

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: _____ J.S.C.

PART 19

Justice

Schwartz Velma / Schwartz Hayward

INDEX NO.

109060/07

MOTION DATE

2/3/10

MOTION SEQ. NO.

#002

MOTION CAL. NO.

A-Russo Wrecking Inc.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance

with the accompanying memorandum decision.

FILED

APR 05 2010

NEW YORK
CLERK'S OFFICE

Dated: _____

3/31/10

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
VELMA SCHWARTZ and HAYWARD SCHWARTZ

Plaintiffs,

- against-

Index No.:109060/07
Submission Date: 02/13/10

A. RUSSO WRECKING INC.,

DECISION AND ORDER

Defendant.

-----X
For Plaintiffs:
Picciano & Scahill, P.C.
900 Merchants Concourse, Suite 310
Westbury, NY 11590

For Defendant:
Rubin, Fiorella & Friedman, LLP
292 Madison Avenue, 11th Floor
New York, NY 10017

Papers considered in review of this cross-motion to dismiss:

Notice of Motion 1
Mem. Of Law in Support 2
Aff. in Opp. 3
Reply Mem. Of Law 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant A. Russo Wrecking Inc. (“A. Russo”) moves for summary judgment pursuant to CPLR 3212 dismissing the complaint against it.

This action arises from injuries sustained by plaintiff Velma Schwartz (“Schwartz”) on April 21, 2007. Schwartz alleges that on that date she fell in a pothole while walking in the roadway in front of A. Russo’s demolition site located at 200-206 W. 72nd Street, New York, New York.

At their depositions, each plaintiff testified that at the time of Schwartz's fall, a dump truck was blocking pedestrians from walking on the sidewalk in front of A. Russo's demolition site. The truck was loading debris from the demolition site, preventing pedestrians from passing through. The plaintiffs also testified that a man in a construction uniform was directing pedestrians to walk around the truck and onto the roadway because the truck was blocking the sidewalk.

The plaintiffs testified that at the construction worker's direction, they moved from the sidewalk to the roadway and Schwartz fell in the roadway. Schwartz nor Hayward Schwartz saw any pothole or unevenness in the road prior to Schwartz's fall. However, Hayward Schwartz testified at his deposition that the Emergency Medical Technicians who arrived at the scene afterwards also fell in the pothole and recommended that he return to the site to take a photograph of the hole. Schwartz also provided a detailed description of the pothole's shape and dimensions.

At her deposition, Ann Marie Russo, president of A. Russo ("Russo"), testified that it is normal practice for trucks to block the sidewalk when pulling in and out of demolition sites. She stated that when trucks block the sidewalk, flag people usually block pedestrians from walking in front of the truck. Though she did not confirm ever witnessing it, Russo testified that workmen may direct pedestrians onto the roadway if a truck is blocking the sidewalk. Finally, she testified that she inspected the roadway after Mrs. Schwartz's fall and that it "looked fine."

In their summons and verified complaint, the plaintiffs allege that their injuries resulted from A. Russo's negligent operation and management of the sidewalk premises. They allege that A. Russo was negligent in closing off the sidewalk to pedestrian traffic and failing to ensure the safety of pedestrians walking onto the roadway. In its answer, A. Russo denied all material allegations.

A. Russo now moves for summary judgment pursuant to CPLR 3212 dismissing the complaint. A. Russo argues that it is not liable for Schwartz's injuries because it did not have actual or constructive notice of the alleged dangerous condition, nor did it cause or create the condition. Furthermore, A. Russo claims that there is no evidence that the plaintiffs or anybody else saw the pothole before or after Mrs. Schwartz's accident.

In opposition, the plaintiffs argue that notice is irrelevant because A. Russo made special use of the sidewalk and directed the plaintiffs to the pothole. They argue that A. Russo had a duty to provide a safe passageway for pedestrians because it blocked the sidewalk. Furthermore, the plaintiffs argue that there is a triable issue of fact related to whether the A. Russo's use of the sidewalk was necessary, temporary and reasonable.

Discussion

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, presenting evidence eliminating any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The opponent to the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563

(1980). On a summary judgment motion, the court must accept the testimony of the nonmoving party as true. *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Med. Ctr.*, 217 A.D.2d 98, 101 (1st Dep't 1995).

In general, a defendant in a trip-and-fall action must have notice of the defect to be liable for injuries resulting from the defect. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). However, notice of the alleged defective condition in the roadway is not needed in this case. Where, as here, the defendant makes special use of the sidewalk, the defendant has a duty to provide a safe alternative passageway for pedestrians, and the relevant inquiry is whether defendant breached that duty. *See McKenzie v. Columbus Ctr.*, 40 A.D.3d 312 (1st Dep't 2007); *Coulton v. City of New York*, 29 A.D.3d 301, 302 (1st Dep't 2006); *Hunter v. City of New York*, 23 A.D.3d 223 (1st Dep't 2005); *Fleischer v. White Rose Food Corporation*, 152 A.D.2d 489, 491 (1st Dep't 1989).

Both plaintiffs here testified at their depositions that a construction worker in front of A. Russo's demolition site directed them off of the sidewalk and directly into the pothole. Through this evidence plaintiffs have raised a triable issue of fact as to whether A Russo breached its duty to provide a safe alternative passageway for Schwartz after making special use of the sidewalk for its demolition work.

A. Russo also argues that the plaintiffs present no evidence that anybody saw the pothole before or after Mr. Schwartz's fall. But at his deposition, Hayward Schwartz testified that after the EMTs arrived at the scene to assist Schwartz they also fell into the

pothole, and he further testified that the EMTs spoke Hayward Schwartz about the pothole at that time. Hayward Schwartz also went to the accident site shortly after the accident, and gave a detailed description of the pothole's dimensions. Thus, there is a triable issue of fact as to whether the pothole was the cause of Mrs. Schwartz's fall.¹

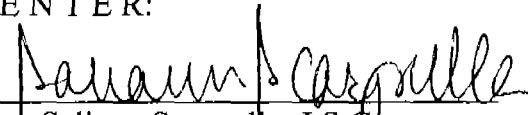
In accordance with the foregoing, it is

ORDERED that defendant A. Russo Wrecking, Inc.'s motion for summary judgment dismissing the complaint is denied

This constitutes the decision and order of the Court.

Dated: New York, New York
March 31, 2010

ENTER:


Saliann Scarpulla, J.S.C.

FILED

APR 05 2010

NEW YORK
COUNTY CLERK

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¹ Plaintiffs also assert that A.Russo may be held liable to them for failing to comply with New York City Administrative Code § 27-1018, but plaintiffs have not plead violation of this particular code provision as a basis for liability in their Bill of Particulars.