Laureano v Melrose Site D-1 Houses, Inc
2019 NY Slip Op 30796(U)
February 11, 2019
Supreme Court, Bronx County
Docket Number: 301463/2015
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 12

TARSILA LAUREANO,

Plaintiff,

-against-

MELROSE SITE D-1 HOUSES, INC,

Defendant.

DECISION AND ORDER

Index No. 301463/2015

The following papers, numbered 1-3 were considered on the motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion and annexed Exhibits and Affidavits	1
Answering Affidavits and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion for summary judgment is decided as follows:

Tarsila Laureano (plaintiff) commenced this action to recover damages for injuries she sustained on October 15, 2013, when she tripped and fell on the sidewalk in front of 225 East 149th Street in Bronx County, which is owned by defendant Melrose Site D-1 Houses, Inc.[1] Defendant moves for summary judgment pursuant to CPLR §3212 and for an order to dismiss plaintiff's complaint on the grounds that the alleged defect upon which plaintiff tripped is trivial and defendant did not have actual or constructive notice of the defect. Defendant contends that since plaintiff was unable to identify what caused her to trip, because she did not see the alleged condition either before or after the accident, the alleged condition is therefore trivial. Defendant further contends that the photographs reflect only a slightly elevated piece of sidewalk which is physically insignificant.

[1] The summons and complaint were amended to reflect the correct address of 225 East 149th Street.

In opposition, plaintiff asserts that defendant fails to satisfy its prima facie burden by demonstrating that the defect was de minimus. Specifically, plaintiff avers that defendant offers no measurements or expert opinions in support of its motion and the photographs themselves. Plaintiff further avers that the testimony of its property manager, Miriam Valette, demonstrates that such defect is not trivial since she testified that she would have had a handyman inspect the sidewalk and then requisition a purchase order to hire a contractor to repair it. Plaintiff also maintains that defendant failed to establish its entitlement to summary judgment based upon its lack of actual or constructive notice.

It is well established that the proponent of a summary judgment motion must make a prima facie case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992], citing *Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]). The court's role is "issue-finding, rather than issue determination" (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

"[O]rdinarily a plaintiff's failure to identify what it was that caused her to fall invites dismissal of the underlying cause of action because the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007], quoting *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570 [1st Dept 2003] [internal quotations omitted]). Here, however, plaintiff testified at her deposition through a Spanish interpreter, that "some kind of abnormal level on the sidewalk" caused her to fall (Defendant's Exh. D at 35) and that she felt that she tripped "against or with something" (Defendant's Exh. D at 36). She was able to identify the sidewalk where she was walking when the accident occurred (Defendant's Exh. D at 53). Taken together, plaintiff's testimony would be

a sufficient nexus between the defective condition in the sidewalk and the circumstances of her fall to establish causation (*Id.* at 131).

A defendant seeking dismissal based on a trivial defect must demonstrate that "the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses" (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). The court must look at the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v. County of Suffolk*, 90 NY2d 976, 978 [1997] [internal citation omitted]).

Here, defendant does not proffer evidence to show that the defect was trivial and not actionable, such as expert testimony or a report from an expert examining the alleged defect, nor does defendant proffer evidence of the height differential in the sidewalk. Defendant's reliance on the photographs and the deposition testimony fail to support a finding of triviality as a matter of law (*Hutchinson*, 26 NY3d at 83). Further, the fact that Ms. Valette would have taken remedial action for the unleveled sidewalk supports the assertion that the defect is not trivial. Summary judgment should not be granted on the basis of a "mechanistic disposition of a case based on exclusivity on the dimension[s] of the . . . defect" (*Trincere* , 90 NY2d 976 at 977-978) or "in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" (*Hutchinson*, 26 NY3d at 84).

A party moving for summary judgment in a trip and fall action must demonstrate that it did not create or have actual or constructive notice of the dangerous condition (*see Briggs v. Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dep't 2013]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dep't 2011] [internal citations omitted]). Notably, defendant fails to produce evidence that any inspection of the exterior had been done. Ms. Valette testified that there was no written inspection schedule for the exterior and none of the staff were responsible for regularly inspecting the exterior (Defendant's Exh. D at 31). Although there is no evidence showing that defendant affirmatively created the condition in the sidewalk, defendant failed to meet its burden with regard to

constructive notice (*see Sada v. August Wilson Theater*, 140 AD3d 574 [1st Dep't 2016]). A jury could infer from the photographs that the defective condition existed for such a length of time for the defendant to have discovered it and have time to repair it (*Flanders v Sedgwick Ave. Assoc., LLC*, 156 AD3d 504 [1st Dept 2017]).

Defendant's failure to meet its prima facie burden on summary judgment warrants denial of the motion regardless of the sufficiency of plaintiff's opposition (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED, that defendant shall serve a copy of this order with notice of entry within 45 days.

This constitutes the decision and order of this court.

Dated: February 11, 2019

Robert T. Johnson, J.S.C.