Vasquez v 521 Props. Corp.
2007 NY Slip Op 32559(U)
August 10, 2007
Supreme Court, New York County
Docket Number: 0103834/2006
Judge: Shirley W. Kornreich
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SCANNED ON 8/20/2007
[* 1]

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

PRESENT: HON. SHIRLEY WERNER KORNREICH — PART 54

Index Number : 103834/2006
VASQUEZ, JOSE
VS
521 PROPERTIES
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 6/17/07
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to 9 were read on this motion to/for S.J.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-8 9 8A
Replying Affidavits	9

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
AUG 20 2007
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 8/10/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
JOSE VASQUEZ,

Plaintiff,

-against-

521 PROPERTIES CORP. and LA UNION MINI MARKET,

Defendants.
---X

INDEX NO. 103834/06
DECISION & ORDER

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for injuries suffered when plaintiff fell on a sidewalk outside of 521 West 168th St., also known as 57 Audubon Avenue ("the premises"). Defendant 521 Properties Corp. ("521") is the owner of the premises. Defendant La Union Mini Market ("La Union") leases commercial space within the premises. 521 now moves, and La Union cross-moves, for summary judgment dismissing the complaint and all cross-claims against them. Plaintiff cross-moves for summary judgment against both defendants.

I. Statement of Facts

On November 5, 2005, plaintiff, an 85 year old man, took a bus from his home to 168th Street to visit Audubon Barbershop, located at 61 Audubon Avenue. He arrived in front of the barbershop at 8 a.m., but it had not yet opened. Plaintiff, therefore, decided to enter La Union, a nearby store. The store sits on a raised cement platform, atop a slightly sloping lower sidewalk. There is an intermediate step from the lower sidewalk to the sidewalk platform. The door to the store is at the back of the platform, opposite the two steps. Plaintiff had no problem entering the store, where he purchased a drink. Upon exiting the store, plaintiff safely stepped down from the

platform to the intermediate step, but fell as he stepped to the lower sidewalk. The accident was witnessed by Juan Gaton, an employee of Audubon Barber Shop.

Plaintiff testified at his deposition that there was no precipitation and the weather was sunny on the morning of his accident. He did not remember what shoes he was wearing, but said he was wearing his bifocals at the time. Plaintiff admitted that he had cataract surgery performed on both eyes and did not see well, was sensitive to light and had difficulty with depth perception. He stated that sometimes his vision is so bad that his family does not leave him home alone. He saw the step upon which he fell as he was entering the store, but admitted that he was unable to see it as he was exiting. At his deposition, when shown pictures of the site, he said he could not see them.

Andrew Eracleous, President of 521, testified to the following facts. He and his son have owned the premises for approximately twenty years, either individually or as principals of 521. The steps were never modified or altered while the premises were owned by them. The lease required the tenant to fix the steps if there were a problem, and it was never his understanding that the landlord would make structural repairs. No tenant ever had made any repairs to the steps. Nor had he received a complaint or violation for the condition of the steps.

La Union is one of two commercial tenants within the premises. La Union was the second assignee of the lease, pursuant to an assignment made ten years ago. He did not have a copy of the assignment with him and had forgotten the names of the original tenant and the first assignee. No repairs ever had been done to the commercial portion of the premises, although he had hired contractors to work on the residential portion. The building superintendent, Ramon Vicente, was only responsible for the 13 residential apartments within the premises and had no duties related

to the commercial portion.

Jabel Camilo, an employee of La Union, who had been working at the store since December 2002, was at the store at the time of plaintiff's accident. Mr. Camilo stated that La Union is a corporation, whose principals are Ramon Romero and Cristino Romero. He had never seen La Union's lease. However, Mr. Camilo testified that La Union was responsible for maintaining the condition of the steps and that no one had ever complained about the steps or instructed La Union to install handrails, warning signs or other safety measures. Mr. Camilo also testified that no one at La Union had responsibility for making repairs to the store and no repairs have been necessary during his employment.

521 submits an affidavit by Robert L. Grunes, a professional engineer with 35 years of experience. Upon observation of the premises, Mr. Grunes determined that the subject step leads from a public sidewalk to a raised sidewalk platform, both of which are public ways. Mr. Grunes measured the step to be 34 ½ inches wide and 13 7/8 inches deep. He does not state that he measured the height of the risers. Based upon his observation, Mr. Grunes believes that the building was constructed prior to January 1, 1951 which would make Multiple Dwelling Law ("MDL") § 52 and Multiple Residence Law ("MRL") § 132 inapplicable. Mr. Grunes also stated that the step is not considered an "exterior stair" as contemplated in the above laws, because it does not constitute a means of egress from the premises in lieu of interior stairs. Mr. Grunes opined that since the step has a width of 34 ½ inches, under the 42 inch minimum, it is not required to have a handrail or balustrade. Mr. Grunes opined that New York City Building Code ("NYCBC") § 27-375 is inapplicable because the step is located entirely outdoors, leads from one public area to another, and, therefore, is not an interior stair. He further opined that the step

is not an exterior step as defined by NYCBC § 27-232 and is not covered under NYCBC § 27-376. Finally, Mr. Grunes opined that the NYCBC sections cited are not applicable, since the building pre-dates 1951.

Plaintiff's expert, Alvin Ubell, is a "stair, ramp and ladder expert, home and building inspector in the State of New York with over 50 years of experience in the construction industry." He does not dispute that the premises were constructed before 1951, but he opines that the steps violate safety standards set by the NYCBC of 1916, 1938, and 1969. According to Mr. Ubell, under the NYCBC, the standards for exterior and interior stairs have been the same since 1916 and require risers of uniform height. He measured a 5/8 inch height differential between the risers of the exterior steps between the platform and sidewalk in front of La Union. Mr. Ubell states that uniformity is required because human gait is a complex psychomotor function and that nonuniform risers can cause a loss of balance. Without any visual cues, such as highlighting or a handrail, Mr. Ubell opined that the nonuniform risers at La Union were an "architectural trap." He took color photographs of the steps, which are annexed to his affidavit.

Both defendants submit a faded copy of an old lease for the premises. The lease is between Andrew and Louis Eracleous and Rocio Grocery Corp. ("Rocio"), for a term beginning July 1, 1986 and ending December 31, 1992, and is not relevant, without more, to the relationship between 521 and La Union. The assignments of the lease are not in the record.

521 submitted the affidavit of Cristino Romero while the motions were sub judice. This affidavit, therefore, will not be considered. *Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247, 248 (1st Dept. 1999); *Tchaika Renewal Co. v. City of New York*, 232 A.D.2d 250 (1st Dept. Div. 1996).

In addition, to the points made by its expert, 521 urges that plaintiff's admission that he did not see the second step proves conclusively that plaintiff's poor eyesight was the proximate cause of the accident. La Union adopts 521's arguments concerning the alleged code violations and plaintiff's contributory negligence, but asserts that, pursuant to the lease, 521 is responsible for structural repairs and therefore La Union is entitled to summary judgment, dismissing the complaint and cross-claims.

II. The Cross-Claims

521 asserts four cross-claims against La Union: (1) damages caused by La Union's culpable conduct; (2) common law indemnification; (3) contractual indemnification; and (4) coverage under La Union's comprehensive general liability insurance.

La Union asserts two cross-claims against 521: (1) contribution; and (2) common law and/or contractual indemnification.

III. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant "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 N.Y.2d 320, 324 (1986). Upon this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*

521 correctly argues that NYCAC §§ 27-232, 27-375 & 27-376 are inapplicable to the case at bar. *Gaston v. New York City Housing Authority*, 258 A.D.2d 220, 223 (1st Dept. 1999)(§§ 27-232, 27-375 & 27-376 only apply to exterior stairs used as exits, such as metal stairs

attached to outside of building for emergency egress, not stairs located outside parameters of building). The step upon which plaintiff fell did not provide egress from an interior space to an exterior space. It was a step from the mid-point of an exterior sidewalk platform to a lower sidewalk.

Similarly, there has been no showing of a violation of MDL § 52. Section 52 was added by L. 1949, c. 665. The memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings, which accompanied the legislation, stated that it would apply to structures erected after July 1, 1951, but would not be retroactive as to exterior stairs. In addition, § 52, entitled "Stairs," defines them as a "flight or flights of steps together with any landings and parts of public halls through which it is necessary to pass in going from one level thereof to another." MDL §4(41). MDL § 52(3), the subsection dealing with uniform height of treads and risers, does not apply to exterior stairs. *Borduk v. Guerrieri*, 23 Misc.2d 520, 523 (Sup. Ct. N.Y. Co. 1960). The section dealing with handrails, MDL § 52(1), does not apply to stairs less than three feet eight inches wide (42 inches) or to exterior stairs, *Hunter v. G. W. H. W. Realty Co.*, 247 A.D. 385 (1st Dept. 1936). There is no dispute that the step on which plaintiff fell was 34 ½ inches wide. Morever, § 52(1) does not apply to multiple dwellings constructed before July 1, 1951. *Bloomer v. Schwartz*, 3 Misc.2d 195 (Sup. Ct. Bx. Co. 1955). In a like manner, MRL § 132 is inapplicable because the MRL only applies to cities with populations less than 325,000. MRL § 3(1). Section 132 does not require changes to buildings occupied as a multiple dwelling on July 1, 1952 which conformed to prior laws, statues, rules, ordinances and regulations. MRL § 11; *Vega v. Hastings Partners*, 248 A.D.2d 378 (2nd Dept. 1998).

Having eliminated statutory and regulatory violations that could constitute evidence of

negligence, the question becomes whether the 5/8 inch riser differential is actionable under the common law. The court rules that the complaint must be dismissed because the differential is a trivial defect. Whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is generally a question of fact for the jury. *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997). In determining whether a defect is trivial, the court should consider the width, depth, elevation, irregularity and appearance of the defect, as well as the time, place and circumstance of the injury. *Id.* at 978. Defects not constituting a trap or nuisance are not actionable. *Zalkin v. City of New York,* 36 A.D.3d 801 (2nd Dept. 2007). A 3/4 inch (6/8 inch) height differential between levels of adjoining concrete slabs is too trivial to be actionable. *Id.* Here, the differential between the risers was even smaller, 5/8 inch. There were no other surrounding circumstances, such as poor lighting or snow accumulation, that alter the result or would support a finding that the step was a trap or nuisance.

Plaintiffs' contentions that the platform was a special use or that *res ips loquitor* applies are negated by the finding that the defect is not actionable. *Granville v. City of NY*, 211 A.D.2d 195 (1st Dept. 1995)(special use of sidewalk imposes duty on landowner to maintain it free from defects); *Dermatossian v. New York City Transit Authority,* 67 N.Y.2d 219, 226 (1986)(*res ipsa loquitur* doctrine applies where accident would not have occurred absent negligence).

The cross-claims are moot and are dismissed in light of the dismissal of the complaint. Accordingly, it is

ORDERED that the motion and cross-motion for summary judgment by defendants 521 Properties Corp. and La Union Mini Market dismissing the complaint and all cross-claims against them are granted and the complaint and all cross-claims are hereby dismissed; and it is

further

ORDERED that the cross-motion for summary judgment by plaintiff Jose Vasquez is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 10, 2007

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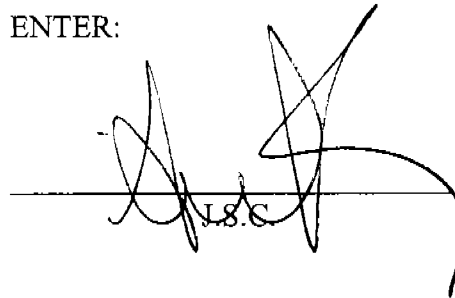

J.S.C.

FILED
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