

Flanders v Sedgwick Ave. Assoc., LLC
2016 NY Slip Op 32450(U)
November 30, 2016
Supreme Court, Bronx County
Docket Number: 301886/2013
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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RUBY FLANDERS,

Plaintiff,

-against-

SEDGWICK AVENUE ASSOCIATES, LLC and
SEDGWICK AVENUE REALTY ASSOCIATES, LLC,

Defendants.
-----X

Index No. 301886/2013

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion by order to show cause for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause dated December 24, 2015, Supplemental Affirmation Beth S. Gereg, Esq. dated December 23, 2015, Affirmation of Beth S. Gereg, Esq. dated December 17, 2015 in Support of Motion, and Exhibits (“A” through “I”).....	1
Affirmation of John S. Manassis, Esq. dated February 19, 2016 in Opposition to Motion and Exhibits (“A” through “D”).....	2
Reply Affirmation of Beth S. Gereg, Esq. dated May 10, 2016.....	3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendants seek an order granting them summary judgment dismissing all of the plaintiff’s claims brought in this action. The motion is granted.

The plaintiff seeks monetary damages for personal injuries allegedly sustained when she tripped and fell on September 13, 2012 due to a broken sidewalk adjacent to premises owned and/or managed by the defendants at 2719 Sedgwick Avenue, Bronx, New York. The plaintiff’s bill of particulars alleges that the defendants were negligent in their upkeep, maintenance, and/or repair of

the subject sidewalk, specifically an area located approximately 5 to 15 feet from the Sedgwick Avenue curb and approximately 145-165 feet south of West 195th Street.

The plaintiff was deposed on March 14, 2014. In pertinent part, she testified that the accident occurred on a nice, clear day and it was light outside, at approximately 11:00 a.m. She had walked on the same sidewalk on multiple occasions before the accident date. She was wearing sneakers and carrying her pocketbook. She testified that her foot got caught in a hole in the sidewalk. She described the hole as being about ½ inch deep, ½ inch wide, and about 6 inches long. She stated that she was looking straight ahead when she fell, and did not see this hole before she fell. She was able to see the ground as she was walking. She testified that she never saw this hole at any time before her accident.

The defendants submit seven photographs that were marked at the plaintiff's deposition. These photographs are said to depict the accident location before and after certain work was performed to the sidewalk.

Three witnesses were deposed on behalf of the defendants. Cesar Maldonado testified that he was the property manager and visited this particular building two or three times per week and he inspects the sidewalk at each visit. He did not recall anything wrong with the subject sidewalk, but he did recall that after 2012, an area of sidewalk was replaced due to trees uprooting a slab at an adjoining building. He did not recall any violations for the condition of the sidewalk.

Hector Pacheco testified that he was the building superintendent and inspected the sidewalk for trash and debris daily at 8:30 a.m. and that he never saw any cracks or holes in the sidewalk.

Manuel Hiciano testified that he was the building's porter and that one of his duties was to clean the sidewalk daily and shovel snow from the sidewalk as necessary. He was unaware of any complaints made about the sidewalk, nor were any violations issued concerning the sidewalk. When shown photographs purportedly depicting the sidewalk in a broken condition, Mr. Hiciano testified that he never observed the sidewalk in that condition, and never observed any part of the sidewalk to be cracked or broken.

In opposition, the plaintiff submits an affidavit stating that she fell when her foot got caught in a broken hole on the sidewalk and that "[s]oon after I fell . . . I also observed that the hole was approximately a half inch to an inch long and 6 inches wide". She does not estimate the depth of the hole. The plaintiff also vouches that the attached photographs depicting the hole taken by her

daughter on the day following the accident and from Google fairly and accurately depict the condition of the sidewalk on the accident date. Also submitted in opposition to the motion is an affidavit from Shameek Smith, the plaintiff's daughter. Ms. Smith corroborates the representations made in the plaintiff's affidavit.

Here, the defendants have submitted evidence satisfying their initial burden of showing that they did not have actual or constructive notice of the allegedly defective sidewalk and maintained the adjacent sidewalk in a reasonably safe condition (*see Gallway v. Muintir*, 142 AD3d 948 [2nd Dept 2016]). The three witnesses who testified on the defendants' behalf stated that they did not observe any defects on the sidewalk despite being on-site regularly. In addition, the plaintiff's testimony established that, although she walked on the subject sidewalk on multiple occasions preceding the accident, she had never observed the defect. In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's description of the hole did not indicate that it existed for a sufficient period to charge the defendants with constructive notice (*see Gallway v. Muintir*, 142 AD3d 948 [2nd Dept 2016]).

In any event, the defect as described by the plaintiff is trivial and not actionable (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 [Ct App 2015]). In *Burko v. Friedland*, 62 AD3d 462 [1st Dept 2009], a larger sidewalk defect measuring 5/8ths of an inch deep, 4 inches long, and 2 inches wide was found to be a trivial defect. Here, the defect does not appear to be a trap by virtue of its location or other circumstances, since the plaintiff herself testified that the weather was good, with mid-morning lighting, and that she was able to see the ground (*see Chee v. DiPaolo*, 138 AD3d 780 [2nd Dept 2016]).

The plaintiff asks the Court to infer from the submitted photographs that the hole must have been created some time ago, sufficient to allow the defendants to discover it and repair it. That the sidewalk may have been replaced several months after the plaintiff's accident is irrelevant to considerations of liability herein.

The plaintiff contends that the defendants must have been aware of the existence of this defect, since photographs show that there was a hole in the sidewalk. However, that alone does not establish that the defendants had sufficient notice of its existence, since it remains unknown when the defect was created. The plaintiff attempt to use photographs taken from the Google website that purport to show the subject sidewalk with visible cracked and broken holes as of August 2011 is unavailing. The plaintiff did not authenticate that these photographs actually depict the area in question as of August 2011. Finally, the plaintiff has not shown which defect in the subject

photographs matches the defect which caused her to fall.

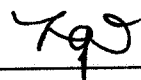
Accordingly, it is hereby

ORDERED, that the defendants are awarded summary judgment dismissing the plaintiff's complaint in its entirety.

This constitutes the Decision and Order of this Court.

Bronx, New York

November 30 2016



HON. LAURA G. DOUGLAS

J.S.C.