

**Shellman v Bradhurst Assoc., LLC**

2011 NY Slip Op 33085(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 118378/06

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

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

PART 10

Index Number : 118378/2006  
**SHELLMAN, CLIFFORD**  
vs.  
**BRADHURST ASSOCIATES**  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

Motion to/for \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

## FILED

NOV 29 2011

NEW YORK  
COUNTY CLERK'S OFFICE

NOV 28 2011

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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 10

-----X  
CLIFFORD SHELLMAN,

Plaintiff,

-against-

BRADHURST ASSOCIATES, LLC and TYRAX  
REALTY MANAGEMENT, INC.,

Defendants.  
-----X

**Decision and Order**

Index No. 118378/06  
Seq No. 005

Present:

Hon. Judith J. Gische, JSC  
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m (3212) (sep back) w/GEL affirm, M, MP, MS and docs . . .	1, 2
Pltf opp w/AAF affirm . . . . .	3
Defs' reply w/BJI affirm . . . . .	4

**FILED**

-----X  
**NOV 29 2011**  
-----X

JUDITH GISCHE, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this personal injury action, plaintiff Clifford Shellman (Shellman) claims that at about 7:30 A.M. on November 8, 2005, he was caused to sustain serious physical injuries when he tripped and fell down a flight of stairs inside the apartment building where he has been living for more than thirty years. More specifically, plaintiff alleges that he had just left his apartment and was about to the walk down a flight of stairs when the heel of his shoe became caught on broken and/or missing floor tiles near the edge of the third floor landing, causing him to tumble forward and seriously injure his left (dominant) hand and right knee. The apartment building, which is owned by defendant Bradhurst Associates, Inc. (Bradhurst) and managed by defendant Tyrax Realty Management Inc. (Tyrax), is located at 192 Bradhurst Avenue, New York, New York.

Plaintiff contends that his accident and injuries were due to the failure of defendants to maintain the floor tiles near the edge of the third floor landing (hereinafter, the third floor landing) in a safe condition.

Plaintiff commenced this action for damages by serving and filing his summons and complaint in the office of the New York County Clerk on or about December 12, 2006. Issue was joined by service of defendants' joint answer on or about February 5, 2007, and discovery ensued. Plaintiff filed the note of issue on January 13, 2011, and defendants now move, under motion sequence 005, for an order granting summary judgment and dismissing plaintiff's complaint on the ground that plaintiff's allegations do not support any theory under which they can be held liable for damages. Plaintiff opposes the motion, arguing that questions of fact exist as to defendants' negligence which precludes summary judgment. The following facts are taken from the parties' pleadings, deposition transcripts, affidavits and documentary evidence, and are undisputed unless otherwise indicated.

According to Shellman, he left his third floor apartment that morning intending to get his car in order to drive his wife to work. He recalled being a few inches from the edge of the stairway landing when he tripped, falling head first. His wife found him in the position in which he had landed, lying on his back at the bottom of the stairs, with his head facing the ceiling and his feet on the wall. She helped him get up and return to their apartment, after which he drove her to work a few blocks away. He testified that when he returned from driving his wife to work, he looked to see what caused him to trip and observed "torn, broke" flooring (Plaintiff's Dep., at 25). He also described it as "[l]ike a brick that broke up" (*id.*, at 34). At his deposition, Shellman was shown two photographs which he identified as accurately depicting the area of the

landing which caused his trip and fall accident (*see* Defendants' Exhibit D) ("the photographs").

Shellman testified that he brought himself to Harlem Hospital's emergency room later that same day for treatment for his knee, dominant left hand, and neck. His arm was placed in a hard cast and he was prescribed medication and released with instructions to return for further treatment. He reported receiving treatment for effusion (swelling) and a tear in the posterior horn of the lateral meniscus of his right knee, and eventually undergoing a total knee replacement. He claims to also suffer from weakness and disability in his hand and arm.

Central to the motion are defendants' assertions that they cannot be held liable for Shellman's injuries because: (1) they did not have actual or constructive notice of the alleged defective and dangerous condition that produced his accident; (2) there is no evidence that an unsafe condition existed at the third floor landing prior to his accident; but in the event it did (3) it was trivial in nature; and/or (4) it did not exist for a sufficient length of time to permit defendants or their employees to discover and remedy it prior to plaintiff's fall. Defendants also offer an independent explanation for plaintiff's injuries, namely, that he sustained them when he slipped on coffee he had spilled on the flooring.

Among the submissions offered by defendants in support of summary judgment are: the deposition transcripts of plaintiff and of Tyrax's building superintendent Mark Peterson (Peterson) who were both deposed on July 18, 2008; sworn affidavits from Tryax and Bradhurst; and two photographs of the stairwell edge of the third floor landing. Defendants rely on the Bradhurst affidavit and deposition testimony of Peterson and Shellman to establish a lack of actual notice, and they rely almost entirely on Peterson's testimony to establish a lack of constructive notice.

According to Peterson, he has been the building superintendent for 192 Bradhurst Avenue, plus two other buildings located at 196 and 200 Bradhurst Avenue, for the past seven to eight years, including the day of Shellman’s fall. He testified that as part of his duties and responsibilities in maintaining the apartment building at 192 Bradhurst Avenue in a safe condition, he, along with a porter, inspected each floor of the building three times a day “to see if there are any objects, any spills, anything out-of-place, need repairs and so forth” to make sure there was “nothing anyone can trip on” and to make sure that the surface of the floors is smooth and clear (Tyra/Peterson Dep., at 13, 14 - 15, 17, 19). He denied noticing any tiles missing from the area of the third floor landing at any time before or after November 8, 2005 (*id.*, at 18). Peterson did, however, testify to an incident on some nonspecific date, involving Shellman’s alleged spilling and slipping on his own coffee and then calling upon Peterson to clean it, in an effort to show that it was Shellman’s own negligence, and not the condition of the landing, which caused his accident and resulting injuries.<sup>1</sup> . . . . .

Plaintiff’s counsel showed Peterson the same photographs which a few hours earlier had been shown to plaintiff by defense counsel and identified by plaintiff as depicting the area of his accident. Peterson responded to few, if any, of plaintiff counsel’s questions relating to the photographs, repeating that he was unable to recognize the area depicted in them as the third floor landing at 192 Bradhurst Avenue. Peterson did, however, acknowledge that the photographs show that the flooring, which did not look to him to be “damaged,” looked “not cleaned” and “filthy.” He also acknowledged that the area looked like missing tiles had been

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<sup>1</sup>At his deposition, plaintiff did not recall an incident involving his holding, spilling, or slipping on coffee. He specifically denied drinking coffee or tea in the mornings, and he denied holding anything in his hands at the time of his accident (Shellman Dep., at 44 - 45).

filled in with cement years back, and that at some time prior to November 8, 2005, he had noticed conditions at the location of the third floor landing which “need[ed] correction” (*id.*, at 19, 23, 25 - 27).

Defendants offer the following excerpts from Shellman’s deposition testimony to show that he (Peterson) did not know what cause his fall.

Q. At the time you tripped were you aware of what [your heel] got caught on?

A. No (Shellman Dep., at 27).

Q. As you sit here today can you state for certain whether or not that’s actually what caused you to fall?

A. I’m pretty sure it did. I hope. I guess it did (*id.*, at 35).

Next, defendants offer the sworn affidavit from Tryax’s director of field operations, Miguel A. Leon (Leon), in which he attests to the results of his search of Tryax’s records pertaining to 192 Bradhurst Avenue. According to Leon, the records do not include any complaints made prior to plaintiff’s accident with respect to broken flooring and/or missing tiles (Defendants’ Exhibit F).

Tyrax also submits an affidavit from Peterson in which he purports to clarify and supplement his prior testimony with respect to his duties at 192 Bradhurst Avenue, his lack of knowledge as to any defects or complaints of any defects at the third floor landing, and his lack of knowledge of any instances when cement was used as filler for missing tiles at that location. Furthermore, in an effort to establish that the alleged broken or missing tiles were merely insignificant defects which could not constitute a trap or nuisance as a matter of law, Peterson states as follows:

I have been asked by counsel the difference in height between a tile that is embedded in the floor and the space in which a tile would be missing. The tiles

that are used throughout the building are made of marble and measure one inch by one inch . . . approximately  $\frac{1}{4}$  inch in depth. Thus, if only the tile was missing, there would be a differential in height of one  $\frac{1}{4}$ .

When secured by concrete, the concrete layering measures only an additional  $\frac{1}{4}$ <sup>th</sup> of [an] inch in depth. Thus, if there were missing tiles and the concrete underneath was missing as well, the total differential in height would be  $\frac{1}{2}$  of an inch.

Looking at the photograph, it appears that the concrete is still in place and the differential in height is only  $\frac{1}{4}$  of an inch. However, assuming the worst case scenario, the height differential would only have measured  $\frac{1}{2}$  of an inch (Defendants' Exhibit G).

The third affidavit was from a Matthew Schmelzer, principal and manager at Bradhurst who attests, in relevant part:

The Corporation did not have any notice, either actual or constructive, of the alleged condition that Clifford Shellman alleges caused his accident, i.e., broken flooring and/or missing tiles in the building of 192 Bradhurst Avenue, New York, New York (Defendants' Exhibit H).

Defendants assert that these submissions, together, demonstrate, prima facie, their entitlement to judgment as a matter of law, and that the burden shifts to plaintiff to produce sufficient to establish the existence of material questions of fact.

Plaintiff disagrees, arguing that defendants have not demonstrated that they lacked constructive knowledge of the hazardous condition at the third floor landing because the "shoddy" cement repair and broken and/or missing tiles were both visible and apparent. Plaintiff further contends that, because the presence of the cement repair indicates that the area had been the subject of a previous repair, which, according to Peterson, predated his employment, defendants were on notice, prior to November 8, 2005, that the area needed careful monitoring and/or further repairs.

It is settled law that a landowner is under a duty to maintain its property in a reasonably

safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233, 241 [1976] [citation omitted]). It is also well settled that a plaintiff seeking to recover damages for injuries sustained due to a dangerous condition on the property of another must establish that the defendant had actual or constructive notice of that condition (*see Leo v Mt. St. Michael Academy*, 272 AD2d 145, 145 - 146 [1<sup>st</sup> Dept 2000]). “To constitute constructive notice of a dangerous condition, the defect or condition must be ‘visible and apparent, and . . . must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it’” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 [1<sup>st</sup> Dept 2005], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see also O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1<sup>st</sup> Dept 1996]). . . . .

While defendants’ proofs, including relevant portions of plaintiff’s testimony, confirm that there is no evidence that either Bradhurst or Tyrax received actual notice of the alleged condition prior to November 8, 2005, questions exist as to whether they had constructive notice of a hazardous condition at the third floor landing and whether the alleged defective condition was trivial or actionable as a matter of law.

To this end, defendants rely on Peterson’s deposition testimony and sworn affidavit to confirm that he did not observe a defective condition at the third floor landing during any of his daily inspections. According to Peterson, he is certain that there was no defective condition at the subject area because if there was, he would have repaired, or supervised the repair of, the condition himself. Defendants also point out that Shellman’s failure to notice or report the alleged defects supports their contention that there were no visible or apparent defects, and that if

there were, they were either de minimis or they were not there for a sufficient period of time prior to plaintiff's accident to permit defendants to discover and remedy the defects.

However, Peterson's testimony to the effect that he neither observed, nor did he consider, any area of the third floor landing to be in a defective condition, is not dispositive of the motion.<sup>2</sup>

When he was shown and questioned about the photographs which Shellman had identified earlier that same day as depicting the area where he was caused to trip and fall, Peterson hesitated to respond. As a result of this witness's inability to recognize and/or respond to simple questions about the area depicted in the photographs, defendants have failed to prove to prima facie case of no constructive notice.

The few acknowledgments plaintiff's counsel was able to get from Peterson -- prior to November 8, 2005, he had noticed a condition in the area of the third floor landing that needed repairs; at some time prior to his tenure as superintendent at 192 Bradhurst Avenue, a cement repair had been made to the tile flooring; and the way it looked in the photograph shown to him by plaintiff's counsel was the way it looked on the day of plaintiff's accident (Tyrax/Peterson Dep., at 22, 23, 25, 26) -- were revisited in the Peterson affidavit defendants submitted in support of the motion (*see* Defendants' Exhibit G). However, it is well settled that when an affidavit contains statements that contradict, rather than clarify, prior testimony, such statements cannot be considered by the motion court (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1<sup>st</sup> Dept 2000]). In his affidavit, dated February 15, 2011, Peterson states that he never noticed the

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<sup>2</sup>It is also not relevant, for the purpose of this motion, whether Shellman noticed or reported the presence of a defective condition on the third floor landing, as it was not his responsibility to inspect, monitor, or repair the apartment building's common hallways, landings or stairways.

alleged condition and that he was unaware of any cement filler used at that location. These statements contradict, rather than “make his [July 18, 2008] testimony more clear and definite” (Defendants’ Reply Aff., at 14). These statements, which “can only be considered to have been tailored to avoid the consequences of [his] earlier testimony,” must, therefore, be disregarded (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d at 320).

Defendants also argue that if one or more defects existed at all, they were so insignificant and trivial in nature that they did not constitute a trap or nuisance as a matter of law (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1<sup>st</sup> Dept 1996]). In support of this argument, defendants rely on the portion of Peterson’s affidavit which sets forth his estimates of the defect’s dimensions. In it, Peterson states that he based his estimates on his knowledge of the marble used as floor tiles at 192 Bradhurst Avenue and on his review of the photographs. As noted above, he estimated a height differential of one-quarter to one-half inch between the level floor and the area where floor tile was missing.

It is well settled that:

the issue of whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. The precise dimensions of the defect, be they in feet or inches, are not dispositive. While in some instances the trivial nature of the defect may loom larger than another element a motion court must examine all the facts presented including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury (*Nin v Bernard*, 257 AD2d 417 [1<sup>st</sup> Dept 1999])[internal quotations and citations omitted].

Peterson’s estimates do not confirm the size, depth, or other dimensions of the alleged defect, nor do they refute plaintiff’s allegations that the heel of his shoe got caught on an edge. The photographs show a cement-like substance filling space between some of the floor tiles and

the edge of the stairway (Peterson Dep., at 22 - 23), and during his questioning of plaintiff, defense counsel concedes “. . . it appears from the photo there might be some tiles missing . . . ” (Shellman Dep., at 34). While the photographs confirm neither the trivial or nontrivial nature of the alleged defective floor tiles, nor the existence of an “edge,” they do establish that the area which plaintiff claims to be hazardous and defective, is adjacent to a downward stairway. The proximity of the alleged broken and/or missing tiles to the edge of the stairway, even if the defect would be deemed insignificant at another location, is relevant in assessing whether a particular defect constitutes an actionable tripping hazard, and precludes this court from finding the defect to be trivial as a matter of law (*Trincere v County of Suffolk*, 90 NY2d at 977; *Rivas v Crotona Estates Hous. Dev. Fund Co., Inc.*, 74 AD3d 541 [1<sup>st</sup> Dept 2010]; *Gerber v West Hempstead Convenience*, 303 AD2d 212 [1<sup>st</sup> Dept 2003]; *Tesak v Marine Midland Bank*, 254 AD2d 717, 718 [4<sup>th</sup> Dept 1998]).

Defendants’ claim that plaintiff might have caused his own accident by spilling coffee is not established as a matter of law on this motion. Their deposition inquiries establish, at most, that he is an occasional coffee drinker who does not drink tea or water in the morning (Plaintiff’s Dep., at 44, 45), and Peterson’s testimony regarding a prior coffee-spilling incident does not establish that Shellman spilled coffee on November 8, 2005.

Also unavailing is defendants’ use of selected portions of Shellman’s deposition transcript to show that he is not sure what caused his accident. The selected portions, set forth above, are not indicative of his testimony as a whole, and any confusion plaintiff may have had as to whether he tripped due to broken cement or missing tiles or both is not tantamount to an inability to identify the cause of his accident (*see Giuffrida v Metro N. Commuter R.R. Co.*, 279

AD2d 403, 404 [1<sup>st</sup> Dept 2001]). A review of his entire transcript reveals that, although there were instances when he may not have understood what defense counsel was asking of him, plaintiff consistently reported that he tripped and fell due to a "broken" or "torn" condition in the surface of the flooring.

The probative evidence submitted in support of this motion fails to eliminate all material issue of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Viewing the testimony, affidavits and photographs in a light most favorable to plaintiff, as this court must, it cannot be said as a matter of law, that the alleged defects are either nonexistent, trivial, or not the proximate cause of plaintiff's accident and injuries.

Accordingly, the motion for summary judgment is denied. This case is ready to be tried. Plaintiff shall serve a copy of this decision and order on the Office of Trial Support so the case can be scheduled.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 28, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith I. Gische, J.S.C.

**FILED**

**NOV 29 2011**

**NEW YORK  
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