

Giraldo v Brookfield Fin. Props., L.P.

2018 NY Slip Op 33112(U)

November 27, 2018

Supreme Court, New York County

Docket Number: 159689/2014

Judge: Gerald Lebovits

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

PRESENT: HON. GERALD LEBOVITS **PART** **IAS MOTION 7EFM**
Justice

-----X **INDEX NO.** 159689/2014

NAVEZDA GIRALDO, **MOTION SEQ. NO.** 004

Plaintiff,

- v -

**BROOKFIELD FINANCIAL PROPERTIES, L.P., THE CITY OF
NEW YORK, & BATTERY PARK CITY AUTHORITY**

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Gerald Lebovits, J.,

Defendants Brookfield Financial Properties, L.P. (Brookfield) and Battery Park City Authority (BPCA), move for an order under CPLR 3212 for summary judgment dismissing the complaint as against them. In the alternative, it moves for an order granting partial summary judgment dismissing the statutory or Administrative Code Violations as against them; or, in the alternative, bifurcating the trial on the issues of liability and damages.

Plaintiff Navezda Giraldo alleges that, on November 7, 2013, at approximately 4:40 p.m., she was walking on the main concrete area of the sidewalk, abutting a building known as 200 Liberty Street, New York, New York (a/k/a One World Financial Center), about 32 feet east of the northeast corner of South End Avenue and Albany Street, when, because of people coming toward her, she stepped aside to the cobblestone area of the sidewalk. Giraldo alleges that she tripped and fell, or slipped and fell, due to a dangerous and defective condition of the cobblestone area. According to Giraldo, when her accident occurred, she and a fellow worker, Ewa Wyszomirska, were walking to work at 200 Liberty Street, where she was employed as a janitor. Giraldo alleges that she sustained serious and permanent injuries as a result of her fall.

Giraldo alleges that she fell because of defendants' negligence in "failing to maintain the sidewalk/cobblestone area in a reasonably safe condition; causing and/or allowing the said sidewalk/cobblestone area to be and remain in an unlevel, pitted, cracked and otherwise

dangerous condition; [and] failing to place barricades, warnings and/or signs in the subject area.” (Affirmation of Robert J. Brown, exhibit E, Verified Bill of Particulars, ¶ 7.)

At her deposition, Giraldo testified that there were people coming toward her on the sidewalk so “I moved to the side in order for them to pass.” (Brown affirmation, exhibit I, Giraldo dep November 8, 2016, at 59.)¹ “Like I said before, there were people walking by the wall so I moved away and when I noticed there was some bricks.”² (*Id.*, exhibit G, Giraldo dep, August 13, 2014, at 33.) In response to the question “Do you know what caused you to fall” Giraldo stated that she had “no idea.” (*Id.* at 24.) Responding to the question of whether there were any missing cobblestones, however, Giraldo stated, “No, just that it was divided, but I didn’t notice. My foot hit with one of the spaces” between the bricks. (*Id.* at 34.) Finally, when asked if there were any broken cobblestones, she responded “No the spaces (between the cobblestones).” (*Id.*)

In her response to defendants’ Bill of Particulars, Giraldo alleges that defendants violated sections 7-210, 7-211, 7-212, and 16-123 of the Administrative Code of the City of New York (Administrative Code) and section 19-152 of the New York City Department of Transportation Rules and Regulations which is also located in the Administrative Code. (*See* Administrative Code §§ 7-210, 7-211, 7-212, 16-213 and 19-512.)

Giraldo relies on the report of her expert, Scott M. Silberman, P.E., of SMS Engineering, P.C., who inspected the cobblestone area with Giraldo present, and measured the space between the cobblestones where she allegedly fell. According to Silberman,

“The majority of the sidewalk is constructed of concrete, however there is a 5’-5” wide strip of Belgium block pavers used in this area. ... The brick pavers at this location are irregularly shaped but the nominal dimensions are approximately 4 inches by 8 inches. The pavers are not laid close to each other, instead there are joints that vary in width but in many places are greater than 1 inch.”

(Affirmation of Robert J. Brown, exhibit N, Silberman Report, at 2.) Silberman measured the space between the cobblestones where Giraldo allegedly fell and found it to be 1 and 1/8 inches wide and 1 and 1/8 inches deep. (*Id.* at 3.) He did not measure the difference in elevation of the two cobblestones or take any other measurements in the cobblestone area.

¹ Giraldo was deposed on August 13, 2014 (50-h hearing), Brown affirmation, exhibit G; September 19, 2014 (50-h hearing), *id.* exhibit H; and November 8, 2016, *id.* exhibit I.

² In her deposition on November 8, 2016, it was clarified that in mentioning “bricks” in her testimony, Giraldo was referring to cobblestones. (Exhibit I, Giraldo dep at 64.)

According to Silberman,

"[a]ny surface condition of one half (½) inch or greater in height or depth is sufficient to cause a trip or misstep and fall. Most design guidelines consider ½" to be excessive and requires that this transition be accomplished by means of a ramp, leveling, beveling or replacement. It is the generally accepted practice that any abrupt change in elevation in a walkway or public sidewalk is an inherent and unreasonable danger to pedestrians and is unreasonably inexpensive to repair. Most trip and fall accidents are caused by abrupt changes in elevation, usually a vertical grade differential of ½" or higher."

(*Id.* at 5.) According to Silberman, a vertical grade difference of greater than ½ inches between adjacent sidewalk flags constitutes a substantial hazard, pursuant to Administrative Code § 19-152 (a) (4) and section 2-09 (f) (5) (iv) of the Rules of the City of New York (34 RCNY § 2-09) (Highway Rules). Additionally, a vertical grade differential between sidewalk flags of greater than or equal to one half inch or a sidewalk flag containing one or more surface defects of one half inch or greater in all horizontal directions and is one half inch or more in depth is considered a hazard pursuant to section 19-152 (a-1) of the Administrative Code.

Silberman also quotes section 2-09 (f) (4) (i) (General Sidewalk Requirements) of the Highway Rules that state: "Except as otherwise authorized, all sidewalks . . . shall be untinted concrete. . . . Sidewalks shall consist of a single course of concrete, 4' in thickness, laid upon a foundation 6" in thickness." (34 RCNY § 2-09 (f) (4) (i); Silberman report at 6.) Silberman states that he was unaware if any approval was given for a sidewalk of other than concrete. (*Id.*)

Finally, Silberman also notes section 19-152 of the Administrative Code and section 2-09 (f) (1) of the Highway Rules regarding the duty of owners of real property to maintain sidewalks abutting their property in a safe condition and their liability for personal injury occurring on the sidewalk. (Administrative Code § 19-152; 34 RCNY § 2-09 [f] [1].)

The Silberman report concludes as follows:

"Based on the foregoing, it is my professional opinion, within a reasonable degree of engineering certainty, that the above described open paver joint constituted an unsafe condition at this location. The defective condition described above was a proximate cause of Navezda Giraldo's accident. The main intent of implementing the Building Codes as well as other mandatory or industry guidelines is to eliminate or mitigate as best we can all safety hazards. The hazardous and defective conditions indicated above were not only violative of the above mentioned codes, but are also deviation from good and accepted practice. It is further evident based upon a review of all evidence that the condition of the sidewalk as it existed at the time of the accident, if not constructed in that manner, was a condition which developed over the course of time, taking several month (*sic*), if not years, to develop, and that the condition was not suddenly created prior

to the accident. If this sidewalk was properly constructed and maintained in accordance with the above mentioned rules, regulations and codes, a safe means of travel would have been provided to the general public including Navezda Giraldo.”

(*Id.* at 8.)

Defendants move for an order granting summary judgment dismissing the complaint arguing that plaintiff cannot establish a prima facie case of negligence by defendants and that there is no evidence supporting any violation of the Administrative Code or the New York City Highway Rules.

Defendants submit documents establishing that the cobblestone area in which Giraldo allegedly fell was approved in 1986 by then Acting Deputy Commissioner for the New York City Department of Transportation, Bureau of Highway Operations. (*See*, Affirmation of Brown, exhibit P, Report of Robert L. Grunes, attachments and exhibit O, Joseph Ganci aff and attachments.) The approved cobblestone area is known as a “non-conforming distinctive sidewalk.” (*Id.*, at 4.) Thus, the contention of Giraldo’s expert that the cobblestone area failed to comply with the requirement that sidewalks must be concrete fails, as it was “otherwise authorized.”

Defendants next argue that regulations in the Administrative Code and Highway Rules relied on by Giraldo which specify that a height differential of more than $\frac{1}{2}$ ” constitutes a tripping hazard are likewise inapplicable, because those regulations expressly relate to sidewalk flags, which are the 5’x5’ segments of concrete sidewalks³ (*see* Highway Rules § 2-09 [f] [4] [vi and vii]), rather than to approved cobblestone areas, like the area that Giraldo allegedly fell. (*See* Administrative Code § 19-152 [a] [4] and Highway Rules § 2-09 [f] [4] [iv] [“A trip hazard where the vertical differential between adjacent *flags* is greater than or equal to $\frac{1}{2}$ in. or where a *flag* contains one or more surface defects of one inch or greater in all horizontal directions and is $\frac{1}{2}$ in. or more in depth.” [emphasis supplied].)

