

**Cruz v Arman/482 Greenwich Venture**

2016 NY Slip Op 31923(U)

October 4, 2016

Supreme Court, New York County

Docket Number: 451695/2015

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

-----X  
ANTONIO CRUZ and MELYNDA CRUZ

v

INDEX NO. 451695/2015

ARMAN/482 GREENWICH VENTURE,  
LLC, 482 GREENWICH, LLC, MAGNUM  
REAL ESTATE GROUP, and LIBERTY  
VIEW CORP.

MOTION SEQ. NO. 003, 004

-----X  
LIBERTY VIEW CORP.

DECISION AND ORDER

v

APOLLO BUILDERS, LLC, ROCKLEDGE  
SCAFFOLD CORP., ROCK SCAFFOLDING  
CORP., and ARSENAL SCAFFOLD, INC.  
-----X

**BANNON, J.:**

I. INTRODUCTION

In this action to recover damages for personal injuries, defendant Liberty View Corp. (Liberty) moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and plaintiffs cross-move for summary judgment on the issue of liability insofar as asserted against Liberty (SEQ 003). Plaintiffs separately move to sever the third-party action from the main action (SEQ 004). Liberty's motion and plaintiffs' cross-motion are denied, as the submissions reveal the existence of a triable issue of fact, inter alia, as to the existence of defect having the characteristics of a trap at Liberty's premises. The plaintiffs' motion for a severance is granted.

## II. BACKGROUND

Plaintiff Antonio Cruz, while delivering packages in the course of his employment for the United States Postal Service, ascended a staircase connecting the sidewalk to a loading dock platform at Liberty's building in Manhattan, and allegedly fell and sustained injuries as he stepped from the landing of the staircase onto the platform. Cruz, and his wife suing derivatively, commenced this action against Liberty and others, alleging that they failed to maintain the subject premises in a reasonably safe condition, and that Liberty had actual or constructive notice of a tripping hazard on the platform that essentially had the characteristics of a trap. In their bill of particulars, plaintiffs allege, among other things, that there was a height differential between the metal border of the loading dock platform and a concrete slab installed immediately on top of it, which created the tripping hazard. They assert that Liberty permitted scaffolding to be erected on top of the concrete slab, with a vertical pole installed in the slab only one or two feet from the point of access to the platform, creating an additional obstruction. They also allege that Liberty, in violation of the New York City Building Code, failed to provide a handrail on the left side of the staircase or a guardrail around the loading dock.

As Cruz explained both at his deposition and in an

affidavit, the accident occurred when he walked up the staircase to the landing, turned to his left, and stepped up onto the loading dock platform with his left foot. His foot landed on the five-inch-wide metal outer border of the platform, and clipped the uneven and raised area where the concrete slab was laid upon the metal base, which protruded approximately 1/4"-1" above the base. He averred that he did not try to brace himself with his hands or his arms as he fell to the sidewalk, landing on his right foot. He also testified that he had never noticed the height differential between the concrete slab and the metal border prior to the date of the accident, even though he had previously delivered packages to Liberty's building.

The action was discontinued against all defendants save Liberty. Liberty now moves for summary judgment dismissing the complaint against it, arguing primarily that its building, which was erected in 1910, was not subject to the Building Code provisions cited by plaintiffs because several of those provisions only apply to newly erected structures, or because the particular staircase is not one to which the provisions apply. It contends that the platform was in a reasonably safe condition in any event, the platform did not constitute a trap or tripping hazard, and any height differential between the metal border and the concrete slab installed upon the platform was trivial and, hence, nonactionable. In support of its motion, Liberty submits

the pleadings, the parties' deposition transcripts, photographs of the accident site, and the affidavit of its expert engineer, who opines that Liberty did not violate any provision of the Building Code.

In opposition to Liberty's motion, and in support of their cross motion for summary judgment on the issue of liability, plaintiffs submit Cruz's affidavit, photos, deposition transcripts, and an affidavit from their own expert certified safety professional, who explains that "[t]he edge of the walking surface and edge of the final step up to the 'loading platform' is covered by a five inch wide piece of metal. At the joint between the metal trim and concrete of the 'loading platform' there is an immediate rise above 1/4" and is uneven. This is in the portion of the platform which in effect constitutes the final tread on the staircase." He concludes that this condition presented a danger to pedestrians. He further asserts that, contrary to the conclusion of Liberty's expert, the staircase and platform violated the Building Code by virtue of the absence of a handrail on the left side of the staircase, unevenly spaced risers, and the absence of a guardrail on the outer edge of the platform.

Both Cruz and his expert describe the photos submitted by the parties as depicting a staircase consisting of three risers-- one from the sidewalk to the first tread, one from the first

tread to the second tread, and one from the second tread to the landing. The expert asserts that, as depicted in the photo, a pedestrian arriving at the landing after climbing the stairs would encounter the curtain wall of the building if he or she continued straight ahead. As Cruz described it, in order to proceed any further, he had to turn to the left and step up approximately eight or nine inches to place his foot on the loading dock platform, and that doors to the building interior were accessible to the right after one ascended onto the platform. Cruz explains that the photo reveals that a pedestrian ascending to the platform would have to place his or her foot on the five-inch-wide metal outer border that serves as a skirt around the slightly raised concrete slab laid upon the platform. Both Cruz and his expert assert that the photos also depict a vertical pole supporting a scaffold that was embedded in the concrete slab only 12 to 18 inches beyond the portion of the metal border where Cruz climbed up onto the platform. As Cruz explained it, the presence of this pole made "a dangerous condition worse and more difficult to traverse."

