

Gelb v Hilton Hotels Corp.

2009 NY Slip Op 30701(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 110273/07

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: **JUSTICE SHIRLEY WERNER KORNREICH** PART 54

Index Number : 110273/2007
GELB, MORTON A.
VS.
HILTON HOTELS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/29/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1, 2
3
4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

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

FILED

MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/27/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
MORTON A. GELB,

Plaintiff,

-against-

HILTON HOTELS CORP.,

Defendant.

Index No.: 110273/07

DECISION
and
ORDER

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover damages for personal injuries suffered by plaintiff, Morton Gelb, when he fell off a walkway-curb in defendant's garage. Specifically, plaintiff contends that the design of the sidewalk, upon which he was walking, is such that the garage driveway blends with the sidewalk, "creating the appearance of no height difference." Def.'s Op., p. 3.

I. Facts

A. Defendant's Submissions

1. Plaintiff's EBT

Plaintiff testified to the following. He is a Certified Public Accountant and was at the Hilton Hotel, on May 16, 2007, to attend the New York State Accounting and Exposition Show. He arrived at approximately 8:30 a.m. and entered the hotel through the parking garage. He walked into the garage and along a sidewalk, until he entered the hotel. Plaintiff had been to the hotel for business purposes about 10 times previously, the last time being an IRS convention held on August 28, 29 and 30, 2006. He used the garage entrance on two occasions on those dates.

Plaintiff left the hotel at approximately 1:30 or 1:45 p.m. He exited the hotel through

the garage door and walked onto the garage walkway toward 53rd Street. At the time, plaintiff was carrying two bags containing samples from the various vendors and his jacket. He testified that he was carrying a bag in each hand and was looking where he was going. He further testified that he stepped off the curb to cut across the driveway and fell, stating, "I don't know" what caused the fall. EBT, p. 44. The sidewalk continued after the point at which plaintiff stepped off of it.

A security guard came to plaintiff's aid after he fell, and plaintiff told him what had happened. When confronted with the following statement on the accident report, plaintiff did not deny that he may have made it:

Mr. Gelb stated that he was leaving the hotel after attending the accounting show in the hotel and was stepping of [sic] the sidewalk toward 53rd Street to cut across the driveway to enter the street on 53rd Street when he misjudged the step and fell to the ground.

EBT, p. 59.

In questioning by his own attorney, plaintiff stated he fell as he stepped off the curb because the curb blended into the garage driveway. He also stated that there were yellow markings painted on other curb-edges in the garage. When again questioned by the defense, he stated that he noticed these curb markings, but did not notice a sign posted in the garage which warned pedestrians not to walk on the driveway.

In addition, the 74 year old plaintiff testified that he wears eyeglasses at all times, and that the glasses have a graduated view field. At the time of the accident, he was wearing clip-on sunglasses over his eyeglasses.

A videotape of the accident was shown to plaintiff at the deposition, and he identified himself. He explained that the video depicted him with a piece of paper in his mouth and

carrying the two bags of which he spoke, in his right hand. He was pushing his jacket into one of the bags as he walked.

2. *Hilton EBT*

Anthony Spagnuolo, the director of safety and security for the Hilton Hotel in New York, testified as follows. The hotel is located on the west side of Sixth Avenue, between 53rd and 54th Streets in Manhattan. A parking garage is located at the west end of the hotel and can be accessed from either 53rd or 54th Streets. The garage property is owned by Hilton and leased to Central Parking, also known as Kinney Systems, Inc,

Mr. Spagnuolo learned of plaintiff's accident on the day of the incident from James White, the security officer who wrote the incident report and downloaded the video of the accident from the garage security camera. The incident report was written on the day of the accident and noted the time of the accident as 1:45 p.m. Mr. Spagnuolo was not aware of any other accidents on the sidewalk in the 3 years prior to plaintiff's fall.

3. *Photographs*

Eight photographs are annexed to defendant's papers. Five (photos 1-5) depict the sidewalk and driveway inside of the garage; one (photo 6) depicts the front of the hotel; and two (photos 7 and 8) depict a sign in the garage which states: "CAUTION, SPEED BUMP, PEDESTRIANS DO NOT WALK ON DRIVEWAY; USE WALKWAY ONLY." Photographs 1 to 5 are taken from different angles. Photo 1 shows a green granite sidewalk, edged with grey granite, and a grey granite driveway; photo 2 is similar. Photo 3 depicts a black and grey driveway and a darker grey granite sidewalk; photo 4 is similar, but looks to the street. Photo 5 depicts a speckled granite sidewalk, a grey driveway and a concrete, sloped portion of sidewalk.

4. *Videotape*

The video tape of the accident was submitted. It depicts a darkened garage. Six people are seen walking along the sidewalk. Plaintiff then appears approximately ten feet behind them. The sidewalk appears to be grey with a black stripe along the curbed edge, and the driveway appears to be a charcoal color.