Rather, according to defendants, cobblestone areas are governed by the Standard Specifications of the Department of Highways of the City of New York which state that “Joints between blocks shall be *approximately* one inch in width.” (*See* Brown affirmation, exhibit P,

³ “Flags shall be 5’ X 5’ where feasible. ... If it is exactly divisible, all flags shall be 5’ wide; if not, the flags shall be plus or minus in an amount which shall make them as near to 5’ as possible.” 34 RCNY § 2.09 (f) (4) (vii). Flags may also be composed of a material called bluestone, the regulation of which is contained in the Standard Specifications of the Department of Highways of the City of New York § 6.07 (Bluestone Flags); however it is alleged that the area of the sidewalk where Giraldo fell was composed of cobblestones, not bluestones, and the photographs submitted by Giraldo depicts cobblestones rather than bluestones.

appendix 4 & 5, Standard Specifications dated June 1, 1965, and June 1986 § 6.06.4 [C] [emphasis supplied].) It appears that there is no specific requirement regarding the permissible depth of the joints. According to the report of defendants' expert, Robert L. Grunes, PhD, PE of R.L. Grunes & Associates, Inc., a joint or space between the cobblestones of 1 and 1/8 inches is approximately 1." (See Brown affirmation, exhibit P, Grunes Report, at 4.) Furthermore, as defendants' note, Silberman apparently did not measure the difference in elevation of the two allegedly offending cobblestones; therefore, his discussion of differential levels of sidewalk flags greater than 1/2 inch is of little relevance here.

With respect to Silberman's discussion of the real property owner's duty, pursuant to Administrative Code § 19-152, to install, construct, repave, reconstruct and repair a sidewalk "trip hazard" on abutting property, defendants contend that, pursuant to the Administrative Code, such obligation arises "after an inspection of such real property by a departmental inspector" and after "[t]he commissioner ... direct[s] the owner to install, reinstall, construct, reconstruct, repave or repair ... those sidewalk flags which contain a substantial defect." (Administrative Code 19-152 [a].) Furthermore, section 19-152 refers specifically to "sidewalk flags," not cobblestone areas. Moreover, Jesse Edelman, an employee of Brookfield, and the property manager of the building located at 200 Liberty Street states that he searched the building records for a notice of violation related to the sidewalks for any years up to the date of Giraldo's accident and found none, and further states that he is not aware of any such citation. (Brown affirmation, exhibit R, Edelman aff at 2-3.) In addition, Patrick Kramer, assistant property manager testified that he inspected the sidewalk area on a weekly or biweekly basis and stated that he never observed any problems with the cobblestones in the period from April 2012 until November 7, 2013, and that he is not aware of any prior complaints or accidents in connection with the cobblestones in the area. (*Id.*, exhibit Q, Brown affirmation, at 10-11, 21. Finally, in her testimony, Giraldo indicated that there were no missing or broken cobblestones, but rather, that her "foot hit with one of the spaces" between the cobblestones. (Giraldo dep August 13, 2014, at 34.)

In response to defendants' motion, Giraldo argues that there are triable issues of fact regarding whether defendants were negligent in maintaining the sidewalk that precludes summary judgment. Referring to the liability shifting provisions of Administrative Code § 7-210 which indicate that the owners of real property, rather than the city, are responsible to repair sidewalk defects and are liable for personal injuries which occur on the sidewalk abutting their property, Giraldo's counsel contends that the sidewalk was not kept in a reasonably safe condition. She refers to the Silberman report, and states that it indicates that the area where Giraldo fell was "a 'sidewalk flag' composed of a 5'-5" wide strip of Belgium block pavers [which] contained an 8" defect measuring 1 and 1/8 inches wide and 1 and 1/8 inches deep." (Affirmation in Opposition of Monica P. Becker, ¶ 32.) Relying on the Silberman report she then goes on to contend that any surface condition of 1/2" is sufficient to cause a trip and fall. Counsel repeatedly contends that the failure to meet the 1/2" requirement indicates that the area where Giraldo fell violates the Administrative Code.

Describing the area where plaintiff allegedly fell as a “sidewalk flag,” made of Belgium block pavers, plaintiff’s counsel seeks to rely on the regulations governing “sidewalk flags” and apply them to cobble stone sidewalks. But because sidewalks composed of cobblestones are addressed separately in the city regulations, the court concludes that the various regulations relied on by plaintiff governing cement sidewalks do not apply to the cobblestone area in question, and counsel’s linguistic attempt to graft the requirements for cement flags onto sidewalks composed of cobblestones fails. Moreover, as noted above, there is no evidence of any measurement of the height differential of the allegedly offending cobblestones.

Giraldo also contests the conclusion of defendants’ expert that the joint between the cobblestones where Giraldo allegedly fell satisfied the standard governing the permissible space between cobblestones. Giraldo contends that the opinion of defendants’ expert, that a 1 and 1/8 inch gap between cobblestones (as measured by plaintiff’s expert) is approximately 1 inch in conformity with the Standard Specifications, is merely self-serving. Giraldo contends that such a gap is *not* in fact approximately equal to 1.” According to Giraldo, whether 1 and 1/8 inches meets the “approximately one inch” requirement is an issue of fact that must be decided by a jury, and, therefore, summary judgment is inappropriate.

“It is well settled that summary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues.” (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018], citing *Andre v Pomeroy*, 35 NY2d 362, 364 [1974].) “But when there is no genuine issue to be resolved at trial, the case should be summarily decided . . .” (*Andre*, 35 NY2d at 364.)

“While it is generally true that the finding of the existence of a dangerous or defective condition depends on the peculiar facts and circumstances of each case and is ordinarily a question of fact for the jury, not every determination poses a jury question.” (*Outlaw v Citibank, N.A.*, 35 AD3d 564, 564 [2d Dept 2006] [internal quotation marks and citations omitted].) For example, it is up to the court to determine whether a defect is trivial. (*Id.*; accord *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]) (“Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury”); *Hymanson v A.L.L. Assocs.*, 300 AD2d 358, 358 [2d Dept 2002] “[A]lleged defects may, as a matter of law, be too trivial to be actionable”].) Thus, the question of whether a defect is in fact trivial, is a matter for the court, rather than the jury.

Similarly, the question of whether a gap of 1 and 1/8 inches constitutes a gap of “approximately 1 inch” as specified by the Standard Specifications of the Department of Highways, is a question of law to be determined by the court, and not a question of fact for a jury. The court concludes that a gap of 1 and 1/8 inches does constitute a gap of “approximately 1 inch” as a matter of law.

Counsel for Giraldo also notes that there are discrepancies between Giraldo’s testimony that she fell in the cobblestone area and that of Wyszomirska, who testified that Giraldo fell in

the cement area of the sidewalk. Giraldo's counsel contends that this discrepancy constitutes another issue of fact which precludes summary judgment. Giraldo's complaint, her deposition testimony, and the report of her expert, however, do not allege defects in the cement sidewalk area, thus the discrepancies in Giraldo's testimony and her companion regarding where the accident took place do not create an issue of fact which must be decided by a jury.

Finally, with respect to Giraldo's argument that defendants failed to satisfy their general obligation under Administrative Code § 7-210 to maintain its abutting sidewalks in a "reasonably safe condition," neither Giraldo, nor her expert, have indicated the manner in which the cobblestone area was unsafe, other than by alleging non-compliance with inapposite regulations governing cement sidewalk flags, and claiming that the space between the cobblestones where Giraldo allegedly fell was not in compliance with the Standard Specifications governing cobblestones. This court has concluded, however, that the space between the cobblestones met the Standard Specifications. Thus, Giraldo fails to establish that the fact that her foot "hit with one of the spaces" between the cobblestones resulted from any failure of defendants to maintain the cobblestone area in a reasonably safe condition.

Thus, plaintiff has failed to make out a prima facie case that defendants violated applicable regulatory requirements.

To the extent that Giraldo is claiming that defendants' maintenance of the cobblestone area where she allegedly fell violated standards of common law negligence, her testimony fails to indicate any problem with the cobblestones that caused her fall other than the fact that her foot hit one of the cobblestones. Rather, in response to the question "[w]as there anything wrong with the bricks in the area or it was just that it was a bricked area," she stated "[s]ince they are all divided they are spaces." In response to the question "[w]ere there any missing bricks" she answered, "[n]o, just that it was divided but I didn't notice. My foot hit with one of the spaces." (Giraldo dep, August 13, 2014 at 33-34.)

Giraldo's expert, Silberman, stated that "[a]ny surface condition of one half (½) inch or greater in height or depth is sufficient to cause a trip or misstep and fall." (Silberman Report at 5.) Silberman did not measure the height differential between the two cobblestones where Giraldo allegedly fell, he only measured the gap between them and the depth of the gap. There is no testimony that the depth of the gap played any role whatever in Giraldo's fall. Giraldo merely states that her foot "hit with one of the spaces." (*Id.*) Thus, beyond her expert's assertion that the 1 and 1/8 inch space between the cobblestones in question constituted a violation of the Administrative Code or Highway Rules, which this court concludes it did not, Giraldo has failed to show any negligent maintenance by defendants.

For these reasons defendants' motion for summary judgment dismissing the complaint is granted. It is not necessary, therefore, for the court to reach that branch of defendants' motion seeking to bifurcate the trial on issues of liability and damages.

Accordingly, it is hereby

ORDERED that the motion of defendants Brookfield Financial Property, L.P. and Battery Park City Authority 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 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.



GERALD LEBOVITS, J.S.C.

11/27/2018
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
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