

Trinidad v New York City Transit Authority

2007 NY Slip Op 34193(U)

December 11, 2007

Supreme Court, New York County

Docket Number: 0112454/2005

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

TRINIDAD, FRANCES

INDEX NO. 112454/05

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 002

NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION WHICH IS ATTACHED.

Dated: 12/11/07

D. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
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NEW YORK
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----x
Francis Trinidad,

Plaintiff,

Index No. 112454/05

-against-

New York City Transit Authority,
Defendant.

-----x

Donna Mills, J.:

In this negligence action defendant New York City Transit Authority (NYCTA) moves for an order, pursuant to CPLR 3212 (b), granting summary judgment dismissing the action on the basis that the NYCTA is not negligent as a matter of law.

On April 27, 2005, plaintiff Francis Trinidad was injured when he either tripped or slipped on his right foot and fell while entering into the subway as he stepped onto the bottom last step of the "P5" stairway located at the 161st Street and Amsterdam Avenue "C" train subway station. The fall resulted in a reconstructive operation of his right patella tendon.

In its Notice of Motion, the NYCTA asserts that it is not negligent as a matter of law because the alleged defect which resulted in plaintiff's fall is trivial. In paragraph 11, it is stated that a scrutiny of the photographs by the court is sufficient to conclude that as a matter of law the alleged defect is too trivial to be actionable. In paragraph 12, it is stated that a review of the photographs of the area where the plaintiff claims that his fall occurred reveals no indication of any defects whatsoever. In its Reply Affirmation, the NYCTA categorically states that "a scrutiny of the photographs alone in this case shows that the alleged defect is too trivial to be actionable," and, "Such a scrutiny of photographs is sufficient for the court to conclude that as a matter of law an alleged defect is trivial." The photographs which the NYCTA makes reference

to are the pictures attached as Exhibit E to its August 14, 2007 Notice of Motion and Exhibits 1 and 2 attached to its Reply Affirmation. It cites to *Pennella v 277 Bronx River Road Owners, Inc.* (309 AD2d 793 [2d Dept 2003]) in support of its proposition that the photographs show that the defect is trivial. *Pennella v 277 Bronx River Road Owners, Inc., supra*, citing to *Trincere v County of Suffolk* (90 NY2d 976, 977-978 [1997]), holds that, in addition to a scrutiny of photographs in determining whether a defect is trivial, a court must examine all of the facts presented, including width, depth, elevation, irregularity, appearance of the defect, as well as time, place and circumstances of the injury (*Pennella*, 309 AD2d at 794). Were this court to scrutinize the photographs, as suggested by the NYCTA, it would not be able to determine on those pictures alone that the alleged defect which caused plaintiff's injury was trivial. The exhibit pictures are of too poor a quality for the court to rely upon in reaching such a result. Turning to *Trincere v County of Suffolk*, (90 NY2d 976 *supra*), there the Court of Appeals held that, although there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth to be actionable, an action may, nonetheless, be dismissed after an examination of all the facts and circumstances presented, including the dimension of the defect at issue (*id.* at 977).

CPLR 3212 (b) provides that the motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other admissible proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts, shall recite all material facts, and shall show that there is no defense or merit. The motion will be granted, at that point, if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of

any party. As the NYCTA's reliance upon the photo exhibits alone is misplaced, the court will resort to a review of the other proof proffered in support of its argument that the defect is trivial, namely the pleadings, documentation, deposition testimony and affidavits attached to the parties' papers.

In plaintiff's Notice of Claim (Exhibit E), there is no definitive description of the alleged defect. There were photos annexed to the Notice of Claim. These photos were later used at plaintiff's deposition. In his December 6, 2005 verified bill of particulars (Exhibit C), he states that the accident occurred on the last step of the staircase. The record reflects that a 50-h hearing was held on July 18, 2005 (Exhibit F) and that Mr. Trinidad was thereafter deposed on December 6, 2006 (Exhibit D). At the 50-h hearing, when asked what caused him to trip, Mr. Trinidad stated that a "deformation" in the stairs or something like a crack, a little crack in the step, caused him to trip (Exhibit F, at 22 lines 14-20). Though he stated that the crack was "little," he also described the crack as being deep (*id.*). He further described the accident as occurring when a little bit of the bottom of his right foot got stuck in the deformation causing him to twist and then fall on his right knee (*id.* at 23 lines 1 - 12). He stated that he had not noticed the crack prior to his accident. The pictures attached to Exhibit E were marked at the 50-h hearing for the location of the alleged defect on the bottom last step of the staircase (*id.* at 41-42). At the 50-h hearing, he circled the area in the photograph where he fell. A copy of the photo he marked was later annexed as Exhibit 2 to the NYCTA's Reply Affirmation.

At his deposition, Mr. Trinidad stated that he used the P5 stairway on a regular basis (Exhibit D, at 16-17) to go to work which is where he was going on th date of his injury (*id.* at 14). He walked down the middle of the stairway (*id.* at 17-18) without use of the handrails (*id.*

at 17). Even though it was drizzling on the date of the accident, the steps were not wet nor was there any debris on the stairs (*id.* at 19). The lighting conditions were adequate on the date of the incident (*id.* at 21). He was looking straight ahead as he descended the stairs (*id.* at 25). He stated that, on the date that he fell, he was not wearing glasses, but explained that, though he used glasses for reading, the glasses he used were not prescription glasses (*id.* at 47).

He further stated that, as he stepped on the last step, with his whole right foot placed on the last step, his right foot got stuck in something (*id.* at 21-23) and then he lost his balance and fell (*id.* at 17, 23 and 24). His deposition testimony reflects that he could not unequivocally state that he fell as a result of the crack but guessed that the right outside bottom part of his sneaker got stuck in the crack (*id.* at 23). After he fell, he noticed a crack in the concrete [of the step] (*id.* at 25). At his deposition, he also marked a copy of the same photo which he had marked at his 50-h hearing by drawing a circle on the photo of the last step, showing the area which caused his fall (*id.* at 51-52). A copy of the photo marked at his deposition was annexed as exhibit 1 to the NYCTA's Reply Affirmation.

While the court can discern the circle and handwritten notation of "7/18/05" on one of the photo exhibits annexed to Exhibit E, which is also included as Exhibit 2, the court reiterates that the quality of the photos prohibits their use for the purpose of assisting this court in finding that the defect was trivial. The additional deposition photo of the P5 stairway attached as Exhibit 1 to the NYCTA's Reply Affirmation is not any more helpful. The court notes that, though the circled areas of the last step of the stairway are not identical in Exhibits 1 and 2, the different circled areas identifying the location of the alleged defect are both toward the middle portion of the same bottom step. The court further notes that there was a one and a half year gap in time

between the testimonies wherein plaintiff was asked to mark the two separate picture exhibits.

Mr. Trinidad's opposition papers make reference to Stanley Fein, P.E., his expert witness. Mr. Fein's September 11, 2007 affidavit is attached to the CPLR 3101 (d) Expert Exchange form annexed to plaintiff's counsel's Affirmation in Opposition. For the purpose of addressing the issue of determining whether the defect was trivial, it is necessary to quote pertinent language from Mr. Fein's affidavit. Mr. Fein's affidavit provides:

I am a professional engineer, duly licensed in the State of New York. ...

I performed an inspection of the exterior staircase of a building and premises located on the P5 staircase at the "C" subway station at 161st Street and Amsterdam Avenue.

I was advised that plaintiff sustained a slip/trip and fall from the last step of the subject staircase on April 27, 2005.

Based upon my visual inspection of said location, my review of the photographs depicting where plaintiff had fallen as well as of the pleadings and proceedings ... I state the following: at the location where the plaintiff had his accident, the edge of said stair was excessively worn and/or dilapidated; the stair was covered with an additional layer of concrete over the original concrete surface; the stair was deteriorated in the bullnose portion of the front of the stair and eroded to the point of creating a slipping/tripping hazard; the resurfacing of the stair did not create a proper bond with the original undersurface and was therefore defective and improper; good and accepted engineering practice would have required that the entire concrete surface of the stair be replaced which was not done herein with only a portion of the concrete surface of the stair having been replaced; the superficial addition to the top of the step was improper and created a tripping and/or slipping condition; the front bullnose portion of the stair was improperly and negligently resurfaced, inspected, maintained and repaired and said condition existed for a sufficient amount of time prior to the happening of the plaintiff's accident as to impute notice. ... The aforesaid are the exact conditions which are depicted in the photograph marked at plaintiff's 50-h hearing and annexed to the defendant's moving papers. Based upon the information available to me, the above referenced condition was a competent producing cause of plaintiff's accident on April 27, 2005.

The court notes that, while Mr. Trinidad's counsel's affirmation makes reference to the surface

of the last stair as being “sloped downwards,” the expert witness does not use a similar phrase to describe the surface of the last stair where plaintiff fell.

Regardless, the plaintiff’s expert does state in his affidavit that “the said condition existed for a sufficient amount of time prior to the happening of the plaintiff’s accident,” the conditions described in the expert’s affidavit were “the exact conditions which are depicted in the photograph¹ marked at plaintiff’s 50-h hearing,” and the “*referenced condition was a competent producing cause* of plaintiff’s accident on April 27, 2005.”

It is a well established principal of law that the court’s role in a summary judgment motion is that of issue finding not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and that a court will not grant a motion for summary judgment upon the trivial defect theory when there is a material issue of fact regarding the presence of a defect (*Fairchild v J. Crew Group, Inc.*, 21 AD 3d 523800 NYS2d 735 [2nd Dept 2005]). Yet, while the question of whether a defective condition exists is a question for the trier of fact, the court may determine if a defect is so trivial as to negate liability (*see Trincere*, 90 NY2d at 977). A court reaches a determination that a defect is trivial by examining depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance surrounding the injury (*id.* at 977-978).

Here, the expert witness’s use of the phrase “competent producing cause” would seem to indicate that a, or the, alleged defect in, or on, the bottom last step of the P5 staircase which allegedly caused plaintiff to fall was not trivial. Even though plaintiff could not say what the

¹The court trusts that the pictures reviewed by the expert witness were of a better quality than those provided to the court.

exact defect was on the last step of the P5 staircase which caused him to fall, the only defects being what he surmised in his testimonies to be a "crack" or a "deformity" in, or on, the surface of the step, his inability to exactly identify a defect, until a cursory glance at the step after he fell, does not resolve the issue of whether or not the defect was trivial or not. Mr. Fein's absence of a specific reference in his expert witness affidavit to the same crack referred to at the plaintiff's 50-h hearing and deposition, does not mean that the defect was trivial. Nor does the plaintiff's circling two different locations on the last step, as exemplified by Reply Affirmation Exhibits 1 and 2, moot out the existence of a triable question of fact. Both circled areas are in the middle of the stairway and plaintiff testified at his deposition that he descended down the middle of the stairway without using the handrails.

Based on an application of the case law cited by the parties and a review of the record before this court, including the photographs, the testimony of the plaintiff and the affidavit of the expert witness, a question of fact exists as to whether or not the alleged defect which caused plaintiff to fall was either trivial or substantial enough so as to constitute a trap or a snare. As such, this is a question of fact for the trier of fact to decide (*see Fairchild* 21 AD2d at 524-525).

Accordingly, it is

ORDERED that the NYCTA's motion for summary judgment is denied.

Dated: 12/11/07

ENTER:

Donna M. Mills

J.S.C.
DONNA M. MILLS, J.S.C.

FILED
 DEC 26 2007
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