

Rottenberg v Vala

2024 NY Slip Op 34774(U)

November 13, 2024

Supreme Court, Queens County

Docket Number: Index No. 700968/20

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
Jack Rottenberg,

Index
Number: 700968/20

Plaintiff,

- against -

Motion
Date: 10/28/24

Motion Seq. No.: 3

Rosario Vala and Maria Vala, as Trustees
of the Rosario Family Revocable Living Trust,
Brian 74, Inc. and The City of New York,

Defendants.

-----X

The following papers numbered E78-E88, E90-E95 & E101-E102
read on this motion by Defendants, Rosario Vala and Maria Vala, as
Trustees of the Rosario Family Revocable Living Trust and Brian 74,
Inc., for summary judgment; and cross-motion by Plaintiff for
summary judgment on the issue of liability.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E78-88
Notice of Cross-Motion-Affirmation-Exhibits.....	E90-95
Affirmation in Opposition.....	E101
Reply.....	E102

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by Defendants, Rosario Vala and Maria Vala, as Trustees
of the Rosario Family Revocable Living Trust and Brian 74, Inc.,
for summary judgment is granted. Cross-motion by Plaintiff for
summary judgment on the issue of liability is denied.

Plaintiff allegedly sustained injuries when he tripped and
fell on the sidewalk abutting 40-06 74th Street in Queens County on
December 20, 2019.

It is undisputed that a restaurant by the name of "Brian 74 Inc." operates at the location where Plaintiff's accident occurred. The owner of the premises is Rosario Vala and Maria Vala, as Trustees of the Rosario Vala Family Revocable Living Trust.

Plaintiff testified at his 50-h hearing that the height differential in the sidewalk was approximately one inch. He did not recall the length of the defect. Movants aver that they are entitled to summary judgment because the alleged defect which caused Plaintiff's injuries is trivial and open and obvious in nature. Photographic exhibits marked at Plaintiff's deposition depict the subject sidewalk. The alleged defect appears to be a crack in the sidewalk. Several of the photographs contain a ruler demonstrating that the subject defect is approximately one quarter of an inch deep. Plaintiff testified someone from his attorney's office took the photographs and that the photographs represent the location of his accident.

In order to obtain summary judgment, movant must make a prima facie showing that he is entitled to said relief, by tendering sufficient proof, in admissible form, to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Defendants, Rosario Vala and Maria Vala, as Trustees of the Rosario Family Revocable Living Trust and Brian 74, Inc have met their burden. Plaintiff has failed to meet his burden on the cross-motion.

A property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant (see Hymanson v. A.L.L. Assocs., 300 A.D.2d 358, 358 [2d Dept. 2002]). The issue of whether a defect is too trivial to be actionable depends upon the particular facts of each case and is generally a question for the jury (see Trincere v. County of Suffolk, 90 N.Y.2d 976 [1997]). Although a property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant (see Hymanson v. A.L.L. Assocs., 300 A.D.2d 358, 358 [2d Dept. 2002]). The determination of whether a condition is trivial must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury (see Trincere, 90 N.Y.2d at 976). Moreover, a defendant cannot prevail on a summary judgment

motion solely on the basis of the dimensions of an alleged defect where the dimensions are unknown and the photographs and descriptions are inconclusive (see Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 666 [2015]). A defendant seeking dismissal on the basis that the alleged defect is trivial must establish that, "under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (see id.).

The photographs of the sidewalk here establish that the alleged defect appears to be approximately one quarter of an inch and certainly less than one-half inch in height. The photographs do not otherwise create a question of fact as to whether the relevant portion of the sidewalk contained a trap or nuisance. This Court also notes that the accident occurred at approximately 5:30PM, there was sunlight, and no issue has been raised as to whether the defect was concealed or otherwise not visible.

Despite Plaintiff's contentions, although Movants did not specifically cite to Hutchinson, they met their prima facie burden pursuant to the Court of Appeals requirements set forth therein. Indeed, the Court of Appeals made it clear in Hutchinson that in order for a moving Defendant to meet its prima facie burden in establishing a trivial defect, it must establish that "under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (see id.). Here, Movants not only discuss the trivial nature of the defect with respect to its size, but also the circumstances surrounding the accident. At the time Plaintiff fell, the sun was still out, Plaintiff was familiar with the area, and had even observed the condition prior to his fall. Moreover, at his deposition, he all but acknowledged the height differential based upon the marked photographs.

Therefore, after examination of all the facts presented, including the appearance, dimensions and irregularity of the defect, and the time, place and circumstances of the accident, this Court is of the opinion that the alleged sidewalk defect which caused Plaintiff fell was clearly a trivial defect that is not actionable. Therefore, Rosario Vala and Maria Vala, as Trustees of the Rosario Family Revocable Living Trust and Brian 74, Inc. are entitled to summary judgment as a matter of law.

The branch of the motion to dismiss the action because the alleged condition was open and obvious is rendered academic in light of the forgoing. Nevertheless, the Court addresses the argument as a matter of completeness. In any event, the branch of

the motion is denied, since "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (Cupo v. Karfunkel, 1 A.D.3d 48 [2d Dept. 2003] [explicitly overruling the line of Second Department cases which had held that negligence does not attach where the allegedly dangerous condition is open and obvious]; see DiVietro v. Gould Palisades Corp., 4 A.D.3d 324 [2d Dept. 2004]; see also, Power v. Garden World, Inc., 2007 NY Slip Op 50801 [U] [Supreme Court, Queens County]). Therefore, whether the condition was open and obvious to Plaintiff is not dispositive of the issue of liability, but merely raises an issue of Plaintiff's comparative negligence to be determined at trial.

