

Lynch v Q-Marqet

2025 NY Slip Op 30868(U)

March 18, 2025

Supreme Court, New York County

Docket Number: Index No. 154526/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

HARRY LYNCH, as Administrator of the Estate of
SHARON DALY, deceased,

Plaintiffs,

- v -

Q-MARQET,

Defendant.

-----X

INDEX NO. 154526/2020

MOTION DATE 03/13/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52

were read on this motion to/for DISMISS.

Defendant’s motion for summary judgment is granted.

Background

This trip and fall case concerns injuries purportedly suffered by plaintiff Sharon Daly when she was on her way to a medical appointment. Unfortunately, Ms. Daly passed away in August 2020 from a condition unrelated to the injuries she suffered here. When she passed away, this case was already commenced but defendant had not yet answered.

Her husband, plaintiff Lynch, testified that when the accident occurred, he was “waiting for her at the Dubin Breast Cancer several hundred feet away. She had a regular appointment there every 28 days” (NYSCEF Doc. No. 43 at 20). The appointment was scheduled for 10 a.m. and Mr. Lynch was sitting in the waiting room (*id.* at 22). He explained that he arrived a few minutes before the appointment and, when his wife was not there, he started texting her (*id.*). “I took out my phone and started texting her probably for ten or twelve minutes. And then got,

finally got a call from her, you know, extremely upset, distraught, barely talking, crying saying that she had fallen (*id.*). According to Mr. Lynch, his wife said she fell over a “bump in the sidewalk” (*id.*). When asked about the condition of the sidewalk, “I remember seeing an uneven sidewalk. I remember seeing a black mat. I’m trying to remember if there were, there was a hose, you know, maybe there as well (*id.* at 33-34). Mr. Lynch admitted that he had no idea how long that portion of the sidewalk was uneven or how long the black mat was there (*id.* at 34).

Defendant moves for summary judgment on multiple grounds. It claims that Mr. Lynch’s testimony is inadmissible as he was not an eyewitness to the events and that he is only able to offer inadmissible hearsay. Defendant points out that, apparently, Ms. Daly visited the scene of the incident the next day and took photographs of the purported condition. However, it argues that there was no admissible testimony that anything depicted in the photograph caused plaintiff Daly’s accident.

Defendant also points out that it is merely the tenant of the property where the accident occurred and that nothing in the lease required it to maintain the sidewalk. It contends the lease required the owner to maintain and repair the public portions of the property, which means that the property owner (and not defendant as the tenant) should have corrected any conditions with the sidewalk.

In opposition, plaintiffs complain that the lease was only produced in connection with the instant motion. Plaintiffs argue that the lease required defendant to keep the sidewalk in good order. They contend that the photographs taken by Ms. Daly accurately depict the condition—the raised portion of the sidewalk—that caused her to fall. With respect to the admissibility issue, plaintiffs contend that Ms. Daly’s statements to her husband in the immediate aftermath of the accident qualify as a present sense impression and excited utterance and therefore are exceptions

to the rule against hearsay. Plaintiffs argue that Mr. Lynch ran to his wife “a few minutes” after the accident and found her in pain near the accident location.

In reply, defendant reiterates that there is no admissible evidence as to the location of the accident and observes that plaintiff Daly passed away prior to her deposition. It contends that it had no duty to repair or maintain the sidewalk nor was it obligated to do structural repairs.

Discussion

As an initial matter, the Court must observe the difficult circumstances surrounding this case. The fact is that plaintiff Daly unfortunately passed away in August 2020, after this case was commenced but before defendant answered. That fact complicates the evidence adduced on this record as she was not deposed and there is no question that her husband, Mr. Lynch, did not witness the accident. And so, as plaintiffs correctly noted in opposition, they must rely on an exception to the hearsay rule in order to raise an issue of fact in opposition to defendant’s motion for summary judgment. Plaintiffs cited to two such exceptions—present sense impression and excited utterances.

“Excited utterances are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative. Present sense impression declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant's excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory” (*People v Vasquez*, 88 NY2d 561, 574, 647 NYS2d 697 [1996] [internal quotations and citations omitted]).

As an initial matter, the Court finds that the excited utterance exception does not apply here. According to Mr. Lynch, he waited for his wife for ten or so minutes prior to leaving the doctor's office and running to see her (NYSCEF Doc. No. 43 at 22). This means that at least 20 minutes passed between the time of the accident and when Mr. Lynch heard the account of the incident from plaintiff Daly. Therefore, these statements do not qualify as excited utterances.

The Court also finds that the present sense impression exception does not apply. As noted above, this exception applies to descriptions of events that are occurring. Here, again, according to Mr. Lynch, his wife tripped and fell and then made her way to the stoop of a nearby brownstone (*id.* at 30). Combined with the fact that about 20 minutes passed before Mr. Lynch arrived to check on Ms. Daly, the Court finds that too much time elapsed in order to qualify as a present sense impression. Ms. Daly had adequate time for reflection (*People v Meritt*, 193 AD3d 661, 146 NYS3d 259 [1st Dept 2021] [denying a request to rely upon the present sense impression exception]).

And even if the Court could consider the statements as part of a present sense impression exception to the rule against hearsay, the fact is that plaintiffs failed to raise an issue of fact. Plaintiffs did not describe the condition with enough detail to defeat defendant's motion. The Court observes that Mr. Lynch testified that he was not the person who took the subject photographs (Ms. Daly took them the next day), nor did he accompany her to the location to take these photos (*id.* at 44). That renders these photographs as inadmissible as there is no one with personal knowledge to identify these photographs as a fair and accurate depiction of the purportedly dangerous condition that caused the accident. Moreover, there is no admissible evidence to describe what, specifically, in these photographs caused Ms. Daly to trip and fall. Mr. Lynch could only offer speculation at his deposition about these photographs.

Even if the Court could consider these photographs and Mr. Lynch's assertions that the black mat caused the incident, that would not defeat defendant's motion. Plaintiffs did not include an expert report detailing measurements about the purportedly dangerous condition. Instead, they only present Mr. Lynch's estimate that "It looked like it was probably an inch and-a-half or two inches and she, you know, she said [she] tripped over that" (*id.* at 37). That is not sufficient to raise an issue of fact about a dangerous condition. In other words, plaintiffs did not meet their burden to cite an uneven or raised sidewalk sufficient to sustain a trip and fall based on a dangerous condition.

Summary

It is completely understandable that plaintiffs' first priority was not this action and they had more important matters than calculating how to prepare and preserve evidence in case Ms. Daly would be unavailable to pursue this action. They had other issues to address, namely her serious medical issues. But this Court is left with an action in which all the descriptions of what occurred are hearsay and where it is wholly uncertain what exactly caused plaintiff Daly to trip and fall. The purpose of the hearsay rule in these circumstances is to ensure that a defendant has the ability to cross-examine a plaintiff about what occurred and to marshal their own witnesses (such as experts) to evaluate those claims.

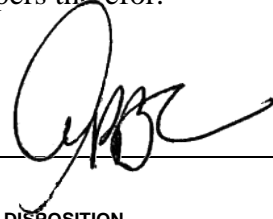
Here, plaintiffs can only offer a secondhand account of a trip and fall in which the precise dangerous condition is not fully explored. Plaintiffs offered no measurements or expert testimony about the nature of the condition and instead speculate that the difference in the sidewalk was an inch and-a-half to two inches without any basis for that assertion. And, of course, the photographs themselves are inadmissible as no witness is available to confirm they are fair and accurate depictions of the sidewalk when the picture was taken, which is alleged to

be the day after Ms. Daly tripped and fell. Nor can anyone testify specifically what in the photographs caused her to fall. This compels the Court to grant the motion.

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment dismissing this case is granted and the Clerk is directed to enter judgment in favor of defendant and against plaintiffs along with costs and disbursements upon presentation of proper papers therefor.

3/18/2025
DATE



CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE