Watkins v Forsyth
2009 NY Slip Op 33329(U)
June 29, 2009
Sup Ct, New York County
Docket Number: 107677/07
Judge: Joan A. Madden

[* 1]

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 107677/2007
WATKINS, PATRICIA
VS.
FORSYTH, ALFRED
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4-2-09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 29, 2009

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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PATRICIA WATKINS,

Index No. 107677/07

Plaintiff,

- against -

ALFRED FORSYTH and ROMAN LUTAK,

Defendant.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant Alfred Forsyth (Forsyth) moves for summary judgment pursuant to CPLR 3212 dismissing the complaint against him. Defendant Roman Lutak (Lutak) separately moves for the same relief. For the reasons set forth below, both motions are denied.

Background

Plaintiff Patricia Watkins (Watkins) alleges that she sustained personal injuries on December 18, 2006, at approximately 4:45 pm, when she tripped and fell on a raised section of the sidewalk in front of 73 and 75 St. Mark's Place, New York, NY, respectively Forsyth's and Lutak's properties.[1] (Watkins Dep. at 18, 39). At her deposition, Watkins testified that she was in the process of walking westward down the middle of the sidewalk when her right foot hit a raised section of the sidewalk, causing her to fall on her right side (Id. at 22, 26, 40). Watkins was presented photographs of the site of the accident at her deposition and testified that the

[1] At her deposition, Watkins testified that she was walking between Avenue A and First Avenue at the time of the accident. (Watkins Dep. at 18). However, it is clear from the record that 73 and 75 St. Mark's Place is between First and Second Avenues.

[* 3]

photographs accurately depicted the condition of the sidewalk at the time of the accident. (Id. at 38 - 44).

At his deposition, Forsyth testified that in 1990, he hired a contractor to replace the entire sidewalk in front of his property at 73 St Mark's Place. Lutak testified that some time in the 1990's, the City replaced the entire sidewalk in front of his property at 75 Mark's Place.

Watkins retained Scott Silberman (Silberman), a registered professional engineer, to inspect the site of the accident and testify as to the sidewalk's condition. Silberman inspected the sidewalk on August 6, 2007, and measured a vertical gap of 9/16 of an inch between the two sidewalk flags bordering the 73/75 St. Mark's Place property line. (Silberman Report, 2).[2]

Forsyth retained Thomas Piciocco (Piciocco), a licensed surveyor, to conduct a survey of the site. Piciocco's survey showed that the expansion joint connecting the adjacent sidewalk flags at issue spanned an inch, beginning at the boundary between the defendants' properties and extending one inch east into the area in front of Lutak's property. (Piciocco Affidavit, para. 5). The survey showed the vertical gap to vary from half an inch to three-quarters of an inch along the middle portion of the sidewalk. (Id. at Exhibit B).

Forsyth and Lutak each move for summary judgment, arguing that, even assuming Silberman correctly found a vertical gap of 9/16 of an inch between sidewalk flags, such gap is a trivial defect and "does not amount to an actionable condition absent evidence that such a defect present[s] a significant hazard." (Forsyth Notice of Motion for Summary Judgment, para. 26). Each defendant further argues that he lacked actual and constructive notice of the defect and therefore cannot be held liable.

[2]Silberman submits an affidavit which incorporates by references an attached report dated August 10, 2007 which resulted from his August 6, 2007 investigation of the site.

In opposition, Watkins submits Silberman's affidavit, arguing that Silberman's opinion as to the nature of the defect is sufficient to raise issues of fact regarding whether the defect at issue was sufficient to give raise to liability on the part of the defendants. In his affidavit, Silberman opines the gap at issue as "an inherent and unreasonable danger to pedestrians" and notes that several engineering and administrative guidelines, including § 19-152(a)(4) of the Administrative Code of the City of New York (Administrative Code),[3] consider any vertical gap greater than half an inch to be a substantial defect, since "[m]ost trip and fall accidents are caused by [such] abrupt changes in elevation." (Silberman Report, at 2 - 3). Silberman also notes that the Administrative Code enforces a duty on a property owner to repair any defective sidewalk flag in front of his property. (Id. at 3 - 4)

Watkins further argues that whether the defendants had constructive notice of the defect is a question of fact since the defect is in front of defendants' property. In addition, Watkins points out that according to Silberman's affidavit, the defect may have formed due to water migration over a long duration or gradual settling under the sidewalk's surface. (Id. at 4 - 5). These gradual changes, Watkins argues, imply that the defendants would have had plenty of time to take note of the defect and make due repairs.

In reply to Watkins' arguments, Lutak and Forsyth assert that Silberman's opinion as to the nature of the defect and how it formed is speculative and not based on any form of admissible evidence. Additionally, the defendants argue that Silberman provides no basis for his opinion that the 9/16 inch defect he observed nearly eight months after the accident existed at the time of the accident. With respect to the Administrative Code, the defendants argue that courts

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[3]Section § 19-152(a)(4) of the Administrative Code of the City of New York provides, in pertinent part, that an owner of real property has an obligation to "reconstruct, repair or repave... those sidewalk flags" where, inter alia, there exists "a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half an inch..."

have granted summary judgment even though defects at issue have violated the Administrative Code. See, e.g., Villaplana v. Kane Assocs. Family Ltd. P'ship, 17 Misc 3d 1129(A), *6 (Sup. Ct. N.Y. County 2007).

Additionally, Forsyth asserts that he cannot be held liable since, according to Piciocco's survey, the expansion joint over which Watkins tripped spans Lutak's property and not his.

Watkins and Lutak both oppose Forsyth's argument. Watkins argues that Piciocco's affidavit is ambiguous as to where Watkins fell. Similarly, Lutak argues that Piciocco's identification of the location of the expansion joint on the sidewalk does not prove where Watkins fell. Lutak further notes that § 2-09(f)(4)(viii) of the Rules of the City of New York provides that sidewalk flags with substantial defects must be replaced, and one of the adjacent flags in question is in front of Forsyth's property.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the face..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

"Whether a dangerous or defective condition . . . create[s] liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" Trincere v. County of Suffolk, 90 NY2d 976, 977 (1997), citing Guerrieri v. Summa, 193 AD2d 647 (2d Dept. 1993). However, "trivial defects on a walkway not constituting a trap or nuisance, as a consequence of which a pedestrian might . . . trip," are not actionable. Morales v. Riverbay Corp., 226 AD2d 271 (1st Dept. 1996). In determining whether an alleged defect is trivial as a

matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or snare. Trincere v. County of Suffolk, 90 NY2d at 977, citing Caldwell v. Vill. of Isl. Park, 304 NY 268 (1952).

The fact that a sidewalk defect violates the Administrative Code may be introduced as some evidence of negligence, (see Elliot v. City of New York, 95 NY2d 730, 737 (1999)), but the defect may still be trivial as a matter of law. See Villaplana v. Kane Assocs. Family Ltd. P'ship, 17 Misc. 3d 1129(A), 6 (Sup. Ct. N.Y. County 2007). Even under the Administrative Code, "a height differential alone is insufficient to establish the existence of a dangerous or defective condition." Id.; see, e.g., Morales v. Riverbay Corp., 226 AD2d at 271 (ruling that a difference in elevation of about an inch, without anything more, does not constitute a trap or snare). However, the defect may be actionable when the change in height is abrupt. See Tineo v. Parkchester S. Condo., 304 AD2d 383 (1st Dept. 2003); Nin v. Bernard, 257 AD2d 417 (1st Dept. 1999) (ruling a 3/16 of an inch depression to be a trap or snare because of its sharp edges).

The rulings in Tineo and Villiplana illustrate the specificity of detail required to defeat a defendant's motion for summary judgment. In Tineo, the plaintiff tripped over a broken and uneven section of asphalt pavement, causing her to fall. The defect was four square feet in area, three quarters of an inch deep, and sunk abruptly at its perimeter. Photographs of the accident site were taken, and an expert witness characterized the site as a tripping hazard. The court therefore denied summary judgment. Tineo v. Parkchester S. Condo., 304 AD2d at 383 - 84; see also Villaplana v. Kane Assocs. Family Ltd. P'ship, 17 Misc. 3d 1129(A) at 7.

Villaplana, like the present case, involved a trip and fall over a vertical gap between two sidewalk flags. There, the plaintiff provided evidence that the gap was half an inch and argued that the Administrative Code characterized such a gap as a substantial defect. However, the court

ruled that without any additional evidence to establish the existence of any trap-like characteristics beyond a height differential, the case must be dismissed. Villaplana v. Kane Assocs. Family Ltd. P'ship, 17 Misc. 3d 1129(A) at 7 - 8.

Here, even if the defendants have met their burden of proof by showing that the defect was trivial, Watkins has controverted this showing by providing evidentiary proof that the defect may constitute a trap or snare. Both Watkins in her deposition and Silberman in his affidavit assert that the gap in the sidewalk was abrupt. Silberman further opines that the gap was "an inherent danger" in need of repair. Accordingly, there are triable issues of fact as to the nature of the defect and the defendants' consequent liability.

Silberman's opinion that the sidewalk conditions had not significantly changed from the time of the accident until the time of his inspection is supported by his review of Watkins' photographs, which according to Watkins accurately depict the condition of the sidewalk at the time of the accident. Accordingly, contrary to defendants' position, Silberman's opinion cannot be disregarded on the ground that his inspection of the sidewalk occurred almost eight months after the accident.

In a personal injury action like the present case, "it is not the plaintiff's burden in opposing motions for summary judgment to establish that defendants had actual notice of the hazardous condition. Rather, it is the defendants' burden to establish the lack of notice as a matter of law." Giuffrida v. Metro N. Commuter R. Co., 279 AD2d 403, 404 (1st Dept. 2001). "A defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." Id.

In the present case, Silberman's opinion that the condition could have taken a significant period of time to develop is sufficiently supported by his engineering experience. Given the

presence of Forsyth and Lutak at the premises, their responsibility to maintain the walkways in front of their respective properties and the questions of fact as to whether the gap was a trivial or substantial defect, there are triable issues of fact as to whether each defendant had actual and/or constructive notice of the relevant condition.

As for Forsyth's argument that the defect spans only Lutak's property, such argument mistakenly focuses on the location of the sidewalk expansion joint instead of on the sidewalk flags. Silberman's affidavit constitutes evidence that the vertical gap in the sidewalk was created by the shifting of one or both sidewalk flags bordering the 73/75 St. Mark's Place property line, although it is unclear from the affidavit and survey which flags shifted. Each defendant is responsible for one of the flags; therefore, there are questions of fact as to whether Forsyth and Lutak are liable.

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Forsyth is denied; and it is further

ORDERED that the motion for summary judgment by defendant Lutak is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11 room 351, 60 Centre Street, New York, NY, on ~~June 30, 2010 at 2:00pm.~~ July 23, 2009 @ 4pm

DATED: June 29 2009

J.S.C.

FILED
JUL 02 2009
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NEW YORK