

Duffy v 292 Herricks Rd. Realty Corp
2024 NY Slip Op 35273(U)
March 6, 2024
Supreme Court, Nassau County
Docket Number: Index No. 606197/21
Judge: Randy Sue Marber
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asserted against it, are decided as hereinafter provided.

In this action, the Plaintiff alleges that on January 17, 2021, at approximately 8:10 a.m., he was injured when he tripped and fell on cracked and broken asphalt immediately adjacent to and abutting a storm drain located in the parking lot located at 292 Herricks Road, Mineola, New York. The co-Defendant, 292 HERRICKS, was the owner of the building and premises, and CITY MD was a tenant at the premises.

Legal Analysis:

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter, its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]).

The moving party's burden seeking summary judgment is to demonstrate their prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *Miceli v. Purex*, 84 A.D.2d 562 [2d Dept. 1981]). A defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a

prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*See Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]).

“ ‘To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell’ ” (*Oliveri v. Vassar Brothers Hospital*, 95 A.D.3d [2d Dept. 2012], quoting *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598 [2d Dept. 2008]).

“The elements of a cause of action alleging negligence are the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach proximately caused the injury” (*Mitchell v. Icolari*, 108 A.D.3d 600 [2d Dept. 2013]; *See Turcotte v. Fell*, 68 N.Y.2d 432, 437 [1986]). Further, “liability for a dangerous condition or property is generally predicated upon ownership, occupancy, control or special use of the property” (*Mitchell v. Icolari, supra*).

Motion by CITY MD

In support of its motion, CITY MD submits a lease agreement and deposition testimony which demonstrates that it only leased interior space within the building owned by 292 HERRICKS. The subject lease agreement further demonstrates that the parking lot area where the Plaintiff fell is a “common area” and the tenant, CITY MD, owed no duty of care with respect to the parking lot area.

CITY MD also submits an “Assignment and Assumption of Lease”

whereby the lease was assigned to an entity called “P Care Billing, LLC”, of which CITY MD is a subsidiary. A witness on behalf of 292 HERRICKS identified the lease and assignment of the lease for the subject interior space and confirmed that according to those documents, CITY MD was assigned 4400 rentable square feet within the building. The witness also testified that the landlord, 292 HERRICKS was responsible for structural issues at the premises.

The Plaintiff submits an affirmation in partial opposition wherein the Plaintiff does not substantively oppose the relief requested by CITY MD for dismissal of all claims as asserted against it. The Plaintiff only opposes any portion of CITY MD’s motion which can be interpreted to apply to dismissal of any claims as against the co-Defendant, 292 HERRICKS. Moreover, no opposition has been submitted by the co-Defendant landlord, 292 HERRICKS.

Based on the foregoing, the Court finds that CITY MD has met its prima facie burden entitlement it to summary judgment as a matter of law. In opposition, neither the Plaintiff nor the co-Defendant have raised any issues of fact. As such, all claims and cross-claims as asserted against CITY MD shall be dismissed.

Motion by 292 HERRICKS:

292 HERRICKS argues that the Plaintiff is responsible for the accident as he was aware of the open and obvious defect based on Plaintiff’s admission that he had been to the location of the accident on a dozen occasions prior thereto.

“While the issue of whether a hazard is ... open and obvious is generally

fact-specific and thus a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence.” (*Gallardo v. Gilbert*, 153 A.D.3d 791 [2d Dept. 2019] [citations omitted]).

Here, counsel for 292 HERRICKS cites to a case where the plaintiff tripped over a bucket and another one where the plaintiff tripped over a utility box. The Court finds those alleged “defects” readily distinguishable to the claimed hazardous condition at issue here.

292 HERRICKS also argues that the condition was not hazardous or dangerous and that the subject drain at issue “merely had ordinary wear and tear to it and was not hazardous or otherwise defective.” The Court disagrees.

In this matter, clear issues of fact exist as to whether the Defendant, 292 HERRICKS, had actual or constructive notice of the defective condition for a sufficient length of time to discover and remedy it. Further, at this juncture, the Court does not find that the subject hazardous condition was “open and obvious” and readily observable to someone using their reasonable senses. As such, the motion by 292 HERRICKS is denied.

The parties’ remaining contentions have been considered and the Court finds them to be either irrelevant or without merit.

Accordingly, it is hereby

ORDERED, that the motion (Seq. 01) by the Defendant, CITY

PRACTICE GROUP OF NEW YORK, LLC d/b/a CITY MD, seeking an Order, pursuant to CPLR § 3212, granting summary judgment in its favor on the grounds that it had no duty to maintain the subject parking lot where the Plaintiff's trip and fall accident occurred, is **GRANTED**, and all claims and cross-claims as asserted against this Defendant are **DISMISSED**; and it is further

ORDERED, that the cross-motion (Seq. 02) by the Defendant, 292 HERRICKS ROAD REALTY CORP., seeking an Order, pursuant to CPLR § 3212, granting summary judgment in its favor dismissing all claims as asserted against it, is **DENIED** in its entirety; and it is further

ORDERED, that the Clerk of the Court is hereby directed to amend the caption of this matter to reflect the deletion of the dismissed Defendant therefrom as follows:

FRANCIS DUFFY,

Plaintiff,

Index No.: 606197/21

-against-

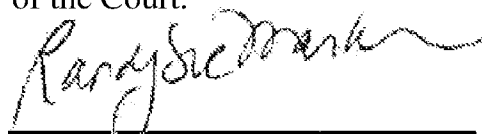
292 HERRICKS ROAD REALTY CORP,

Defendant.

X

This decision constitutes the order of the Court.

DATED: Mineola, New York
March 6, 2024



Hon. Randy Sue Marber, J.S.C.

ENTERED
Mar 07 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE