Bono v Middle Country Cent. Sch. Dist.
2019 NY Slip Op 33045(U)
October 15, 2019
Supreme Court, Suffolk County
Docket Number: 03283/2016
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Patricia Bono,

Plaintiff,

-against-

Middle Country Central School District,

Defendant.

Motion Sequence No.: 001; MG; CD
Motion Date: 12/19/18
Submitted: 5/8/19

Index No.: 03283/2016

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Clerk of the Court

Upon the following papers numbered 1 to 20 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 - 23; Replying Affidavits and supporting papers, 19 - 20; it is

ORDERED that the motion by defendant Middle Country School District for summary judgment dismissing the complaint is granted.

Plaintiff Patricia Bono commenced this action to recover damages for injuries she allegedly sustained on May 4, 2015, when she tripped and fell on a concrete sidewalk while walking toward the auditorium entrance at the Newfield High School, which is part of defendant Middle Country Center School District (hereinafter the School District). The complaint alleges that the School

District was negligent and reckless in allowing a defective and dangerous condition to exist on the premises, and in failing to warn of such condition. By her bill of particulars, plaintiff alleges, inter alia, that the proximate cause of her accident was a "broken and defective" sidewalk "in the vicinity of the auditorium," and that the School District had actual or constructive notice of such condition. She further alleges the School District was negligent, among other things, in allowing a dangerous and defective condition to exist on the sidewalk, in failing to repair such condition, and in failing to warn of such condition.

The School District now moves for summary judgment dismissing the complaint, arguing that there is no credible evidence that a defective condition existed on the sidewalk, or that it had constructive or actual notice of such defect. It further asserts that the nature of the defect was trivial and non-actionable, and that the sole proximate cause of plaintiff's injury was her own misstep. In support of the motion, the School District submits copies of the pleadings, the bill of particulars, photographs of the sidewalk, transcripts of plaintiff's Municipal Law § 50-h hearing and transcripts of the parties' deposition testimony.

Plaintiff opposes the motion, arguing that the School District failed to make a prima facie showing that the alleged defective condition on the sidewalk was trivial as a matter of law, and that questions of fact exist whether the School District was on notice of the alleged defect. Plaintiff further argues that her fall was due to a shallow depression and the uneven surface, as well as the presence of small rocks and loose pieces of concrete, on the sidewalk. Plaintiff's submissions in opposition include photographs of the sidewalk, and affidavits of plaintiff, her daughter, and Robert Fuchs.

In reply, the School District argues, inter alia, that plaintiff's self-serving affidavit changing her testimony as to the accident's cause cannot be considered and is insufficient to raise a triable issue of fact, and that plaintiff's daughter's affidavit consists of hearsay statements from the mother is another attempt to contradict prior sworn testimony. In addition, the School District argues that inasmuch as plaintiff's expert affidavit was not based on personal knowledge of the premises' condition, and did not consider plaintiff's testimony as to the cause of her fall, the affidavit should be rejected.

At the Municipal Law § 50-h hearing, plaintiff testified that on the incident date she walked on the sidewalk toward the auditorium doors at Newfield High School while wearing shoes with a heel height of "about two to three inches" and carrying a purse. She testified that nothing obstructed her view and that there was sufficient daylight for her to see where she walked. Plaintiff testified that she walked on the sidewalk closest to the side of the building, just past the handicapped cutout, when her right foot rolled on a pebble or rock and she fell to the ground. Plaintiff testified that as she walked she looked straight ahead and did not see the ground prior to her fall. She testified that after she fell, she observed some "gravel, rocks," and a rusty safety pin, but that she was unable to identify the rock she fell on. She testified that after she fell, her husband and daughter came outside. Plaintiff testified that when her husband asked her how she fell, she replied, "My foot rolled over on a rock or pebble and I just went down." She also testified that after she fell both her daughter and husband took photographs of the sidewalk, but that she was not present at the time they were taken.

When shown the photographs taken by her daughter, plaintiff testified that she was unable to identify what was depicted in photograph marked as exhibit E, and that she believed the photograph marked exhibit F showed the area in which she fell. When looking at the photographs taken by her husband, plaintiff testified that she could not identify from those photographs the area in which she fell.

Similarly, at her examination before trial, plaintiff testified that as she walked on the sidewalk at Newfield High School looking forward, her right foot rolled to the side and she fell forward onto the ground. She testified that a "rock, rocks on the sidewalk" caused her to fall. She explained, "Well, I knew I stepped on something when my foot rolled. I didn't know it was a rock until I was on the ground." Plaintiff further testified that as she was on the ground her family came over to her, but that she did not have any conversation with them about how she fell. She testified that prior to this accident, she did not observe any crumbled area of concrete or pebbles in that area, and that she never made any complaints to the school about the area.

