Eisenbach v 884 Riverside L.P.
2017 NY Slip Op 32483(U)
November 20, 2017
Supreme Court, New York County
Docket Number: 159320/13
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT OF
NEW YORK COUNTY: IAS PART 7

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LUISA EISENBACH,

Plaintiff,

Index No. 159320/13
Motion. Seq. 003

- against -

884 RIVERSIDE LIMITED PARTNERSHIP,

Defendant.

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884 RIVERSIDE LIMITED PARTNERSHIP,

Third-Party Plaintiff,

- against -

THE CITY OF NEW YORK,

Third-Party Defendant.

---X

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants 884 Riverside Limited Partnership's motion for summary judgment.

Papers	**NYSCEF Documents Numbered**
Defendant's Notice of Motion	99-115
Opposition	117-130
Reply	131-133

Gerald Lebovits, J.:

Plaintiff commenced this action seeking damages for injuries suffered when she tripped and fell on a sidewalk in front of the building owned by defendant/third-party plaintiff 884 Riverside Limited Partnership (Riverside). Riverside moves for summary judgment dismissing the complaint on the ground that plaintiff does not know what caused her to fall.

During an examination before trial (EBT), plaintiff testified that she was walking on the sidewalk when she felt her left heel become stuck in something that caused her to lose balance. She did not see what her foot was stuck in but she felt that it was a hole. She was not able to get her foot out and she fell. She did not remember whether her right foot was touching the curbstone when her left foot got stuck.

Riverside's superintendent testified at his EBT that the sidewalk was not damaged and that there was a crack on the curbstone abutting the sidewalk in front of the building. The superintendent identified the crack on the curbstone in a photograph.

Previously, third-party defendant the City of New York (the City) moved for summary judgment dismissing the third-party complaint brought against it by Riverside. The City argued that the evidence showed that the accident took place on the sidewalk abutting Riverside's property. Under Administrative Code City of NY § 7–210, the owner of real property abutting a sidewalk has the duty to maintain the sidewalk in a reasonably safe condition. That duty fell on Riverside. The City further contended that it did not create a defective condition on the sidewalk. Concerning a possible defect on the curbstone (*see Yousef v Lee,* 103 AD3d 542, 542-543 [1st Dept 2013] [stating that the City is responsible for the curb]), the City contended that there was no evidence that any such defect caused plaintiff to fall.

In opposition to the City's motion, Riverside argued that because plaintiff could not conclusively identify the cause of her fall, it was possible that a defect on the curb caused her to fall. Riverside referred to a photograph shown to plaintiff during an EBT that showed the location of her accident. Riverside claimed that plaintiff circled and initialed a portion of the photograph showing a broken section of curb. Therefore, Riverside concluded, an issue of fact existed about whether a defect on the sidewalk or a defect on the curb caused the accident, and the City's motion should be denied.

The court's decision of February 17, 2017, granted the City's motion to dismiss the third-party complaint. The court rejected Riverside's argument that evidence existed indicating that the accident could have occurred on the curb, noting that "there can be no dispute that plaintiff testified that the accident took place on the sidewalk . . ." The court determined that the transcript of plaintiff's EBT did not support Riverside's claim that plaintiff had identified the defect on the photograph. Thus, the court concluded, the marking on the photograph "purportedly made by plaintiff indicating a curb defect" was not admissible evidence.

Riverside's subsequent motion for reargument was denied. On March 27, 2017, Riverside filed a notice of appeal from the court's original decision. As of the date of this decision, the appeal had not been decided.

Plaintiff points out that Riverside's instant motion makes the same arguments made by Riverside's opposition to the City's motion for summary judgment. Riverside repeats the argument that plaintiff cannot tell whether she fell due to a defect on the sidewalk or on the curbstone. The February 17, 2017, decision already determined that there is no issue of fact concerning whether plaintiff fell due to a defect on the curbstone or on the sidewalk, because the evidence indicates that she fell on the sidewalk and not on the curb. According to the doctrine of the law of the case, once an issue is judicially resolved on the merits, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Wells Fargo Bank, N.A. v Zelaya,* 56 Misc 3d 1219 [A]), *2 [Sup Ct, Suffolk County 2017]). Riverside's argument was resolved on the merits and is precluded from further discussion by this court.

The assumption is that plaintiff fell on the sidewalk. The issue to be resolved for the purposes of the instant motion is whether plaintiff's inability to identify exactly what caused her to fall necessitates the dismissal of her complaint.

To impose liability upon Riverside, plaintiff must show that Riverside either created the allegedly dangerous condition that caused her fall or that Riverside had actual or constructive notice of said condition (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 967 [1994]; *accord Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). Initially, there must be some evidence that there was a dangerous condition (*Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 110 [1st Dept 2006]). Without such evidence, there is no connection between the condition of the premises and the accident, and the cause of the accident can only be based on speculation (*see Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007]). Thus, when a plaintiff provides testimony that plaintiff is unable to identify the defect that caused the injury, the defendant is entitled to summary judgment (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]; *accord Morrissey v New York City Tr. Auth.*, 100 AD3d 464, 464 [1st Dept 2012]).

At the same time, however, a plaintiff is not required to recall the exact manner in which the fall occurred (*Cuevas v City of New York*, 32 AD3d 372, 372-373 [1st Dept 2006]). Rather, plaintiff must identify the defect enough for a trier of fact to find, based on logical inferences, not speculation, that the defect proximately caused the accident (*Cherry*, 41 AD3d at 131; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006]). Here, plaintiff testified that her foot entered a hole. That is enough evidence of a defect to withstand the instant motion for summary judgment. Plaintiff is entitled to a reasonable inference that her foot became stuck in a hole (*see Cuevas*, 32 AD3d at 373), and it would be reasonable for the evidence to lead a trier of fact to conclude that there was a hole and that a hole is a dangerous condition (*see Kovach v PJA, LLC*, 128 AD3d 445, 445 [1st Dept 2015] [finding that although she could not identify the bump in a photograph, plaintiff's statement that her foot hit a bump in the sidewalk was sufficient to demonstrate a causal nexus between the alleged defect and her fall]; *accord Yoon Peng Choo v Fiedler Cos. Inc.*, 123 AD3d 529, 530-531 [1st Dept 2014] [finding that plaintiff sufficiently identified the cause of her fall, although she did not see it before the accident]; *Cherry*, 41 AD3d at 131 [noting that if believed, plaintiff's testimony that the blacktop was uneven where it was cracking would establish "a sufficient nexus between the condition of the roadway and the circumstances of her fall to establish causation"]).

The cases cited by Riverside in which the inability to identify the cause of the accident led to dismissal are distinguishable, because those plaintiffs could not identify any defect (*Issing v Madison Sq. Garden Ctr., Inc.*, 116 AD3d 595, 595 [1st Dept 2014] [finding that plaintiff did not observe, let alone identify, the specific condition which purportedly caused him to slip and fall]; *accord Goldfischer v Great Atl. & Pac. Tea Co.*, 63 AD3d 575, 575 [1st Dept 2009] [noting that plaintiff surmised that she fell due to a bump in a floor mat]; *Kwitny v. Westchester Towers Owners Corp.*, 47 A.D.3d 495, 495-496 [1st Dept 2008] [noting that plaintiff tripped over a carpet runner, but she could not say whether it had bunched up or shifted]; *Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007] [noting that plaintiff slipped while ascending a

staircase, but could not identify what caused him to slip]; *Pena,* 35 AD3d at 106 [noting that plaintiff was unable to identify any cause of falling on the stairs other than her shoe]).

As Riverside has not shown the absence of material issues of fact in this case (*see Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012]), its motion for summary judgment is denied.

It is hereby

ORDERED that defendant/third-party plaintiff 884 Riverside Limited Partnership's motion for summary judgment dismissing the complaint is denied.

Dated: November 20, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.