142 A.D.3d 948
Supreme Court, Appellate Division,
Second Department, New York.

Laurene GALLWAY, appellant,
v.
MUINTIR, LLC, et al., respondents.

No. 2015–01424.
|
(Index No. 700324/13).
|
Sept. 14, 2016.

Synopsis

Background: Pedestrian, who was allegedly injured when she tripped and fell on sidewalk outside of restaurant, brought negligence action against restaurant, which was tenant in abutting property, and owner of abutting property. The Supreme Court, Queens County, Elliot, J., entered summary judgment in favor of restaurant and owner. Pedestrian appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] restaurant and owner did not have constructive notice of any defect in sidewalk, and, thus, were not liable for any injuries sustained by pedestrian;

[2] pedestrian's unsigned deposition transcript was admissible in support of summary judgment motion by restaurant and owner; and

[3] affidavit of pedestrian's granddaughter could not be considered in opposition to summary judgment motion.

Affirmed.

West Headnotes (3)

[1] Municipal Corporations
Notice of Dangerous Condition

Restaurant, which was tenant in abutting property to sidewalk where pedestrian allegedly tripped and fell, and owner of abutting property, did not have constructive notice of any defect in sidewalk, and, thus, were not liable for any injuries sustained by pedestrian when she allegedly tripped and fell on sidewalk, since pedestrian's description of alleged sidewalk defect as consisting of cracks radiating from hole 1 1/2 inches deep, with diameter larger than silver dollar, did not indicate that alleged defect was present for sufficient length of time to give restaurant and owner constructive notice of its existence, and restaurant's employee, who was responsible for day-to-day operations, stated he did not observe any defects.

Cases that cite this headnote

[2] Judgment
Documentary Evidence or Official Record

Pedestrian's unsigned deposition transcript was admissible in support of summary judgment motion by restaurant, which was tenant in abutting property to sidewalk where pedestrian allegedly tripped and fell, and by owner of abutting property, since pedestrian acknowledged transcript's accuracy by submitting it herself in opposition to motion, and any defects in admissibility of transcript were cured by fact that transcript was forwarded to parties for review and signature and by submission, in reply by restaurant and owner, of reporter's certification of transcript. McKinney's CPLR 2001.

Cases that cite this headnote

[3] Judgment
Admissibility

Affidavit of pedestrian's granddaughter could not be considered in opposition to summary judgment motion by restaurant, which was tenant in abutting property to sidewalk where pedestrian allegedly tripped and fell,

and by owner of abutting property, even though granddaughter had dinner with pedestrian in restaurant on evening of alleged accident, where pedestrian failed to disclose granddaughter as notice witness to restaurant and owner, and did not offer valid excuse for failure. McKinney's CPLR 3101(a).

Cases that cite this headnote

Attorneys and Law Firms

Stefano A. Filippazzo, P.C., Brooklyn, N.Y. (Louis A. Badolato of counsel), for appellant.

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REINALDO E. RIVERA, J.P., RUTH C. BALKIN, SYLVIA O. HINDS–RADIX, and BETSY BARROS, JJ.

Opinion

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Elliot, J.), dated December 24, 2014, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced this action to recover damages for injuries allegedly sustained by her when she tripped and fell on a sidewalk abutting premises owned by the defendant Muintir, LLC, where the defendant Dalton Sea Side Grill, Inc., operated a restaurant. The defendants moved for summary judgment dismissing the complaint, contending, inter alia, that they did not have constructive notice of the alleged defective sidewalk condition that the plaintiff claimed caused her fall. The Supreme Court granted the defendants' motion, and the plaintiff appeals.

[1] In support of their motion, the defendants submitted evidence establishing, prima facie, that they did not have constructive notice of the alleged defective sidewalk condition. An employee of the restaurant in charge of its day-to-day operations testified at his deposition that he did not observe any defects (*see Sperling v. Wyckoff Hgts. Hosp.,* 129 A.D.3d 826, 827, 12 N.Y.S.3d 131; *Jackson v. Conrad,* 127 A.D.3d 816, 817, 7 N.Y.S.3d 355). Further, the plaintiff's deposition testimony established that, although she had visited the restaurant at least 10 times in the year preceding her accident, she had never observed the alleged sidewalk defect prior to her accident. She described the defect which caused her to fall as cracks radiating from a hole 1½ inches deep, with a diameter larger than a silver dollar. That description, did not, by itself, indicate that the alleged defect was present for a sufficient length of time to give the defendants constructive notice of its existence.

[2] The plaintiff's challenges to the admissibility of the defendants' evidence are without merit. The plaintiff's unsigned deposition was admissible, since it was submitted by the plaintiff herself in opposition to the defendant's motion, thus acknowledging its accuracy (*see Pavane v. Marte,* 109 A.D.3d 970, 971 N.Y.S.2d 562). Additionally, the defendants cured any defects in the admissibility of the deposition transcripts submitted in support of their motion by submitting, in reply, the reporter's certification of those transcripts and the fact that the depositions were forwarded to the parties for review and signature (*see* CPLR 2001; *Rosenblatt v. St. George Health & Racquetball Assoc., LLC,* 119 A.D.3d 45, 51, 984 N.Y.S.2d 401; *David v. Chong Sun Lee,* 106 A.D.3d 1044, 1045, 967 N.Y.S.2d 80).

[3] In opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Contrary to the plaintiff's contentions, the Supreme Court providently exercised its discretion in refusing to consider the affidavit of the plaintiff's granddaughter, who was having dinner with the plaintiff in the restaurant on the evening of the accident. The plaintiff failed to disclose the witness to the defendants as a notice witness and did not offer a valid excuse for that failure (*see* CPLR 3101[a]; *Henry v. Higgins,* 117 A.D.3d 796, 796, 987 N.Y.S.2d 72; *Zayas v. Morales,* 45 A.D.2d 610, 612, 360 N.Y.S.2d 279).

The plaintiff's remaining contentions are without merit.

All Citations

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