

<b>McCabe v Avalon Bay Communities Inc</b>
2018 NY Slip Op 33108(U)
November 30, 2018
Supreme Court, New York County
Docket Number: 156813/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. GERALD LEOVITS**

**PART**

**IAS MOTION 7EFM**

*Justice*

INDEX NO.

156813/2016

LYNN MCCABE,

MOTION SEQ. NO.

001

Plaintiff,

- v -

AVALON BAY COMMUNITIES INC, SMITHTOWN GALLERIA  
ASSOCIATES LIMITED PARTNERSHIP,

**DECISION AND ORDER**

Defendant.

-X-

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for

JUDGMENT - SUMMARY

Gerald Lebovits, J.

Defendants Avalon Bay Communities, Inc. (Avalon) and Smithtown Galleria Associates Limited Partnership (Smithtown) move for summary judgment dismissing the complaint.

This is a personal injury action. The complaint alleges as follows: on July 15, 2016, plaintiff tripped and fell on a sidewalk on the premises of the Avalon Commons apartment complex, located at 313 Avalon Circle, Smithtown, New York. Plaintiff, who resides in the complex, was walking to another unit in the complex where she fell after tripping over a raised portion of the sidewalk at or near 36 Avalon Circle, Building 2. Avalon and Smithtown are co-owners of the complex. Plaintiff alleges that defendants were negligent in creating a defective condition in the sidewalk, and/or having actual or constructive notice of a defective condition.

Upon the completion of discovery, defendants move for summary judgment dismissing the complaint. They move on the grounds that: (1) the defect on the sidewalk was too small and trivial (de minimis) to be actionable, and (2) the defect on the sidewalk was open and obvious and not inherently dangerous.

Defendants rely on the deposition testimony of plaintiff and Gary Doherty, a maintenance manager employed by Avalon; photographs of the subject premises; and the expert affidavit of Timothy Joganich, an engineer who is a senior consultant for ARCCA, Inc.

Plaintiff testified about the accident. Before the accident occurred, plaintiff was on her way to her mother's apartment, which she visited regularly. She took a route that she generally took and walked along the sidewalk to the right of her mother's apartment's front door. She testified that while she walked, the tip of her left foot came into contact with the gap between two sidewalk flagstones, causing her to fall forward toward the ground. Plaintiff stated that she did not look down at the surface of the sidewalk as she was walking, and that there was nothing obstructing her view of the sidewalk as she walked. Plaintiff testified that she wore prescription eye glasses for nearsightedness, but that she did not wear glasses or corrective lenses at the time of the accident.

Doherty testified that he was present on site on the date of the accident and witnessed plaintiff's fall. After observing the fall, he stated that he approached plaintiff and helped her up off the ground. Doherty stated that afterwards, he conducted a search on Avalon's database for any complaints or comments regarding the condition of the subject sidewalk, but did not find any.

Defendants submit Joganich's affidavit to prove that the defect is not actionable. Joganich conducted a site inspection of the sidewalk area, and took measurements and photographs of the defect. The measurements establish that the height differentials between the two sidewalk flagstones in question were 7/16 of an inch. Joganich further shows that the flagstones along the line had a height differential no higher than 13/16 of an inch. Defendants state that upon her deposition, plaintiff affirmed the accuracy of Joganich's photographs of the sidewalk. Defendants argue that the evidence demonstrates that the sidewalk defect would qualify as trivial in size and dimension and is not subject to a negligence action. Defendants submit court decisions that uphold their argument.

Alternatively, defendants contend that the defect was open and obvious, apparent to any observer in the area. Despite the minimal height differential of the flagstones, defendants argue that any reasonable person could have observed the defect and avoided it. According to them, plaintiff, who did not wear her glasses at the time, did not make a reasonable use of her senses and contributed to the accident through her apparent carelessness. Defendants contend that the defect did not pose any danger to the public.

Based on these arguments, defendants request the granting of their motion and the dismissal of the complaint.

Plaintiff raises opposition to the motion, arguing that issues of fact exist. She submits evidence which she claims is proof that defendants concluded prior to the accident that the defective area needed to be repaired on a "high priority" basis. She refers to the photographs submitted by defendants which showed that the subject area was subsequently painted yellow due to safety concerns and to serve as a warning. Plaintiff also claims that defendants' counsel, who argued that the defect was trivial or open and obvious, also told defendants (according to defendants' witness) to paint the raised sidewalk yellow to provide a safety warning. Plaintiff argues that this advice clearly contradicts defendants' arguments in their motion for summary judgment.

Plaintiff also argues that, during the discovery stage, defendants never produced the Avalon Commons Map (Map), which clearly recorded the subject area as one in need of repair, or the Budget Report (Report), which highlighted the area as a “high priority” area for repair, with the work to commence on April 1, 2016. According to plaintiff, this evidence was revealed solely as a result of plaintiff’s counsel questioning Doherty at his deposition.

