SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
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MARIE LOURDES NICOLI, as Administratrix of the Estate of JIMMY NICOLI, MARIE LOURDES NICOLI, Individually, and TAISHA NICOLI,

Plaintiff,

-against-

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.
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Part C2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 12679/03

Motion No. 1323-001

The following papers numbered 1 to 3 were marked fully submitted on the 1st day of August, 2012.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendants THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION, with Supporting Papers and Exhibits (dated April 27, 2012)	1
Affirmation in Opposition by Plaintiffs, with Supporting Papers and Exhibits (dated July 14, 2012)	2
Reply Affirmation (dated July 31, 2012)	3

Upon the foregoing papers, the motion for summary judgment of defendants THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION is denied.

NICOLI v THE CITY OF NEW YORK, et al.

Plaintiff MARIE LOURDES NICOLI, individually, as administratrix of the estate of her late husband, JIMMY NICOLI, and on behalf of her daughter, TAISHA NICOLI (hereinafter "plaintiffs"), commenced this action against THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION (hereinafter "defendants") to recover damages for the wrongful death and personal injuries sustained by JIMMY NICOLI when he was struck and killed by a motor vehicle on Woodrow Road on Staten Island.

Plaintiffs allege that their decedent had been jogging on the sidewalk alongside Woodrow Road when he apparently ran into the street from in front of a parked van and was struck by a passing motor vehicle driven by non-party Kristen Jacques.[1] According to plaintiffs, the deceased was forced to leave the sidewalk and enter upon the roadway because he had come upon a portion of sidewalk that was either missing or in poor condition, *i.e.*, overburdened with pieces of broken-up concrete and an overgrowth of grass and weeds. It is further alleged that as he emerged from in front of the parked van, he was struck and killed by the Jacques' vehicle. As the gravamen of their complaint, plaintiffs allege that defendants were negligent in their maintenance and/or failure to repair that portion of the subject sidewalk, and that it was this neglect which was the proximate cause of the accident in which the decedent was killed.

In the current application (Motion No. 1323-001), defendants move for summary judgment pursuant to CPLR 3212 and/or dismissal of the complaint for failure to state a cause of action (CPLR 3211[a][7]). Defendants maintain that any defect in the sidewalk was not a proximate cause of this

[1] A separate action against Ms. Jacques has been settled.

accident. According to defendants, regardless of plaintiffs' claims of negligence in their ownership, maintenance, control, repair, or design of the sidewalk in question, there is no admissible evidence demonstrative of any causal connection between their purported neglect and the subject accident, *i.e.*, plaintiffs' claim is based entirely upon speculation.

In support, defendants maintain that the proof at bar merely indicates that the decedent was jogging in the area of Woodrow Road (between Nippon Avenue and Boulder Street), he ran into the roadway from in front of a parked van, and was struck by a passing vehicle. In defendants' estimation, there is no testimony from any witnesses to the accident; no proof conclusively establishing why decedent entered the roadway at that particular location; and no proof establishing whether decedent (1) maintained a proper look-out before entering the roadway, (2) was distracted, *i.e.*, listening to music, or (3) was looking in another direction when struck. More importantly, defendants argue that there is no proof establishing that it was the condition of the sidewalk which caused decedent to enter the roadway at that time and place, nor any non-speculative basis for resolving this issue. As a result, it is impossible to ascertain the cause of the accident without engaging in impermissible speculation. Thus, summary judgment must be granted and the complaint dismissed.

In addition, defendants contend that since there is no evidence demonstrating that any negligence on their part was a proximate cause of the accident, this Court need not even entertain the issue of prior written notice.

NICOLI v THE CITY OF NEW YORK, et al.

In opposition, plaintiffs contend that the proof in this case raises triable issues of fact regarding proximate cause which require a jury to determine, *i.e.*, whether the dangerously deteriorated and unmaintained pathway/walkway at the subject location caused the decedent to enter the roadway where he was struck and killed. According to plaintiffs, there is uncontested evidence that the sidewalk at the accident location was in a hazardous condition, citing, in particular, a police investigation report indicating that the location where the decedent was struck was directly adjacent to an area where the normal sidewalk along Woodrow Road ends and an area of broken asphalt and overgrowth begins. Plaintiffs maintain that this constitutes sufficient proof to support an inference that decedent stepped into the roadway to avoid the missing and/or defective sidewalk which, in turn, placed him in harm's way.

