

Williams v Fasciglione Realty, Inc.

2012 NY Slip Op 33334(U)

July 2, 2012

Sup Ct, Bronx County

Docket Number: 305020/09

Judge: Betty Owen Stinson

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NEW YORK SUPREME COURT - COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA8

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BARBARA WILLIAMS

Index No. 305020/09

DECISION AND ORDER

Plaintiff(s),

Present:
HON. BETTY OWEN STINSON

-against-

FASCIGLIONE REALTY, INC. and
VITO MICHAEL FASCIGLIONE,

Defendant(s)

-----X

STINSON, J.:

This motion by defendants to dismiss the plaintiff's complaint pursuant to CPLR§3212 is granted.

This is an action for personal injuries by plaintiff Barbara Williams allegedly occurred on either March 4, 2004 at or about 9:20 a.m., or on April 4, 2009 on the sidewalk on the south side of East 222nd Street adjacent to defendants' premises located at 3869 White Plains Road. In paragraph SEVENTEENTH, the complained of condition was that the sidewalk was in a "broken, raised, uneven, dangerous condition". In paragraph EIGHTEENTH, it states that on April 4, 2009 at approximately 4:00 p.m. on the sidewalk adjacent to defendants' property known as 3869 White Plains Road, Bronx, New York was in a dangerous, defective, condition that existed on or about the aforementioned premises. Both of those allegations have been denied in the defendants'

Answer. On August 12, 2009, plaintiff served a Verified Bill of Particulars which states in Paragraph 4 that the accident occurred on the 4th day of March, 2004 at or about 9:20 a.m. The place of the accident is described as the south side of East 222nd Street approximately 55 ft. from the southwest corner of East 222nd Street and White Plains Road adjacent to defendants' premises located at 3869 White Plains Road, Bronx, New York. By the time the plaintiff submitted to an EBT on April 16, 2010, she gave the accident date, under oath, as April 4, 2009. Obviously, had the accident occurred on March 4, 2004, the action would have been time barred as the Summons and Complaint was not filed until June 22, 2009. Believing that to be a pleading error the court will now address the defendants' motion based on an accident date of April 4, 2009.

Plaintiff alleges in paragraph EIGHTEENTH that on the 4th day of April, 2009 at approximately 4:00 p.m. she was lawfully upon the aforesaid sidewalk adjacent to defendants' property known as 3869 White Plains Road, Bronx, New York when she was caused to trip and fall, sustaining severe personal injuries due to the dangerous, defective, conditions that existed on or about the aforementioned premises. The location described in paragraph SEVENTEENTH is the sidewalk on the south side of East 222nd Street, approximately 55 feet from the corner at White Plains Road and further states that said sidewalk was in a broken, raised, uneven dangerous condition. However, in Paragraph 5 of her Bill of Particulars the plaintiff states that the accident occurred on the sidewalk on the south side of East 222nd Street, approximately 55 feet from the southwest corner of East 222nd Street at White Plains Road, adjacent to the defendants' premises located at 3869 White Plains Road. (emphasis supplied).

Notably, in that same Bill of Particulars, plaintiff states that the accident occurred on the 4th day of March, 2004 at or about 9:20 a.m. Again the court is considering this as a pleading

error otherwise the action would be time barred. The court also takes note that the plaintiff was 72 years old at the time of the accident in 2009. She resided at 1573 White Plains Road, Bronx, New York 10462.

Plaintiff's deposition was held on April 16, 2010. In her EBT she acknowledged the date of the accident was April 4, 2009 (Exhibit D, p.14, l. 10). The stated purpose of her trip that day was to visit a neighbor who was in a nursing home. The plaintiff did not remember the name of the nursing home or its address. However, the nearest nursing home to the site of this accident is the Bronx Park Rehabilitation Facility located at 3845 Carpenter Avenue, Bronx, New York. Carpenter Avenue is the first avenue west of the defendant Fasciglione Furniture store that is located at 3869 White Plains Road, Bronx, New York.

