Fuentes v City of New York
2018 NY Slip Op 33232(U)
October 30, 2018
Supreme Court, Queens County
Docket Number: 1786/16
Judge: Ernest F. Hart

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ERNEST F. HART Justice — IA Part 6

ROSA FUENTES, x

Plaintiffs,

-against-

THE CITY OF NEW YORK and ELIBERTO PENA,

Defendants.
x

Index Number 1786/16

Motion Date: July 23, 2018

Motion Seq. Nos. 3 & 4

The following papers numbered 1 to 22 read on this motion by Eliberto Pena and separate motion by the City of New York for summary judgment dismissing the complaint, insofar as asserted against the individual defendants, pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1 - 9
Answering Affidavits - Exhibits	10-16
Reply Affidavits	17-22

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on September 13, 2015, when she slipped and fell on the sidewalk abutting the premises located at 57-26 Xenia Street, in Queens, New York. The premises is a two-family home owned by Eliberto Pena. Pena resides at the premises with his family, and rents one of the apartments to a tenant. Plaintiff injured, inter alia, her right wrist in the fall.

Plaintiff testified upon examination before trial, in short, that she was walking home from a party where she had consumed four to five beers within an approximate two hour period, when she fell in front of Pena's house. Plaintiff alleges that a crack in the sidewalk caused her to fall. Plaintiff testified that a woman walking by as plaintiff lay on the ground, came over and helped plaintiff up. This (unidentified) woman also called 911, and an ambulance responded and took plaintiff to the hospital. Copies of the hospital reports note that plaintiff was intoxicated. Plaintiff testified that she took a photograph of the area where she fell after leaving the hospital, but that she gave the photograph to her attorney. According to plaintiff, the photograph is no longer available.

Defendant Pena submitted two photographs in support of his motion. On one there are no visible defects depicted in the picture of the driveway. The other photograph depicts the area in front of the driveway which has a curb and in it there are areas on the curb which appear cracked and broken.

Pena moves for summary judgment in his favor on the grounds that the property is a two-family residence and therefore Pena is not responsible for defects in the sidewalk; that there was no defect in the driveway area where plaintiff fell and, alternatively, that said defect was trivial and therefore not actionable. Pena also moves to dismiss the complaint based upon plaintiff's alleged spoliation of evidence, to wit, a photograph which she took of the area where she fell following her dismissal from the hospital. The City moves for summary judgment in its favor on the ground that the alleged defect was trivial, and also on the basis of spoliation of evidence. The City adopts the factual and legal arguments presented by Pena. The motions are opposed by plaintiff.

Motion by Pena

Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner (*see Hausser v Giunta*, 88 NY2d 449, 452–453 [1996]). "However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk" *(Staruch v 1328 Broadway Owners, LLC*, 111 AD3d 698, 698 [2d Dept 2013]; *see Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012]; *Romano v Leger*, 72 AD3d 1059 [2d Dept 2010]).

"Administrative Code of the City of New York § 7–210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner" (*Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921, 922 [2d Dept 2012]; *see Vucetovic v Epsom Downs, Inc*., 10 NY3d 517 [2008]).

However, this liability shifting provision does not apply to "one-, two-or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of City of N.Y. § 7–210[b]; *see Meyer v City of New York*, 114 AD3d 734 [2d Dept 2014]; *Velez v City of New York*, 97 AD3d 813 [2d Dept 2012]; *Moreno v Shanker*, 93 AD3d 829 [2d Dept 2012]). "The purpose of the exception ... is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" (*Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010]; *see Medina v City of New York*, 120 AD3d 1398, 1399 [2d Dept 2014]; *Howard v City of New York*, 95 AD3d 1276, 1277 [2d Dept 2012]). Legislative enactments in derogation of the common law which create liability where none previously existed must be strictly construed (*see Vucetovic v Epsom Downs, Inc*., 10 NY3d at 521).