At his deposition before trial, John Sommer testified that on the accident date he was employed by Summit Security as a security officer and was assigned to Newfield High School. He testified that he did not see plaintiff fall, but that he observed her lying on her left side on the ground afterward. Sommer testified that he asked her how she was and she replied that she fell. He testified that he asked plaintiff if anyone was with her, and that he assisted her in locating her family members. Sommer also testified that when plaintiff's daughter came outside she stated that her mom already fell and injured her other arm while wearing the same shoes, and that she had told her mom not to wear those shoes anymore. He testified that he prepared an incident report. Sommer testified that when plaintiff was on the ground, she was approximately five to ten feet past the handicapped apron of the sidewalk and that the handicapped apron portion was a little bit uneven.

In his affidavit, Robert Fuchs avers that he is a forensic engineer, and that he reviewed the pleadings, photographs, and deposition testimony related to plaintiff's accident. Fuchs avers that plaintiff fell as a result of stepping into a depression on the walkway where concrete was cracked, broken and loose, and that due to the elevation change coupled with plaintiff stepping onto loose pieces of stone, plaintiff was caused to lose her balance and fall at the incident location. Fuchs further states that industry standards prescribe that abrupt changes in elevation in excess of ¼ to ½ inch should be avoided for walkways. He concludes that the abrupt differences in elevation and the loose condition of the pavement were surface defects that proximately caused plaintiff's injury.

In her affidavit, plaintiff avers that on the accident date she walked on the sidewalk outside the auditorium when she stepped into "an unseen shallow depression in the cement that contained loose rocks," and that as a result her foot rolled, she lost her balance and fell. Plaintiff further avers that the photograph that her daughter took, which is attached to her affidavit, accurately depicts the condition of the sidewalk, and that the photographs she was shown at the hearing were too dark for her to be sure of what they showed.

In her affidavit, Michelle Bono avers that on the accident date she came outside the auditorium and saw her mother on the cement walkway, and that she observed the walkway

immediately next to where plaintiff fell was broken and damaged. She further avers that her mother told her that she stepped into the broken walkway and lost her balance, which caused her to fall.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v. Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v. Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]) ***Doize v. Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, *supra*; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v. Henriquez,*** 100 NY2d 139, 760 NYS2d 741 [2003]; ***Frank v. JS Hempstead Realty, LLC,*** 136 AD3d 742, 24 NYS3d 714 [2d Dept. 2015]; ***Guzman v. State of New York,*** 129 AD3d 775, 10 NYS3d 598 [2d Dept. 2015]). Property owners, however, are not insurers of the safety of people on the premises (*see* ***Nallan v. Helmsley-Spear, Inc.,*** 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v. Seaman's Furniture Corp.,*** 270 AD2d 451, 705 NYS2d 291 [2d Dept. 2000]). To establish a prima facie case of negligence in a premises liability action, a plaintiff must establish that the defendant owed him or her a duty of care, that a dangerous or defective condition on the premises caused his or her injuries, and that the defendant owner or possessor created the condition had actual or constructive notice of it (*see* ***Sermos v. Gruppuso,*** 95 AD3d 985, 944 NYS2d 245 [2d Dept. 2012]; ***Starling v. Suffolk Cty. Water Auth.,*** 63 AD3d 822, 881 NYS2d 149 [2d Dept. 2009]). A defendant moving for summary judgment must show, prima facie, that it did not create the dangerous or defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discover and remedy it (*see* ***McElhiney v. Half Hollow Hills Cent. Sch. Dist.,*** 158 AD3d 615, 70 NYS3d 237 [2d Dept. 2018]; ***Schwartz v. Gold Coast Rest. Corp.,*** 139

AD3d 696, 31 NYS3d 535 [2d Dept. 2016]). Where a plaintiff is unable to give a specific reason for the cause of an alleged accident he or she may not recover based on pure speculation (*see* ***Hunt v Meyers***, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; ***Visconti v 110 Huntington Assoc.***, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept 1994]). Moreover, the mere happening of accident does not establish liability of a defendant for negligence (*see* ***Scavelli v Carmel***, 131 AD3d 688, 15 NYS2d 214 [2d Dept 2015]; ***Foley v Golub Corp***, 252 AD2d 905, 676 NYS2d 308 [3d Dept 1999]). Absent evidence that defendant's alleged negligence was a proximate cause of her accident, there can be no liability (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