In opposition and in support of the cross-motion, Plaintiff contends that he is entitled to summary judgment.

Initially, the cross-motion must be denied as untimely. An untimely cross-motion for summary judgment may be considered timely where a timely motion for summary judgment was made on nearly identical grounds (see Homeland Ins. Co. of N.Y. v. National Grange Mut. Ins. Co., 84 A.D.3d 737 [2d Dept. 2011]; emphasis added). The Court rejects Plaintiff's contention that the underlying motion and the cross-motion are made on nearly identical grounds merely because they both address the condition of the sidewalk. The underlying motion rests solely on the alleged trivial and open and obvious nature of the condition. The cross-motion merely opposes those portions of the underlying motion and seeks summary judgment based upon notice. Accordingly, the motions are not nearly identical, the cross-motion is deemed untimely, and the Court, in its discretion, declines to accept it.

Even assuming, arguendo, that the cross-motion were timely, it must nonetheless be denied on its merits for Plaintiff's failure to meet his prima facie burden.

Initially, since the Court has found that the defect was trivial as a matter of law, it need not analyze liability on the cross-motion for summary judgment pursuant to the relevant section of the Administrative Code. Indeed, the Court is empowered to dismiss an action against where it finds that the alleged defect is trivial in nature. This stands separately from, and despite the landowner's duties and responsibilities with respect to the sidewalk pursuant to §§19-152 and 7-210 of the Administrative Code.

Even assuming, arguendo, that the defect was not trivial as a matter of law, Plaintiff nonetheless failed to meet his burden.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the owner created the defective condition or caused it through some special use, or unless a statute charges the property owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the property owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 A.D.2d 477 [2d Dept. 1999]).

Section 7-210 of the New York City Administrative Code imposes liability upon abutting property owners for their failure to maintain the public sidewalks in a reasonably safe condition, including the negligent failure to remove snow and ice. Excepted are exclusively residential premises of less than four families that are owner-occupied. Since the subject abutting property is a commercial building that is, moreover, not owned by an individual but by a corporation and, therefore, cannot be owner-occupied within the meaning of the statute, §7-210 applies to the landowner here, and, therefore, it is liable for the condition of the property.

However, §7-210 is not a strict liability statute. Rather it only imposes liability upon abutting owners for their negligence (see Muhammad v St. Rose of Limas R.C. Church, 163 A.D.3d 693 [2d Dept. 2018]). The ordinary rules of premises liability were not altered. Rather, the statute merely shifted that liability with respect to the negligent failure to maintain sidewalks from the owner thereof, the City, to the adjoining property owner.

In order for property owners to be found liable for a defective or dangerous condition on their premises, it must be shown that they either created the condition or, where the condition was not actually created by them but came about as a result of a failure to maintain the premises, that they had actual or constructive notice of the hazardous condition and that they had an adequate opportunity to remedy it but failed to do so (see Danielson v. Jameco Operating Corp., 20 A.D.3d 446 [2d Dept. 2005]).

Ordinarily, it is the defendant property owner that moves for summary judgment and, as the movant for summary judgment, has the burden of demonstrating prima facie that it did not have either actual or constructive notice (see Park v. Caesar Chemists, Inc., 245 A.D.2d 425 [2d Dept. 1997]). In the present case, since Plaintiff is the cross-movant, he had the initial burden of establishing that Defendants had actual or constructive notice of the alleged condition of the sidewalk (see Hernandez v Conway Stores, Inc., 143 A.D.3d 943 [2d Dept. 2016]).

Plaintiff's Counsel cites to a news article and photograph to demonstrate that the sidewalk location was subject to flooding in January of 2018. The photograph was marked as an exhibit at the deposition of the restaurant owner, Miung Jung. Counsel for Plaintiff contends that based upon the flooding, Jung had notice of the alleged condition. Initially, the Court rejects this contention since it is pure speculation that the flooding demonstrated in the photographs caused the subject defect. Indeed, Plaintiff failed to proffer an expert opinion for this contention. Moreover, Jung testified that she was unsure whether the flooding damaged the sidewalk.

Additionally, Plaintiff failed to establish his burden with respect to Defendant, Brian 74, Inc., which is a tenant of the premises and not the abutting landowner. The relevant sections of the Administrative Code are applicable solely to abutting landowners, and not tenants. Additionally, there is "nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession" (see Castillo v. Bangladesh Society, Inc., 2006 NY Slip Op 51130(U), *2 [Sup. Court, Queens County 2006]). Plaintiff altogether failed to address the fact that Brian 74, Inc. is a tenant of the premises rather than the abutting landowner and instead analyzed both Defendants under the same standard. Thus, any contention that Jung had notice of the alleged condition is inconsequential with respect to the cross-motion for summary judgment.

With respect to the landowner, Rosario Vala and Maria Vala, as Trustees of the Rosario Family Revocable Living Trust, Plaintiff altogether failed to establish that it had actual or constructive notice of the alleged condition, and thus, failed to meet his burden on summary judgment.

Accordingly, the underlying motion is granted and the complaint is hereby dismissed as against Defendants, Rosario Vala and Maria Vala, as Trustees of the Rosario Family Revocable Living Trust and Brian 74, Inc. Plaintiff's cross-motion for summary judgment is denied.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: November 13, 2024



KEVIN J. KERRIGAN, J.S.C.

