

Lynch v Port Auth. of N.Y. & N.J.

2024 NY Slip Op 34732(U)

September 12, 2024

Supreme Court, Queens County

Docket Number: Index No. 710949/2019

Judge: Mojgan C. Lancman

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

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NANCE LYNCH,

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
MTA, NEW YORK CITY TRANSIT AUTHORITY, MTA-
LONG ISLAND RAILROAD, MERIDIAN MANAGEMENT
CORP., MERIDIAN CONTRACTORS CORP. and T.U.C.S.
CLEANING SERVICE, INC.,

Defendants.
-----x

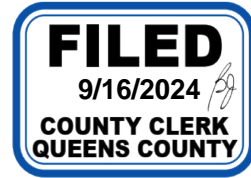
IAS PART 20

Index No.: 710949/2019

Motion Seq. Nos.: 6 and 7

Motion Date: 2.14.2024

Motion Cal. No.: 17 and 18



The papers bearing NYSCEF Doc. Nos. 168-185, 238, 242, 245, 250,-255, 266, 268 269, 275 and 280 were read on the motion (seq. no. 6) filed by the defendant Port Authority of New York and New Jersey (“Port Authority”) for summary judgment dismissing the complaint.

The papers bearing NYSCEF Doc. Nos. 186-208, 231, 235-236, 239, 249, 264, 279 and 281 were read on the motion (seq. no. 7) filed by the plaintiff, Nance Lynch (the “Plaintiff”), for: (1) summary judgment on the issue of liability against the defendants Port Authority, New York City Transit Authority (“NYCTA”), MTA-Long Island Railroad (“LIRR”), Meridian Management Corp. (“Meridian Management”), Meridian Contractors Corp. (“Meridian Contractors”) and T.U.C.S. Cleaning Services, Inc. (“TUCS”) (collectively, the “Defendants”); and (2) striking “all defenses of comparative fault.”

The Port Authority’s motion and the Plaintiff’s motion are consolidated for disposition. For the following reasons, both motions are denied.

I. Factual Background

The Accident took place on February 18, 2019 at the Jamaica Station. More particularly, the Accident occurred on the mezzanine bridge of the AirTrain, which is located at 93-02 Sutphin Boulevard, Jamaica, New York (the “Premises”). The Plaintiff was walking towards a subway elevator when her “shoe hit a ledge,” causing her to fall. The “ledge” was a metal perimeter surrounding glass blocks that were embedded in a cement walkway. The Plaintiff alleges that the metal “ledge,” which shall be referred to the “trim,” was a tripping hazard because, among other things, there was a height differential between it and the surrounding area.

The Port Authority moves for summary disposition on the theory that the height differential between the metal trim and the surrounding concrete floor constituted a trivial defect because same amounted to “approximately” $\frac{1}{4}$ inch. Here, the Port Authority relies upon the affidavit of one of its employees, Gianpiero Carovillano (“Carovillano”), a Senior Resident Engineer. Carovillano opines, in essence, that “... based on the measurements ... recorded on October 3, 2020 ... the height differential between the ground and the metal trim on which Plaintiff alleges to have tripped is approximately a quarter of an inch.”

In opposition to the Port Authority’s motion and in support of her motion, the Plaintiff submits the affidavit of William Marletta (“Marletta”), a safety consultant. Marletta, who inspected the Accident location on May 9, 2019, arrived at the following conclusions: that the height differential of the metal trim is $\frac{3}{8}$ of an inch; that the “abrupt” surface level change of over $\frac{1}{4}$ of an inch created by the metal trim violates industry standards, including ATSM F1367 5.1 through 5.2.4, and ANSI Standard A117.1, which require that walkways be “flush and even”; that the slope value of the beveled edge where the Plaintiff tripped is approximately 76 degrees, which violates ATSM, ANSI, and ADA standards; that said slope value “far exceeds” what is considered good and accepted safe practice and is “very steep”; that warning signs could have been installed in accordance with ANSI standards to warn pedestrians of the “abrupt” surface change; and that the “abrupt” surface level change is a dangerous condition.

II. Procedural History

The Court previously granted the summary judgment motions filed by NYCTA, MTA, LIRR, Meridian Management and TUCS. Accordingly, the branches of the Plaintiff’s motion for summary judgment against the subject defendants are denied as moot.

In considering the present motions, the Court has examined its file and takes judicial notice thereof. Meridian Contractors did not answer the complaint, the amended complaint or the second amended complaint. Since the Plaintiff did not seek a default judgment against this entity and the deadline to do so expired long ago, this cause is dismissed as to Meridian Contractors pursuant to CPLR § 3215 [c].

The issues presented is thus whether the Port Authority is entitled to summary judgment dismissing the complaint and whether the Plaintiff is entitled to summary judgment against the Port Authority. These issues are considered separately below.

III. Discussion

A. Summary Judgment Standards

The familiar standards applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

“To establish *prima facie* entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact. The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Gonzalez v Abreu*, 162 AD3d 748, 748-749 [2d Dept 2018] [citations omitted]).

Lastly, “[o]n a motion for summary judgment, a moving defendant does not establish its *prima facie* entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff’s case. The moving defendant must affirmatively demonstrate the merit of its claim or defense” (*Cooper v First in Queens, Inc.*, 229 AD3d 761, 763 [2d Dept 2024] [internal quotation marks and citations omitted]).

A. The Port Authority’s Motion

“Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. However, injuries resulting from trivial defects are generally not actionable. A defendant seeking dismissal of a complaint on the basis that the 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. 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” (*Tamburo v Long Island University*, 229 AD3d 828, 829, 829 [2d Dept 2024] [internal quotation marks and citations omitted]). “[T]here is no minimal dimension test’ or *per se* rule that a defect must be ... a certain minimum height or depth in order to be actionable” (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

The Port Authority’s motion is denied because it fails to establish *prima facie* entitlement to summary disposition. Here, although Carovillano’s affidavit quantifies the height differential at issue, “approximately” $\frac{1}{4}$ of an inch, his affidavit fails to address and consider all of the facts that the Court must examine in determining whether a defect is trivial, including “irregularity and appearance of the defect along with the time, place and circumstance of the injury” (*see id.*). Here, among other things, Carovillano’s affidavit does not address the slope of the defect. Consequently, the Port Authority’s motion must be denied irrespective of the sufficiency of the Plaintiff’s opposition (*see Gonzalez v Abreu*, 162 AD3d 748; *Elentuck v New York City Transit Authority*, 188 AD3d 825 [2d Dept 2020]). The Port Authority’s attempt to obtain summary

disposition by pointing to gaps in the Plaintiff's case is insufficient to establish entitlement to summary judgment (*see Cooper v First in Queens, Inc.*, 229 AD3d 761).

B. The Plaintiff's Motion

“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” (*Losito v JP Morgan Chase and Co.*, 72 AD3d 1033, 1033 [2d Dept 2010] [citations omitted]).

The Plaintiff's application for summary judgment is denied because there are triable issues of fact as to whether the height differential was non-trivial. The case of *Shapiro v 89th Street Development Company LLC*, 220 AD3d 499, 500 [1st Dept 2023] is instructive: “[i]n light of plaintiff's testimony, photos of the accident location, and the conflicting expert affidavits on the height differential of the sidewalk flags, the court properly concluded that triable issues of fact remained as to whether the defect was trivial. In particular, while defendant's expert testified that the height difference between the two sidewalk flags was one quarter of an inch and was trivial, plaintiff's expert concluded that the height difference was three quarters of an inch and presented a tripping hazard” [citations omitted]. Here, conflicting affidavits relative to height differentials are submitted by Carovillano and Marletta, respectively. Carovillano opined that the height differential was “approximately” $\frac{1}{4}$ of an inch, while Marletta opined that the height differential was $\frac{3}{8}$ of an inch and constituted a tripping hazard. As triable issues of fact exist as to whether the height differential was non-trivial, the Plaintiff's application for summary disposition is denied (*see id.*; *Trinidad v Catsimatidis*, 190 AD3d 444 [1st Dept 2021]).

The Plaintiff's application to strike “all defenses of comparative fault” is also denied. This issue is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence” (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted].

Furthermore, CPLR § 3212 [g] “... permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action. The provision recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers” (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]).

“Where a plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence, the plaintiff must establish, *prima facie*, freedom from comparative fault” (*Katsankou v Brink's Incorporated*, 222 AD3d 855, 856 [2d Dept 2023] [citations omitted]). Since the Plaintiff testified at her deposition that the area of the Accident was not crowded; that she had previously walked in said area; that the weather was clear; that it was not dark; and that there was nothing obstructing her view, there are triable issues of fact

relative to her comparative negligence (*see Lopez v 1675 Realty*, 209 AD3d 407 [1st Dept 2022]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Port Authority's motion is denied; and it is further,

ORDERED, that the Plaintiff's motion is denied; and it is further,

ORDERED, that the complaint is dismissed as to Meridian Contractors pursuant to CPLR § 3215 [c]; and it is further,

ORDERED, that the Port Authority shall serve a copy of this Order with Notice of Entry upon all other parties via NYSCEF by October 15, 2024; and it is further,

ORDERED, that the Clerk of the Court shall close motion seq. nos. 6 and 7.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 12, 2024



MOJGAN C. LANCMAN, J.S.C.

