

Slowinski v Port Auth. of N.Y. & N.J.

2013 NY Slip Op 30030(U)

January 7, 2013

Sup Ct, NY County

Docket Number: 113106/07

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. Madden
Justice

PART 11

Alice Slowinski

INDEX NO. 113106/07

MOTION DATE _____

- v -

Post Authority, et al

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision + Order

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

FILED

JAN 10 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 7, 2013

[Signature]
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
NEW YORK COUNTY

-----X
ALICE SLOWINSKI,

Index No.: 113106/07

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY
CITY OF NEW YORK, and US AIRWAYS, INC.,

Defendants.
-----X

JOAN A. MADDEN, J.:

FILED

JAN 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendants Port Authority of New York and New Jersey, City of New York, and US Airways, Inc. (together "Defendants") move for summary judgment dismissing the complaint. Plaintiff Alice Slowinski ("Slowinski") opposes the motion. For the reasons set forth below, the motion is denied.

BACKGROUND

Slowinski seeks damages for personal injuries she allegedly sustained on December 17, 2006, at approximately 2:00 pm, when she fell while on the sidewalk at or near the curbside luggage check-in-area of the US Airways Terminal at LaGuardia Airport. After her fall, she was attended to by US Airways employee Ravin Robinson ("Robinson"), who notified the Port Authority Police and filled out a US Airways Incident Report, in which she noted that there was a defect, specifically a joint in the pavement, in the area of the accident .

At her deposition, Slowinski testified that the accident occurred as she was exiting a taxi on the passenger side and stepped onto the sidewalk (Id., at 15). Slowinski fell after having taken five steps from the curb (Id., at 16) and at a distance of approximately five feet from the nearest US Airways check-in-counter (Id., at 18, 21). Slowinski testified that immediately before her fall, her "leg got caught into something"(Id., at 25). She subsequently clarified that "something" as "that expansion

thing there”(Id., at 25) but that she did not see the “expansion thing”at any time either before or after she fell (Id., at 27). An ambulance was subsequently called and Slowinski was taken to New York Queens Hospital (Id., at 33). Slowinski testified that she did not talk to any police officers following her fall and denied that she told a police officer that she tripped over her own feet (Id., at 52).

Brian Vitale (“Vitale”), a police officer with the Port Authority since June, 2006 (Vitale Dep., 8), testified that on December 17, 2006, the date of the incident, he was assigned to patrol the US Airways terminal (Id., at 10-11). Vitale was dispatched by the police desk to the scene of Slowinski’s accident (Id., at 12) and upon arrival followed standard protocol, first seeing to Slowinski’s medical needs and then conducting a survey of the area (Id., at 15-16). Vitale looked around for ‘anomalies or defects in whether it be the street, the pavement, whatever, the terminal itself’(Id., at 16) and took personal notes but does not know where these notes now are (Id., at 12-13). After his investigation, he filled out a Port Authority Accident Report known as a 146 report. On this report he indicated that the area was ‘clean and dry’ and that there were no defects (Id., at 18). Vitale also completed a report known as a 147 report, which is substantially the same as the 146 report.

Vitale testified that after his investigation, he asked Slowinski, ‘How did this happen? Where did this happen? When did this happen?’(Id., at 24), and Slowinski replied, ‘It happened right out there in the sidewalk. I tripped over my foot. I tripped over my own feet’(Id., at 25). After Slowinski was taken to the hospital, Vitale conducted a second investigation of the area. Again, he found ‘no defects’ and ‘nothing that could have caused the fall’(Id., at 27). Vitale also testified that there was a US Airways employee present, but he remembers nothing about this employee other than that it was a woman (Id., at 20). Vitale did not talk to her (Id., at 28) and did not speak to any

witnesses other than Slowinski's son, who was traveling with his mother, (Id., at 29). From Slowinski's son he asked only for a name and an address (Id., at 36).

Robinson, a US Airways Customer Service Supervisor, testified that she was working on date of the incident, in charge of ticket counters both inside and outside the terminal (Rob. Dep., 6), but does not remember either the incident itself or the name Alice Slowinski (Id., 11). Robinson testified that the Incident Report marked as Plaintiff's Exhibit 1 is 'a report of injury or illness' (Id., at 29). Although her signature appears to be on the report she testified that she had no recollection of filling out the report in question (Id., at 14). That report identified the defect in the area as "joint in pavement."

Defendants argue that they are entitled to summary judgment, as Slowinski could not specify the cause of her fall. They assert that Slowinski did not notice anything unusual, dangerous or defective, about the sidewalk either before or after her accident, did not see what caused her to fall, and reported to Vitale that she tripped over her own feet. Defendants assert that Slowinski's claim that she tripped over 'an expansion thing' is mere speculation and rely on Vitale's Accident Report, in which Vitale notes that there was no defect in the area. Defendants alternatively argue that there is no evidence that they caused or created the defect or had actual or constructive notice of it.

Slowinski opposes the motion, arguing that the defendants' claim that Slowinski tripped over her own feet is contradicted by Slowinski's deposition testimony, in which she testified that she did not trip over her own feet and did not speak with police at the scene, and that there are no grounds for claiming that Slowinski does not know what caused her fall. Moreover, Slowinski argues that even if she were unaware of the exact cause of her fall, circumstantial evidence establishes that Slowinski fell over the expansion joint. Plaintiff points to the US Airways Incident Report as evidence that there was a faulty joint in the pavement and argues that there are issues of fact as to whether

the defendants had notice of the defective condition, as their employees worked in the area on a daily basis and the defect is a permanent and not transient feature of the area. Slowinski also contends that the accident report completed by Vitale is not dispositive, as Vitale has no engineering expertise or experience conducting inspections and failed to interview properly any witnesses, including the US Airways employee who reported the incident.

Slowinski also submits an expert affidavit from Nicholas A. Politis, P.E. ("Politis"), an engineer and a board certified building inspector licenced to practice in New York who has over 20 years of engineering experience, including over 4,600 building inspections. Politis performed an on-site inspection of the accident scene on October 3, 2011 and photographed the area. Politis notes, "I observed over 12 areas from the south proceeding north along all of the sidewalk and roadway areas where the expansion joints installed were either missing, deteriorated, or protruding above the elevation of the sidewalk and roadway areas. Of particular high risk are the areas along the exterior check-in stations just outside the terminal. These conditions pose a clear tripping hazard"(Politis Aff. ¶ 6). Slowinski additionally submits an affidavit stating that the photographs taken by Politis "accurately depict the area where I fell as it existed at the time of the incident"(Slow. Aff., ¶ 3).

In reply, Defendants argue that, contrary to Slowinski's claims, Slowinski did not identify the defective condition and points to Slowinski's deposition as evidence that she did not see what caused her to trip and fall, either before or after the accident. Defendants also argue that no testimony or evidence has been presented that demonstrates that the "expansion joint" constituted a defect.

With respect to Politis' affidavit, defendants argue that the affidavit should be disregarded, as Politis' inspection occurred nearly five years after the accident and, in any case, Politis makes no indication that either the construction or maintenance of the

sidewalk deviated from acceptable standards. In addition, defendants contend that Slowinski's affidavit asserting that the photographs submitted by Politis accurately depict the area as it existed at the time of the incident should be disregarded, as Slowinski has testified that she did not see what exactly caused her to fall.

DISCUSSION

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 case." Wingard v. New York Univ. Med. Center, 64 N.Y.2d 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 which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

"The owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2nd Dep't 2000); see also O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996).

As a preliminary matter, even assuming *arguendo*, that Defendants met their burden of showing that Slowinski did not know what caused her fall, Slowinski has rebutted this showing based on evidence that she fell as a result of the joint pavement, including her deposition testimony that before her fall her leg got caught in something which she identified as a "expansion thing." Notably, Slowinski's testimony was consistent with the accident report filled out by defendant U.S. Airways which identified the defect on which plaintiff fell as a "joint expansion," and her expert's affidavit

regarding the existence of defective expansion joints, including along the exterior check-in stations just outside the terminal where Slowinski alleges she fell.¹

Moreover, although the expert's inspection took place five years after the accident, Slowinski's affidavit stating that the expert's photographs accurately depicts the area where she fell as it existed at the time of the accident is sufficient to permit consideration of the expert's affidavit. Additionally, that Slowinski testified that she did not look back at the area after she fell does not mean that she did not observe the general condition of the area before the accident.

Furthermore, contrary to Defendants' argument, it cannot be said as a matter of law that expansion joint at issue does not constitute a potentially defective condition. "Whether a dangerous or defective condition exists on property so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." Croakley v. City of New York, 286 AD2d 576, 577 (1st Dept 2001)(citations and quotations omitted). Here, based on the record, which includes here expert's opinion that the expansion joints in the area "were either missing, deteriorated, or protruding above the elevation of the sidewalk," there are triable issues of fact as to whether the expansion joint on which Slowinski allegedly fell constitutes a defective condition. Id. (reversing trial court's overturning of jury verdict based on trial court's finding that there was insufficient evidence that the expansion joint on which plaintiff fell constitute a tripping hazard). Moreover, the cases cited by Defendants are not dispositive of this issue as they involved different factual circumstances. See e.g. Belmonte v. Metropolitan Life Ins. Co., 304 AD2d 471 (1st Dept 2003)(Big Apple Map and other evidence in record were insufficient to give defendant notice of defect at issue); Lacy v. New York City Housing Authority, 4 AD3d 455 (2d Dept 2004)(plaintiff failed

¹While the expert could not identify the exact area of the accident, when his statements, are considered with the other evidence in the record, his opinion as to the cause of the fall is probative.

to submit evidence that expansion joint in ramp which was built to specification was defective in any way).

Next, there are triable issues of fact as to whether Defendants had constructive notice of the expansion joint at issue. On a motion for summary judgment, the movant has the burden of demonstrating the "lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." Giuffrida v. Metro North Commuter R.R. Co., 279 A.D.2d 403, 404 (1st Dep't 2001). Thus, "[o]nly where the record is 'palpably insufficient' to establish ...constructive notice 'that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it' can it be said that there is no factual issue to submit to the trier of fact." Giambrone v. New York Yankees, 181 A.D.2d 547, 548 (1st Dep't 1992) (quoting Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246, 251 (1st Dep't 1984) aff'd 64 N.Y.2d 670 [1984]). Here, as the expansion joint was not a transient condition, and was near the curbside checkout, an area where employees of the Defendants were present on a regular basis, summary judgment is not warranted based on Defendants' alleged lack of notice.

CONCLUSION

In view of the above, it is

ORDERED that the Defendants' motion for summary judgment is denied.

The parties shall contact the mediation part to schedule a mediation.

DATED: January 7, 2013

J.S.C.

FILED

JAN 10 2013

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