

Reed v Kobas & Salih Realty, Ltd

2024 NY Slip Op 33924(U)

October 31, 2024

Supreme Court, Kings County

Docket Number: Index No. 518766/2020

Judge: Carolyn E. Wade

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At an IAS Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 31st day of October, 2024.

PRESENT: HON. CAROLYN E. WADE, J.S.C.

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ALPHONSO REED,

Plaintiff,

-against-

KOBAS & SALIH REALTY, LTD; and BROOKLYN BROADWAY MASJID AND ISLAMIC CENTER,

Defendants.

Index No: 518766/2020

Mot. Seq. 003

Cal. No. 45

ORDER

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The following numbered papers were read on the motion for summary judgment: NYSCEF Doc. Nos. 43-72.

Upon the foregoing papers, and after oral argument, defendant KOBAS & SALIH REALTY, LTD. ("Defendant") moves for an Order, granting it summary judgment and dismissing plaintiff ALPHONSO REED's Verified Complaint ("Plaintiff").

The underlying action was commenced by the Plaintiff as a result of personal injuries that he allegedly sustained on September 13, 2017, when he was caused to trip and fall due to a dangerous condition on the sidewalk in front of 986 Gates Avenue, Brooklyn, New York.

This Court decides the instant motion as follows:

A. Defendant's Motion is Premature as Significant Discovery, Including the Deposition of Defendant, Remains Outstanding

"A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Rosenblum v. City of NY*, 216 NYS3d 295,

296 [2d Dept 2024] [quotations omitted]. “A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party’s position may exist but cannot then be stated” *Id.* [quotations omitted].

Defendant’s deposition has not taken place. Consequently, Plaintiff has not had the opportunity to question Defendant about relevant issues, such as the installation and condition of the sidewalk, repairs that may have been made, notice of the claimed defects, prior accidents at that location, and any special use of the subject sidewalk. This Court finds that a summary judgment motion should not be considered until Plaintiff can depose the Defendant.

B. Defendant has not established a prima facie burden of showing that it neither created the dangerous condition nor had actual or constructive notice of its existence

“The 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 the absence of any material issues of fact” (*Alvarez v. Prospect Hospital*, 68 NYS2d 320, 324 [1986], citing *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). “In a premises liability case, ‘a defendant real property owner who moves for summary judgment has the initial burden of making a *prima facie* showing that [he/she] neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence’” (*Dilorenzo v. Nunziatto*, 209 AD3d 838, 839 [2d Dept 2022], citing *Deutsch v. Green Hills [USA], LLC*, 202 AD3d 909, 910 [2d Dept 2022]).

Here, Defendant has failed to submit any affidavit from a witness with knowledge of the ownership, control, installation, maintenance, or repair of the subject property, or notice of any defects or prior accidents. Thus, “[D]efendant failed to meet its prima facie burden as the moving party, [and] it is [therefore] not necessary to consider whether the papers submitted in opposition

to the motion were sufficient to raise a triable issue of fact” (*Herskovic v. 515 Ave. I Tenants Corp.*, 124 AD3d 582 [2d Dept 2024], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

C. **Plaintiff Sufficiently Identified the Portion of the Sidewalk That Caused Him to Trip and Fall and Whether a Defect is De Minimis Is Generally a Jury Issue**

“Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury” (*Clarke v. 90 S. Park Owners, Inc.*, 228 AD3d 722, 723 [2d Dept 2024], citing *Balbo v. Greenfiled’s Mkt. of Bethpage, LLC*, 216 AD3d 1130 [2d Dept 2023], quoting *Losito v JP Morgan Chase & Co.*, 72 AD3d 1033 [2d Dept 2010]). “A defendant seeking dismissal of a complaint on the basis that [an] alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” *Id.* at 723. “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.” *Id.* “There is no “minimal dimension test” or “per se rule” that the condition must be of a certain height or depth in order to be actionable.” *Id.* “Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable.” *Id.*

In the instant case, Defendant’s argument that Plaintiff did not sufficiently identify the location of his fall on the sidewalk at his deposition is unavailing. Plaintiff testified that he tripped over a broken sidewalk and/or concrete in front of 986 Gates Avenue and fell. He also identified the location of his accident upon review of several photographs.

While Defendant argues that the raised edge of the sidewalk is *de minimis*, it can not be said that it is so trivial to be non-defective as a matter of law. This Court finds that the raised edge visible in the photographs is sufficient to raise a triable issue of fact as to whether it constituted a tripping hazard.

E. Defendant Failed to Demonstrate That the Location of the Accident is Within the Bus Stop Footprint

NYC Administrative Code § 7-210 provides that abutting landowners of commercial properties are responsible for maintaining the sidewalks in front of their properties and are liable to pedestrians injured on such sidewalks. Defendant has raised a potential exception for situations where the sidewalk is part of a bus stop maintained by the City or an agency, such as the MTA. However, Defendant has not met its prima facie burden of establishing as a matter of law that the location of Plaintiff's accident was a part of the bus stop.

As the Second Department held in *Moonilal v. Roman Catholic Church of St. Mary Gate of Heaven*, 225 AD3d 592 [2d Dept 2024], "Here, the defendant failed to demonstrate, prima facie, that the area of the sidewalk where the accident occurred was within a designated bus stop location maintained by the City." *Id.*; see also *Smoot v. Rite Aid*, 185 AD3d 411 [1st Dept 2020].

"Absent any applicable statute or any evidence defining the parameters of a bus stop, a triable issue of fact exists as to whether the part of the sidewalk where plaintiff fell is within a designated bus stop that the City is required to maintain" (*McCormick v. City of New York*, 165 AD3d 565 [2018]).

It is well settled that unsworn expert reports cannot be considered competent to evidence sufficient to raise an issue of fact (*Arce v. 1704 Seddon realty Corp.*, 89 AD3d 602 [1st Dept 2011]; *Beier v. Giglio*, 230 AD3d 733 [2d Dept 2024]).

Here, Defendant proffers no evidence that the subject accident location was within the bus stop “footprint.” Defendant relies on the unsworn report of expert Peter Chen when making the “footprint; however, this report does not contain any diagrams or measurements to establish that the accident location is within the bus stop “footprint.” The blueprint included in the report is simply a generic drawing of a standard features of a bus stop, not the particular one in question. The photographs included in the report clearly show that the bus stop, including its pole and shelter, are further down the block, some distance from the front of the mosque where Plaintiff fell.

Accordingly, based upon the above, Defendant’s Motion for Summary Judgment is **denied**.

This constitutes the Decision and Order of the Court.

ENTER:

A handwritten signature in black ink, appearing to be 'CW', enclosed within a large, hand-drawn oval. The signature is positioned above a horizontal line.

HON. CAROLYN E. WADE, J.S.C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT