Ferdinand-Guest v Rochdale Vil., Inc.
2025 NY Slip Op 35325(U)
March 31, 2025
Supreme Court, Queens County
Docket Number: Index No. 720176/2019
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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STACY R. FERDINAND-GUEST,

Plaintiff,

-against-

ROCHDALE VILLAGE, INC. and 111 MEAT & PRODUCE, INC. D/B/A KEY FOOD SUPERMARKET

Defendants.

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ROCHDALE VILLAGE, INC.

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK

Third-Party Defendant.

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Index No.: 720176/2019

Motion Date: February 3, 2025

Motion Cal. No.: 15

Motion Sequence No: 2

FILED
4/1/2025
COUNTY CLERK
QUEENS COUNTY

The following efile papers numbered EF 62-70, 74-84 and 87-88 submitted and/or considered on this motion by defendant ROCHDALE VILLAGE INC. (hereinafter referred to as "Rochdale") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting summary judgment dismissing plaintiff's, STACY R. FERDINAND-GUEST (hereinafter referred to as "Plaintiff"), Complaint along with such other and further relief as the Court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 62-70
Stipulation…….	EF 74-75
Aff in Opp.....	EF 76-84
Reply……..…….	EF 87-88

This personal injury litigation arises from an alleged trip and fall accident which occurred on Sunday, August 18, 2019 at approximately 1:30 PM, as the Plaintiff was stepping off the curb and onto the asphalt in front of Key Food Supermarket on Baisley Boulevard in the county of Queens, New York (hereinafter referred to as the "Subject Premises"). During her deposition Plaintiff stated that she shopped at the Subject Premises on a weekly basis prior to the accident, she testified as follows regarding the accident and the location:

> Q: Now, did he get all the packages in the car before the incident?
> A: I'm assuming so, because I just stepped, I went to step down to get in the car, he was on his side and I stepped down, when I stepped down my ankle turned and I heard it pop, I heard it crack, like a crackling noise, and I just was in pain.
> (EF 68 pg 5 lines 4-10)

> Q: Approximately how may steps did you take from the curb before you hurt your ankle?
> A: Ma'am, I'm not exactly sure of that. I know that whatever the length of the door, from the door to the car, whatever that is, because that's as far as I went.
> Q: So is it fair to say then that the passenger side of the car was parked less than 3 feet from the curb?
> A: If that's the length of it, yes.
> (EF 68 pg 47-48 lines 23-25 and 1-7)

> Q: How far from the handicapped ramp was the area of the curb that you stepped down from?
> A: Couple of feet.
> Q: You mean 2 feet when you say a couple?
> A: Around, about.
> Q: Okay.
> A: Maybe about 4, I'm not sure. I can't, I don't know the distance, the distance between it.
> Q: Was it less than a car length?
> A: Yes.
> Q: But if we're looking at the store, if we're looking at the front of the store was the handicapped ramp that was a couple feet from where you stepped down, was it to the right of where you stepped down or to the left?

A: If I'm standing in front, directly in front of the store, it would have been to the left.
Q: Where you entered the car, was it in the – was it in the vicinity of a fire hydrant?
A: Yes.
Q: Where in relation to the car was the fire hydrant?
A: Maybe about right there. It was very close.
Q: So where you stepped off the curb to get into the car, how far was the fire hydrant from you?
A: Maybe about a foot, maybe.
Q: Was it closer to you than the handicapped ramp?
A: Yes
Q: As you are looking, again, as you're looking at the store, not coming from the store but looking at the store, was the fire hydrant, was it to the left of where you came from off the curb or to the right?
A: To the left.
Q: Were there any poles surrounding the fire hydrant?
A: Yes, two of them.
Q: Were you closest to one of the poles?
A: Yes
Q: How far were you, how close were you to the pole?
A: I don't know, maybe inches, feet, I'm not sure, maybe a foot, I'm not sure of that.
(EF 68 pg 48-50 lines 24-25, 1-25 and 1-18)

Q: After the incident occurred did you notice anything strange about the area where you placed your foot down onto the black, to the asphalt, did you see like any crack, anything like that?
A: I stepped down and I was just in pain. My ankle was, I was just in pain. I didn't see, I don't know if I saw. I didn't see anything or feel anything but pain.
Q: Okay. My question is do you know what it was on the black asphalt that caused the injury to your ankle?
A: There was a crack there, a dent, indent, something.
Q: When you say – what do you mean a dent?
A: It was a hole there, there was a hole there.
Q: And the hole was in the blacktop, correct?
A: Yes.
W: Would you say it was like uneven or like a little –
A: A swoop, a dent, impression.
Q: Like indentation?
A: Yes
Q: Did you happen to see the size of that indentation?
A: Sir, I was in pain, I didn't see that. I don't know, I didn't look. I was just in pain.
(EF 68 pg 82-83 lines 5-25 and 1-8)

Q: When did you first see the indentation in the asphalt?

