

Almanzar v Golden Arch Realty Corp.
2025 NY Slip Op 35587(U)
February 5, 2025
Supreme Court, Bronx County
Docket Number: Index No. 808793/2022E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 8**

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JOSE M. MOTA ALMANZAR,

Index No. 808793/2022E

Plaintiff

-against-

Hon. Bianka Perez

Justice Supreme Court

GOLDEN ARCH REALTY CORPORATION,
SINGELYN ENTERPRISES IV, INC., and PEJ
XVIII, INC.,

Defendants.

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The following documents were read on this motion (**Seq 1**) for **SUMMARY JUDGMENT** submitted on **November 19, 2024**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 29-38
Answering Affidavit and Exhibits	NYSCEF No(s). N/A
Reply Affidavit and Exhibits	NYSCEF No(s). N/A

Upon the foregoing papers, Plaintiff moves for an Order (1) pursuant to CPLR §3212 granting Plaintiff summary judgment on the issue of liability against Defendants and (2) pursuant to CPLR §§3211 and 3212 striking Defendants' affirmative defenses of comparative fault/culpable conduct. No opposition filed.

Plaintiff commenced the instant action to recover for injuries allegedly sustained on February 24, 2022 when he was caused to trip and fall after he stepped on a defective sidewalk located in front of the premises owned by Golden Arch Realty Corporation, leased by Singelyn Enterprises IV, Inc. and PEJ XVIII, Inc, a McDonald's located at 2065 Jerome Avenue, Bronx, New York. Plaintiff testified at his deposition that as he was walking down the sidewalk, he suddenly fell, and, after falling, he looked down and saw a hole in the sidewalk (NYSCEF Doc. 34, Pg. 16-17). Plaintiff argues that he is entitled to summary judgment on the basis that Defendants had both actual and constructive notice of the defective condition.

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 (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *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” (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept. 2006]). When deciding a summary judgment motion, the court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).

Summary judgment is the procedural equivalent of a trial (*Mendoza v. Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept. 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders Inc., supra*, 231]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad, supra* at 853).

It is well settled that a premises owner has a duty to keep its property in a “reasonably safe condition, considering all of the circumstances including the purposes of the person’s presence and the likelihood of injury” (*Macey v. Truman*, 70 N.Y.2d 918 [1987]); *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). To recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994]; *Leo v. Mt St. Michael Academy*, 708 N.Y.S.2d 372 [1st Dept. 2000]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). Further, New York City Administrative Code §7-210 (“Administrative Code”) creates a nondelegable duty for the landowner of the abutting premises, to maintain the sidewalk (*see, Yuk Ping Cheng Chan v. Young T. Lee Son Realty Corp.*, 110 A.D.3. 447 [1st Dept. 2008]).

Administrative Code §7-210 states in pertinent part:

- b. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
- c. Notwithstanding any other provision of the law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

(Administrative Code §7-210).

Administrative Code §7-210 creates for the landowner of the abutting premises, a nondelegable duty to maintain the sidewalk (see *Yuk Ping Cheng Chan v. Young T. Lee Son Realty Corp.*, 110 A.D.3d 637 [1st Dept. 2013], *Cook v. Consolidated Edison Co. of N.Y., Inc.*, 51 A.D.3d 447 [1st Dept. 2008]). However, “Section 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 the owner is liable,” (*Harakidas v. City of New York*, 86 A.D.3d 624, 627 [2d Dept. 2011]). “Except in cases where the defendant created the condition, thus constituting actual notice to establish a prima facie case, a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence” (*Lewis v. Metropolitan Transp. Authority*, 99 A.D.2d 246, 249 [1st Dept. 1984]).

“[T]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it,” (*Hayes v. Riverbend Housing Co., Inc.*, 40 A.D.3d 500 [1st Dept. 2007]). Furthermore, a plaintiff must prove defendant had more than a general awareness of the condition as, “general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff’s fall,” (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994]).

Summary judgment has been denied where there is a triable issue of fact as to whether the landowner had actual or constructive notice of a defect in the sidewalk (see *Molinari v. 167 Housing Corp.*, 103 A.D.3d 507 [1st Dept. 2013], *Alexander v. New York City Transit*, 34 A.D.3d

312 [1st Dept. 2006]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it,” (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986], see also *George v. New York City Transit Authority*, 41 A.D.3d 143 [1st Dept. 2007]).

In support of his motion, Plaintiff submits his own deposition and sworn affidavit, photographs depicting the incident location, and the deposition of defendant witness Vanessa Renta (“Renta”), Director of Operations for the Fonseca Group, a franchisee of McDonald’s. In his deposition, Plaintiff states that he was walking to McDonalds around 7:30 p.m. when suddenly, he tripped and fell on his right side (NYSCEF Doc. 34, Exh. D, Pg. 16-17). He further states that, after he fell, he saw a hole, “a bit larger than my feet” in the sidewalk, and that his foot “went into the hole, which caused him to fall (*Id.* at 17, 20-21).

In the deposition of defendant witness Renta testified that she would visit the subject premises two to three times a month and would walk the exterior and interior to observe it (NYSCEF Doc. 35, Exh. E, Pg. 22-23, 26). She further stated that she performed a safety inspection of the interior and exterior of the subject premises and at least once a month looking for “anything that could cause injury or harm to a customer or an employee,” (*Id.* at 22-23). While she testified that she had not seen the alleged hole in the sidewalk, she also stated that the particular area of the sidewalk in which the incident occurred would not have been part of her inspections (*Id.* at 44). She stated that the city was responsible for maintaining the particular area of the sidewalk where the accident occurred (*Id.* at 44-45).

As stated above, pursuant to Administrative Code §7-210(a), “It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.” Accordingly, defendant is responsible for the subject sidewalk. However, there remains triable issues of fact as to whether the alleged defect was visible and apparent and had been in existence for a sufficient length of time, prior to the accident, to determine whether Defendants’ had actual and/or constructive notice of the defect to discover and remedy it (*see Fields v. New York City Transit Authority*, 15 A.D.3d 156, 158 [1st Dept. 2005]). As to the branch of Plaintiff’s motion seeking to strike Defendants’ affirmative defenses of comparative fault/culpable conduct, that branch of the motion is denied as the issue of Plaintiff’s comparative fault and culpable conduct remains an issue for the factfinder at trial (see *Rodriguez v. City of New York*, 31 N.Y.3d 312, [2018]).

The Court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: February 5, 2025

HON.



BIANKA PEREZ, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ TRANSFER |
| | ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT |