

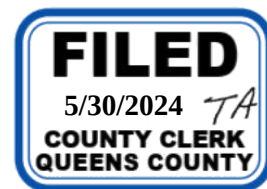
Elliot v Filomena's Rest., Inc.
2024 NY Slip Op 35449(U)
May 29, 2024
Supreme Court, Queens County
Docket Number: Index No. 716580/2019
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE KARINA E. ALOMAR
JUSTICE

IAS PART 23



-----X
LENORA ELLIOT and ROBERT ELLIOT,

Plaintiffs,

Index No.: 716580/2019
Motion Date: 05/16/2024
Motion Seq. No.: 2

-against-

FILOMENA'S RESTAURANT, INC. and CHRISTINA
MATOZZO,

Defendants.

-----X
The following numbered papers 28 to 54 read on this motion by defendant Filomena's Restaurant Inc for an order pursuant to CPLR §3212 dismissing plaintiff's complaint and any and all crossclaims against Filomena's Restaurant Inc

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibit.....	EF No: 28 – 43
Answering Papers.....	EF No: 46 - 50
Reply Papers.....	EF No: 52- 54

Upon the foregoing cited papers, it is ordered that defendant Filomena's Restaurant Inc's for an order pursuant to CPLR §3212 dismissing plaintiff's complaint and any and all crossclaims against Filomena's Restaurant Inc is decided as follows:

Plaintiff commenced the instant action on September 27, 2019, to recover for personal injuries allegedly sustained as the result of a trip and fall accident which occurred on May 23, 2017, at the sidewalk at 1039 Hempstead Turnpike, Franklin Square, in the Town of Hempstead, County of Nassau, State of New York. It is alleged that Filomena's Restaurant Inc. through their agents, servants, employees, and/or assigns, owned, operated, managed, maintained, possessed, supervised, repaired, constructed, altered and controlled the sidewalk adjacent to the premises located at 1039 Hempstead Turnpike, Franklin Square, County of Nassau, State of New York.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an

issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]).

“As a general rule, a landowner or tenant will not be liable to a pedestrian injured by a defect in a public sidewalk abutting its premises.” (*Cannizzaro v Simco Mgt. Co.*, 26 AD3d 401 [2d Dept 2006]). However, “an abutting landowner or tenant will be liable to a pedestrian injured by a defect in a sidewalk where the landowner or the tenant negligently constructed or repaired the sidewalk, otherwise caused the defective condition, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk.” (*Biondi v County of Nassau*, 49 AD3d 580 [2d Dept 2008]; *Padarat v New York City Tr. Auth.*, 175 AD3d 700 [2d Dept 2019]; *Cannizzaro v Simco Mgt. Co.*, 26 AD3d 401 [2d Dept 2006]; *O'Brien v Vil. of Babylon*, 196 AD3d 494 [2d Dept 2021]; *Kaufman v Silver*, 90 NY2d 204 [1997]). Special use occurs where a landowner whose property abuts a public street or sidewalk derives a special benefit unrelated to the public use and is therefore required to maintain a portion of that property (*id.*).

In support of their motion, defendants submit, inter alia, plaintiff Lenor Elliot's deposition transcript dated January 19, 2021. Plaintiff averred that prior to the accident she had jogging with fellow gym-goers as part of that day's routine. The portion of the sidewalk where the accident occurred was constructed in a different manner than the rest of the concrete pavement. Specifically, plaintiff averred that the portion of the sidewalk where the accident occurred was built with bricks (pavers). Plaintiff averred that as she was jogging, her left foot got caught between the edge where the brick meets the concrete pavement.

Defendants also submit, inter alia, the deposition transcript dated November 29, 2021 of Mario Testani, owner of Filomerna's Restaurant. Mr. Testani averred that he bought the restaurant in 2005, at which time the sidewalk was all concrete. Thereafter, the Town of Hempstead led a revitalization program which added new concrete and paver inlays to the sidewalks in downtown Franklin Square, including the sidewalk where the accident occurred. Mr. Testani averred that, after the revitalization project was completed, the concrete and the paver strips were leveled. However, he did notice that at some point thereafter there was a height differential. Mr. Testani averred that a two foot portion of the pavers by the middle of the sidewalk had essentially sunken down approximately one inch and a quarter or one inch and a half lower than the concrete portion of the sidewalk. Around the pavers where six large plant pots weighing approximately one hundred pounds each owned by defendant Filomena's. Mr. Testani averred that other street blocks had the same issue and thus he notified the Town of Hempstead who thereafter fixed the issue.

Defendant further submits the expert report of Jeffrey M. Laux and photographs depicting the subject location. The photographs demonstrate that three planters are located immediately in front of defendant Filomina's property (one planter is located near the portion of the sidewalk where the concrete pavement and pavers meet). The photographs also show three other planters located on the pavers on the end of the sidewalk near parked cars. Mr. Laux averred that the accident was not casually related to the placement of the planter pots on the sidewalk as plaintiff averred that the accident occurred on the middle of the sidewalk where no planter pots were present.

Defendant also submits a copy of the property lease providing that defendant Filomina's Restaurant leased the building located at 103 Hempstead Turnpike, Franklin Square, NY, from Christina Matozzo. The property lease provides in part:

...the tenant will take good care of the demised premises, fixtures and appurtenances, and all alteration, additions, and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition, which repairs shall be, in quality und class, equal to the original work...

The rider to the lease also reads in part:

RIDER 6

Tenant shall make all interior 'repairs and renovations at tenant's sole cost and expense, including, without limitation, painting, decorating, repair or replacement of electrical, plumbing, heating, arid other systems.

In opposition, plaintiff submits, inter alia, the expert report of Nicholas Bellizzi, P.E.

In his report, Bellizzi states that he is a licensed engineer and an accident reconstruction expert. He performed a site inspection of the subject accident location on December 9, 2022. He observed that the sidewalk area in front of Filomena's Restaurant was decorated with a metal bench, large potted plants, a street tree, and decorative streetlights. He further observed that the sidewalk area had brick pavers adjacent to the southerly concrete curb line of Hempstead Turnpike in an area commonly called the "planting strip." After taking several photographs of the area, he concluded the following: The subject defective public sidewalk pavement area, which was measured by Mr. Testani, the owner of Filomena's Restaurant, to have an approximately 1¼-1½ inches vertical height difference, was not trivial or de minimus. It was a substantial sidewalk defect and a known and well recognized pedestrian trip and fall hazard in need of repair. The variable, irregular, mis-leveled, non-uniform, sunken, depressed, non-flush, and uneven 1¼-1½ inches vertical height differential at the sidewalk defect, was sufficient in size, shape, and dimensions to be classified as a known and well recognized pedestrian trip and fall hazard in need of repair.

He further stated that, the subject sidewalk surface discontinuity and sidewalk pavement height differential was a "toe trap" and a pedestrian trip and fall hazard that was not properly or safely maintained, remediated or repaired. It was in violation of NYS Property Maintenance Code requirements in that it was not flush with the surrounding sidewalk surfaces, mis-leveled, uneven, non-uniform, irregular, and sunken and met the definition of a defective sidewalk and a substantial sidewalk defect in that the unevenness, or height differential, was greater than ½ inch and violated Section 302.3 of the NYS Property Maintenance Code. Moreover, the subject unwarned of, defective, unsafe, hazardous, and dangerous sidewalk area was a substantial factor in the cause of Ms. Elliot's trip and fall accident and her resulting injuries.

It is clear from all the evidence presented and the pertinent case law, that defendant Filomina's Restaurant has demonstrated that as a tenant of the property it did not have a duty to repair the alleged defective pursuant to a specific ordinance or statute. Defendant's duty to repair was limited to defects located on and/or within the building. Moreover, plaintiff's contention that

defendant caused the defective condition, or caused the defect to occur by some special use of the sidewalk, by placing six large planters of the sidewalk is unavailing. The photographs demonstrate that the planters were placed at the ends of the sidewalk and not at the middle of the sidewalk were plaintiff averred the accident actually occurred.

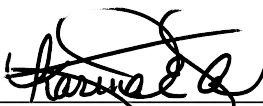
Accordingly, it is hereby

ORDERED, that defendant Filomena's Restaurant Inc's motion for an order pursuant to CPLR §3212 dismissing plaintiff's complaint and any and all crossclaims against Filomena's Restaurant Inc is granted, it is further

ORDERED, that defendant Filomena's Restaurant Inc shall serve a copy of this order, with notice of entry, upon all parties within thirty days of the date of entry.

This constitutes the Decision and Order of this Court.

Dated: May 29, 2024



HON. KARINA E. ALOMAR, J.S.C.