A: That would be when I went back with the investigator. The day it happened, when, not the day it happened, the day that I went back with the investigator.
Q: How long after the accident did you go back with the investigator?
A: Maybe 3 days, 4 days.
(EF 68 pg 87 lines 17-25)

Plaintiff further testified that the next time she returned to the Subject Premises was with the investigator, who took pictures of the location. Plaintiff testified as follows regarding the photos she was shown at the deposition.

Q: Did you accompany the investigator?
A: Yes.
Q: Were you with him when he took photos of the area?
A: Yes
Q: Did you tell him what to take photos of?
A: No. I just showed him where I fell. I just showed him where it happened.
(EF 68 pg 70 lines 16-23)

Plaintiff testified that she did not see the photos after they were developed. While viewing a photo during the deposition, Plaintiff testified as follows about what she recognized:

Q: Do you recognize what this area is?
A: That's a sidewalk, the curb and the street, the parking lot.
Q: Where is that?
A: That's in front of Key Food.
Q: You can recognize that from this photograph?
A: Well, I'm assuming because the shopping cart is there, that that's that place, but that's the hole right there.
(EF 68 pg 72-73 lines19-25 and 1-3)

Plaintiff further testified that she never reported the alleged defective condition of the roadway to Key Food Supermarket prior to the subject accident and did not report the alleged defective condition immediately following the accident.

Rochdale argues that Plaintiff did not see the alleged defect on the day of the incident and is unable to substantiate the existence of an actual hazardous or dangerous defect. That, the Plaintiff was unable to verify at her deposition if the photos represent the actual area where the incident occurred.

Rochdale further contends that the alleged defect was trivial in light of Plaintiff's testimony that she saw the area before the incident but did not notice a dangerous condition. This Court was unable to locate this specific testimony.

Furthermore, Rochdale contends that it lacked prior notice of the alleged defect evidenced by the testimony of Junior Dayes, grounds manager for Rochdale. At the time of his deposition,

Mr. Dayes had been employed by Rochdale for 15 years and had been grounds manager for 5 years. Mr. Dayes testified as follows:

> Q: Okay, great. So, Mr. Dayes, where do you work?
> A: I work for Rochdale Village.
> Q: Okay. And in what capacity do you work for Rochdale Village?
> A: I am the grounds manager.
> Q: As best you can, describe some of your duties and responsibilities as a grounds manager of Rochdale Village?
> A: As a grounds manager, I'm in charge of the entire grounds, the exterior of all the buildings, sidewalks and walkways and roadways within Rochdale Village.
> (EF 70 pg 9 lines 11-23)

> Q: I apologize, only the five years, you said you were a mechanic for ten years you've been a grounds manager for five. That was my error, so I apologize. So, could you just give me, I wasn't trying to deceive you, I misspoke, I apologize again. Could you just give me what a normal day might look like for you in your five years as a grounds manager?
> A: I begin work at 7 a.m. in the morning and I dispatch the groundsmen to their normal job. After that, I would, you know, inspect the complex, parking lots, roadways, trees, everything on the outside.
> (EF 70 pg 11 lines 4-16)

> Q: How big is your grounds crew?
> A: I have 23 groundsmen.
> Q: Okay. And just briefly tell me what kind of repairs and work they do?
> A: The groundsmen are in charge of maintaining the walkways, the parking lots. During the snow removal, we do the clean-up, deicing and for the trees, whenever's [sic] there's branches, we would cut and remove as needed, so it's basically the grounds crew is in charge, its main job is to upkeep the grounds outside of the buildings, the parking lots, the malls.
> (EF 70 pg 19 lines 3-14)

> Q: Okay. Now, as grounds manager of the Village of Rochdale, in the event that there is a defect or deformity on a piece of asphalt in any position, in any part of the Village of Rochdale, is there a notification system in place so that employees can make everybody aware of such a defect?
> A: No, this is done verbally.
> Q: Could you just go into it in a little more detail what might happen if such a defect might be discovered?
> A: If there's a pothole or defect, then the grounds crew would go and repair the pothole. If it's something that's beyond our scope, a local contractor would come in and do the repair.
> Q: Okay. So, it's your testimony here today that there would be no sort of written report made or written notification of any defect discovered within the Village of Rochdale?

A: That's correct.
(EF 70 pg 13-14 lines 21-25 and 1-16)

As it relates to the inspection and repair of the parking lot, sidewalk and curb in front of the Subject Premises, Mr. Dayes testified as follows:

Q: Okay. In your experience or from your memory, is Key Food supermarket responsible for any of the repairs of the parking lot?
A: No.
Q: Who is responsible for repairs of the parking lots?
A: Rochdale Village.
Q: Okay. Have you ever supervised any of the repairs to the parking lot in front of the Key Food from August 2019 to the present?
A: No.
Q: How about before that date?
A: No.
Q: Does the grounds crew department keep any records of the repairs that are made to the parking lot?
A: No.
Q: How about any photographs?
A: No.
Q: When you dispatch your grounds crew each morning, do you give them like a work ticket or is it just verbal "Hey, go cut down some branches or go repair the pothole?"
A: Verbal.
(EF 70 pg 20-21 lines 24-25 and 1-23)

Q: Okay. And do you know if prior to August 18, 2019, if a contractor was hired by Rochdale Village to perform any repairs or replacement of the parking lot in around the area in front of the Key Food?
A: No.
(EF 70 pg 22 lines 12-17)

Q: Okay. In general, how often do you yourself travel the grounds for inspection of the property?
A: Every day.
(EF 70 pg 22 lines 23-25)

Q: But any repairs to the parking lot in front of the Key Food would be performed by either Rochdale Village grounds crew or possibly an outside contractor, correct?
A: That's correct.
(EF 70 pg 23 lines 16-20)

Q: And the same question with regard to the sidewalk, who's responsible for the repair and/or replacement of the sidewalk in front of the Key Food supermarket?
A: Rochdale Village.

Q: Okay. And would that be true for the curb area as well?
A: Yes.
(EF 70 pg 24 lines 2-9)

LEGAL ANALYSIS

"[T]he 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

General Negligence

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (See *Calabro v Harbour at Blue Point Home Owners Assn., Inc*., 120 AD3d 462 [2d Dept 2014].)

Rochdale has established prima facie entitlement to judgment as a matter of law. The burden now shifts to the Plaintiff to raise a triable issue of fact as to whether the defect was trivial in nature.

In opposition, Plaintiff argues that while the Plaintiff lacked the opportunity to observe the condition that caused her to fall, due to having just sustained painful injuries, she returned “3 to 4 days” later with an investigator and identified the condition. Furthermore, during her deposition, through the use of landmarks like the handicap ramp, the fire hydrant and the two poles surrounding the fire hydrant Plaintiff was able to describe the location of the condition that caused her to fall.

Plaintiff further disputes Rochdale’s claim that that the condition was trivial and points to the holding in *Hutchinson v Sheridan Hill House Corp.,* 26 NY3d 66 [2015] where the Court of Appeals addressed three cases involving trip and fall accidents. In the first case, *Hutchinson,* the plaintiff claims he tripped and fell over a metal object screwed in to the concrete (*id* at 72). Images and measurements of the defective condition indicate that it was “’between one eighth of an inch…and one quarter of an inch’ above the sidewalk and was ‘approximately five eights of an inch’ in diameter” (*id* at 73). The defendants moved for summary judgment arguing that the defective condition was trivial and that they neither created nor had notice of the defect. Plaintiff opposed arguing that there are issues of fact regarding whether the metal object created a hazard in the nature of a trap or snare and whether defendant had constructive notice of its existence (*id*)

The trial court granted defendant summary judgment on the grounds that it lacked notice of the defect and the appellate division affirmed in addition to lack of notice the Appellate Division found that the "minor height differential alone is insufficient to establish the existence of a dangerous or defective condition" (*id* [citation omitted]).

The second case involved the plaintiff, Matvey Zelichenko who fell while walking down a staircase in the lobby of a residential building. The subject staircase had "four step treads, made of terrazzo, 12 inches in horizontal depth, each with a one-inch nosing that projects over the riser below. There are handrails on each side, and Zelichenko made use of one." (*id* at 74). Zelinchenko sustained injuries when his right leg got caught when he stepped on a prat of the nosing that had a missing chipped piece causing his leg to twist and his fall. (*id* [citation omitted]). The defendant moved for summary judgment contending that the defect was trivial and that they lacked notice. The defendant relied upon an expert who determined that the missing chip was 3.25 inches in width and one-half inch in depth (*id*). The expert opined that the subject step tread "did not present a tripping or slipping hazard" because "the small chip in the nosing is forward of a person's foot contact area and would be safely negotiated… unless his/her foot completely overstepped the tread". (*id* [citation omitted]). Plaintiff opposed the motion and presented the opinion of his own expert who presented evidence that a broken tread on a stairway may cause a fall and disputed the measurements submitted by defendants expert (*id* at 75). The trial court denied the motion finding there were issues of fact and the Appellate division reversed finding, based upon the measurements, that the defect was trivial (*id*).

Finally, the third case involved plaintiff, Maureen Adler who was injured when her right foot got caught on a protrusion in a step tread that had been painted over (*id* at 76). Defendant moved for summary judgment seeking to dismiss the alleged defect as trivial and arguing lack of notice. The trial court denied the motion and the Appellate Division reversed finding that the defect was trivial.

The Court of Appeals reversed the Appellate Divisions holdings in *Adler* and *Zelichenko* relying on "the principle that a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it 'unreasonably imperil[s] the safety of' a pedestrian" (*id* at 78 citing *Wilson v Jaybro Realty & Dev. Co.,* 289 N.Y. 410, 412 [1943]; *see Trincere v County of Suffolk,* 90 NY2d 976 [1997]). The Court further noted that "the case law provides numerous examples of factors that may render a physically small defect actionable, including a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; poor lighting; or a location- such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet" (*id* at 78; *see e.g. Brenner v Herricks Union Free Sch. Sist.,* 106 AD3d 766, 767 [2d Dept 2013]; *see also e.g. Glickman v City of New York,* 297 AD2d 220 [1st Dept 2002] [citations omitted]).

As to *Zelichenko*, the Court of Appeals found material issues of fact. It noted that the relevant question is not whether the defect was avoidable but whether "a person would invariably avoid the defect while walking in a manner typical of human beings descending stairs." (*id* at 82).

As to *Adler,* the Court of Appeals found that the record was inconclusive because while it contained deposition testimony and "indistinct photographs, there were no measurements contained in the record" (*id* at 83). Thus, the court held "without evidence of the dimensions of the 'clump,' it is not possible to determine whether it is the kind of physically small defect to which the trivial defect doctrine applies" (*id*). The court clarified that measurements are not always necessary where, upon examination of the photographs, the court could justifiably infer that an elevation "or depression or other defect is so slight as to be trivial as a matter of law" (*id*).

Finally, Court of Appeals affirmed the holding in *Hutchinson,* finding that the test was not whether a defect is capable of catching a pedestrians shoe but whether the "defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id* at 80). The court reasoned that in *Hutchinson,* the sidewalk was well illuminated and "in a place where a pedestrian would not be obliged by crowds or physical surroundings to look only ahead. The object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as a hazard. Its edge was not jagged and the surrounding surface was not uneven." (*Id*). Thus, the court concluded that the defect was trivial as a matter of law (*id*).

The Court of Appeals concluded that:

> *Trincere* stands for the proposition that a defendant cannot use the trivial defect doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect, and that the reviewing court is obliged to consider all the facts and circumstances presented when it decides the motion. Summary judgment should not be granted to a defendant on the basis of a 'mechanic disposition of a case based exclusively on the dimension[s] of the defect' (*Trincere* at 977-978), and neither should summary judgment be granted in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive. Moreover, in deciding whether a defendant has met its burden of showing prima facie triviality, a court must – except in unusual circumstances not present here – avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere… (*Hutchinson* at 84)

Here, the evidence in the record including Plaintiff's deposition testimony provides sufficient information by way of the usage of landmarks and photographs to sufficiently identify the location of the alleged defective condition. Furthermore, the testimony of Mr. Dayes establishes that Rochdale was on constructive notice of the defect as he testified that he, and his 23 grounds men, performed daily inspections of the parking lot, sidewalks and exterior features of Rochdale Village.

Plaintiff has raised a triable issue of fact as to whether the defect at issue was trivial. The record is silent as to the dimensions of the defective condition and due to the inconclusive nature of the photograph, which depicts the alleged defect filled with a puddle, this Court does not have

sufficient information to make a determination as a matter of law as to whether the defect was trivial. Therefore it is,

ORDERED, that the motion is **denied**.

The foregoing constitutes the decision and Order of this Court.

Dated: March 31, 2025

Hon. Chereé A. Buggs, JSC