Plaintiff, wearing dark sunglasses, is walking in the middle of the sidewalk, holding two tote-bags in his right hand. He is looking into one of the bags, stuffing something into it, and has a white paper in his mouth. He subsequently takes the paper from his mouth with his left hand, reaches to his back, left pocket with that hand and brings his left hand in front of him. As he veers to his right, he is holding something in his left hand and looking at it. At the same time, he steps off of the sidewalk and falls out of sight. The incident appears to take place a number of car lengths from the entrance to the garage. There is no yellow stripe along any part of approximately 70 feet of sidewalk depicted.

5. *Incident Report*

The incident report, written and signed by James White, is dated and timed as May 16, 2007, 1:45 p.m. It states:

On May 16th 2007 at approx 1:45 pm Security Dispatcher informed me that someone had fallen in the garage area of the hotel. S/O White responded to the garage and observed a Male sitting on the garage driveway nearest the exit to 53rd Street. The Male was accompanied by another Male who was passing the garage and saw the accident. The Male passing by was Mr. Adam Popper, 646-428-8424. The Male on the ground of driveway was Mr. Morton Gelb, 72 years old. Mr. Gelb stated that he was leaving the hotel after attending the accounting show in the hotel and was stepping of [sic] the sidewalk towards 53rd St to cut across the driveway to enter the street on 53rd St when he misjudged the step and fell to the ground. Mr. Gelb believes that he broke his right shoulder. S/O White asked for 911 to be called which arrived 50 minutes later. Mr. Gelb was making calls on his cell phone and complaining of the pain in his shoulder.... Mr. Gelb called his family members on his cell phone. S/O White observed no

obstructions on sidewalk [illegible] the [illegible] accident.

B. Plaintiff's Submissions

1. Photographs

Plaintiff submits a July 3, 2007 photograph of an entrance to the garage, depicting yellow arrows painted on the driveway and a yellow stripe along a sidewalk and brick pillar. There is a warning sign on the brick pillar. A second photograph taken from the inside of the garage depicts a sidewalk made of at least 3 large green granite rows of squares and edged with grey rectangular granite. The driveway of the garage appears to be made of grey material.

2. Gelb Affidavit

Mr. Gelb avers that he fell from a walkway in the Hilton garage at approximately 1:50 p.m. on May 16, 2007, outlines his injuries and states that the accident occurred after he exited the hotel through a doorway leading into the garage area at street level. He then states:

As I got closer to the sidewalk on 53rd Street, I began to walk to my right over what appeared to be a driveway leading into the garage, and it was at that point that I was caused to fall. Immediately prior to my falling, I was unaware of a height differential that existed from the walkway upon which I was walking and the surface of the driveway leading into the garage. It appeared to me to be level and of similar height and it was only after I had fallen to the ground that I was able to note that there was in fact a height differential in excess of several inches.

The surface of the roadway and the walkway upon which I was walking, both appeared to be of the same dark color, making it very difficult to distinguish the height differential which existed.

It was also apparent to me that all of the other height differentials located in the parking garage in that area had been painted with a bright yellow paint to warn persons of the existence of the curbs. The walkway upon which I was walking, the main walkway leading to the hotel entrance in the garage, appeared to be the only walkway not painted with a bright yellow paint along the curb area.... On the date of my accident there was sun glare...

* * * * *

At the time of my accident, I was looking straight ahead and to the best of my ability was taking in everything that was capable of being readily observed.

3. *Affidavit of Engineer*

Carl J. Abraham, a licensed professional engineer submits an affidavit in which he avers that he specializes in safety engineering and design and has consulted in over 1,000 slip and fall cases. He states that he has reviewed the motion papers, the pleadings, the Bill of Particulars, the depositions of Mr. Gelb and Mr. Spagnuolo, photographs, the accident report and the videotape. He does not aver that he visited the premises.

Mr. Abraham notes that there is no law mandating concrete curbs be painted yellow, but that “[i]t is the custom and practice throughout North America that curbs are painted yellow to warn people to avoid tripping over them. That is the basic standard of care in the hotel industry. In the alternative, some hotels use signs such as ‘Watch Your Step.’ The best suggestion is to have both the signs and the heavy yellow paint on all the areas that place the invitees at risk.” Aff., para. 5(b), (c) and (d). He further states:

- e. The yellow paint is easy to observe in both daylight and at nighttime.
- f. Coloring the curbs provides some defense against trips and falls.
* * * *
- h. People with diminished vision have difficulty managing curbs especially when they are not placed on notice.
* * * *
- j. When people walk on the sidewalk or the street, they tend to memorize the area they are walking to and are able to , in most instances, do other tasks while they are walking without paying full attention to any foreseeable risk unless they are placed on notice for that risk.

Aff., para. 5.

