

**Singh v Actors' Equity Holding Corp.**

2010 NY Slip Op 30353(U)

February 22, 2010

Supreme Court, New York County

Docket Number: 114166/2005

Judge: Jane S. Solomon

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

**JANE & SOLOMON**

PRESENT: \_\_\_\_\_  
*Justice*

PART 55

Index Number : 114166/2005  
**SINGH, HARBHAJAN**  
vs.  
**ACTORS' EQUITY HOLDING**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

**PAPERS NUMBERED**  
1-3  
4-5  
6


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 *is decided by the annexed memorandum decision and order*

**FILED**  
FEB 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2-22-10

  
**JANE & SOLOMON** J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----x  
HARBHAJAN SINGH f/k/a BHAJAN RAKKAR,

Plaintiff,

Index No.: 114166/2005

-against-

DECISION and ORDER

ACTORS' EQUITY HOLDING CORPORATION  
and NEWMARK & COMPANY REAL ESTATE,  
INC.

Defendant.

-----x

**JANE S. SOLOMON, J.:**

Plaintiff, Harbhajan Singh f/k/a Bhajan Rakkhar (Singh),  
sues Defendants, Actors' Equity Holding Corporation (AEHC) and  
Newmark & Company Real Estate, Inc. (Newmark), for damages  
arising from a fall on a flight of stairs. Defendants move for  
summary judgment, dismissing the complaint. The motion is  
granted for the following reasons.

On March 5, 2005, Singh, a painter employed by a non-  
party, was painting the 10<sup>th</sup> floor hallway of 1560 Broadway, in  
Manhattan, New York. The building is owned by AEHC and managed  
by Newmark. While carrying paint down a flight of stairs, Singh  
fell, suffering injuries. Singh claims the defendants were  
negligent in failing to properly maintain the stairs.

At his EBT on January 29, 2008, Singh testified as  
follows:

- Q. When you say then you fell, what caused you to fall?
- A. I don't know. There was some obstruction I believe, but I cannot tell you exactly

what happened.

Q. Where was there an obstruction?

A. I do not know the cause, I don't know, I just fell there.

(Motion, Ex. J, pp. 72).

He further stated that he "imagined in [his] mind that there was an obstruction" (Id., at 74), and that it was only after he climbed the stairs after the fall that he saw "a metal piece coming up" from the stair (Id., at 114).

Defendants argue that Singh has not established what caused him to fall or that they had any notice, actual or constructive, of the said condition, which might give rise to liability on their part.

In opposing the motion, Singh submits an "Affidavit of Merit," which affirms that "[a]s I put my right foot on the 2<sup>nd</sup> step, my foot got caught in a metal nosing that had been bent and was sticking up in the air at the right side of the step by about 4-5 inches" (Opposition, Ex. C, p.2), and that "the nosing was the same color as the step and I could not differentiate the two" (Id.). Singh also submits the report of Peter Pomerantz, an engineer he hired to inspect the stairs in 2007, and a photograph of a stair (not the stair that he fell on) with a severely rusted and bent nosing (Affirmation in Opposition, Ex. E). The photograph, according to Singh, "has been modified to show the condition of the nosing as it existed on the date of accident" (Opposition, ¶ 10).

In Defendants reply, they contend that Singh's Affidavit of Merit completely contradicts his earlier sworn testimony; that Pomerantz's opinion should be disregarded because his inspection took place several years after the incident; that Pomerantz's report is speculative and focuses on defects not in issue; and that the photograph is not of the stair in question, but merely shows a "doctored" condition, and that there is no evidence that the stair in question ever looked as represented in the photograph.

"To establish a prima facie case, the plaintiff must show that the defendant either created a dangerous condition . . . or had actual or constructive knowledge of the condition . . . . Furthermore, [t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners'] employees to discover and remedy it . . . . However, a mere general awareness of some dangerous condition is legally insufficient to establish constructive notice" (*Segretti v. Shorestein Co., East, L.P.*, 256 AD2d 234, 235 [1st Dept. 1998] [citations and internal quotation marks omitted]; see also *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Singh supplies no evidence that Defendants had actual knowledge of any defect to the stair. Regarding constructive notice, Singh testified that the stairway was well lit, that he

had climbed the stairway in question one or two times prior to his fall and had not noticed any problem or danger, that he was unaware of any other individual's complaints or warnings of a dangerous condition, and that he, himself, had not complained or warned of any danger to the Defendants (Motion, Ex. J, pp 64-66).

Singh did not see a dangerous condition on the stair prior to his fall, and no evidence is presented that established what condition predated his fall. Singh's subsequent recasting of his testimony in his Affidavit of Merit is unpersuasive, as affidavit testimony prepared in support of ongoing litigation "that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Telfeyan v. City of New York*, 40 AD3d 372, 373 [1<sup>st</sup> dept. 2007]).

Similarly, Pomerantz's report is unpersuasive. His inspection was made on August 1, 2007, over two years after Singh fell, and in it, Pomerantz only states that, as of August 2007, the stair was loose and needed repairs, and that the stairs violated several building code sections, none of which are germane to the description of the stairs made by Singh or to the issue of notice of the alleged condition.

Under the circumstances, any finding that defendants

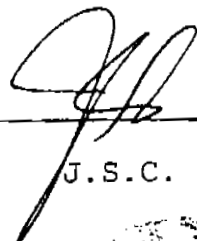
were responsible for plaintiff's accident would rest upon sheer speculation (*Ragusa v. Lincoln Center for Performing Arts, Inc.*, 39 AD3d 294, 295 [1st Dept. 2007]).

Accordingly, it hereby is

**ORDERED** that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: February 22, 2010

ENTER:   
\_\_\_\_\_  
J.S.C.

**FILED**  
FEB 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE