Irizarry v Caban
2012 NY Slip Op 33678(U)
June 15, 2012
Supreme Court, Bronx County
Docket Number: 303118/2010
Judge: Lucindo Suarez

NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 03

PART 19

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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IRIZARRY, MARGARITA

- against -

CABAN, HERMITANIO, et ano

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Index Nº. **0303118/2010**

Hon. **LUCINDO SUAREZ,**

Justice.

The following papers numbered 1 to **6** read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **April 9, 2012** and duly submitted as No. **32** on the Motion Calendar of **June 13, 2012**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	4, 5	
Answering Affidavit and Exhibits	6	
Replying Affidavit and Exhibits		
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, defendant's motion for summary judgment seeking dismissal of plaintiff's complaint and plaintiff's cross-motion for a special trial preference are disposed of, in accordance with the annexed decision and order.

Dated: **06/15/2012**

Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MARGARITA IRIZARRY,

Plaintiff,

- against -

HERMITANIO CABAN and YVETTE CABAN,

Defendants.

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DECISION AND ORDER

Index No. 303118/2010

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated March 6, 2012 and the affirmation and exhibits submitted in support thereof; plaintiff's notice of cross-motion dated May 16, 2012 and the exhibit annexed thereto; defendant's reply affirmation dated June 11, 2012; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for personal injuries sustained when she tripped and fell on a shared driveway located between plaintiff's home at 329 Brinsmade Avenue and defendant's home at 331 Brinsmade Avenue, Bronx County. Defendant Yvette Caban[1] now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves pursuant to CPLR 3403(a)(4) for a special trial preference.

In support of the application, defendant submits copies of the pleadings, the parties' deposition transcripts, and a color photograph depicting the accident location. Plaintiff testified that she and her husband had owned their home for fifty years; a shared driveway separated her home from defendant's house next door. Twenty-five years prior to the accident, plaintiff resurfaced two-thirds of the driveway

[1] At her deposition, Caban testified that her husband, defendant Hermitanio Caban, passed away in 2008.

with cement. No work was performed on the remaining one-third, which belonged to her next door neighbor. Despite the work, the driveway was level. Ten years prior to the accident, plaintiff noticed a difference in height between her share and defendant's share of the driveway. She spoke with defendant two or three times prior to the accident about the height differential and asked defendant about fixing her share of the driveway. Defendant and her daughter regularly parked their vehicles in the driveway, and plaintiff walked over defendant's portion of the driveway ten or more times each month. The weather was clear and dry the day of the accident. While walking at a normal pace, plaintiff tripped on the uneven surface between defendant's parked vehicles. She saw no loose asphalt, gravel, or cement in the area where she fell.

Defendant testified that she had owned her home for nearly twenty-four years. She could not recall a specific discussion with plaintiff about the condition of the driveway but recalled that plaintiff had commented defendant should repair her side of the driveway. No repairs were made prior to the accident. Defendant and her daughter, as well as plaintiff, regularly parked their vehicles in the driveway. She did not witness the accident but responded when she heard plaintiff's screams. She found plaintiff on the ground between defendant's parked vehicles. Plaintiff told defendant that she had fallen over a "lip."

Defendant contends that (1) she did not cause or create the condition that caused plaintiff to fall; (2) the defect was open and obvious; and (3) the defect was trivial and *de minimis*. Defendant, though, has not met her *prima facie* burden of entitlement to summary judgment.

Defendant has not demonstrated that plaintiff created the alleged defect either through the resurfacing work over two decades earlier or through plaintiff's use of the driveway. *See e.g. Torres v. City of New York*, 32 A.D.3d 347, 820 N.Y.S.2d 268 (1st Dep't 2006). The resurfacing work took place over two decades before the accident, and plaintiff testified that the entire driveway was level after

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the work had been completed. Moreover, the driveway was shared by both parties, with defendant and her daughter regularly parking their two vehicles there. It cannot be said that plaintiff's use of the shared driveway was exclusive or that her use of the driveway was the only cause of the defect.

Defendant also has not shown that the defect was open and obvious. Although plaintiff testified she was aware of an elevation differential, this does not negate defendant's responsibility to maintain her property in a reasonably safe condition. *See Rivas v. Crotona Estates Hous. Dev. Fund Co.*, 74 A.D.3d 541, 902 N.Y.S.2d 536 (1st Dep't 2010); *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dep't 2004). Defendant and plaintiff had discussed defendant repairing her portion of the driveway, but no repairs were made until after the accident.

Whether summary judgment may be granted on a trivial defect requires an examination of the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury. *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490, 665 N.Y.S.2d 615, 616 (1997) (internal citation omitted). Defendant failed to meet her burden that the defect was trivial and *de minimis*. *See Gonzalez v. Club Monaco U.S., LLC*, — A.D.3d —, 943 N.Y.S.2d 109 (1st Dep't 2012); *Rogers v. 575 Broadway Assoc., L.P.*, 92 A.D.3d 857, 939 N.Y.S.2d 517 (2d Dep't 2012). The parties described the defect as an "uneven surface" and a "lip" without loose gravel or asphalt. There was no testimony elicited as to defect's height, shape, or width. The court is also unable to conclusively discern from the photograph submitted whether the defect plaintiff identified can be considered trivial since a portion of the defect is obscured by a dark shadow.

Plaintiff's cross-motion for a special trial preference is granted as she is over the age of seventy. *See* CPLR 3403(a).

Accordingly, it is

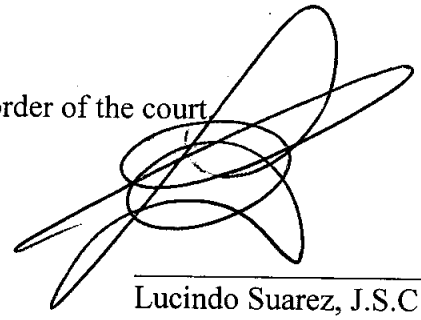
ORDERED, that defendant's motion for summary judgment dismissing plaintiff's complaint

is denied; and it is further

ORDERED, that plaintiff's cross-motion for a special trial preference pursuant to CPLR 3403(a)(4) is granted, without opposition.

This constitutes the decision and order of the court.

Dated: June 15, 2012



Lucindo Suarez, J.S.C.