Abadariki v Paris
2019 NY Slip Op 34949(U)
June 11, 2020
Supreme Court, Kings County
Docket Number: Index No. 506193/2018
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11 day of JUNE, 2020.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

----------X

MORIYIKE ABADARIKI,

Plaintiff,

Index No.: 506193/2018

-against-

Decision and Order

ANDREW PARIS and THE BROOKLYN UNION GAS COMPANY D/B/A/ NATIONAL GRID NY A/K/A KEYSPAN ENERGY DELIVERY N.Y.C.,

Defendants.

----------X

After oral argument being held on June 10, 2020 and a review of the submissions herein, the Court finds as follows:

Defendant, THE BROOKLYN UNION GAS COMPANY, (hereinafter "PROSPECT"), move pursuant to C.P.L.R. 3212, for an Order granting Defendants summary judgment and dismissing the Complaint of the Plaintiff against upon the grounds that the alleged sidewalk "defect" over which the plaintiff tripped is as a matter of law too trivial to be actionable. (MS#1). Plaintiff opposes the same and cross-moves for summary Judgment. (MS#2).

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id*.

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 (see T*rincere v. County of Suffolk*, 90 N.Y.2d 976, 665 NYS2d 615, 688 NE2d 489; *Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Mishaan v. Tobias,* 32 AD3d 1000, 821 NYS2d 640; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624). However, injuries resulting from trivial defects are not actionable, and in determining whether a defect is trivial, a court must take account 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" (*Trincere v. County of Suffolk*, 90 NY2d 976, 978, 665 NYS2d 615, 688 NE2d 489, *quoting Caldwell v. Village of Is. Park*, 304 NY 268, 107 NE2d 441; s*ee Portanova v. Kantlis*, 39 AD3d 731, 833 NYS2d 652; *Herring v. Lefrak Org.*, 32 AD3d 900, 821 NYS2d 624); *quoting Hahn v. Wilhelm*, 54 AD3d 896, 898, 865 NYS2d 240, 241 (2008). As stated by the Court of Appeals, "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" (T*rincere v County of Suffolk*, 90 NY2d at 977); *quoting Brenner v. Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767, 964 NYS2d 605 (2013).

In the present case, defendants contend the owner Mr. Paris testified that he measured the distance from the gas cap to the defect where plaintiff allegedly fell was it 25 inches. The court notes that all photographs attached to this motion do not contain any pictures with a ruler evidencing the actual width, depth, elevation, and irregularity of the crack. Based upon the pictures annexed the crack the plaintiff allegedly fell on clearly goes the whole way to the gas cap, creating a question of fact for the jury as to how the crack originated and whether it originated from the gas cap. Therefore, defendant's motion for summary judgement dismissing the complaint and all cross claims is hereby denied.

As to plaintiff's motion for summary judgment again, plaintiff's own testimony states that she slipped on snow at the time of the accident. This creates a question of fact as to what the defect on the sidewalk was, (i.e did the plaintiff trip on the alleged defective condition, or did the plaintiff slip on snow?). Therefore, the deposition testimony of the parties, and the photographs submitted all create issues of fact for a jury. See *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986).

Accordingly, defendant's Motion for Summary Judgment is hereby denied. (MS#1). Plaintiff's motion for summary Judgment is hereby denied, as questions of fact exist, (MS#2) for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: JUNE 11, 2019

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

JUN 11 2020

KINGS COUNTY CLERK
FILED
2020 JUN 25 AM 10:10