SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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SUZANNE ROFF-WEXLER,

Plaintiff,

-against-

MORANDI LLC and CHARLES 15 ASSOCIATES,

Defendants.

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Index No. 160031/15
Motion Sequence 004

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, defendant Charles 15 Associates (Associates) moves pursuant to CPLR 3212 for summary judgment dismissing Plaintiff Suzanne Roff-Wexler's (Plaintiff) claims against it. Associates' position is that it was not responsible for maintaining the sidewalk where Plaintiff fell and that Plaintiff can only speculate whether she was injured as a result of a sidewalk defect as opposed to a misstep or loss of balance. The crux of Plaintiff's opposition is that discovery is not yet complete and that the testimony taken thus far is sufficient to raise a triable issue of fact.

Plaintiff alleges that she tripped and fell on a defect on a public sidewalk on August 20, 2014 along Waverly Place between Seventh Avenue and Charles Street in Manhattan. She fractured her hip in the fall which required surgery to repair. Plaintiff did not measure the dimensions of the alleged defect at the time of her accident. Plaintiff testified[1] that several months after recovering from her injuries she walked by the area and observed that the alleged defect no longer existed (Plaintiff's Deposition, Exhibit G, pp. 152-153).

It is undisputed on this motion that non-party "15 Charles at Waverly Place - A Condominium" (Condominium) occupies the building that abuts both Waverly Place and Charles Street. Defendant Associates is the sponsor of the Condominium and the owner of a number of residential and

[1] Copies of Ms. Roff-Wexler's deposition transcripts are submitted as Associates' exhibits G and H (Plaintiff's Deposition).

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commercial units within the Condominium. Associates leased one of its commercial units to non-party Bar Italia Realty Corp. Defendant Morandi LLC (Morandi) operated a restaurant within that leased space. The restaurant's storefront adjoined the sidewalk where Plaintiff fell.

Associates' witness, James Seiler, testified[2] that he occasionally inspected the sidewalk but never observed any defects. He has no knowledge of the sidewalk ever having been repaired, either before or after the accident (Seiler Deposition, pp. 61-62, 94, 96-100). He believed that Morandi was responsible for identifying and repairing any sidewalk defects.

Plaintiff's expert engineer, Dr. Carl Abraham, photographed and examined the sidewalk approximately one month after the accident in September of 2014. He claims that his photographs demonstrate that the sidewalk constituted a tripping hazard because it contained several structural defects which existed for a significant period of time prior to the accident.[3]

New York City Administrative Code § 7-210 provides that it "shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition." Pursuant to this statute, liability can be imposed upon an "owner of real property abutting any sidewalk" where a pedestrian is injured because of a dangerous condition on the sidewalk." Associates concedes that it owned the property until 1993 when the property was first converted to condominium ownership. At that point, according to Associates, the Condominium became the "owner" for purposes of § 7-210. Recent case law from the First Department supports Associates' argument. *See Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48 (1st Dept 2016) ("a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers."); *see also Pekelnaya v Allyn,* 25 AD3d 111, 120 (1st Dept 2005)

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[2] Mr. Seiler's deposition transcript is submitted as Associates' Exhibit J (Seiler Deposition).

[3] Plaintiff's expert affidavit and accompanying photographs are submitted as Plaintiff's exhibit 3.

("condominium commons elements are solely under the control of the board of managers"); *Keech v 30 E. 85th St. Co., LLC*, 154 AD3d 504, 504 (1st Dept 2017) (owner of condominium's commercial units is not an owner for purposes of Administrative Code §7-210).

Plaintiff responds that under the Offering Plan, the "effective date" of the conversion to condominium ownership was not the date of the declaration, but the date that 15% of all of the residential units were sold. Plaintiff contends that summary judgment is premature because a member of the Condominium's board of managers must be deposed to determine when this threshold sale occurred. This is not necessary. The documents and testimony presented on this motion show that, as of August of 2014, Associates owned 39 residential units and three non-residential units out of the 122 units within the Condominium itself.[4] In other words, there can be no question that the "effective date" of the building's condominium conversion long preceded Plaintiff's accident.

Plaintiff also makes a point of questioning whether or not the board of managers was controlled by Associates. But the records indicate that Associates relinquished control of the board of managers in 1998. As of August of 2014, the same month as Plaintiff's accident, the Condominium's board of managers consisted of seven members, four of whom allegedly had no relationship with Associates.[5] In any event, case law provides that the question of who controlled the board is not relevant for liability purposes (*Jerdonek*, 143 AD3d at 50):

> Nor would a result different than the one we reach here be proper in the event that the sponsor, at the time the claim arose, continued to own a sufficient number of units to enable it to control the condominium's board of managers. If the sponsor could be sued based on its ability to select a majority of the members of the board of managers, it would follow that, even where that is not the case, a plaintiff could sue all of the individual unit owners on the ground that the owners collectively control the board of managers.

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[4] See, e.g., Associates' exhibit K; see also Deposition of James Seiler, dated June 5, 2017 (Seiler Deposition), pp. 13-18.

[5] See "Twenty-Seventh Amendment to Condominium Offering Plan for 15 Charles at Waverly Place – A Condominium" (NYSCEF Doc. 114).

Therefore, the record sufficiently demonstrates that Associates owed no legal duty to maintain the sidewalk under Administrative Code §7-210. Further discovery on this issue is not necessary.