In addition, plaintiff-administratrix has submitted a copy of her deposition testimony, wherein she swore that both she and the decedent were well-acquainted with the subject location, and that the decedent often jogged along this route. According to plaintiff, she would sometimes accompany the deceased, and that when they reached the area of the defective sidewalk they were compelled to enter the street in order to bypass the hazardous area. She also testified that she had driven often past the location, and was well-acquainted with the hazardous condition of the sidewalk in that area.

Plaintiffs have also submitted a copy of a Preliminary Design Investigation Report for Street Improvement conducted in 1992, which details the results of a study commissioned by defendants regarding the existing conditions and planned reconstruction of Woodrow Road. Included therein

is a discussion of the necessity for sidewalk installation and/or repair along Woodrow Road. Plaintiffs contend that this proof confirms, *inter alia*, defendants' knowledge of the hazardous condition of the sidewalk at the accident location, and of the need for repair or replacement. In addition, plaintiffs claim that there were violations issued and concerns raised by local residents regarding (1) the area of missing sidewalk, (2) the danger which it posed, and (3) its proximity to a public school. With these facts before it, plaintiffs contend that a jury would not be required to take a speculative leap in order to reach the conclusion that decedent entered the street at the accident site in order to avoid the risk of injury posed by jogging in the area of deterioration.

The Court agrees.

Defendants at bar established their prima facie entitlement to judgment as a matter of law by submitting proof confirming that no one actually witnessed the decedent leaving the sidewalk and, thus, no one could testify as to how the accident actually occurred. In this connection, defendants argue that the copy of police investigation report merely confirms that plaintiffs' deceased suddenly and unexpectedly stepped out in front of the passing motor vehicle. Accordingly, the role, if any, of the alleged sidewalk defect in causing the accident cannot be satisfactorily established. Nevertheless, it is the opinion of this Court that plaintiffs have raised a triable issue in opposition to defendants' motion sufficient to require a trial (*see* Zuckerman v. City of New York,, 49 NY2d 557, 562).

It is well settled that proximate cause is a question of fact for a jury to determine where varying inferences are possible from the evidence at trial (*see* Mirand v. City of New York, 84 NY2d

44, 51). Here, it is the opinion of this Court that there is sufficient proof which would allow a rational jury to infer that the sidewalk adjacent to the accident scene was substantially defective; that defendants were on notice thereof; and that the hazard to joggers posed thereby caused decedent to enter the roadway where he was struck and killed.

Although conclusions based upon conjecture, speculation or surmise are without probative value, a case of negligence can be proved circumstantially where there are "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (Seelinger v. Town of Middletown, 79 AD3d 1227, 1229 [internal quotation marks omitted]). Moreover, it has been held that where there are various possible causes of an accident, a plaintiff need only prove "that it was 'more likely' or 'more reasonable' that the alleged injury was caused by the defendant's negligence than by some other agency" (Gayle v. City of New York, 92 NY2d 936, 937 [citations omitted]).

In this case, the combination of proofs provided by plaintiffs is sufficient to raise a triable issue of fact as to whether the death in question was proximately caused, in whole or in part, by defendants' negligence in their maintenance of the sidewalk at the accident location. The police investigation report at bar is admissible to confirm the accident location. This, together with the EBT testimony of the plaintiff-administratrix regarding both her familiarity with the area and her occasional accompaniment of the decedent on his jogs along Woodrow Road, is sufficient to establish a factual basis for the alleged need to detour into the street in order to avoid the defective or missing section of sidewalk at the accident location. In addition, the photographs of the sidewalk

at the accident location which were identified by plaintiff during her EBT tend to confirm her testimony as to the nature of the sidewalk defect existing at the time and place of the accident.

In the opinion of this Court, the aforementioned proof is legally sufficient to allow a rational jury could to conclude that it was more likely or reasonable to find that decedent's fatal encounter with the Jacques' vehicle was caused, at least in part, by defendants' failure to maintain the area of sidewalk in question in a reasonably safe condition, than the alternative "impulsiveness" tendered by defendants.

Accordingly, it is

ORDERED that defendants' motion is denied in its entirety.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: October 2, 2012