

Gibson v Wyckoff Hgts. Med. Ctr.

2019 NY Slip Op 33199(U)

October 16, 2019

Supreme Court, Kings County

Docket Number: 509993/2017

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of October 2019.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

ELEATHA GIBSON,

Plaintiff,

Index No.: 509993/2017

DECISION & ORDER

-against-

WYCKOFF HEIGHTS MEDICAL CENTER

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>88-96</u>
Opposing Affidavits (Affirmations) _____	<u>99-106</u>
Reply Affidavits (Affirmations) _____	<u>109-110</u>

Introduction

Defendant, Wyckoff Heights Medical Center, moves by notice of motion, sequence number five, pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint. Plaintiff, Eleatha Gibson, opposes this application.

Background

Plaintiff allegedly sustained personal injuries May 23, 2014, when she tripped and fell on the sidewalk in front of Wyckoff Heights Medical Center, located at 374 Stockholm Street, Brooklyn, New York. Plaintiff testified at an examination before trial on January 7, 2019 (*see* Notice of Motion, Exhibit 3). Plaintiff testified that after picking her grandchild up from school, she went to an appointment at defendant medical office. In the afternoon, she went to a food truck parked outside of the premises to purchase lunch. After completing her purchase, she turned around and fell on a sidewalk defect. Plaintiff first described the area as a “crack in the street” (*see id.* at 19). However, she later described the defect as “a hole in the cement” approximately four inches by five inches in size (*see id.* at 24). Six photographs of the sidewalk in question were marked at the deposition as Defendant’s Exhibit 1.¹

Q. What is this photograph a picture of, or what does this photograph resemble?

A. Where I fell at, and the chip of the corner of the cement was, you know, up. I don’t know, I guess my foot went under there, I don’t know. I don’t know how I fell, I tell you the truth, but I was on the ground, I fell. When I got there, I knew I was like this, I fell straight (indicating).

(*id.* at 40).

The photograph shows a hole in the corner of one sidewalk flag, where it meets the surrounding three flags (*see* Exhibit 6).

¹ This Court notes that only one photograph is annexed the defendant’s motion as exhibit six.

Discussion

Summary Judgment

“[T]he 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 demonstrate absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions". To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form". Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts"... "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party". "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist". Accordingly, "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned". "[W]here credibility determinations are required, summary judgment must be denied" [internal citations omitted].

(*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]).

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965

N.E.2d 240 [2012]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). “A motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Chimbo v. Bolivar*, 142 A.D.3d 944, 37 N.Y.S.3d 339 [2 Dept., 2016], quoting *Ruiz v. Griffin*, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2 Dept., 2010]).

“Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation” (*Kontorinakis v. 27-10 30th Realty, LLC*, 172 A.D.3d 835, 101 N.Y.S.3d 50 [2 Dept., 2019], quoting *Mitgang v. PJ Venture HG, LLC*, 126 A.D.3d 863, 5 N.Y.S.3d 302 [2 Dept., 2015]; *see also Kozik v. Sherland & Farrington, Inc.*, 173 A.D.3d 994, 103 N.Y.S.3d 128 [2 Dept., 2019]). “Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any

determination by the trier of fact as to causation would be based upon sheer conjecture”

(*Mitgang v. PJ Venture HG, LLC*, 126 A.D.3d 863, *supra*, quoting *Dennis v.*

Lakhani, 102 A.D.3d 651, 958 N.Y.S.2d 170 [2 Dept., 2013]).

A plaintiff's inability to testify as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence (*see Patrikis v. Arniotis*, 129 A.D.3d 928, 930, 12 N.Y.S.3d 174; *Costantino v. Webel*, 57 A.D.3d 472, 472, 869 N.Y.S.2d 179; *Cormack v. Cross Sound Ferry Servs.*, 273 A.D.2d 433, 433, 710 N.Y.S.2d 380). “However, the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation” (*Thomas v. New York City Tr. Auth.*, 194 A.D.2d 663, 664, 599 N.Y.S.2d 127; *see Gayle v. City of New York*, 92 N.Y.2d 936, 937, 680 N.Y.S.2d 900, 703 N.E.2d 758; *Simion v. Franklin Ctr. for Rehabilitation & Nursing, Inc.*, 157 A.D.3d 738, 739, 69 N.Y.S.3d 64).

(*Grande v. Won Hee Lee*, 171 A.D.3d 877, 97 N.Y.S.3d 230 [2 Dept., 2019]).

In the instant case, defendant failed to meet their prima facie burden and establish entitlement to summary judgment as a matter of law. Here, defendant set forth no arguments with respect to constructive or actual notice. Rather, it argues entitlement to summary judgment solely on the basis that plaintiff cannot identify the cause of her fall. Although plaintiff testified “I don’t know how I fell, I tell you the truth, but I was on the ground”, she also described the defect more than once in her prior testimony as a “crack” or a “hole” and marked photographs of the defect which clearly show a hole in the sidewalk flag. Contrary to defendant’s contentions, plaintiff was able to sufficiently testify as to how her accident occurred and a determination as to causation would be far

from "sheer conjecture". The evidence provided sufficiently demonstrates that plaintiff fell when she tripped on a hole in the sidewalk.

Inasmuch as defendant failed to meet its burden, this court need not address the sufficiency of plaintiff's opposition papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, *supra*).

Conclusion

Accordingly, the defendant's motion for summary judgment is denied. The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

**Lara J. Genovesi
J.S.C.**

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