Reid v Phipps House Servs., Inc.
2011 NY Slip Op 32842(U)
October 14, 2011
Supreme Court, New York County
Docket Number: 108332/10
Judge: Joan A. Madden
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SCANNED ON 10/25/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 108332/2010

REID, BLANCHE

VS.

PHIPPS HOUSE SERVICES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum and Decision and Order.

FILED
OCT 25 2011
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: October 14, 2011

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

---X

BLANCHE REID, Index No. 108332/10

Plaintiff,

-against-

PHIPPS HOUSE SERVICES, INC., and
BELLVUE SOUTH ASSOCIATES, LLC,

Defendants.

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Joan A. Madden, J.:

Defendants Phipps House Services, Inc. ("Phipps") and Bellevue South Associates, L.P. ("Bellevue") move for summary judgment dismissing the complaint. Plaintiff opposes the motion, which is denied for the reasons below.

Plaintiff alleges that on April 21, 2010, she tripped and fell on a raised sidewalk flag in front of 460-470 Kips Bay Court, located on the south side of 27th Street and Second Avenue, in Manhattan. Bellevue is the owner of the relevant property and Phipps was hired by Bellevue to maintain the property including the sidewalk where plaintiff fell.

Plaintiff testified at her deposition that she was caused to fall by the "unevenness of the sidewalk" (Plaintiff's Dep. at 20). She also testified that the accident happened as she turned to go from the south to the north corner of 27th Street and that "there were a lot of people there" (Id. at 31). Specifically, plaintiff testified that as she was walking on the sidewalk her right foot "struck concrete" and then "the other one (i.e. the left foot) was up against the ledge and I hit them both together because I went down flat on my face"(Id at 39). She identified the area where she fell on a photograph as the area where there were two different colored pieces of concrete towards the right

center portion of the photograph, and that the gray or lighter portion was higher than the darker or tan portion of the sidewalk (Id. at 20, 23). She also testified that the elevation is to the left of a crack running diagonally in the flag to the center of the photograph (Id. at 30).

Defendants argue that they are entitled to summary judgment as the defect at issue, which they assert is trivial. In support of their position, they rely on photographs of the defect and the expert affidavit of Jeffrey J. Schwalje, P.E. Mr. Schwalje, who reviewed the relevant material and inspected the relevant sidewalk in January 2011, states that "the diagonal crack in the inner concrete slab in the area of plaintiff's accident presented no height differentials except the small chip that exhibit a minor depth of 3/8 of an inch." He also opined that "there was no tripping hazard associated with the crack." Defendants also argue that summary judgment is warranted in their favor as there is no evidence that they had actual or constructive notice of the defect.

In opposition, plaintiff argues that the presence of the edge caused by the height differential is sufficient to raise a jury issue as to whether the defect posed a tripping hazard. In support of her position, plaintiff submits her affidavit to clarify her testimony regarding the location of the accident. She attaches two photographs which she asserts represent the location of the accident. This statement and the photographs are consistent with her deposition testimony regarding the location of the accident. She also states in her affidavit that she did not observe the uneven portion of the sidewalk as "the crowd of people on the corner made it impossible to notice the defect." (Plaintiff Aff. ¶ 7).

With respect to notice, plaintiff notes that defendants' facility director testified that the sidewalk is cleaned five days a week and that five years before the accident defendants "ground down" the area where plaintiff fell because "the flag was raised" (Deposition, V. Banek, at 12-13).

Plaintiff also assets that defendants' expert opinion should not be considered as defendants failed to timely identify him as an expert, and that in any event, it is conclusory.

On a motion for summary judgment, the proponent "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 face..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

"Whether a dangerous or defective condition . . . create[s] liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" Trincere v. County of Suffolk, 90 NY2d 976, 977 (1997), citing Guerrieri v. Summa, 193 AD2d 647 (2d Dept. 1993). However, "trivial defects on a walkway not constituting a trap or nuisance, as a consequence of which a pedestrian might . . . trip," are not actionable. Morales v. Riverbay Corp., 226 AD2d 271 (1st Dept. 1996). In determining whether an alleged defect is trivial as a matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or snare. Trincere v. County of Suffolk, 90 NY2d at 977, citing Caldwell v. Vill. of Isl. Park, 304 NY 268 (1952).

Here, even assuming *arguendo* that Mr. Schwalje's opinion[1] is sufficient to meet the

[1]Contrary to plaintiffs' position, the court may consider the expert's affidavit despite defendants' asserted failure to previously identify him as an expert since there is no indication that such failure was intentional or willful or prejudicial to plaintiff. Hernandex-Vega v. Zwanger-Psiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992).

[* 5]

defendants' burden of showing that the defect on which plaintiff fell was trivial, plaintiff has controverted this showing by providing evidence that the defect constituted a trap or snare based on plaintiff's testimony describing the elevation between the sidewalk flags as an abrupt condition, and in particular, as a condition causing her feet to suddenly strike at concrete ledge, and the photographs of the defect showing the elevated portion of concrete. See e.g. Dominguez v. OCG IV, LLC, 82 AD3d 434 (1st Dept 2011)(trial court properly found issue of fact existed as to whether defect was trivial where photographs showed irregular, patched and worn surface and plaintiff testified that he fell when his foot got caught in crack on edge of step); Mishaan v. Tobias, 32 AD3d 1000 (2d Dept 2006)(denying summary judgment photographs provided by the plaintiff depicting the alleged defect show that it consisted of a cracked and broken sidewalk, and that a portion of that sidewalk was raised, at least an inch in height, over the remaining portion of the sidewalk); McKenzie v. Crossroads Arena, LLC, 291 AD2d 860 (4th Dept.), lv dismissed, 98 NY2d 647(2002) (denying defendant's motion for summary judgment where there were questions of fact as to whether the ¾ inch difference in height between concrete slabs outside of arena created a tripping hazard based on testimony from plaintiffs and their children that the height difference was abrupt, not gradual, and that the accident occurred on a misty night in a poorly lit area).

Furthermore, plaintiff's testimony that the sidewalk where she fell was crowded so that she could not observe the defect also supports a finding that the defect was not trivial. See generally Argenio v Metropolitan Transp. Auth., 277 AD2d 165 (1st Dept 2000)(finding that record raised triable issue of fact as to whether defect was trivial, including plaintiff's testimony that she was looking straight ahead as she walked and that there were many people around her in crowded train station rendered observation of depression on which she fell less likely).

[* 6]

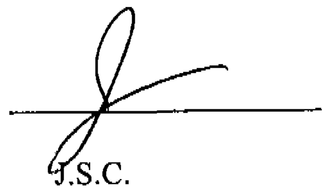
Finally, contrary to defendants' position, the testimony of its facility director raises triable issues of fact as to whether defendants has actual or constructive notice of the defect at issue.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, 60 Centre Street on November 17, 2011 at 2:00 pm.

DATED: October 14, 2011



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

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