[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 108091/2009

PICHARDO, ONNY

VS.

701 W180TH STREET L.L.C.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 108091/09

MOTION DATE

MOTION SEQ. NO. 003

otion to/for

No(s).

No(s).

No(s).

Upon the foregoing papers, it is ordered that this motion is

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/20/12

J.S.C.

HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

---x

ONNY PICHARDO,

Plaintiff,

-against-

701 W 180TH STREET, L.L.C. and CITIBANK, N.A.,

Defendants.

---x

Decision/Order
Index No.: 108091/09
Seq. No. : 003, 004

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Seq 003 (by: Citibank, N.A.)	
Def's n/m [3212] w/ SAM affirm, exhs.	1, 2
Pltf's opp. w/ JB affirm, OP affid, exhs.	3
Def's reply w/ SAM affirm.	4
Seq 004 (by: 701 W 180th Street, LLC)	
Def's n/m [3212] w/ PHP affirm, exhs.	1, 2
Pltf's opp. w/ JB affirm, EP affid, exhs.	3
Def's opp. w/ SAM affirm, exhs.	4
Def's reply w/PHP affirm.	5

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is a negligence action arising from a trip and fall in which plaintiff, Onny Pichardo ("Pichardo" or "plaintiff"), allegedly sustained personal injuries. Defendants are 701 West 180th Street, LLC ("701") and Citibank, N.A. ("Citibank") (collectively "defendants"). Issue has been joined and defendants now separately seek summary judgment dismissing plaintiff's claims against them. Plaintiff opposes both motions. Since

these motions were timely brought after plaintiff filed his note of issue, they will be considered on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004). The motions are consolidated for consideration and determination in this single decision/order that follows.

Summary of the Facts

The following facts are undisputed unless otherwise indicated:

Onny Pichardo

Plaintiff was deposed and at his examination before trial ("EBT") testified that he sustained injuries as a result of a trip on a broken sidewalk, at 1:00 am on October 15, 2007, while walking uptown on Broadway, between 180th and 181st Street. Plaintiff's right foot tripped, then his right hand went forward onto the ground, then his upper body went forward onto the ground. He described the broken sidewalk as follows: "It has plenty of broken pieces [of glass], one sidewalk was lower that the other sidewalk, like an inch higher, that caused me to trip."

Plaintiff identified a Citibank branch on the side of the street where he fell, estimating he was about eight feet from the storefronts to his left. After he fell, plaintiff looked to where he fell and noticed that the sidewalk was broken and that there was broken glass on the sidewalk. Plaintiff attributed the cause of his fall to the broken sidewalk. At the EBT, plaintiff identified photographs of the alleged defect taken by his lawyer, demonstrating a height differential of approximately an inch, with jagged edges. (Def. Ex. B, C.) Plaintiff described the broken glass as follows: "it was like the bottom part, you see the bottom part of the–it's like thick, the bottom part of a bottle...like half of it and little pieces."

Although present in the photographs, plaintiff testified that the tables and bins shown on the photographs, marked as Defendant's Exhibit I at the deposition, were not present was the time of his accident. Nor was there any garbage placed for pickup by the Sanitation Department at the time of the alleged fall. On the evening of the alleged accident, Plaintiff was walking home from a school party at a church, with his brother, sister and girlfriend. The traffic was to his right and his companions were to his left. Plaintiff was not under the influence of an substance, the weather was clear and there was no rain. Plaintiff described the evening as being dark, somewhere between pitch black and broad daylight, because there was light illuminating from the Citibank.

Savatino Pagano

Savatino Pagano, a field manager for Joans Lang LaSalle (a management company that does maintenance work for Citibank), testified on behalf of Citibank. Mr. Pagano was not the field manager of the Citibank branch at issue at the time of the alleged accident. Maintenance of the premises was conducted as a "quarterly inspection" and consisted of visiting the branch, looking to see if there is anything unusual involving inspecting lights, cleaning, and repairs, and also included inspecting the sidewalk in front of the building. Mr. Pagano did not know whether the sidewalk, as depicted in pictures, looked different from his inspections of the premises. At the time his deposition was taken, Mr. Pagano had only twice visited this Citibank location.