### III. DISCUSSION

#### A. Cross Motions for Summary Judgment

##### 1. New York City Building Code

Although the parties spill much ink describing the

particulars of the Building Code, Liberty correctly argues that it is relieved of the obligation of conforming its staircase and loading dock to the current Building Code provisions cited by plaintiffs, which require handrails, guardrails, and appropriate riser heights, inasmuch as its building was erected in 1910, long before the enactment of those Building Code requirements. Thus, the stairs were "grandfathered" in under Admin. Code of City of N.Y. § 27-111. See Hyman v Queens County Bancorp, Inc., 3 NY3d 743, 744 (2004); Sarmiento v C&E Assocs., 40 AD3d 524 (1<sup>st</sup> Dept 2007). Since Liberty demonstrated that the building has not undergone significant renovations resulting in a change of occupancy group classification, and plaintiffs adduced no contrary evidence, plaintiffs may not rely on Admin. Code of City of N.Y. § 27-118(a), which otherwise subjects such an older building to more recent Code provisions. Moreover, the most recent permit for work on the loading dock was issued in 2007 and, thus, only the provisions of the pre-2008 Building Code are applicable to it. See Admin. Code of City of N.Y. § 28-101.4.1. Liberty also correctly argues that the handrail requirements applicable to interior staircases do not apply to its staircase, which is located outside of the building, and that the handrail requirements applicable to exterior staircases do not apply, since its staircase does not provide access to a door or entryway to the building. See Admin. Code of City of N.Y. § 27-376; Gaston

v New York City Hous. Auth., 258 AD2d 220 (1<sup>st</sup> Dept 1999).

2. Existence of a Common-Law "Trap"

Nonetheless, Liberty failed to establish its prima facie entitlement to judgment as a matter of law. See Alvarez v Prosepct Hosp., 68 NY2d 320 (1986). Its submissions reveal the existence of a triable issue of fact as to whether the arrangement of the metal border of the loading dock platform and the concrete slab laid upon it constituted a trap. A trap is defined as "an artificially created, inherently dangerous but deceptively innocent instrumentality or condition." Basso v Miller, 40 NY2d 233, 244 (1976) (Breitel, J., concurring), citing Beauchamp v New York City Hous. Auth., 12 NY2d 400, 405 (1963). A trap may exist where, as here, the condition may be difficult for the person traversing it to detect it. See Valentin v Columbia Univ., 89 AD3d 502, 503 (1<sup>st</sup> Dept 2011). Moreover, "the presence of an edge which poses a tripping hazard" renders nontrivial even a defect presenting an otherwise slight height differential between two surfaces on which a pedestrian might walk. Argenio v Metropolitan Transp. Auth., 277 AD2d 165, 166 (1<sup>st</sup> Dept 2000); see Glickman v City of New York, 297 AD2d 220, 221 (1<sup>st</sup> Dept 2002). Since Liberty concedes that the layout of the platform slab upon the metal base is permanent, and that it knew that scaffolding had been erected on the platform, it either had actual notice of the condition or constructive notice

thereof, inasmuch as the condition was "visible and apparent and . . . existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). Accordingly, Liberty's motion must be denied regardless of the sufficiency of plaintiffs' opposition papers. In any event, the opinion of plaintiffs' expert that the height differential between the metal border and the concrete slab constituted a tripping hazard essentially possessing the characteristics of a trap raises an issue of fact as to whether the defect indeed had the characteristics of a trap, particularly in light of its location above and to the left of the top of the staircase. See Pion v New York City Hous. Auth., 125 AD3d 462, 463 (1<sup>st</sup> Dept 2015); Valentin v Columbia Univ., supra.

For the same reasons as apply to Liberty's motion, plaintiffs' cross motion for summary judgment must be denied. Inasmuch as the action has been discontinued against Liberty's codefendants, that branch of its motion which is for summary judgment dismissing all cross claims asserted against it must be denied as academic.

#### B. Motion for a Severance

Where, as here, a third-party action is commenced shortly after the main action is placed on the trial calendar, severance is the appropriate remedy since delay in the disposition of the

main action would ensue absent a severance, discovery is already complete in the main action, and the plaintiffs, who are ready for trial, would be prejudiced if compelled to await the commencement and completion of discovery in the third-party action. See CPLR 603, 1010; Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P., 91 AD3d 864, 865 (2<sup>nd</sup> Dept 2012); Wassel v Niagara Mohawk Power Corp., 307 AD2d 752, 753 (4<sup>th</sup> Dept 2003); Fernandez v Abalene Oil Co., Inc., 2010 NY Slip Op 32604(U), \*8-9 (Sup Ct, Kings County 2010), mod on other grounds 91 AD3d 906 (2<sup>nd</sup> Dept 2012).

#### IV. CONCLUSION

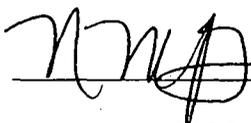
Accordingly, it is hereby

ORDERED that the branch of the motion of defendant Liberty View Corp. which is for summary judgment dismissing the complaint insofar as asserted against it is denied, its motion is otherwise denied as academic, and plaintiffs' cross motion for summary judgment on the issue of liability as against defendant Liberty View Corp., is denied (SEQ 003); and it is further,

ORDERED that plaintiffs' motion to sever the third-party action (SEQ 004) is granted, and the third-party action is severed from the main action

This constitutes the Decision and Order of the court.

Dated: 10/8/16

ENTER: 

J.S.C.

**HON. NANCY M. BANNON**