

Marson v Gonzalez
2024 NY Slip Op 35204(U)
July 3, 2024
Supreme Court, Westchester County
Docket Number: Index No. 50455/2022
Judge: Paul I. Marx
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
HON. PAUL I. MARX, J.S.C.

-----X
JACQUELINE MARSON,

Plaintiff,

-against-

JENNIFER GONZALEZ, JEANETTE RIVERS,
DELROY HEARNE, MABLE HEARNE,
GLENFORD G. RICHARDS, PAULINE
RICHARDS, NATALIE RICHARDS, and
TIMOTHY KILGALLON,

Defendants.
-----X

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

Index No. 50455/2022

DECISION AND ORDER

Motion Seq. Nos. 1 & 2

The papers filed electronically via NYSCEF in connection with the motions for summary judgment filed by (1) Defendants Glenford G. Richards, Pauline Richards, and Natalie Richards (“Richards Defendants”), and numbered as documents 108-116, 131-140, 144, 146-161, 178-179, 181 (Motion # 1); and (2) Casey Schaaf and Yanirys Sanchez (“Schaaf and Sanchez”), and numbered as documents 117-127, 129, 141, 162-177, 180 (Motion #2); were read and considered by the Court.

Upon reading the foregoing papers, it is ORDERED that the motions are disposed as follows.

BACKGROUND

This action arises from an accident which occurred on October 16, 2020, when Plaintiff Jacqueline Marson tripped and fell in the common driveway of five abutting properties located at 37 North Columbus Avenue, 43 North Columbus Avenue, 22 Willard Avenue, 26 Willard Avenue, and 30 Willard Avenue, located in Mount Vernon, New York. Plaintiff resided at 30 Willard Avenue, which was owned by Defendant Jennifer Gonzalez. The Richards Defendants owned the premises located at 22 Willard Avenue. Defendants Schaaf and Sanchez owned the premises at 26 Willard Avenue.

Plaintiff testified that she disembarked from a church bus and crossed the street on North Columbus Avenue to get to her home. It was approximately 3:00 p.m. in the afternoon, and the

weather was clear. Plaintiff was wearing shoes with a small wedge heel. She was carrying only her pocketbook. Plaintiff alleges that she was traversing the “road inside towards [her] house” when her foot hit a pothole [located] in a strip of concrete existing between the driveway of the premises located at 37 North Columbus Avenue, which was owned by Defendants Delroy Hearne and Mabel Hearne, and the driveway of the premises located at 43 North Columbus Avenue, which was owned by Defendant Jeannette Rivers. Plaintiff alleges that she fell on her face, and her body landed on both sides of the adjacent driveways.

The common driveway shared by the occupants of 43 North Columbus, 22 Willard Avenue, 26 Willard Avenue, and 30 Willard Avenue for ingress and egress is located at 43 North Columbus Avenue. The owners and occupants of the Willard Avenue properties utilize the shared driveway to access the garages at the back of their homes and/or to gain access from the back to their homes, which front on Willard Avenue. Plaintiff alleges that all Defendants were negligent in their ownership, maintenance, control, and management of the subject area of the driveways.

Motion of the Richards Defendants

The Richards Defendants move for summary judgment, asserting that the claims against them should be dismissed as a matter of law because “they did not own, operate, control, or make special use¹ of the driveway where the subject accident occurred.” Affirmation of Lisa M. Rolle, Esq. in Support at p 1, NYSCEF Doc # 109. They also move to dismiss the cross-claims asserted against them as a matter of law, contending that “there is no evidence of negligence on behalf of the Richard Defendants and there was no contract between the Richard Defendants and Defendants Hearne and River[s]”, *id.*, the owners of the North Columbus Avenue properties with the abutting driveways where Plaintiff allegedly tripped and fell.

In support of their motion, the Richards Defendants submit Plaintiff’s Bill of Particulars, and the deposition transcripts of Plaintiff and Defendants Natalie Richards, Delroy Hearne, Jeanette Rivers, and Casey Schaaf.

In opposition, Plaintiff submits the deeds for 22 and 30 Willard Avenue, and for 37 and 43 N. Columbus Avenue; title information for 26 Willard Avenue; satellite photos, and transcripts of

¹ Later in their motion papers, the Richards Defendants acknowledge their special use of the driveway at 43 Columbus Avenue, but they assert that Plaintiff did not allege the theory of special use in her Amended Complaint or Bill of Particulars and may not raise it in her opposition. Affirmation of Lisa M. Rolle, Esq. in Support at pp 10-11, NYSCEF Doc # 109 (citing *People ex rel Spitzer v Grasso*, 54 AD3d 180, 213 [1st Dept 2008] (citing *Pinn v Baker’s Variety*, 32 AD3d 463, 464 [2nd Dept 2006])).

Plaintiff and Defendants' depositions. Plaintiff contends that the evidence shows that "each of these defendants owned a right-of-way easement over the land where the accident occurred." Opposition at p 9, NYSCEF Doc # 146. Plaintiff contends further that "both the June 14, 1932 Deed and the Schaaf-Sanchez Land Survey indicate that the properties owned by Richards, Schaaf, and Sanchez are subject to an easement over the property where the accident allegedly occurred." *Id.* The Richards Defendants contend that the easement does not apply to their property because it is absent from their deed. Plaintiff refutes the Richards Defendants' contention that the easement does not exist because it is not mentioned in their deed, contending that following initial conveyance of an easement through a recorded Deed, the easement runs with the land through subsequent transfers without the necessity for each deed thereafter to expressly mention the easement. *Id.* at 9-10.

Plaintiff argues that, as dominant owners of an easement over the property where the accident allegedly occurred, Defendants Richards, Schaaf, and Sanchez owed Plaintiff a duty of care. Plaintiff cites case law which holds that "[a] dominant easement holder generally owes the same duty of care to third parties as owed by the fee simple owner of the land". *Id.* at 8 (citing *Sutera v Go Jokir, Inc.*, 86 F3d 298, 307-08 [2nd Cir 1996]; see also *Piluso v Bell Atlantic Corp.*, 305 AD2d 68, 71 [1st Dept. 2003] (confirming that the Second Circuit's *Sutera* decision "contains a thorough analysis of the law of easements under New York State law").

Plaintiff points to the testimony of Defendant Natalie Richards wherein she stated that she was informed of the easement when she bought her property, and she openly, repeatedly and notoriously used the easement to access her garage, which opens onto the common driveway. *Id.* at p 10 (citing Natalie Richards Deposition Transcript at pp 17-18, NYSCEF Doc # 113). Plaintiffs contend that, in this way, the Richard Defendants' own submissions raise a material issue of fact regarding their ownership of an easement, and therefore summary judgment must be denied.

Plaintiff responds to the Richards Defendants' claim that they did not own or have an easement over the "concrete strip" that separated the two driveways, where Plaintiff tripped, asserting that they did not submit proof in admissible form to clarify ownership of the concrete strip. Plaintiff asserts that the Richards Defendants did not submit land surveys which show whether the concrete strip is entirely within the boundary line of a particular property. Plaintiff contends that the absence of such proof leaves open the issue; thus, it is unclear whether the concrete strip rests upon the property line between the two properties, with half of the concrete

strip on one property and the other half on the other property. Plaintiff thus argues that there are material issues of fact regarding whether the Richards Defendants own an easement over the driveway, and whether the alleged defective condition existing on the concrete strip where she tripped was located within, or partially within, the property subject to the easement. Accordingly, Plaintiff requests that the Richards Defendants' motion for summary judgment be denied.

