

Sandoval v Vecchio
2024 NY Slip Op 35392(U)
June 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 712048/2020
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Leonard Livote

Supreme Court Justice

IAS TERM, PART 33

-----X
 YANIRIS SANDOVAL,
 Plaintiff(s),

Index No: 712048/20

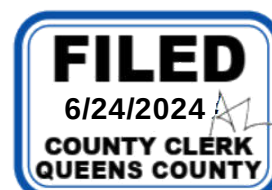
-against-

Motion Date: 11/14/23

ROGER D. VECCHIO and NEW YORK SMSA
 LIMITED PARTNERSHIP d/b/a VERIZON
 WIRELESS and HECTOR R. PIMENTAL,
 Defendant(s).

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Seq. No: 5



The following papers numbered below read on this motion by Plaintiff for
 an Order:

- (1) Pursuant to CPLR §3212, granting Plaintiff, YANIRIS SANDOVAL summary
 judgment on the issue of liability against Defendant ROGER D. VECCHIO; and
 (2) Pursuant to CPLR §3211 and/or CPLR § 3212, dismissing of Defendant's
 affirmative defenses of comparative fault.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	89-104
Cross Motion, Affirmation, Affidavits and Exhibits.....	
Answering Affirmations, Affidavits And Exhibits.....	130
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Upon the foregoing papers, the motion is determined as set forth herein:

BACKGROUND

On July 29, 2019, plaintiff Yaniris Sandoval (Sandoval) sustained personal injuries when she tripped and fell allegedly as the result of a cracked, mis-leveled, raised, uneven, irregular, hazardous, defective sidewalk flag which abutts the property owned by defendant Roger D. Vecchio (Vecchio) and is located at 68-41 Forest Avenue, Queens, New York. Plaintiff Sandoval commenced the within action alleging that defendant Vecchio was negligent by failing to maintain the public sidewalk abutting his premises and permitting a cracked, mis-leveled, raised, uneven, irregular, hazardous, defective sidewalk flag to exist causing a tripping hazard in violation of Administrative Code §§ 7-210 and 19-152 and alleging that defendant Vecchio had constructive notice of the defective sidewalk. Plaintiff Sandoval now moves for summary judgment on the issue of liability.

DISCUSSION

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City*

of New York, supra).

" 'Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner' (*Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921, 922, 947 N.Y.S.2d 543; see *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520, 890 N.E.2d 191, 860 N.Y.S.2d 429). Administrative Code of the City of New York § 7-210(a) 'imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, [***3] and provides that said owners are liable for personal injury that is proximately caused by such failure' (*Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797, 28 N.Y.S.3d 652, 48 N.E.3d 933; see *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171, 114 N.Y.S.3d 14, 137 N.E.3d 469). 'However, [****2] Administrative Code of the City of New York § 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' (*Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693, 81 N.Y.S.3d 131; see *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d at 171). 'Thus, to prevail on a motion for summary judgment, a plaintiff must demonstrate, prima facie, that the property owner created the defect or had actual or constructive notice of the defect' (*Robinson v Hess Retail Stores, LLC*, 197 AD3d 517, 518, 148 N.Y.S.3d 899; see *Vasquez v Giandon Realty, LLC*, 189 AD3d 1120, 133 N.Y.S.3d 840)" (*Curry v E. Extension, LLC*, 202 AD3d 907, 908 [2d Dept 2022]).

Administrative Code of City of New York §19-152 imposes a duty upon the owner of any real property to repair a sidewalk flag which contains a substantial defect. "A substantial defect shall include ... a trip hazard ... where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch in depth." (Administrative Code of City of New York §19-152[a][4]).

Plaintiff Sandoval establishes prima facie entitlement to a summary judgment award on the issue of liability through the submission of copies of the pleadings, deposition transcripts of plaintiff Sandoval and defendant Vecchio, plaintiff Sandoval's affidavit, marked photographs, deed to 68-41 Forest Avenue Queens, New York, and Google Map photograph.

Plaintiff Sandoval testified that she tripped and fell in a hole in the sidewalk that measured about one inch and the sidewalk was in front of a bodega. The date of the accident was the first time she walked this route. That day she was walking alone. Immediately prior to the accident, she did not have anything in her hands, and she was walking straight ahead. In her affidavit, which was executed after her deposition was conducted, plaintiff Sandoval averred that she reviewed the three photographs which were marked as Exhibits A and B at her deposition and that these three photographs fairly and accurately depict the location of the accident that occurred on July 29, 2019, as well as the condition of the sidewalk in front of 68-41 Forest Avenue in Queens, New York, as it existed on that date. The photographs marked as exhibit A depict the Deli Grocery Store located on a corner which shows the intersecting streets, Catalpa and Forest Avenue and the sidewalk area on Forest Avenue where plaintiff testified the accident occurred. . The photograph marked as exhibit B depicts a cracked and broken sidewalk flag. Plaintiff Sandoval circled the broken corner of a sidewalk flag depicted in exhibit B and identifies this area as the location and cause, of her trip and fall accident. The deed for the premises located at 68-41 Forest Avenue is dated August 30, 1999, and reflects that defendant Roger D. Vecchio is the owner of the premises abutting the sidewalk where plaintiff tripped and fell. Defendant Vecchio testifies that he is the owner of 68-41 Forest Avenue and has been since 1999. He has an office located in this building and he goes to the office Monday through Friday and occasionally on the weekend. The Google Map photograph depicts the sidewalk flag where plaintiff tripped and fell as it existed in September 2017, almost two years prior to the accident. Plaintiff Sandoval testified that this photograph also fairly and accurately depicts the location of the accident that occurred on July 29, 2019, as well as the condition of the sidewalk in front of 68-41 Forest Avenue in Queens, New York, as it existed on that date.