The use of a sidewalk as a driveway "constitutes a special use" (*Katz v City of New York*, 18 AD3d 818, 819 [2d Dept 2005]; *see Nunez v City of New York*, 41 AD3d 677, 678 [2d Dept 2007]; *Breger v City of New York*, 297 AD2d 770, 771 [2d Dept 2002]). Where the defect which caused the accident is "adjacent" to a driveway, the Appellate Division, Second Department has dismissed causes of action against an abutting landowner on the ground that there was no evidence that the driveway contributed to the defective condition (*see Ivanyushkina v City of New York*, 300 AD2d 544, 545 [2d Dept 2002]; *Benenati v City of New York*, 282 AD2d 418, 419 [2d Dept 2001]; *Winberry v City of New York*, 257 AD2d 618, 619 [2d Dept 1999]). However, where the defect occurs in a part of the sidewalk which is used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did "nothing to either create the defective condition or cause the condition through" the special use of the property as a driveway (*Breger v City of New York*, *supra*, 297 AD2d at 771). Here, Pena failed to establish, prima facie, that the defect did not arise as a result of his special use of the sidewalk as a driveway (*see generally Campos v Midway Cabinets, Inc*., 51 AD3d 843 [2d Dept 2008]; *Adorno v Carty*, 23 AD3d 590 [2d Dept 2005]; *Katz v City of New York*, 18 AD3d 818 [2d Dept 2005]). Plaintiff testified that she fell "in the entry to the driveway." One of the two photographs submitted by Pena depicts a cracked driveway entry. Cracks adjacent to the raised portion of the sidewalk indicate that the weight of traffic from the driveway may have been a concurrent cause of the accident (*see Karr v City of New York*, 161 AD2d 449, 450 [1st Dept 1990]). On a motion for summary judgment, the court should view the evidence in the light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence (McKinney's CPLR 3212(b)).

Notably, there was evidence in the record, including plaintiff's testimony, regarding her intoxication at the time of the subject accident. Resolution of the issue of whether and to what extent plaintiff's condition contributed to his accident is a question of fact (see

Johnson v Ann-Gur Realty Corp., 117 AD3d 522 [1st Dept 2014]; *Ruiz v 30 Real Estate Corp*., 47 AD3d 432 [1st Dept.2008]; *compare McNally v Sabban*, 32 AD3d 340 [1st Dept.2006]). Similarly, any inconsistencies in plaintiff's testimony regarding where she actually fell present credibility issues for a trier of fact *(see e.g. Hagensen v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, PC*, 108 AD3d 410, 411 [1st Dept.2013]).

The branch of the motion which is to dismiss the complaint on the ground of spoliated evidence, is granted to the extent that defendant is entitled to an adverse inference charge at trial. Under the common-law doctrine of spoliation, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (*Pennachio v Costco Wholesale Corp*., 119 AD3d 662, 663-64 [2d Dept 2014]; *Jennings v Orange Regional Med. Ctr*., 102 AD3d 654, 655-56 [2d Dept 2013]; *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007] [internal quotation marks omitted]; *see Coleman v Putnam Hosp. Ctr*., 74 AD3d 1009, 1011 [2d Dept 2010]). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]). Precluding a party from presenting evidence at trial is also a drastic sanction (*see Light v Light*, 64 AD3d 633, 634 [2d Dept 2009]), which generally requires a showing that a party's lack of cooperation with discovery was willful, deliberate, or contumacious (*see Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.*, 24 AD3d 742 [2d Dept 2005]). Less severe sanctions for spoliation of evidence are appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case (*see Barone v City of New York*, 52 AD3d 630, 631 [2d Dept 2008]; *Iannucci v Rose*, 8 AD3d at 438).

Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes "the sole means" by which the defendant can establish its defense (*Alleva v United Parcel Serv., Inc*., 112 AD3d 543, 544 [1st Dept 2013]), or where the defense was otherwise "fatally compromised" (*Jackson v Whitson's Food Corp*., 130 AD3d 461, 463 [1st Dept 2015]), or defendant is rendered "prejudicially bereft" of its ability to defend as a result of the spoliation (*Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013] [internal quotation marks omitted]). Here, the record does not demonstrate that defendants have been left " 'prejudicially bereft' " of defending themselves against those claims brought against them by plaintiff (*Fossing v Townsend Manor Inn, Inc*., 72 AD3d 884, 885 [2d Dept 2010], *quoting Weber v Harley–Davidson Motor Co., Inc*., 58 AD3d 719, 722 [2d Dept 2009]). Although plaintiff and or her counsel readily admitted that she disposed of the photograph which she took depicting the area where she fell, defendant may defend their case with, inter alia, the photographs of the current condition of the sidewalk which, according

to Pena, accurately depict the condition at the time of plaintiff's accident (see *Vasquez v Soriano*, 106 AD3d 545, 545 [1st Dept 2013]; *Alleva v United Parcel Serv., Inc.*, 102 AD3d 573, 574 [1st Dept. 2013]). Thus, under the circumstances of this case, an appropriate sanction would be to direct that a negative inference charge be given at trial with respect to the unavailable photographs (see *Jennings v Orange Regional Med. Ctr*., 102 AD3d 654, 656 [2d Dept 2013]; *Mendez v La Guacatala, Inc*., 95 AD3d 1084, 1085 [2d Dept 2012]; *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814, 816 [2d Dept 2010]; *Barone v City of New York*, 52 AD3d at 631).

Accordingly, the motion by Pena for summary judgment dismissing the complaint is denied.

Motion by the City

The motion by the City for summary dismissal of the complaint on the ground that the defect in the sidewalk was trivial and therefore not actionable, is denied. "The issue of whether a dangerous condition exists on real property depends on the particular facts and circumstances of each case, and generally presents a question of fact for the jury" (*Bolloli v Waldbaum, Inc*., 71 AD3d 618, 618 [2d Dept 2010], *citing Hahn v Wilhelm*, 54 AD3d 896, 898 [2d Dept 2008]; *see Trincere v County of Suffolk*, 90 NY2d 976 [1997]). However, injuries resulting from trivial defects are not actionable (*see Hahn v Wilhelm*, 54 AD3d at 896; *Portanova v Kantlis*, 39 AD3d 731, 732 [2d Dept 2007]; *Herring v Lefrak Org*., 32 AD3d 900 [2d Dept 2006]).

In determining whether a defect is trivial, a court must take into account "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Bolloli v Waldbaum, Inc*., 71 AD3d 618, 618-19 [2d Dept 2010]*, quoting Trincere v. County of Suffolk*, 90 NY2d at 978; *see Boxer v Metropolitan Transp. Auth*., 52 AD3d 447, 448 [2d Dept 2008]; *Maxson v Brentwood Union Free School Dist*., 31 AD3d 506, 507 [2d Dept 2006]; *Fairchild v J. Crew Group, Inc*., 21 AD3d 523, 524 [2d Dept 2005]; *Corrado v City of New York*, 6 AD3d 380 [2d Dept 2004]). In considering the various factors, the Court of Appeals has made it clear that "there 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" (*Trincere v County of Suffolk*, 90 NY2d at 977), and that "a mechanistic disposition of a case based exclusively on the dimension of the ... defect is unacceptable" (id. at 977–978).

In support of their motion for summary judgment, the City failed to make a prima facie showing that the alleged defective condition was trivial as a matter of law and, thus, not actionable . The deposition testimony of the plaintiff, as well the two photographs of the area where the plaintiff fell, are insufficient to demonstrate, as a matter of law, that the alleged

defect in the driveway/sidewalk was trivial and, therefore, not actionable (*see Bolloli v Waldbaum, Inc*., *supra; Serano v New York City Hous. Auth*., 66 AD3d 867 [2d Dept 2009]; *Ricker v Board of Educ. of Town of Hyde Park*, 61 AD3d 735 [2d Dept 2009]).

Conclusion

The motion by Pena for summary judgment in his favor is denied.

The motion by the City for summary judgment in its favor is denied.

Dated: October 30, 2018

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ERNEST F. HART, J.S.C.