In addition to denying that the easement is applicable to them, the Richards Defendants contend that the defective condition is not actionable because it is trivial as a matter of law. Richards Memorandum of Law in Support at 12-14, NYSCEF Doc # 109. Defendants assert that “[g]enerally, whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury unless the defect is trivial as a matter of law”, *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997) (internal quote and citation omitted). Defendants contend that “the photograph of the alleged defect produced by Plaintiff’s counsel and presented to Plaintiff during her deposition establishes prima facie that the appearance and location of the claimed defect is trivial and not actionable.” Richards Memorandum of Law at 13. Defendants cite several cases for the proposition that “[p]hotographs of a defect which fairly and accurately reflect how it appeared on the date of the accident may be used to demonstrate whether it is trivial.” *Id.* (citing *Das v Sun Wah Restaurant*, 99 AD3d 752 [2nd Dept 2012]; see also *Milewski v Washington Mutual, Inc.*, 88 AD3d 853, 856 [2nd Dept 2011]; *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982 [2nd Dept 2011]; *Aguayo v New York City Housing Authority*, 71 AD3d 926 [2nd Dept 2010]; *Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2nd Dept 2009]; *Shiles v Carillon Nursing and Rehabilitation Ctr., LLC*, 54 AD3d 746 [2nd Dept 2008]; *Hawkins v Carter Community Housing Development Fund Corp.*, 40 A.D.3d 812 [2nd Dept 2007]). The Richards Defendants request that summary judgment be granted in their favor, because the “alleged defect does not have any of the characteristics of a trap or snare, and is too trivial to be actionable.” *Id.* (citing *Bekritsky v TACS-4, Inc.*, 27 AD3d 680 [2nd Dept 2006]).

As the Court of Appeals stated in *Trincere, supra*, “in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury (see, e.g., *Hecht v City of New York*, 60 NY2d 57, 61 [claim involving trivial gap between two flagstones of the sidewalk was properly dismissed]).” 90 NYS2d at 977. The Court of Appeals cautioned against “a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect [as being] unacceptable”, 60 NY2d at 977-78,

requiring instead, an “examination 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.” *Id.* at 978 (citing *Caldwell v Village of Is. Park*, 304 NY 268, 274).

The Appellate Division, Second Department has adopted this approach, as well as the use of photographs which depict the general area where an incident occurs and the defect which allegedly caused the plaintiff to fall, and other evidence, to determine whether the alleged defect is too trivial to be actionable. *Pennella v 277 Bronx River Rd. Owners, Inc.*, 309 AD2d 793, 794 [2nd Dept 2003] (“Scrutiny of the photographs depicting both the general area where the incident occurred and the crack which allegedly caused the injured plaintiff’s fall, as well as the other evidence presented, supports the Supreme Court’s conclusion that, as a matter of law, the alleged defect was too trivial to be actionable”) (citing *Wasserman v Genovese Drug Stores*, 282 AD2d 447 [2001]; *Riser v New York City Hous. Auth.*, 260 AD2d 564 [1999]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1996]; *cf. Smith v A.B.K. Apts.*, 284 AD2d 323 [2001]; *Sanna v Wal-Mart Stores*, 271 AD2d 595 [2000]).

In this case, examination of the photographs reveals that the alleged defect did not, by reason of its location, the weather conditions, or other relevant circumstances, have any of the characteristics of a trap or snare, and it was trivial as a matter of law and therefore not actionable. *Shiles v Carillon Nursing & Rehabilitation Ctr., LLC*, 54 AD3d 746 [2008]; *D’Arco v Pagano*, 21 AD3d 1050, 1051 [2005]).

Indeed, Plaintiff did not respond to the Richards Defendants’ contention that the allegedly defective condition of the concrete strip is too trivial to be actionable. As such, Plaintiff failed to raise a material issue of fact on the issue whether the alleged defect was too trivial to be actionable. Accordingly, the trivial nature of the allegedly defective condition, as established by the Richards Defendants and not refuted by Plaintiff, warrants granting summary judgment and dismissal of all claims against them.² *Copley v Town of Riverhead*, 70 AD3d 623 [2nd Dept 2010].

Consequently, the motion of the Richards Defendants for summary judgment dismissing Plaintiff’s claims against them and any cross-claims is granted.

² Because the trivial nature of the alleged defect is dispositive of the claims against movants, the Court does not reach the issues regarding the existence of an easement in favor of the Richards Defendants, or ownership of the concrete strip which Plaintiff alleges was defective and dangerous.

