

Wojcik v City of New York
2024 NY Slip Op 35447(U)
May 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 714194/2022
Judge: Chereé A. Buggs
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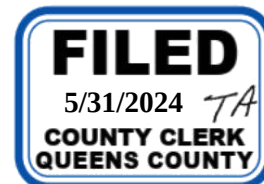
Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice



-----X
ELZBIETA WOJCIK,

Index No.:714194/2022

Motion Date:4/1/2024

Plaintiff,

Motion Cal. No.: 29

-against-

Motion Sequence No.: 1

THE CITY OF NEW YORK and YOLANDE
SYLVESTRE,

Defendants.

-----X

The following efiled papers numbered 29-43, 45-54, 56-58 submitted and considered on this motion by defendant Yolande Sylvestre (hereinafter Sylvestre) and cross-motion by co-defendant the City of New York (hereinafter City), seeking an Order pursuant to CPLR 3212 granting summary judgment in favor of defendants, and dismissing plaintiff Elzbieta Wojcik's (hereinafter Wojcik) Complaint against defendants on the grounds that the evidence on the record establishes that no liability for the incident which gave rise to this action exists against defendants.

Motion Sequence 12

Papers
Numbered

Notice of Motion-Affirmation in Support-	
Affidavits-Exhibits.....	EF 29-43
Affirmation in Opposition-Affidavits-Exhibits.....	EF 45-51
Notice of Cross-Motion-Affirmation in Support-	
Affidavit-Exhibits.....	EF 52-54
Affirmation in Reply-Affidavits-Exhibits.....	EF 56-58

This action stems from a trip-and-fall accident on the sidewalk abutting the premises at 23-41 35th Street in Astoria, Queens, on May 18, 2021, wherein Wojcik tripped over a line where two sidewalk plates meet and sustained personal injury. Wojcik initiated the lawsuit on July 8, 2022. Defendant Sylvestre filed the notice of motion on January 4, 2024, and Co-Defendant City filed its notice of cross-motion on February 20, 2024.

Law and Application

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If 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...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact necessitating a trial” (see *Pullman v. Silverman*, 28 NY3d 1060, 1062 [2016]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). “Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action” (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v. City of New York*, 49 NY2d at 562 [1980]; *Laffey Fine Homes of New York, LLC v. 7 Cowpath, LLC*, 210 AD3d 974, 975 [2d Dept 2022]). “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (see *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

In support, Sylvestre argues that the defect in the sidewalk is trivial and not actionable, asserting that Wojcik tripped over a minor unevenness where two sidewalk plates met, which does not constitute a dangerous condition. Sylvestre alleges that the photo in records and the testimony of both Sylvestre and Wojcik indicate that the defect was minor, and that the prior repairs in 2015 by her were non-negligent and did not create a substantial defect. Sylvestre testified that she had the sidewalk replaced in 2015, and there were no noticeable defects or complaints about the sidewalk prior to the plaintiff's fall.

The City's cross-motion adopts the arguments, facts, and procedural background presented by Sylvestre in her support, asserting that the defect is trivial and not actionable.

“The trivial defect doctrine is grounded on a fundamental principle that spans all types of liability: that if a defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence, and yet an accident occurs that is traceable to the defect, there is no liability” (see *Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 81 [2015]; citing *Beltz v. City of Yonkers*, 148 NY 67, 70 [1895]). “In determining whether a defect is trivial, the court must examine 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 v. County of Suffolk*, 90 NY2d 976, 978 [1997]; *Lomele v. Chawla*, 161 AD3d 1144, 1145 [2d Dept 2018]). “[T]here is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable” (see *Trincere v. County of Suffolk*, 90 NY2d at 977 [1997]; *Green v. New York City Hous. Auth.*, 137 AD3d 748, 749 [2d Dept 2016]). “Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable” (see *Reich v. Alexander's, Inc.*, 182 AD3d 615 [2d Dept 2020]; *Melia v. 50 Ct. St. Assoc.*, 153 AD3d 703, 704 [2d Dept 2017]; *Green v. New York City Hous. Auth.*, 137 AD3d 748, 749 [2d Dept 2016]; *Baldasano v. Long Is. Univ.*, 143 AD3d 933, 934 [2d Dept 2016]).

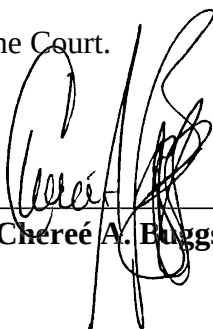
Here, the evidence submitted by Sylvestre and the City, including the photographs of the alleged defect; the bright lighting conditions at the time of the accident, based on Wojcik's testimony of the time of day and the weather conditions; and the description of the alleged defect by both parties, established prima facie that the alleged defect in the sidewalk is trivial and not actionable. The gap between the two sidewalk slabs was physically insignificant, especially with the white fillings installed between the gap, minimizing the risk of the condition; and the characteristics of the defect or the surrounding circumstances did not increase the risks it posed (*see Brown v. Villarba*, 224 AD3d 652, 653 [2d Dept 2024]; citing *Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d at 79; *Melia v. 50 Ct. St. Assoc.*, 153 AD3d 703, 704 [2d Dept 2017]; *Hawkins v. Carter Community Hous. Dev. Fund Corp.*, 40 AD3d 812, 813 [2d Dept 2007]).

In opposition, Wojcik failed to raise a triable issue of fact by submitting evidentiary proof in admissible form. The photograph submitted by Wojcik shows no sign of any dangerous condition. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, it is hereby

ORDERED, that Sylvestre's motion for summary judgment and the City's cross-motion for summary judgment are granted in their entirety.

This constitutes the decision and Order of the Court.

Dated: May 30, 2024



Hon. Chereé A. Buggs, JSC