Plaintiff argues that these documents establish that defendants had prior notice and awareness of a defective and potentially dangerous condition on the premises, and did nothing to repair or warn others of the condition. Plaintiff also questions the expert’s report, which failed to comment on the wide width and deep depth of the gap where plaintiff fell. The expert commented only on the height differential between the sidewalk flags. Plaintiff contends that the matter of the nature of the width, depth, and dimension of such a defect is an issue to be determined by a trier of fact, and every case involving such a condition is to be decided on an individual basis. Thus, plaintiff argues that summary judgment must be denied.

Plaintiff also seeks sanctions against defendants’ counsel for compelling her to oppose the motion, which she regards as meritless and unwarranted. She seeks sanctions in the amount of \$5,000.

In reply, defendants repeat their support for their expert’s report. They contend that plaintiff did not testify in her deposition that she tripped on the gap between the flagpoles, but on a raised portion of the sidewalk that was deemed minimal by Joganich. They contend that the gap is an unrelated portion of the area with respect to the fall. They also contend that the subsequent yellow painting of the subject photograph qualifies as a subsequent remedial measure which is inadmissible to prove negligence. According to defendants, their request for repairs on the sidewalk is too general to be admissible as evidence that the subject defect was a serious matter. Defendants argue that they have provided sufficient evidence that the subject defect is open and obvious and not a dangerous condition. They oppose sanctions on the ground that their motion is valid and meritorious.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues” (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). “The substantive law governing a case dictates what facts are material, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]” (*id.* at 82).

“A plaintiff alleging injury by a dangerous condition must show that defendant either created the condition, or failed to remedy it despite actual or constructive notice thereof [internal citations omitted]” (*Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]). Plaintiff alleges that defendants created and/or had notice of the subject defect prior to the accident. One of

defendants' defenses and arguments for dismissal is that the defect, a raised portion of the sidewalk, is of such a minimal height that, in the absence of unusual circumstances, this action should be dismissed as a matter of law. Defendants argue that unusual circumstances would be visual obstructions to the defect or inclement weather, none of which occurred at the time of the accident. Defendants also argue that there was no indication that the defect could be conceived as a trap or snare to plaintiff.

There is no per se rule as to what constitutes a minimum elevation or width differential for purposes of determining an actionable suit. A dangerous condition "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury [internal quotation marks and citations omitted]" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

Defendants provide evidence that the subject defect is not adequately defective for a lawsuit, showing that there were no adverse conditions that existed at the time of the accident. The weather at the time was clear, and there were no physical obstacles obscuring the defect. Plaintiff's path was one she had followed on previous occasions, without incident. There is no evidence of complaints concerning the defect prior to the accident. The affidavit from Joganich indicates that the height differential between the sidewalk flagstones was between 7/16 and 13/16 of an inch.

In opposition to this motion is plaintiff's claim that defendants prevented the disclosure of evidence that would raise an issue of fact in this case. The Report proposed by defendants is a reflection that certain portions of the sidewalks were in need of repair and that some repairs, designated as concrete repairs, were to be done on a high priority basis. In their reply, defendants do not deny that they proposed this Report. The deposition testimony from Doherty also affirmed the need for repairs on the premises.

Defendants object to the assertion that the repair of the specific defect was subject to a high priority basis and aver that the evidence does not specifically refer to the subject defect at all. The Report provides that the concrete repairs were subject to a high priority basis. The Map submitted by plaintiff indicates that a blue mark, designated as a concrete repair area, is near Building 2, 36 Avalon Circle, the scene of the accident.

The court concludes that despite the Map, there is insufficient proof that the location of the accident is specifically a high priority repair area. Moreover, plaintiff contradicted herself over the specific area where she injured herself. In her deposition, plaintiff testified that while walking, the tip of her sneaker hit the raised portion of the sidewalk after it went partially into the gap. Plaintiff, in her affidavit, stated that her toe struck the bottom of the gap, but that due to the width of the gap, her foot struck more of the raised portion of the sidewalk. One week after the fall, she stated that she measured the gap and claimed that it was almost two inches deep and one inch wide. She criticized defendants' expert for failing to measure the gap during his inspection of the area.

However, later in her deposition, in response to defendants' counsel, plaintiff testified that her foot did not enter the gap between the flagstones. She conceded that she was caused to

trip and fall after the toe of her shoe caught a raised portion of the sidewalk. Thus, the gap was not a proximate cause of the fall.

In the absence of more specific material evidence, plaintiff has not raised a triable issue of fact about the serious nature of the raised portion of the sidewalk, which would preclude the granting of summary judgment. The court hereby grants defendants' motion on the ground that the subject defect is too trivial to be actionable in a negligence case.

Accordingly, it is

ORDERED that defendants Avalon Bay Communities, Inc. and Smithtown Galleria Associates Limited Partnership's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendants must serve a copy of this decision and order on all parties and on the County Clerk's office, which is directed to enter judgment accordingly.

11/30/2018

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

GERALD LEBOVITS, J.S.C.