While, in general, 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 a jury to determine, not every determination poses a jury question (***Hymanson v A.L.L. Assoc.***, 300 AD2d 358, 751 NYS2d 756 [2d Dept 2002]; *see also* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]). A property owner may not be held liable in damages for trivial defects on a sidewalk, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub a toe, or trip (***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]; ***Marinaccio v LeChambord Rest.***, 246 AD2d 514, 667 NYS2d 395 [2d Dept 1998]). A court may find a defect trivial upon an examination of all the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury (*see* ***Trincere v County of Suffolk***, *supra*; ***Mendez v De Milo***, 17 AD3d 328, 792 NYS2d 600 [2d Dept 2005]). "A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a person" (***Hutchinson v. Sheridan Hill House Corp.,*** 26 NY3d 66, 78, 19 NYS3d 802 [2015]) "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" ***(Schenpanski v. Promise Deli, Inc.***, 88 AD3d 982, 984, 931 NYS2d 650 [2d Dept 2011]; *see also* ***Maiello v. Eastchester Union Free School Dist.***, 8 AD3d 536, 778 NYS2d 716 [2d Dept 2004]). However, a defendant is not entitled to summary judgment where the dimensions of the alleged defect are unknown and the photographs and descriptions do not conclusively establish triviality (***Hutchinson v. Sheridan Hill House Corp.,*** 26 NY3d at 84).

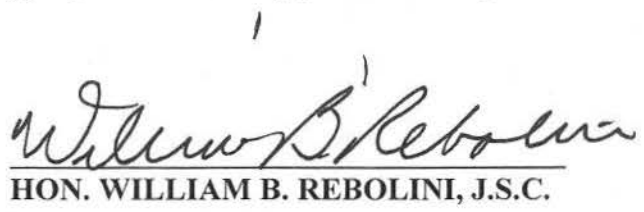
Here, the School District has established its prima facie entitlement to judgment as a matter of law by demonstrating that the stone or pebble upon which plaintiff stepped was a trivial, non-actionable defect (*see* ***Trincere v County of Suffolk***, *supra*). Significantly, plaintiff's testimony revealed that she was wearing shoes with a heel height of two-to-three inches when her foot "rolled over on a rock or pebble" and caused her to fall. When asked at her deposition, plaintiff was unable to identify exactly which pebble or stone she may have stepped upon. Defendant further established it lacked notice of the alleged dangerous condition by submitting deposition testimony there have been no prior incidents, injuries, or complaints in connection with the subject walkway (*see* ***Shiles v Carillon Nursing & Rehabilitation Ctr., LLC***, 54 AD3d 746, 864 NYS2d 439 [2d Dept 2008]; ***Matone v DGM Partners Rye Ltd. Partnership***, 6 AD3d 585, 774 NYS2d 814 [2d Dept 2004]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact as to whether the sidewalk was dangerous and defective and not trivial as a matter of law. Plaintiff's self-serving affidavit submitted in opposition, wherein she states she stepped into "an unseen shallow depression in the cement that contained loose rocks," is insufficient to defeat summary judgment, and is regarded as an attempt to raise a questionable factual issue so as to avoid the consequences of her earlier testimony in which she testified that she tripped and fell when her foot stepped on either a stone or pebble and caused her foot to roll (*see* ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; ***Krohn v Melanson***, 298 AD2d 510, 748 NYS2d 658 [2d Dept 2002]; ***Capraro v Staten Is. Univ. Hosp.***, 245 AD2d 256, 664 NYS2d 826 [2d Dept 1997]). Additionally, plaintiff's affidavit contradicts her earlier testimony in which she was unable to identify what was depicted in photographs shown her, yet she now avers that the photographs are accurate depictions of the sidewalk location where she fell.

Likewise, Michelle Bono's affidavit, which states that plaintiff told her that "she had stepped into the broken walkway, lost her balance and fell," is tailored to meet a desired result, contradicts plaintiff's earlier testimony, and is hearsay. This hearsay statement is the only evidence that the alleged broken sidewalk contributed to or caused plaintiff's fall and may not be considered in support of plaintiff's opposition (*see* ***Flynn v Bulldogs Run Corp.***, 171 AD3d 1136, 100 NYS3d 35 [2d Dept 2019]; ***Alpha Investors, LLC v McGoldrick***, 151 AD3d 800, 59 NYS3d 33 [2d Dept 2017]). Moreover, even if the court were to consider it, the statement is an another attempt to contradict prior sworn testimony. At the Municipal Law § 50-h hearing, plaintiff's testimony revealed that she did not tell her daughter how she fell; rather, her daughter was present when plaintiff spoke to her husband and told him that she fell because she stepped on a rock and rolled her foot. At plaintiff's deposition, however, she testified that she did not tell either her husband or daughter why she fell. Rather than offer any evidence or triable issue of fact as to any other condition that caused the accident, plaintiff now simply speculates that her fall was due to stepping into a broken walkway or "unseen shallow depression," as opposed to a misstep or loss of balance (*see* ***Grand v Won Hee Lee***, 171 AD3d 877, 97 NYS3d 230 [2d Dept 2019]; ***Ash v City of New York***, 109 AD3d 854, 972 NYS2d 594 [2d Dept 2013]).

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: 10/15/2019



HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION