

Beirne v Ames' Strand View W. Corp.

2016 NY Slip Op 32879(U)

December 22, 2016

Supreme Court, Nassau County

Docket Number: 11892/2014

Judge: Antonio I. Brandveen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

Margaret Beirne,

Plaintiff,

- against -

AMES' STRAND VIEW WEST CORP. D/B/A
SHINES TAVERN and THE CITY OF LONG
BEACH,

Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 11892/2014

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5, 6</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The underlying personal injury is a trip-and-fall case. The defendant Ames' Strand View West Corp. d/b/a Shines Tavern moves (Sequence 001) pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the complaint and cross claims against it, and granting it costs, fees and disbursements. The defendant The City of Long Beach cross moves (Sequence 002) pursuant to CPLR 3212 for an order granting it summary judgment and dismissing the complaint and cross claims against it. The opposing parties submit opposition, and the moving parties reply to the opposition.

The plaintiff alleges tripping and falling on Saturday morning, July 12, 2014, at or near 55 California Street, and the corner of Beech Street, Long Beach, New York while walking with the plaintiff's sister. The plaintiff claims a defect/crack in the sidewalk/curb caused the accident. The plaintiff testified, at a hearing pursuant to General Municipal Law § 50-h, on October 7,

2014. The parties submitted the verified complaint, verified bill of particulars and the plaintiff's deposition on June 24, 2015. The plaintiff was shown photographs of the accident site, during the plaintiff's deposition testimony and identified the sidewalk crack where she fell.. Those photographs were submitted here as exhibits together with other photographs and measurements of the accident site.

The plaintiff testified about going to Three June Walks in Long Beach with her sister that early morning to observe the plaintiff's three-bedroom bungalow. The two women visited, left and walked intending to visit a friend in Long Beach. The plaintiff testified it was a perfect day, the weather was gorgeous, the sun was absolutely out, and the roads and sidewalks were dry. The plaintiff testified she recalled the only person there at the time of the accident was her sister. The plaintiff testified the accident happened when she was looking straight ahead after stepping up onto the sidewalk.

“ ‘A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses’ (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015])” (*Kam Lin Chee v DiPaolo*, 138 AD3d 780, 782 [2d Dept. 2016]).

In determining whether a defect is trivial, the court must examine all of the facts presented, including the “width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury.” “[T]here is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable.” “Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable” [citations omitted]

Baldasano v Long Is. Univ., 143 AD3d 933, 934 [2d Dept. 2016].

This Court reviewed the evidence, including but not limited to the photographs, measurements of the sidewalk condition, the plaintiff's 50-h hearing testimony, the pleadings and the deposition testimony, time, place and circumstances of the incident, and the width, depth, elevation, irregularity and appearance of the defect. The Court determines Ames' Strand View West Corp. and The City of Long Beach establish a *prima facie* entitlement to summary judgment as a matter of law by showing the alleged defect was trivial as a matter of law, and

therefore, not actionable (*see generally Kam Lin Chee v DiPaolo*, 138 AD3d 780 [2d Dept. 2016]). Here, the lighting was good and it was a gorgeous, perfect and sunny day according to the plaintiff. The physically small defect had no jagged edge. The accident was not in a place where the plaintiff was naturally distracted from looking down at her feet. The surrounding circumstances or intrinsic characteristics of the condition were not difficult for the plaintiff to see or to identify as a hazard or difficult to traverse safely while walking there. The incident was not in a parking lot, an entrance or exit to a property or a heavily-traveled walkway.

In opposition, the plaintiff fails to raise a triable issue of fact regarding the triviality of the alleged defect (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Jackson v Michel*, 142 AD3d 535 [2d Dept. 2016]). Contrary to the plaintiff's assertions, the issue is not whether the sidewalk condition was able to snag the plaintiff's right foot rather whether it was difficult for the plaintiff to see or identify the alleged defect as a hazard or difficult to pass over safely walking there in light of the surrounding circumstances. The defendants present evidence that the defect measured approximately 3/8 of an inch wide to a one-half inch in height. The plaintiff's measurements about the defect are one and 1/8 inch wide by approximately 10 inches long, and more than one-half inch in depth. The plaintiff testified the accident area was well-lit and unobstructed at the time of the accident.

Notwithstanding the determination regarding the triviality of the alleged condition, the Court considers Ames' Strand View West Corp.' contention that the City's indemnification cross claims must be dismissed. The Court also considers the City's alternative assertion regarding the lack of prior written notice or an exception to it, as well as the City's claim that Ames' Strand View West Corp., as the abutting owner is required to maintain that sidewalk and no civil action may be maintained against the City pursuant to the City's Charter § 256A. The Court determines the City provides evidence in admissible form showing the City had no prior written notice of the alleged defect.

In opposition, the plaintiff fails to raise a triable issue of fact by showing the alleged sidewalk defect was created as an immediate consequence of an affirmative act of negligence by the City or a special use on this public sidewalk for the City's own benefit (*Groninger v Vil. of Mamaroneck*, 67 AD3d 733 [2d Dept. 2009], *affd*, 17 NY3d 125 [2011]; *see Ruffino v New York City Tr. Auth.*, 55 AD3d 817 [2d Dept. 2008]). The City's contractor installation of the sidewalk years before the subject incident, and the oral statement by the representative of Ames' Strand View West Corp. to the City regarding the crack's appearance within one month of the sidewalk installation are insufficient to regard the crack as an immediate consequence of an

affirmative act of negligence by the City. The Court also determines the City's law imposes liability on abutting landowners, and neither the plaintiff nor Ames' Strand View West Corp. show otherwise (Charter § 256 and Code of Ordinances of City of Long Beach § 1-2; *Klau v Belair Bldg., LLC*, 110 AD3d 769 [2d Dept. 2013]). The plaintiff's assertion that tables and chairs lined up along California and West Beach Streets adjacent to Shines Tavern at the easterly and southerly sides show an outdoor café persona is speculative and inconclusive regarding special use on this public sidewalk for the benefit of Ames' Strand View West Corp. The plaintiff's assertion that the crack may have been caused by the defendant's vehicles driving on the sidewalk is also speculative.

ORDERED that the motion is GRANTED (Sequence 001) by Ames' Strand View West Corp. d/b/a Shines Tavern for summary judgment and dismissing the complaint and cross claims against it, and it is also,

ORDERED that the cross motion is GRANTED (Sequence 002) by The City of Long Beach for summary judgment and dismissing the complaint and cross claims against it.

This decision constitutes the order and judgment of the Court.

Dated: **December 22, 2016**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED

DEC 28 2016

LONG BEACH COUNTY
COUNTY CLERK'S OFFICE