

Francisco v 340 Nassau Ave. Realty LLC
2024 NY Slip Op 35308(U)
January 16, 2024
Supreme Court, Bronx County
Docket Number: Index No. 20008/2019E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CLAUDIO FRANCISCO,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 20008/2019E

340 NASSAU AVENUE REALTY LLC,

Motion Sequence No. 2

Defendant.

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GUZMAN, J.

Plaintiff commenced the instant action on January 2, 2019, to recover damages for personal injuries he allegedly sustained on August 26, 2016. At the time of his alleged accident, Plaintiff worked for a private company that provided sanitation services to commercial businesses. Plaintiff alleges that he was on his customary route, picking up refuse from a dumpster in an industrial area on Varick Street, Brooklyn, at 2:30 a.m., when he tripped and fell over a large metal plate that had been placed over part of the sidewalk.

Plaintiff initially brought suit against Jin Hua Inc--the business from which he was picking up refuse, located at 12-14 Varick Street in Brooklyn--and Wah Wing Realty LLC, the owner of that property.¹ See Bronx County Index No. 27968/2016 (assigned to Taylor, J.) On or about December 6, 2018, Plaintiff appeared for a deposition in the 2016 action. He testified that he picked up refuse from Jin Hua on Varick Street as part of his daily route from 2012 through the date of his accident in 2016, and that the address of the location where he was injured was 12 Varick Street. He was also shown and authenticated two photographs, marked at the deposition as Exhibits "A" and "B." Exhibit A shows the metal plate at issue, which is situated over the curb, and extends from the sidewalk into the street. Exhibit B depicts a person driving a forklift from the street, over the metal plate, onto the sidewalk. See Index No. 27968/2016, NYSCEF Doc. 67; *also* Index No. 20008/2019E, NYSCEF Doc. 42.

¹ Wah Wing Realty, LLC failed to appear or answer the complaint, and a default judgment was entered against it. See Index No. 27968/2016, NYSCEF Doc. 28.

Shortly after appearing for his deposition, Plaintiff then commenced the instant action.² The complaint herein alleges that Plaintiff's accident occurred on the premises located at 17 Varick Street in Brooklyn, which consists of a warehouse owned by Defendant 340 Nassau Avenue. The premises at 17 Varick Street are directly across the street from Jin Hua's warehouse at 12-14 Varick Street. On the motion now before the Court, Defendant moves for an Order granting summary judgment pursuant to CPLR § 3212 dismissing the complaint on the grounds that (1) Plaintiff is unable to identify the proximate cause of his fall; and (2) Defendant did not create the allegedly dangerous condition or have notice of the condition. Plaintiff also cross-moves for partial summary judgment on the issue of liability.³

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact. *Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039, 1043, 33 N.Y.S.3d 853 (2016); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, the existence of disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). Because summary judgment is a "drastic remedy," it should only be employed "when there is *no doubt* as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep't 2021). Additionally, the court views the evidence in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence.

Negligence is the failure to use reasonable care. A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition. *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976). "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive

² The RJI filed by counsel for Plaintiff in this action did not disclose the existence of the 2016 action, and thus this action was not assigned to the justice handling the 2016 action.

³ Counsel representing defendants in the 2016 lawsuit filed an identical motion in that action.

notice of its existence.” *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500, 856 N.Y.S.2d 573 (1st Dep’t 2008). Actual notice of a dangerous condition exists where the defendant created the condition or was aware of it before the accident. *Atashi v. Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dep’t 2011). A defendant demonstrates its lack of actual notice by producing “a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell.” *Velocci v. Stop & Shop*, 188 A.D.3d 436, 439 (1st Dep’t 2020). “Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition” that caused plaintiff’s injury. *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421, 927 N.Y.S.2d 49 (1st Dep’t 2011). A defendant demonstrates its lack of constructive notice by producing evidence that the condition did not exist when the area was last inspected prior to the accident, or by furnishing, for example, proof that it followed a regular cleaning schedule for the area on the day of the accident. *Person v. New York City Hous. Auth.*, 167 A.D.3d 438, 439 (1st Dept 2018); see *Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 (2d Dep’t 2011).

Defendant first contends that Plaintiff cannot identify the proximate cause of his accident. Defendant states that Plaintiff “has no clue where he fell,” evidenced by the fact that he has alleged two different locations where the accident allegedly took place. Defendant therefore concludes that “based on plaintiff’s own sworn testimony, there is no way to know what condition caused the plaintiff to fall without engaging in improper speculation.” See NYSCEF Doc. 37 at ¶ 23.

Generally, “[a] plaintiff’s inability to identify the cause of his or her fall is fatal to a cause of action to recover damages for personal injuries because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation.” *Vojvodic v. City of New York*, 148 A.D.3d 1086, 51 N.Y.S.3d 534 (2d Dep’t 2017). “Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation.” *Ash v. City of New York*, 109 A.D.3d 854, 972 N.Y.S.2d 594 (2d Dep’t 2013).

With respect to the discrepancies in the pleadings over the location of Plaintiff’s accident, the Court notes that during his deposition--submitted by Defendant in support of its motion--Plaintiff was shown various photographs, which, he testified, accurately depicted the condition of

the sidewalk at the time of his accident. He was asked if the photographs showed the area where he tripped and fell, and whether the photographs fairly and accurately reflected the area of the location of his accident, to which he responded “yes.” Plaintiff also circled the specific area of the metal plate upon which he tripped. *See* NYSCEF Docs. 51, 52. Under these circumstances, viewing the evidence in the light more favorable to Plaintiff as the nonmovant, Defendant has failed to establish, *prima facie*, that the plaintiff was unable to identify the cause or location of his fall without resorting to sheer speculation. *See Padilla v. CVS Pharmacy*, 175 A.D.3d 584, 107 N.Y.S.3d 428 (2d Dep’t 2019); *Belton v. Gemstone HQ Realty Assoc., LLC*, 145 A.D.3d 840, 43 N.Y.S.3d 499 (2d Dep’t 2016) (where plaintiff clearly identified at his deposition, through photographs, the location of his fall and the condition that allegedly caused it, any conflicts between the plaintiff’s original deposition and the errata sheets merely raised issues of credibility inappropriate for resolution on summary judgment); *see also Martinez v. City of New York*, 190 A.D.3d 561, 136 N.Y.S.3d 702 (1st Dep’t 2021).

Next, Defendant contends that it lacked notice of the allegedly dangerous condition of the sidewalk. In support, Defendant mostly rehashes its argument that Plaintiff is unable to identify the location of his alleged accident and argues that “Plaintiff has failed to establish Moving Defendant created any condition that caused the accident, or that Moving Defendant otherwise owed a duty and had actual or constructive notice of the condition.” *See* NYSCEF Doc. 37 at ¶ 33. However, a defendant moving for summary judgment in a premises liability case involving an alleged dangerous condition has the initial burden of demonstrating, *prima facie*, that it neither created nor had actual or constructive notice of the existence of the allegedly hazardous condition for a sufficient length of time to discover and remedy it. *Del Marte v Leka Realty LLC*, 156 A.D.3d 453, 67 N.Y.S.3d 16 (1st Dep’t 2017). Here, Defendant has made no such evidentiary showing.⁴ Accordingly, since Defendant has failed to meet its initial burden, its motion for summary judgment is denied without regard to the sufficiency of Plaintiff’s opposition papers. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

Plaintiff also cross-moves for partial summary judgment on the issue of liability. A plaintiff moving for summary judgment on a cause of action asserted in a complaint generally has the burden of establishing, *prima facie*, all of the essential elements of the cause of action.”

⁴ The affidavit of Jefferson Baracaldo, Defendant’s investigator, states only that he visited the subject location on May 25, 2023 and did not observe a metal plate at or near 17 Varick Street, “identified and circled by Plaintiff in Exhibit D.” *See* NYSCEF Doc. 38.

Smith v. City of New York, 210 A.D.3d 53, 67, 175 N.Y.S.3d 529 (2d Dep’t 2022) (quotation marks and citation omitted). To impose this duty on a defendant, the plaintiff must show the existence of a dangerous condition and either that the defendant created the dangerous condition or had actual or constructive notice of the dangerous condition. See *Castaldo v. Manhattan Mini Stor. LLC*, 211 A.D.3d 401, 179 N.Y.S.3d 216 (1st Dep’t 2022). However, “[i]n order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon his or her property, it must also be established, *inter alia*, that a defective condition existed.” *Laventure v. McKay*, 266 A.D.2d 516, 699 N.Y.S.2d 92 (2d Dep’t 1999).

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition. *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976). Additionally, New York City Administrative Code Section 7-210 makes it “the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition.” Under the statute, the owner of real property abutting any sidewalk is “liable for any injury to property or personal injury proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” Nevertheless, Section 7-210 only establishes the first element of a negligence claim. *Gyokchyan v. City of New York*, 106 A.D.3d 780, 965 N.Y.S.2d 521 (2d Dep’t 2013) (noting that section 7-210 “does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable”). Thus, to impose this duty on a defendant, the plaintiff must show the existence of a dangerous condition and either that the defendant created the dangerous condition or had actual or constructive notice of the dangerous condition. See *Castaldo v. Manhattan Mini Stor. LLC*, 211 A.D.3d 401, 179 N.Y.S.3d 216 (1st Dep’t 2022).

In support of his cross-motion, Plaintiff has submitted, *inter alia*, his deposition testimony and a sworn affidavit. In his affidavit, Plaintiff explains that his daily route from 2012 through the date of the accident included a stop for Jin Hua; the route sheet listed its address as 12-14 Varick Street, however, Jin Hua used multiple warehouses and yards on the block; it had a dumpster in front of 17 Varick Street, directly across the street from 12-14 Varick Street; the dumpster was always in the same location; his previous testimony that it was located by 12 Varick Street was in error, Jin Hua used both warehouses and yards at 12-14 Varick Street and 17 Varick Street for conducting its business; he regularly observed that its trucks and forklifts “would zip back and forth between the two warehouses and yards” in order to access the yard at

17 Varick Street; Jin Hua workers used heavy machinery to cross over the sidewalk, and Jin Hua placed a large metal plate at the location which they used as a ramp to get back and forth into the yard. Plaintiff further states that he observed the metal plate at this location, extending from the street onto the sidewalk in front of 17 Varick Street, for at least six months before his accident; and because one end of the plate was placed on the sidewalk and the other end of the plate was placed in the street, the plate did not lie flush with the ground below, which “for at least six months” mad the tripping hazard even worse. Plaintiff further states that on the date of the accident, at approximately 2:30 a.m., he got out of the truck in order to retrieve the garbage from Jin Hua’s container, located on Varick Street in front of 17 Varick Street and directly across from 12-14 Varick Street, and he tripped over the raised metal plate on the sidewalk in front of 17 Varick Street and fell to the ground. *See* NYSCEF Doc. 49.

Plaintiff does not allege that Defendant placed the metal plate on the sidewalk or was aware of it prior to his accident, such that Defendant had actual knowledge. *See Atashi v. Fred-Doug 117 LLC*, 87 A.D.3d 455, 456, 928 N.Y.S.2d 529 (1st Dep’t 2011). However, Plaintiff’s affidavit, deposition testimony, and the photographs authenticated by Plaintiff therein establish that the metal plate on the sidewalk was visible and apparent for at least six months prior to his alleged accident.

In opposition, Defendant has submitted only an affirmation of counsel, arguing again that the cross-motion should be denied because Plaintiff cannot identify the location of his alleged accident. Defendant also argues that the affidavit submitted by Plaintiff in support of his cross-motion is self-serving, and that “Plaintiff has failed to establish that Defendant created any condition that caused the accident.” Nevertheless, Defendant offers no argument or evidentiary proof in opposition to Plaintiff’s prima facie showing that the large metal plate placed over the curb and sidewalk of Defendant’s property constituted a dangerous condition that was visible and apparent for at least six months prior to Plaintiff’s alleged accident, thereby constituting constructive notice of that condition. Plaintiff’s cross-motion for summary judgment on the issue of Defendant’s liability for the subject accident is therefore granted.

Accordingly, for the foregoing reasons, it is hereby:

ORDERED AND ADJUDGED that Defendant’s motion for summary judgment is denied; and it is further

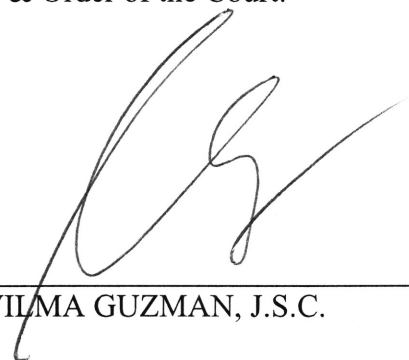
ORDERED AND ADJUDGED that Plaintiff's cross-motion for summary judgment on the issue of liability pursuant to CPLR § 3212 is granted; and it is further

ORDERED AND ADJUDGED that counsel for the parties shall appear at a conference on February 5, 2024 at 11:00 a.m. to address the issue of consolidation with Bronx County Index No. 27968/2016; and it is further

ORDERED AND ADJUDGED that Plaintiff shall serve a copy of this Decision & Order with Notice of Entry upon all parties within twenty days of the date of Entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
January 16, 2024



HON. WILMA GUZMAN, J.S.C.