

Diggs v 543 Union Artists, LLC
2022 NY Slip Op 32958(U)
August 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 522005/2020
Judge: Richard J. Montelione
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At Part 99 of the Kings County Supreme Court of the State of New York, located at 360 Adams Street, Brooklyn, NY 11201 on the _____ day of _____ 2022.

AUG 31 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION and
ORDER**

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NEALIE DIGGS,

Plaintiff,
-against-

Index No.: 522005/2020
Motion Date:
Motion Cal. No.:
Mot. Seq. 1

543 UNION ARTISTS, LLC, 543 UNION STREET,
CONDOMINIUM, BOARD OF MANAGERS OF THE 543
UNION STREET CONDOMINIUM, CLAIREWARE POTTERY
LLC, IMMATERIAL INCORPORATED, ALEXANDRA
CHAVCHAVADZE, P.K. RAMANI, SIA JIA CHEN AND NYC
PROPERTY CARE LLC

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's notice of motion for summary judgment dated April 14, 2022 (MS#1) on the issue of liability against defendants 543 Union Street Condominium and Board of Managers of the 543 Union Street Condominium; Attorney Affirmation of Howard Schatz, affirmed on April 14, 2022; Exhibits A-G, inclusive of Statement of Material Facts and Affidavit of Adam Cassel, P.E., sworn to on April 14, 2022.....	38-47
Defendants 543 Union Street Condominium and Board of Managers' attorney affirmation in opposition, of David Neil, Esq., affirmed on April 19, 2022; Exhibit A.....	49-50
Plaintiff's attorney affirmation of Howard Schatz in reply, affirmed on May 3, 2022; Exhibits A-B.....	51-53

MONTELIONE, RICHARD J., J.

This action is for alleged personal injuries suffered as a result of a trip on a sidewalk on December 20, 2017 and was commenced by filing the summons and complaint on November 9, 2020. Plaintiff submits an affidavit from her engineer and moves for summary judgment on the basis there is no factual dispute that the sidewalk was defective because it had more than a 2" differential between the upper section of the sidewalk and the down slope of the sidewalk. Plaintiff does not provide the court with the differential as between the height of the two

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sidewalk flags which abut one another and are within the slope or the measurement of any gap between the flags. Plaintiff argues that (NYSCEF Doc.#39, ¶20):

The presence of opposing slopes (do) not comply with the requirements of §2-09(f)(4)(xi) of the DOT Highway Rules which requires that the longitudinal (running) slope of the sidewalk follow the same running slope as the undisturbed curb which (the engineer) measured to be 0.4 degrees. Thus, the 1.7-degree slope of the lifted flag and the 4.1-degree counter slope on the surface of the same flag which was ground-down do not follow the same profile as the 0.4-degree running slope along the remainder of the undisturbed walking surface of the sidewalk, thereby creating a trip hazard.

Plaintiff's expert opines that the entire flag is required to be replaced under New York City Department of Transportation (DOT) Highway Rules under §2-09(f)(4)(viii) and the repair otherwise does not conform to the requirements of §2-09(f)(4)(xi) that mandate the longitudinal (running) slope of the sidewalk to follow the same running slope as the undisturbed curb.

At plaintiff's deposition, she marked on a photograph with a red circle the area where she allegedly tripped on the sidewalk (NYSCEF Doc. #43, p. 18; LL 6-25, p. 19 LL 2-25, p. 20 LL 2-10).

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR.3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dept 1999); *Tassone v. Johannemam*, 232 A.D.2d 627, 628 (2d Dept 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dept 1964).

A real property owner, other than a one to three family home, must maintain a sidewalk in a reasonably safe condition. New York City Code § 7-210. Under New York City Code §19-152, duties and obligations of property owner with respect to sidewalks and lots, "5. improper slope, which shall mean (i) a flag that does not drain toward the curb and retains water, (ii) flag(s) that must be replaced to provide for adequate drainage or (iii) a cross slope exceeding established standards." Under New York City Code § 19-152:

For purposes of this subdivision, a hazard shall exist on any sidewalk where there is any of the following:

1. one or more sidewalk flags is missing or the sidewalk was never built;

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2. one or more sidewalk flag(s) is cracked to such an extent that one or more pieces of the flag(s) may be loosened or readily removed;
3. an undermined sidewalk flag below which there is a visible void;
4. a loose sidewalk flag that rocks or seesaws;
5. a vertical grade differential between adjacent sidewalk flags greater than or equal to one half inch or a sidewalk flag which contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth; or
6. cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition.

Under New York City, N.Y., Rules, Tit. 34, § 2-09 (viii), "All flags containing substantial defects shall be fully replaced. Patching of individual flags is not permitted." Under New York City, Rules, Tit. 34, § 2-09:

(5) *Substantial defects.* Any of the following conditions shall be considered a substantial defect.

- (i) One or more flags missing or sidewalk never built.
- (ii) One or more flag(s) cracked to such an extent that one or more pieces of the flag(s) may be loosened or readily removed.
- (iii) An undermined flag below which there is a visible void or a loose flag that rocks or seesaws.
- (iv) A trip hazard where the vertical differential between adjacent flags is greater than or equal to 1/2" or where a flag contains one or more surface defects of one inch or greater in all horizontal directions and is 1/2" or more in depth.
- (v) Improper slope, which shall mean (i) a flag that does not drain toward the curb and retains water, (ii) flag(s) that shall be replaced to provide for adequate drainage or (iii) a cross slope exceeding established standards.

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A slope in the sidewalk may constitute a dangerous condition. *See Pizzolorusso v. Metro Mech., LLC*, 205 A.D.3d 748, 168 N.Y.S.3d 103, 2022 N.Y. Slip Op. 03018, 2022 WL 1414563 (AD 2nd Dept 2022).

This case does not involve 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 (New York City, N.Y., Code § 19-152, New York City, N.Y., Code § 19-152), but rather the issue is whether the pitch of the slope from one sidewalk flag to another is defective and a trip hazard as a matter of law. As an initial matter, no court may defer to any expert as to the law. (*See Measom v. Greenwich & Perry St. Hous. Corp.*, 268 A.D.2d 156, 159, 712 N.Y.S.2d 1 [1st Dept. 2000], "(e)xpert testimony as to a legal conclusion is impermissible" *citing People v. Kirsh*, 176 A.D.2d 652, 653, 575 N.Y.S.2d 306, lv denied 79 N.Y.2d 949, 583 N.Y.S.2d 203, 592 N.E.2d 811.) The court will certainly consider any opinion as to whether standards imposed by the statute or regulation were met, which involves strictly factual determinations.

In this case, the defendants grounded down a portion of the sidewalk so as to eliminate a two-inch differential between the sidewalk flags. There is no indication that New York City ever issued any violations as a result of the slope. Assuming *arguendo* that this created a slope and was not in conformity with the requirements of New York City Rules, Tit. 34, § 2-09§2-09(f)(4)(xi) that mandate the longitudinal (running) slope of the sidewalk to follow the same running slope as the undisturbed curb, this is not listed as a *substantial defect* under New York City, N.Y., Rules, Tit. 34, § 2-09 (5)(viii). This court cannot determine whether the slope of the sidewalk was defective as a matter of law and therefore whether the pitch of the slope constitutes a defect, and whether it was a proximate cause of the accident, are issues of fact that must be determined by a jury. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (NYS Ct. of Ap. 1980).

Based on the foregoing, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is DENIED; and it is further

ORDERED that any other requests for relief are DENIED.

This constitutes the decision and order of the Court.

Dated: AUG 31 2022


Hon. Richard J. Montelione