

**Rosenberg v Sears, Roebuck & Co.**

2008 NY Slip Op 30953(U)

March 28, 2008

Supreme Court, Kings County

Docket Number: 0009662/2005

Judge: Lawrence S. Knipel

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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of March, 2008.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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SAMANTHA ROSENBERG,  
Plaintiff,

- against -

Index No. 9662/05

SEARS, ROEBUCK AND CO., ALEXANDER’S  
KINGS PLAZA, LLC, ALEXANDERS OF  
KINGS, LLC AND ALEXANDER’S, INC.

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 4_____
Opposing Affidavits (Affirmations)_____	5, 6_____
Reply Affidavits (Affirmations)_____	7, 8_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Sears, Roebuck and Co. (“Sears”) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff’s

complaint as against it. Defendants Alexander's Kings Plaza, LLC, Alexander's of Kings, LLC and Alexander's, Inc., cross-move for identical relief, adopting the Affirmation and Memorandum of Law of codefendant Sears in support of its summary judgment motion.

Plaintiff commenced this personal injury action to recover damages for injuries she received as a result of a slip and fall on a metal ramp that was part of an exterior covered walkway which led from the rooftop parking lot to the Sears store's merchandise pick-up area on the top floor of Kings Plaza Shopping Center ("Kings Plaza") on the evening of May 9, 2002. According to her complaint, plaintiff stepped onto the inclined portion of the ramp, and her left foot slipped on a "yellow metal grating" at the entrance of the covered outdoor walkway. She testified that it had previously been raining that day, and that, although it had stopped raining for "one" to a "few hours" prior to her accident, "there was water all over, puddles all over" the ramp from the rain. Plaintiff alleges that, as she stepped onto the metal ramp, her left foot slipped, causing her to fall. Consequently, plaintiff contends that the metal ramp was slippery, steep and there was no railing to hold onto, which all violated various sections of New York City Building Code.

In moving for summary judgment, defendants contend that the presence of water in the area of plaintiff's fall is insufficient to establish a dangerous or defective condition. In addition, they argue that the structure at issue is not a ramp and thus the sections of the Building Code relating to ramps, which plaintiff relies on, are inapplicable here. In support, Sears attaches the affidavit of an engineering expert, Dr. Paul Ast, who inspected and

photographed the structure on November 7, 2006, and concluded that the metal structure was not a ramp but rather a bridge plate due to (1) its dimensions, location, construction and (2) the fact that it was not a means of egress from Sears. Specifically, he opines that the structure does not constitute a ramp under NYC Building Code §27-377 because it is not being used as an “exit” “in lieu of . . . exterior stairs,” rather, it leads from the parking lot to the walkway. Dr. Ast specifically notes that the metal structure does not lead from the store building to the exterior, but rather connects a walkway to a parking lot, and therefore does not perform the function of exterior stairs acting as an exit within the meaning of §27-377. Accordingly, defendants assert that plaintiff’s arguments as to the applicability of the Building Code to the metal structure is incorrect.

Dr. Ast opines that the metal structure is a metal bridge plate that was not a dangerous condition. According to Dr. Ast, it was positioned at a 10 degree angle, which is safe for bridge plates, and the surface of the metal bridge plate was studded with a “diamond T” pattern in the same manner as industrial safety stairs. After calculating the friction created on the metal structure under both dry and wet conditions, Dr. Ast determined that the plate had a higher resistance to slipping than the generally accepted standard. Lastly, defendants refer to Dr. Ast’s conclusion, through his tests, that the metal bridge plate results were actually higher, or more safe, than the generally accepted levels for “slip resistant” or “slip retardant.”

In contrast, plaintiff contends that the structure is a metal ramp, which defendants failed to keep reasonably safe, and which caused her to fall because it was slippery, steep, and had no handrails. In support, she attaches the affidavit of expert Mr. Ubell, which states that the walkway, ramp and roof drainage systems had been improperly designed and constructed, causing water to accumulate at the ramp and leading to the wetness on the ramp and the ramp's wet, slippery condition. Mr. Ubell opined that, as pedestrians entered the exterior corridor, they would step in accumulated water prior to stepping on the ramp, which caused the ramp to be wet, slippery and unsafe. He states that the ramp was constructed as a means of stepping-over accumulated water and an expansion joint in the roof. According to Mr. Ubell, there would have been no need for the ramp had the exterior walkway and the roof drainage system been properly constructed.

Plaintiff also argues that the metal ramp, which was slippery, steep and had no handrails, violated the Building Code. According to plaintiff, the Building Code applies because Kings Plaza's September 10, 1970 Certificate of Occupancy explicitly states that Kings Plaza "conforms . . . to the requirements of the Building Code."<sup>1</sup> Moreover, plaintiff's expert, Mr. Ubell, also states that the metal structure is (1) an "exterior ramp" under the NYC Building Code because it is a means of egress to the parking lot, and the walkway containing

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<sup>1</sup> Plaintiff argues that defendants' expert incorrectly labels the ramp as a bridge plate, which is generally used on a light rail vehicle to provide wheelchair access from the platform to the rail car. Regardless, plaintiff asserts that (1) the "bridge plate" would violate the Americans with Disabilities Act, 42 USC § 1192.83(c)(5) because the same safety requirements apply; (2) defendants had a duty to warn plaintiff that it was a dangerous condition and failed to do so.

the ramp was roofed and not open on all sides; (2) an “exterior corridor” under § 27-232 because it is an “enclosed public passage of access from rooms or spaces to an exit;” and (3) part of an “exit passageway” under § 27-230 because it leads from a yard or court to an open exterior space. Specifically, Mr. Ubell states that defendants violated (1) section 27-377(b) because the ramp where plaintiff fell was excessively steep, “1 7/8” greater than it should be or 87% beyond the allowable safe rise”; (2) section 27-(c)(1) because it was 7 5/8” too short; (3) section 27-375(f) because the ramp did not have handrails. Plaintiff concludes that, as a result of these defects, defendants were negligent in creating a dangerous condition for pedestrians using the ramp.

Lastly, plaintiff asserts that, at the very least, there are factual issues which preclude summary judgment. Plaintiff cites to the fact that his expert and defendants’ expert disagrees as to whether the metal structure was properly designed, constructed and maintained as well as whether it violated the Building Code. Plaintiff also contends that question of fact exists regarding which defendant is responsible for the negligently designed and/or maintained ramp. Plaintiff notes that, while the deposition testimony from Kings Plaza indicates that Sears occupies the covered walkway and ramp, the testimony from Sears indicates that Kings Plaza was responsible for maintaining the walkway and metal ramp.<sup>2</sup>

In moving for summary judgment dismissing plaintiff’s complaint, the defendants have the burden to show their entitlement to judgment as a matter of law, tendering

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<sup>2</sup> Plaintiff alleges that Sears installed the ramp, the canopy and walkway shortly after leasing the store on January 11, 1997.

sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Here, defendants have not done so. They have not eliminated all issues of fact regarding the applicability of some of the Building Code provisions cited by plaintiff, particularly in light of plaintiff's expert's indication that such code provisions were in effect when the building was constructed (*cf. Ryan v KRT Property Holdings, LLC*, 45 AD3d 663 [2007]). "It is the defendants' burden of proof, as the proponents of a summary judgment motion, to eliminate all issues of fact as to whether the Code applies" to the metal structure in question (*See Pavon v 19<sup>th</sup> Street Associates LLC*, 17 Misc.3d 1125 [2007]).

Section 27-377 of the Building Code, in pertinent part, provides:

"Interior or exterior ramps may be used as exits in lieu of interior or exterior stairs provided they comply with the applicable requirements for interior stairs in section 27-375 of this article or exterior stairs in section, 27-376 of this article respectively, and with the following . . ."

This Section governs ramps only to the extent that said ramp is used as an "exit" in place of interior or exterior stairs. Under § 27-232 of the Building Code, an "exit" is defined as "[a] means of egress from the interior of a building to an open exterior space which is provided by . . . interior stairs [or] exterior stairs." Here, the parties have presented conflicting expert evidence as to whether the metal structure was a ramp, being used as "exterior stairs" or as

an “exit” as the term is defined in Building Code § 27-232, or as a metal bridge plate, as defendants contend. Specifically, defendants raise a question as to whether the metal structure acts as an exit under § 27-232 because it is located outside the “parameters of the store building and leads from the parking lot to the walkway, not to the door of the store.” As such, the court finds that issues of fact exist as to whether the alleged Building Code violations relating to the grade of the slope (§ 27-377), and lack of handrails (§ 27-375) are applicable to the metal structure in question, and if so, whether such violations played any role in the plaintiff’s accident (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559; *Lievano v Browning School*, 265 AD2d 233).

Moreover, whether a dangerous or defective condition exists on the property so as to create liability is generally a question of fact for the jury, depending on the facts and circumstances of each case (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Both plaintiff’s and defendants’ experts clearly disagree as to whether the metal structure was properly designed, constructed and maintained, and whether it was a dangerous condition, which precludes summary judgment at this time. Accordingly, defendants’ respective motions are denied.

This constitutes the decision and order of the Court.

ENTER  
  
J.S.C.