Prior to his deposition, Mr. Pagano asked one of his affiliates, Tito Mesias, to search the records for this Citibank, but no records of repair were found for that location. However, Mr. Pagano did not know what records Mr. Mesias searched, nor what period of time was used for the record search.

Tito Mesias

Citibank provided the affidavit of Tito Mesias, in which he states, that there were no sidewalk repairs on the premises prior to plaintiff's accident and that Citibank has no record of any other accidents or complaints pertaining to the sidewalk.

Nelson Lora

Nelson Lora works for Stellar management ("Stellar") as a superintendent for 701 West 180th Street. Mr. Lora has been the superintendent for the building for over 14 years, including on the date of the alleged accident. He stated that in those 14 years he did not see anything wrong, ie. "big holes or anything like that," on the sidewalk on Broadway. He admitted that he looked over the sidewalk in front of the entrance for residential tenants, on West 180th Street, occasionally, to see if it needed repair work. The residential entrance was not, however, where plaintiff claims to have fallen. According to Mr. Lora, it was not his responsibility to clean the Broadway portion of the building. He stated that each business owner was responsible for cleaning the front sidewalk outside its storefront. Although there was repair work done to the sidewalk on the West 180th Street side of the building, Mr. Lora testified that the work did not extend onto the Broadway side. Mr. Lora claimed he did not know anything about the October 13, 2007 alleged accident.

Edward Pichardo

Edward Pichardo is the plaintiff's brother and a non-party witness in this matter. According to Edward, the accident occurred "between Citibank and the Chinese place that was there." He attributed the cause of the plaintiff's accident to the sidewalk being "messed up, cracked up, some holes." Edward did not remember seeing any garbage on the sidewalk or on the curb at the time of the accident. Although there was broken glass

bottle on the sidewalk, he did not notice it until after plaintiff fell.

Edward testified that on a number of occasions he'd noticed that the sidewalk was defective, and that this same defect that has "been there for years" caused plaintiff to fall. Furthermore, Edward testified that he witnessed another person fall on the sidewalk defect approximately one year before plaintiff did.

Summary of the Arguments

701 West 180th Street

701 claims that it is entitled to summary judgment dismissing all plaintiff's claims and all cross claims asserted against it because: [1] both plaintiff and defendant testified that the portion of the unsafe sidewalk is located on Citibank's property, [2] the defective sidewalk was not the proximate cause of the injury, and [3] 701 did not have notice of any dangerous condition, nor did it create any dangerous condition which caused this accident.

Citibank

Citibank claims that it is entitled to summary judgment dismissing all plaintiff's claims and all cross claims asserted against it because [1] the evidence demonstrates that there was no theory of liability upon which the plaintiff can prevail and that there is no issue of fact to present to the trier of fact in this case; [2] the alleged defect is trivial in nature, and thus, not actionable; [3] the condition on the sidewalk was not the proximate cause of plaintiffs injuries and merely furnished the condition for the alleged accident; and [4] Citibank did not have notice of any dangerous condition, nor did it create any dangerous condition which caused this accident.

Plaintiff

Plaintiff claims that Citibank has failed to meet its burden [1] as the movant for

summary judgment; [2] of proving that it didn't have notice of the defective condition; [3] that the sidewalk defect was de minimus; and [4] that the sidewalk defect was the proximate cause of plaintiff's injuries.

Plaintiff claims that 701 has also failed to meet its burden as movant for summary judgment because there are outstanding questions of fact [1] as to whether the sidewalk defect which caused plaintiff to trip and fall was abutting the Citibank branch or abutting Golden Star, the Chinese restaurant located in the 701 building on the Broadway side, [2] as to whether 701 had the duty of maintaining the sidewalk located on the Broadway side, and [3] that the broken glass also present on the sidewalk was not a superseding cause of plaintiffs injuries under New York law and that would relieve defendants of their liability arising from their negligent maintenance of the sidewalk.