Motion of Defendants Schaaf and Sanchez

Defendants Schaaf and Sanchez move for summary judgment, seeking to dismiss the Amended Complaint and any cross-claims and counter-claims asserted against them. Defendants state that they purchased their home at 26 Willard Avenue on September 11, 2020, and they moved in about two weeks later, less than a month before Plaintiff's accident on October 16, 2020. Defendants contend that they did not owe Plaintiff a duty of care, because plaintiff fell on another defendant's property; they had no prior notice of any defects in the driveway which they were responsible to repair; and they were not the proximate cause of Plaintiff's accident. In support of their motion, Defendants Schaaf and Sanchez submit a copy of the pleadings, a transcript of Plaintiff's deposition, title information for 26 Willard Avenue, and Defendant Schaaf's deposition transcript. Defendants Schaaf and Sanchez contend that liability cannot be imposed on them, because they did not own, occupy, control or make special use of the property located at 30 Willard Avenue where the accident occurred. Schaaf and Sanchez Memorandum of Law at 6-9, NYSCEF Doc # 118 (citing *Adriana G. v Kipp Washington Heights Middle School*, 165 AD3d 469 [1st Dept 2018]; see also *Tilford v Greenburgh Housing Authority*, 170 AD3d 1233, 1235 [2nd Dept 2019]). Defendants assert that they are not liable to Plaintiff because "[a]n abutting landowner will not be liable to a pedestrian injured on a public sidewalk unless that landowner created the defective condition complained of, caused the defect to occur because of some special use, or a local ordinance or statute casts a duty upon the landowner to maintain or repair the sidewalk and imposes liability for injuries resulting from a breach of that duty." *Id.* at 7-8 (citing *Pinn v Baker's Variety*, 32 AD3d 463, 464 [2nd Dept 2006]).

Plaintiff has established through the June 14, 1932 Deed and the land survey for the Schaaf and Sanchez property at 26 Willard Avenue, that there is an easement over the subject driveway where Plaintiff fell. As dominant owners of the easement, Schaaf and Sanchez "owe a duty of reasonable care to third parties for injuries that occur in a place where the dominant owner is exercising its rights and the servient owner is also able, for its own purpose, to use the granted property, as is the case here." *Cardinal v Long Island Power Auth.*, 309 F Supp 2d 376, 385 [EDNY 2004] (citing *Sutera v Go Jokir, Inc.*, 86 F3d 298, 303 [2d Cir. 1996]). "The owners of the dominant estates in the easement are responsible for maintaining and repairing the easement ... When an easement is created for the benefit of multiple dominant tenements, all owners are mutually burdened with the construction, maintenance, and repairs of the subject property" (*Raksin v*

Crown-Kingston Realty Assoc., 254 AD2d 472, 473). Thus, [Defendants Schaaf and Sanchez], as owners of the dominant estates in the easement, had a responsibility to maintain the [driveway].” *Morgan v Chong Kwan Jun*, 30 AD3d 386, 387 [2nd Dept 2006].

The contention advanced by Defendants Schaaf and Sanchez concerning the duty of an abutting landowner for an allegedly defective condition of a public sidewalk is not relevant to this case. Defendants did not develop their other arguments, including their argument concerning a lack of prior notice of a defect in the driveway. Therefore, Defendants failed to establish a prima facie case to support granting summary judgment in their favor as a matter of law.

Nonetheless, despite the failure of Defendants Schaaf and Sanchez to argue that the alleged defect in the concrete strip between the abutting driveways was too trivial to be actionable, CPLR §3212 provides that “[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” The Court’s determination that the alleged defect is too trivial to be actionable warrants granting summary judgment in favor of Defendants Schaaf and Sanchez.

In fact, summary judgment is warranted on the same ground to all other Defendants, despite the fact that they did not move for summary judgment, and the action dismissed in its entirety.

CONCLUSION

It is ORDERED that the motion of the Richards Defendants for summary judgment is granted, and the Amended Complaint and any cross-claims against them are dismissed; and it is further

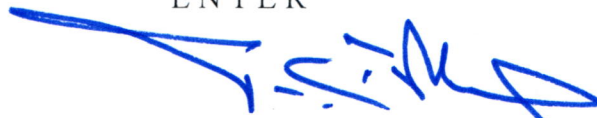
ORDERED that the motion of Defendants Schaaf and Sanchez for summary judgment is granted; and it is further

ORDERED that summary judgment is granted to all remaining Defendants and the action is dismissed in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 3, 2024
White Plains, New York

ENTER



HON. PAUL I. MARX, J.S.C.