Mr. Abraham opines that parking lots are zones of danger, that the Hilton Hotel had an obligation to protect the elderly, that the American National Standard Institute published standard Z535.1-1991, which states in section 6.3 that safety yellow is the color for caution, and that Hilton had been placed on notice of this for decades. He opines that, as a result,

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Hilton did not meet the standard of care used in the industry.

C. Defendant's Submissions in Reply

1. Affidavit of Engineer

Steve Pietropaol, a licensed professional engineer, specializing in safety and human factors engineering, avers that he has been retained by defendant to do a site inspection and has reviewed the pleadings, the bill of particulars, the depositions, photographs, the videotape and the motion papers. He opines that plaintiff's expert failed to identify a breach of the standard of care, noting that no law, code, rule or regulation was violated by not painting the curb yellow. He states that there are caution signs throughout the garage warning pedestrians not to walk on the driveway, that the only curbs and columns painted yellow in the garage are painted to warn motorists of certain objects, that the driveway is macadam and the sidewalk granite, that there is a color differential between the granite slab of the curb and both the granite of the sidewalk and the driveway and that the lighting over the area is 3 times greater than required by accepted standards. Mr. Pietropaol opines that: the area where the accident occurred is constructed and designed in a workmanlike manner; there is no requirement or standard mandating the hotel to paint the curb yellow; there is a clear and visible variance in color and texture between the walkway and driveway; the area is well lit; and there are well marked caution signs warning pedestrians not to walk in the driveway.

2. Spagnuolo Affidavit

Mr. Spagnuolo avers that he is notified of all incidents which occur at the premises and that no falls on the subject sidewalk were reported to him between June 30, 2004 and May 16, 2007, the dates during which he held his position.

II. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause

of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. N.Y.*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and “lay bare his proofs” of any alleged triable issues of fact. *In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3d Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct., Oswego County, 1968)(Aronson, J.). See *Zuckerman, supra*; *Bank of New York v. Spitzer*, 43 A.D.2d 105 (1st Dept. 1973). Here, defendant has met its burden.

A landowner is under an obligation to use reasonable care in maintaining its property in a reasonably safe condition “in view of all the circumstances, including the likelihood of injury to others.” *Cupo v. Karfunkel*, 1 A.D.3d 48, 51 (2d Dept. 2003). Reasonable care may encompass the duty to warn of a dangerous condition. *Id.* However, “a landowner has no duty to warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one’s senses.” *Ramos v. Cooper Investors, Inc.*, 49 A.D.3d 623, 624 (2d Dept. 2008). See also, *Cupo, supra* (landowner need not warn of open and obvious condition). Optical confusion created by flooring may raise a jury issue in a personal injury action when a person is unfamiliar with the premises, where the area is ill lit and where the uneven flooring or step is placed in proximity to an entrance door. *Roros v. Oliva*, 54 A.D.3d 398 (2d Dept. 2008); *Scher v. Stropoli*, 7 A.D.3d 777 (2d Dept. 2004); *Chafoulias v. 240 E. 55th St. Tenants Corp.*, 141 A.D.2d 207 (1st Dept. 1988). On the other hand, where the plaintiff is familiar with the premises, no legal or code violation exists, the lighting is adequate and the height differential is readily observable, there is no duty to warn. *Schwartz v. Hersh*, 50 A.D.3d 1011 (2d Dept. 2008); *Ramos, supra*; *Alger v. CVS Mack Drug of N.Y., LLC*, 39 A.D.3d 928 (3d Dept. 2007); *Salerno v. Street Retail, Inc.*, 38 A.D.3d 515 (2d Dept. 2007); *Meagher-Cox v. Winarski*, 32 A.D.3d 379 (2d Dept. 2006); *Guldy v. Pyramid*

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Corp., 222 A.D.2d 815 (3d Dept. 1995).

Here, no latent defect existed. The video, photographs and affidavits demonstrate that the granite sidewalk was distinguishable in color and texture from the macadam driveway. The height differential between the walkway and road was readily discernable by the reasonable use of plaintiff's senses and, thus, not inherently dangerous. Signs in the garage warned pedestrians not to walk on the driveway, differentiating between the driveway and the walkway. Moreover, the sidewalk met all legal and building code standards; the lighting was more than adequate; and plaintiff had used the walkway on several occasions without problem. Plaintiff's expert's conclusory opinion that defendant's failure to paint the edge of the walkway yellow, the only basis for his opinion that the sidewalk violated custom and practice and was inherently dangerous, did not raise an issue for trial. *See Alger, supra* at 930; *Guldy, supra* at 816. Unlike defendant's expert, plaintiff's expert did not inspect the premises. Unlike defendant's expert, he did not observe the walkway and driveway to determine the material from which they were made, their colors and the height differential. And unlike defendant's expert, he had not inspected the entire garage. Nor can plaintiff's affidavit in reply refute his deposition testimony, the admission he made to James White and the indisputable evidence presented by the videotape. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

March 27, 2009

ENTER:

J.S.C.