Discussion

A movant seeking summary judgment in its favor 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 case." Winegrad v. New York Univ. Med. Ctr.; 64 N.Y.2d 851, 853 (1985). Since here the moving parties are the defendants, to prevail on its motion, each one must establish its defenses as a matter of law. Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065 (1979). Only if defendants meet this initial burden does it then shift to the opponent (here, plaintiff) who then must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial, and therefore, the denial of defendant's motion. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

This motion is predicated primarily on three defenses. The first defense, raised only by Citibank, is that any defect in the sidewalk where plaintiff fell is too trivial to be

actionable, and therefore, there is no issue of fact for the jury to decide. Marcus v. Namdor, Inc., 46 A.D.3d 373 (1st Dept. 2007); Britto v Great Atl. & Pac. Tea Co., Inc., 21 A.D.3d 436, 436 (2d Dept. 2005); Corrado v. City of New York, 6 A.D.3d 380 (2nd Dept. 2004). The second defense mounted by both defendants is that they did not create, nor have notice of, a dangerous condition on the sidewalk in front of its building. Segretti v. Shorenstein Company East, LP, 256 A.D.2d 234 (1st Dept. 1998); Britto v Great Atl. & Pac. Tea Co., Inc., 21 A.D.3d 436, 436 (2d Dept. 2005). The third defense postulated is that it was not foreseeable that plaintiff, upon tripping, would cut his hand on the glass strewn on the sidewalk. Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315 (1980); Boderick v. RY Management Co., Inc., 71 A.D.3d 144, 147 (1st Dept. 2009).

Trivial Defect

While differences in elevation on a sidewalk of approximately one inch have been held by the First Department to be non-actionable ([Morales v. Riverbay Corp., 226 A.D.2d 271 [1st Dept. 1996]), there is no minimal dimension test or "per se rule" that would render a hole or defect of a certain size either actionable or inactionable, as a matter of law (Trincere v. County of Suffolk, 90 N.Y.2d 976 [1997]). When deciding whether a sidewalk defect is actionable, the courts have considered the particular facts and circumstances of each case, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury that is alleged. Trincere v. County of Suffolk, 90 N.Y.2d at 977 and 978; Marcus v. Namdor, Inc., 46 A.D.3d at 374. Though photographs of the alleged defect may be insufficient to demonstrate that, as a matter of law, the defect is too trivial to be actionable, they may be examined by the court to see if there are factual disputes to be tried. Corrado v. City of New York, 6 A.D.3d 380 (2nd

Dept. 2004). Ultimately, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury (Trincere v County of Suffolk, 90 N.Y.2d at 977 [internal quotation marks and citation omitted]).

Citibank has failed to prove that the defect in the sidewalk is so trivial that it is inactionable. Plaintiff has provided photographs depicting the crack as at least an inch deep and is approximately a few feet wide. Defendant offers no affirmative measurements of the crack. The crack is easily visible in the photographs that both plaintiff and defendant have attached to their moving and reply papers. These are the same photos that defendant asked plaintiff questions about at his deposition. Closeup photos show an irregular, jagged edge to the crack running perpendicular to the direction that plaintiff was walking in when the accident occurred. A reasonable jury could conclude that the crack or crevice was deep enough to cause plaintiff to trip. Therefore, not only has Citibank failed to prove its entitlement to summary judgment as a matter of law, but even if it did, there is a factual dispute that must be put to the jury to decide.

Notice

The First Department has consistently stated that :

> A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk (Basso v. Miller, 40 N.Y.2d 233, 241 [1976]; Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d 319, 322 [1st Dept. 2006], *affd.* 8 N.Y.3d 931 [2007]). In order to recover damages for an alleged breach of this duty, the plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (Beck v. J.J.A. Holding Corp., 12 A.D.3d 238, 240 [1st Dept. 2004],

> *lv. denied* 4 N.Y.3d 705 [2005]). The plaintiff must also show that the defendant's negligence was a proximate cause of the injuries. To do so, the negligence must be a substantial cause of the events which produced the injury (Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315 [1980]).

Boderick v. RY Management Co., Inc., 71 A.D.3d 144, 147 (1st Dept. 2009).

Viewing the evidence in the light most favorable to plaintiffs and drawing all reasonable inferences in their favor (Boderick v. RY Management Co., Inc., 71 A.D.3d 144, 147 (1st Dept. 2009) *citing* Boyd v. Rome Realty Leasing Ltd. Partnership, 21 A.D.3d 920, 921 [2005]), the Court finds that there are triable issues of fact as to whether defendants had notice of the defective sidewalk, and whether their failure to maintain the sidewalk in a safe condition proximately caused the plaintiffs' injuries.

Although there is no evidence of complaints (actual notice) to Citibank or 701 about the crack prior to the date of the accident, the defendants have failed to prove that they did not have constructive notice of a dangerous condition.

First of all, it is not important (for the purposes of this motion) whether the crack is directly in front of Citibank or somewhere between the two stores which are at street level. Defendants have a nondelegable duty to maintain the sidewalk area in front of its building in "a reasonably safe condition." NYC Admin. Code § 7-210 (a), (b). Furthermore, the Chinese restaurant is a tenant of 701 (also known as 4727 Broadway) and the Citibank branch is located at 4729 Broadway. No testimony or documents proffered in this matter by the defendants have refuted plaintiff and Edward Pichardo's testimony that the incident occurred between the two properties.

The photographs that the parties have attached to their motions show a crack that is fairly wide and visible at a distance. Although evidence has been introduced, through

the testimony of Savatino Pagano and affidavit of Tito Mesias, that the sidewalk in question was inspected quarterly by the maintenance and management company of Citibank, there is no evidence that the crack was not present prior to plaintiff's accident. The deposition of Mr. Lora, the superintendent of 701, does not conclusively establish that the crack was not present prior to plaintiff's accident since he does not inspect or maintain that side of the building. In any event, plaintiff and Edward Pichardo's testimony and affidavits raise a triable issue of fact whether the defendants kept the sidewalk area in front of its building in "a reasonably safe condition" and whether the crack was present for a sufficient period of time so as to afford defendant constructive notice of a dangerous conditions. Specifically, Edward Pichardo testified about the condition existing for a sufficient period of time for defendants to have discovered and corrected. The material issues of fact preclude the grant of summary judgment to the defendant.

Proximate Cause

"To carry the burden of proving a *prima facie* case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury... [but] need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable....Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve." Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315 [1980]) (internal citations omitted). An injury is a foreseeable consequence of trip and fall on a defective sidewalk. Furthermore, an injury could occur in numerous ways and glass on a sidewalk could affect how the accident occurs and the extent of said injuries. In any event, there

may be more than one proximate cause of an accident, so that even if the glass "caused" plaintiff's injuries, the defective sidewalk may also be found to be a cause. (Sweet v. Perkins, 196 N.Y. 482 [1909]).

Conclusion

Defendants, Citibank, N.A. and 701 West 180th Street, have failed to prove their defenses and are, therefore, not entitled to summary judgment. Plaintiff, Onny Pichardo, has, in any event, raised issues of fact for the jury to decide. Defendants motions for summary judgment dismissing the claims and cross claims are denied in their entirety.

In accordance with the foregoing, it is hereby

ORDERED that defendant, 701 West 180th Street, LLC's, motion for summary judgment is denied; and it is further

ORDERED that defendant, Citibank, N.A.'s, motion for summary judgment is denied; and it is further

ORDERED that plaintiff, Onny Pichardo, shall serve a copy of this decision/order on the office of trial support so this case can be scheduled for trial; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court

Dated: New York, New York
March 20, 2012

So Ordered:

Hon. Judith J. Gische, JSC