Defendant Vecchio argues, in opposition to the motion, that plaintiff offers no expert report or affidavit with respect to the issue of the presence of a defective sidewalk condition. “Expert testimony is unnecessary unless it assists the jury in clarifying an issue which requires professional or technical knowledge possessed by an expert and beyond the comprehension of a typical juror (*see De Long v County of Erie*, 60 NY2d 296, 307, 457 NE2d 717, 469 NYS2d 611 [1983]; *Christoforatos v City of New York*, 90 AD3d 970, 970, 935 NYS2d 641 [2011]; *Jean-Louis v City of New York*, 86 AD3d 628, 629, 928 NYS2d 310 [2011]; *Vaglica v Homeyer*, 30 AD3d 587, 588, 819 NYS2d 529 [2006])” (*Galasso v 400 Exec. Blvd., LLC*, 101 AD3d 677, 678 [2d Dept 2012]). Here, plaintiff Sandoval’s

testimony and the photographs of the sidewalk defect and Google Map photograph constitute evidence, not beyond the comprehension of a typical juror, to support a finding that defendant Vecchio violated Administrative Code of City of New York §19-152(a)(4) (*see Ormond v MTA/New York City Tr. Auth.*, 210 AD3d 998 [2d Dept 2022]). In support of his position that the evidence submitted by plaintiff Sandoval is insufficient to establish that a substantial defect existed when the accident occurred, defendant Vecchio relies on his deposition testimony. He testifies that one of the two photographs marked as exhibit A depicts the sidewalk abutting the Deli and Grocery Store from a distance. The details of the sidewalk flags are not visible in this photograph. However, defendant Vecchio testifies that there is a crack between two sidewalk flags located near the cellar doors and that the crack is no more than three quarters of an inch in width, and it was even on both sides. He also testifies that the photograph marked as exhibit B shows the sidewalk or the condition of the sidewalk at a much later time beyond the two photographs without specifying how much later in time. This testimony raises a question of fact whether the cracked sidewalk flag which abutts the property owned by defendant Vecchio constitutes a substantial defect under Administrative Code of City of New York §19-152(a)(4) thereby imposing upon defendant Vecchio a statutory duty to repair.

Defendant Vecchio further argues that plaintiff Sandoval has failed to establish that he had notice of the condition in light of his unequivocal testimony that he did not perform any replacement work to the alleged area prior to July 2019; that there is no evidence as to how long the condition was present before plaintiff's fall; that he never received any complaints about the alleged hazard from anyone, including his two commercial tenants and that he never received any summonses or violations relating to the condition of the sidewalk from the City. Contrary to defendant Vecchio's assertions, the evidence submitted by plaintiff Sandoval establishes prima facie that defendant Vecchio had constructive notice of the sidewalk defect. In opposition, defendant Vecchio fails to raise a question of fact with respect to the issue of constructive notice.

Additionally, plaintiff Sandoval seeks an order pursuant to CPLR §3211 and/or CPLR § 3212, dismissing defendant Vecchio's affirmative defense of comparative fault arguing that there is no evidence of comparative fault since plaintiff Sandoval testified that the date of the accident was the first time she walked this route; that immediately prior to the accident she did not have anything

in her hands; and she was walking straight ahead. However, “A determination of comparative negligence is almost invariably a question of fact and is for the jury to determine in all but the clearest of cases (*see Shea v New York City Tr. Auth.*, 289 AD2d 558, 559, 735 N.Y.S.2d 609; *Williams v City of New York*, 101 AD2d 835, 836, 475 N.Y.S.2d 495)” (*Ormond v MTA/New York City Tr. Auth.*, 210 AD3d 998, 1000 [2d Dept 2022]).

The court notes that plaintiff Sandoval previously discontinued the action against defendant New York SMSA Limited Partnership d/b/a Verizon Wireless and the court awarded plaintiff Sandoval a default judgment against defendant Hector R. Pimental.

Accordingly, it is hereby,

ORDERED, that the branch of the motion by plaintiff Yaniris Sandoval for an order granting summary judgment on the issue of liability against Defendant Roger D. Vecchio is denied; and it is further,

ORDERED, that the branch of the motion pursuant to CPLR §3211 and/or CPLR § 3212, for an order dismissing defendant’s affirmative defenses of comparative fault is denied; and it is further,

ORDERED, that the amended caption shall read as follows:

(SEE NEXT PAGE)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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YANIRIS SANDOVAL,
Plaintiff(s),

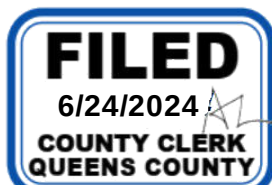
-against-

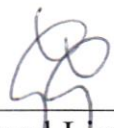
ROGER D. VECCHIO and HECTOR R. PIMENTAL,
Defendant(s).
-----X

Any other and/or further relief requested and not addressed, is denied.

This constitutes the Order of the Court.

Dated: June 11, 2024




Leonard Livote, J.S.C.