Fuentes v New MBF Mgt., LLC
2020 NY Slip Op 35459(U)
October 14, 2020
Supreme Court, Bronx County
Docket Number: Index No. 29511/2017E
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
---X **Index No. 29511/2017E**
Silvia Fuentes,

Plaintiff,

-against- DECISION & ORDER

New MBF Management, LLC,

Present:
Defendant. Hon. Julia I. Rodriguez
---X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion for summary judgment.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation	**3**

In the instant action, plaintiff alleges she was injured when she tripped and fell on a defect in the sidewalk abutting defendants' building.

Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that the alleged cause of plaintiff's fall: (1) constitutes an open and obvious condition and is non-actionable and (2) is based on a *de minimis* or trivial defect and is, therefore, non-actionable.

In support of summary judgment, defendant submitted, *inter alia,* plaintiff's deposition testimony, the deposition testimony and affidavit of Jose Vega and several photographs. At her deposition, plaintiff testified as follows: Plaintiff tripped and fell on the sidewalk in front of the building where she has resided for 19 years. She had observed the defect upon which she fell one to two years prior to her accident. Her accident occurred on April 10, 2017 at approximately 12:35-12:50 p.m. It had not rained that day and the sun was out. At the time of her accident, she was carrying two garbage bags which she was going to put in garbage containers. Prior to her fall, she did not see the defect which caused her to trip and fall because she was looking straight ahead and there were people in the general area which partially blocked her view. After she fell,

plaintiff looked to see what caused her to fall and saw the broken and uneven sidewalk. The sidewalk condition was an uneven condition with a hole between the higher and lower section, a few inches in length and width, and located in the center of the sidewalk. The hole between the higher and lower portions of the uneven condition was as deep as her index finger, approximately 2-3 inches. Due to construction being performed in the sidewalk area where garbage was normally placed, plaintiff was going to put the garbage in front of, and with the garbage from, the building next door.

At her deposition, plaintiff marked the area of the sidewalk on photographs presented to her by defense counsel. Those photographs were submitted by defendant. The photographs depict a white substance in the area of the sidewalk marked by plaintiff. The Court cannot determine the precise dimensions of this area from the photographs.

At his deposition, Jose Vega, the building's superintendent, testified as follows: He has been employed by defendant for 9 years and is responsible for cleaning, upkeep, maintenance and repair for interior and some exterior areas of the subject premises. Vega's practice was to inspect the sidewalk in the front of the building daily for cracks and uneven conditions. If he observed a hole or crack in the sidewalk, Vega would fill it with cement. Prior to plaintiff's accident, Vega had attempted to repair the uneven section of sidewalk marked on photos by plaintiff by placing white concrete in the area. After he placed the white cement at the location, he sent pictures of the area to defendant. Vega did not recall when he performed that repair. Vega testified that the height differential at that location at the time of plaintiff's accident was about 1 inch.

In opposition to summary judgment, plaintiff submitted, *inter alia,* her deposition testimony, discussed above, her affidavit with attached photographs, and the affidavit of Leo J. DeBodes. In her affidavit, plaintiff states that one side of the uneven condition which caused her to fall was approximately 1 inch higher than the other. Immediately prior to her accident, she was walking outside of her building toward the building next door to drop her garbage because construction was being performed on the sidewalk area where she normally threw out her garbage. She did not see the defective condition before her fall because she was looking straight

ahead, the people on the sidewalk were partially obstructing her view and there were a number of sidewalk defects in the area of the accident.

In his affidavit, Leo J. DeBobes states as follows: He is a NYS Dept. Of Labor certified safety consultant. He conducted an investigation into the cause of this accident and reviewed photographs, the bills of particulars, the deposition testimony and defendant's summary judgment motion. He did not perform a site inspection because the area where the accident occurred was repaired after the accident. DeBobes opines that the height differential of 1 inch in the area where plaintiff tripped and fell is a substantial defect and hazard pursuant to NYC Administrative Code §§19-152(a) and 19-152(a-1)(5). DeBobes presents that Section 19-152(a) defines a substantial defect to include: "4. A trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth." DeBobes also presents that, under Section 19-152(a-1)(5), a sidewalk hazard exists when there is a "vertical grade differential between adjacent sidewalk flags greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth." DeBobes also opined that the condition of the sidewalk area where plaintiff fell is considered to be a substantial defect under the New York City Department of Transportation's "Highway Rules." DeBobes concludes that the defective condition of the sidewalk is contrary to good and acceptable safety practices and constitutes a "camouflaged hazard, nuisance, trap and hidden snare."

To the extent that defendant argues in reply that it did not cause or create the alleged defective condition and that it had no actual or constructive knowledge of the condition, the Court notes that because defendant did not raise these arguments in its initial moving papers, it is improper to consider them in reply.

* * * * * * * * * *

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law.

Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Trincere v. County of Suffolk,* 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615 (1997). New York City Administrative Code § 7-210 provides that the owner(s) of all property, other than owner-occupied 1 to 3 family homes used solely for residential purposes, shall be liable for any injury proximately caused by the owner's failure to maintain the sidewalk in a reasonably safe condition. The affidavit of plaintiff's expert stating that the sidewalk defect constitutes a substantial defect and hazard, as well as plaintiff's deposition testimony that she tripped as she was walking, looking straight ahead, with many people around, raise factual questions as to whether the defect was trivial and/or open and obvious. *Narvaez v. 2914 Third Ave. Bronx, LLC,* 88 A.D.3d 500, 501, 930 N.Y.S.2d 561, 562 (1st Dept. 2011).

In any event, "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of plaintiff's comparative negligence." *Cupo v. Karfunkel,* 1 A.D.3d 48, 52, 767 N.Y.S.2d 40, 43 (2nd Dept. 2003). While an open and obvious condition negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition. *Francis v. 107-145 West 135th Street Associates, Ltd. Partnership,* 70 A.D.3d 599, 401, 895 N.Y.S.2d 400, 401 (1st Dept. 2010). Further, a plaintiff's awareness of a dangerous condition does not negate a duty to warn of the

hazard, but only goes to the issue of comparative negligence. *Farrugia v. 1440 Broadway Associates,* 163 A.D.3d 452, 454-455, 82 N.Y.S.3d 1, 4 (1st Dept. 2018).

Based upon the foregoing, defendant's motion for summary judgment, pursuant to CPLR 3212, is **denied**.

The Clerk is directed to enter Judgment.

Dated: Bronx, New York
October 14, 2020

Hon. Julia I. Rodriguez, J.S.C.