Plaintiff traveled from her home at 1573 White Plains Road north on White Plains Road to a bus stop on the east side of White Plains Road near its intersection with 222nd Street. The defendants' property is located on the southwest corner of the intersection of White Plains Road at 222nd Street. In order to go to the Bronx Park Rehabilitation Facility, plaintiff would have gone to 222nd Street and crossed White Plains Road going from east to west. Her route would have been along 222nd Street which abuts the side of defendants' store. The defendants' store- front faces White Plains Road between 221st and 222nd Street. However, plaintiff could also have crossed White Plains Road at 221st Street and upon getting to the west side of White Plains Road gone north to 222nd Street where she would have made a left to go towards the nursing home. Plaintiff testified that when the accident happened she had crossed White Plains Road from east to west but was still on White Plans Road. (Exhibit D: p.18, l.14) Plaintiff was then shown photographs of the sidewalk in front of defendants' store facing White Plains Road. Only defendants' Exhibit

A for identification has been annexed to the moving papers. Plaintiff was unable to identify which road shown in defendants' Exhibit A was White Plains Road but did acknowledge that the intersection shown in the photograph was the area where the accident occurred. She also acknowledged that the elevated subway line was above her as she was walking, presumably on White Plains Road. (Exhibit D: p.19-21). However, she did confirm on page 21 that as she was walking, the road was on her left and the stores were on her right. With the respect to defendants' Exhibit A at the EBT, the witness stated that she was walking from the top of the photograph to the bottom. This means that she was walking from 222nd Street towards 221st Street on the west side of White Plains Road in front of the defendants' business place. This description also confirms that the road was on her left and the stores on her right. In actuality, the nursing home is closer to 221st Street and Carpenter Avenue than 222nd Street and Carpenter Avenue. On page 25 of her examination before trial, the plaintiff, looking at defendants' Exhibit A, identified it as the area where she fell. Plaintiff continued on Page 26 as follows:

Q You're walking down the street. What was on your right-hand side as you were walking on the ground? I'm talking about what was on the right-hand side as you were walking?

A: I don't remember. It was the second time I was walking there.

Q: Was there a building to your right?

A: There were buildings, yes. A building.

Q: Do you remember what kind of building it was?

A: (indicating).

Q: You have to say words.

A: I don't remember what kind of building it was.

Q: If you look at the top of defendants' Exhibit A, there's a street intersecting White Plains Road. Do you see the street I'm indicating with my pen here with somebody standing in it? Do you see that right there?

A: Yes.

Q: Had you crossed that street before this accident

A: Yes, I had already crossed.

Q: You had already crossed that street?

A: Yes.

Q: And then you were walking on the street area depicted in defendants' Exhibit A?

A: Yes.

Q: What happened?

A: Well, I was walking and a little faster than normal.

Q: Why were you walking a little faster than normal?

A: I was late.

Q: You were late?

A: Yes.

Q: You were late for visiting your friend in the nursing home?

A: Yes.

Q: What time had you originally planned to be at the nursing home?

A: I had planned to be there around 4 o'clock.

Q: So would you say it was already 4 o'clock by the time this accident happened?

A: It was after.

Q: Do you remember how much after?

A: I don't remember how much after but it was after four.

Skipping forward to page 28, line 20

Q: You were walking a little faster than normal to get to the nursing home?

A: Yes.

Q: What happened?

A: Before I could get to the area of the tree—

Q: The tree, meaning the tree that we could see in Defendants' Exhibit A?

A: Yes. I felt my foot bump into the — and it threw me.

Q: You felt your foot bump into what?

A: It bumped into the sidewalk and the pavement. I bumped into it and then it threw me and I ended up under the tree.

Q: And you ended up under the tree that we could see in Defendants' Exhibit A right there?

A: Yes.

Plaintiff testified that at first she did not know what it was her left foot had bumped against. However, as she was being helped to her feet by a bystander, she testified she happened to look down and saw like —“It looked like slightly unlevelled in one of these.” The plaintiff apparently pointed at something in the exhibit at that time which is not available to the court. However, she testified that the unlevelled area was not on the brick as depicted in defendants' A but on the non-brick area shown in the photograph. She was unable to pin point exactly the alleged mislevelled piece of the sidewalk that made her trip (page 34, l. 21). She also confirmed the tree as shown in defendants' Exhibit A was where she fell near at the time of the accident.

Plaintiff was unable to circle or otherwise identify from defendants' Exhibit D (not included as an Exhibit) what unlevelling caused her to trip. She then testified that she never returned to the area where she fell.

In opposition to the defendants' motion, the plaintiff submitted an affidavit of the plaintiff in which she states she clearly identified what caused her to fall-the "unleveled raised sidewalk on the East 222nd Street side of defendants' store". However, there is a difference between the description in which the location is described as the "The south side of East 222nd Street, approximately 55 feet from the corner at White Plains Road" and "on the south side of East 222nd Street, approximately 55 feet from the southwest corner of East 222nd Street at White Plains Road". Again in Paragraph EIGHTEENTH of her complaint, she describes the sidewalk as being adjacent to defendants' property known as 3869 White Plains Road. In her affidavit she also states that it was adjacent to defendants' store located at 3869 White Plains Road. She then attaches photographs which have not been identified or authenticated by her or previously disclosed to the defendants, as best I can tell, many of which are patently inadmissible and states:

"The accident occurred on the sidewalk as I approached a tree in the sidewalk which was surrounded by a grassy area (See attached photographs). I know this is where I fell even though at my deposition defendants' attorneys showed me photographs of other trees and a sidewalk that were apparently located on White Plains Road, **not** East 222nd Street. This confused me as I did not fall on White Plains Road but on East 222nd Street, as I repeatedly testified that I fell on the cross street, I felt my left foot bump what I now know was a raised and unleveled portion of the sidewalk and I fell, landing on the ground near the tree shown in the two photographs. After I fell, I saw that the sidewalk was unleveled, raised and uneven".

First, she never repeatedly testified that she fell on the cross street. Second, she never testified nor did she identify any trees on East 222nd Street. The only tree she identified and stated as being the tree that she fell near was the one in defendants' EBT Exhibit A which is a tree on the

sidewalk with the grassy area around it. Whereas, the trees or tree shown in the defendants' photographs in Exhibit B do not have a grassy area around it but contains old cobblestones. It is also curious and somewhat ingenious that the photographs included in the Affirmation in Opposition are ones that have never been exchanged and never identified under oath by Ms. Williams. Not to mention, she stated she never returned to that area after the accident which begs the question as to who took the photographs and who told the photographer where the accident happened. Although this court is not permitted to resolve issues of fact on a motion for summary judgment, the affidavit of Ms. Williams and the "new" photographs were clearly designed to create an issue of fact not previously raised by any of the pleadings or examinations before trial (*Miller v. Doniger*, 272 AD 2d 73).

Based upon the review of the pleadings, Bill of Particulars, deposition testimony and photographs, it is unrefuted that plaintiff's fall occurred in front of premises of the defendants located at 3869 White Plains Road. Upon review of the photograph identified by the plaintiff, there is obviously no evidence of a dangerous, defective condition that existed at the time of plaintiff's accident at that location. Taking as true, the plaintiff's statement that the sidewalk where she fell looked "slightly unlevelled" is insufficient to establish a cause and create or negligent maintenance of a dangerous condition of a sidewalk sufficient to cast the defendants in liability for the happening of plaintiff's accident. Thus, defendants have established a *prima facie* case of their entitlement to summary judgment dismissing the claim which the plaintiff has failed to overcome by admissible evidence.

Accordingly, as indicated, the defendants' motion to dismiss the plaintiff's complaint pursuant to CPLR §3212 is granted.

This constitutes the decision and Order of the court.

July
~~June~~ 2 2012
Bronx, New York

Betty Owen Stinson

BETTY OWEN STINSON, J.S.C.