However, this finding does not necessarily absolve Associates of liability in this case. Prior to Plaintiff's accident, some entity may have assumed responsibility for the sidewalk such that it had a duty to maintain it under the common law. At this juncture, it has not been established which entity – Associates, the Condominium, or Morandi – assumed and/or exercised that responsibility. If there is evidence that it was Associates, then Associates could potentially be liable for Plaintiff's injuries, and summary judgment would be inappropriate. In this regard, Associates' witness, Mr. Seiler,[6] testified that he believed Morandi was responsible for making repairs to the sidewalk (Seiler Deposition pp. 42-43). But Mr. Seiler also testified that from time to time he would inspect the sidewalk in front of Morandi on behalf of Associates to determine if there were any unsafe conditions. Mr. Seiler would then report any unsafe condition to the Condominium's superintendent, although he did not believe the superintendent had the authority to make any necessary repairs (*id.* at 59-61). At the very least, this testimony warrants deposing someone from the Condominium as well as its superintendent to further explore these material issues.

Associates' second argument is that Plaintiff has no cognizable cause of action because she cannot identify a defect as a proximate cause of her fall. Put another way, Associates contends that Plaintiff cannot rule out a misstep or loss of balance as the cause of her fall because she did not see any defects in the sidewalk as she was walking. In support, Associates relies upon *Scott v Rochdale Village, Inc.*, 65 AD3d 621, 621 (2d Dept 2009) ("defendant met its burden of establishing its prima facie entitlement to judgment as a matter of law . . . by demonstrating that the plaintiff was unable to identify the cause of her accident without engaging in speculation"). In *Scott*, the plaintiff slipped and

[6] A copy of Mr. Seiler's June 5, 2017 deposition transcript is submitted as Associates' exhibit J (Seiler Deposition).

fell on a stairway. The court found her claims speculative because she was unable to identify any defect whatsoever. Plaintiff's testimony in this case is quite different (Plaintiff's Deposition, Exhibit G, pp. 146-151):

A. As I said, I was walking through at the entrance to the scaffolding, right, which is entering into Morandi's space. I wasn't looking at the elevation of the sidewalk. I was just walking. I do know that after I fell and I was in a chair, I turned around and saw it, and there was a broken piece and an elevation, like a – I don't even know what it's called – a cup or whatever its called – and I saw where I fell because I was shocked to go . . .

Q. To make the sidewalk even in the area that you described there as being a crack, would someone need to fill in a space or bring down a space? . . .

A. I suppose you'd have to do both. Because you'd have to patch it and then smooth it out so that there's no hole, and there's nothing that you can catch your foot on. . . .

Q. The first time you noticed any crack after you fell, was there any debris inside that crack?

A. I don't recall. . . . Well, it was a broken, depressed piece of concrete. . . .

Q. When you saw that area for the first time after you fell . . . did you assume that because you had fallen and because that was there, that it was involved in your fall?

A. Yes, I did. . . .

Q. When you saw it after you fell . . . could you tell whether or not that area was deep enough for you to fit a cigarette into if you laid the cigarette down the long way?

A. I didn't think of it in those terms, but it was definitely deep enough. Deeper. Much deeper.

The court's reading of the testimony reveals a triable issue of fact.[7] Here, Plaintiff identified what she believed to be the cause of her accident based upon her personal observation of what she perceived to be defects in the sidewalk moments after her fall. That is more than just speculation, and for this reason Associates' reliance upon *Scott* is misplaced. The other cases Associates cites to in this regard, namely *Costantino v Webel*, 57 AD3d 472 (2d Dept 2008) and *Slattery v O'Shea*, 46 AD3d 669 (2d Dept 2007), are distinguishable on the same grounds.

[7] The court notes the extensive colloquy and objections by counsel during the depositions taken thus far in the hopes that the remaining depositions proceed more amicably.

Associates' arguments regarding Plaintiff's expert are well-taken, but somewhat misplaced.[8] Dr. Abraham concedes that the areas photographed as part of his inspection were only meant to be examples of defects along Waverly Place, and that he is unable to ascertain which of the photographs, if any, depict the specific area where Plaintiff fell (Abraham Deposition pp. 23-32). But the photographs were only meant to show the general condition of the sidewalk at the time of the accident. Plaintiff then used the photographs at her deposition to assist her in identifying the specific cause of her fall. At the very least this is sufficient to call Associates' speculation argument into question.

But even if the court were to discount Plaintiff's expert entirely, Associates cannot establish its entitlement to summary judgment merely by pointing to gaps in Plaintiff's proofs. *See Torres v Indus. Container*, 305 AD2d 136, 136 (1st Dept 2003); *Velasquez v Gomez*, 44 AD3d 649, 650 (2d Dept 2007). It must instead affirmatively establish that Plaintiff cannot identify the cause of her fall without engaging in speculation. Here, Plaintiff gave extensive testimony about the condition of the sidewalk, and with the aid of photographs identified the specific area where she believed she fell. Associates has not submitted sufficient evidence, for example its own photographic evidence or expert testimony, to disprove Plaintiff's claims as a matter of law. I therefore find that Associates has not met its burden as to this issue.

The court has considered Associates' remaining contentions and finds them to be without merit.

Accordingly, it is hereby ORDERED that Associates motion for summary judgment is denied with leave to renew upon the completion of discovery as set forth herein; and it is further

ORDERED that all counsel appear for a compliance conference in Part 30 on Monday, July 23, 2018 at 10:30AM. This constitutes the decision and order of the court.

DATED: 6-25-18

SHERRY KLEIN HEITLER, J.S.C.

[8] Plaintiff's expert, Dr. Carl Abraham, was deposed on January 23, 2017. A copy of his deposition transcript is submitted as Associates' exhibit I (Abraham Deposition).