SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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DONTASIA DRUMMOND,

Plaintiff,

-against-

BROADWAY JUNCTION, LLC.,

Defendant.

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Index # 501209/2018

ORDER

HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on July 20, 2021.

Papers	Numbered
Notice of Motion and Affirmation	1&2 (Exh. A-M)
Affidavit/Affirmation in Opposition	3(Exh. A-F)
Replying Affirmation	4
Other [Memoranda of Law]	

Plaintiff moves for an order pursuant to CPLR 3212 granting plaintiff partial summary judgment on the issue of liability with respect to defendant's negligence. Defendant opposes plaintiff's motion on the grounds that the plaintiff fails to make a *prima facie* case for summary judgment; the motion is not supported by admissible evidence, and there are issues of fact.

First, this court will address the admissibility of the unsigned deposition transcripts of the plaintiff, submitted in support of plaintiff's motion for summary judgment. The court deems the unsigned deposition transcripts admissible. *See*, E.W. v. City of New York, 179 A.D.3d 747, 117 N.Y.S.3d 79 (2nd Dept., 2020), *citing*, David Chong Sun Lee, 106 A.D.3d 1044, 967 N.Y.S.2d 80 (2nd Dept., 2013).

Next this court will address the issue raised by defendant as to the inconsistent statements in plaintiff's medical records which plaintiff argues are inadmissible hearsay due to lack of certification pursuant to CPLR 4518. Specifically, defendant argues that plaintiff's motion for partial summary judgment must be denied due to genuine issues of material fact as to the location of the trip and fall accident alleged by the plaintiff. Defendant points to the plaintiff's deposition testimony as to how the accident occurred, i.e., "her foot getting caught

in a crack while walking on the sidewalk, versus the statement she provided while being treated at the hospital, where she states she was "running to the bus when she "tripped on a rock...". Defendant argues that on five separate occasions the plaintiff made prior inconsistent statements as to the location of the trip and fall when she informed the treating doctors that she fell in the street, and not on the sidewalk or driveway which is the alleged location of the defective condition as testified to by the plaintiff.

Notwithstanding, the plaintiff's inconsistent statements as to the location of the accident, the court finds that plaintiff's statements are inadmissible. In *Gomez v. Kitchen & Bath by Linda Burkhardt, Inc.*, 170 A.D.3d 967, 96 N.Y.S.3d 609 (2nd Dept., 2019), the court held that "the notations were not germane to the plaintiff's diagnosis or treatment and, at trial, would not be admissible for their truth under the business records exception to the hearsay rule." Also, *see, Grechko v. Maimomides Medical Center*, 188 A.D.3d 832, 134 N.Y.S.3d 435 (2nd Dept., 2020).

Partial Summary Judgment

This lawsuit seeks to recover damages for personal injuries allegedly sustained by the plaintiff, as a result of a trip and fall accident which occurred on June 1, 2017 due to an alleged defective portion of the sidewalk abutting the property known as 1835 East New York Avenue, Brooklyn, New York.

Plaintiff moves for partial summary judgment pursuant to CPLR 3212 on the issue of liability with respect to Broadway Junction's negligence in maintaining the sidewalk in violation of NYC Administrative Code Sections 7-210(a) and (b), 19-152(a)(4) and 19-152(a)(9)(i).

Administrative Code § 7-210, combined with section 19-152, imposes a nondelegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute. (*See, Collado v Cruz*, 81 AD3d 542 [1st Dept., 2011]; *Stein v. 1394 Hous. Corp.*, 31 Misc.3d 1224[A], 2011 NY Slip Op 50813[U] [Sup. Ct., NY Co., 2011].) Section 7-210 provides in pertinent part:

"a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.

"b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or

replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

It is well settled that in order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See,* Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material facts. The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See,* Gutt v. Bryan, *21 Misc.3d 1121(a), 873 N.Y.S.2d 511 (2nd Dept., 2008).* "The motion must be supported by an affidavit ...from a person having knowledge of the facts..." (CPLR§ 3212[b]). A party may also demonstrate *a prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence. *See,* Gutt v. Bryan, supra, *citing,* Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

In a trip and fall case, where there is no suggestion in the record that the defendant created the defective condition or had actual knowledge of it, the plaintiff must prove constructive notice. *See,* Lewis v. Metro. Transp. Auth., 99 A.D.2d 246 (1st Dept., 1984). "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *See,* Gordon v. Am. Museum of Natural History, 67 N.Y.2d 836 (1986). In the case at bar, plaintiff has submitted documentary evidence, i.e., Google Maps, to establish proof that existence of a visible and apparent defect or that the defect existed for a sufficient length of time in order for the defendant to discover and remedy it.

In opposition to plaintiff's motion for partial summary judgment on the issue of liability, the defendant has submitted an attorney affirmation arguing that there are issues of fact for a jury to determine at trial, as to how the accident occurred; the defect being trivial and whether the defect was open and obvious. While an attorney's affirmation may be of probative value and sufficient, notwithstanding his lack of personal knowledge, it must be based upon documentary evidence. *See,* Zuckerman v. City of New York, supra. The arguments raised in opposition as to the defect being trivial are not supported by evidence which raise a triable issue of fact. Unlike plaintiff, defendant has failed to submit proof as to the trivial nature of the defective sidewalk.

If a defendant were to move for dismissal of the complaint on the basis that the alleged defect is trivial, a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the effect or the surrounding circumstances do not increase the risks it poses must be established. Only then would the burden shift to plaintiff to establish an issue of fact." *See,* Bishop v. Pennsylvania Avenue Management, LLC., 183 A.D.3d 685, 123 N.Y.S.3d 685, *citing,* Hutchinson v. Sheridan Hill House

Corp., 26 N.Y.3d 66, 19 N.Y.S.3d 802. In determining whether a defect is trivial, the court must examine all of 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, Bishop v. Pennsylvania Avenue Management, LLC., supra.*

The defendant, Broadway Junction, LLC fails to establish and has submitted insufficient evidence to demonstrate that the condition of the sidewalk, where the plaintiff allegedly tripped and fell, was trivial as a matter of law and therefore not actionable; nor has defendant raised a triable issue of fact with sufficient documentary proof to negate plaintiff's documentary evidence, that the alleged defect was open and obvious.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability is hereby granted.

This constitutes the order of this Court.

Dated: Brooklyn, New York
November 19, 2021

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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