Flanger v 2461 Elm Realty Corp.
2013 NY Slip Op 33842(U)
April 16, 2013
Supreme Court, Albany County
Docket Number: 1874-11
Judge: Richard M. Platkin

[* 1]

STATE OF NEW YORK
SUPREME COURT

ORIGINAL

COUNTY OF ALBANY

LYNDA B. FLANGER,

Plaintiffs,

-against-

DECISION AND ORDER

2461 ELM REALTY CORP. and AFRIM SPORTS, INC.,

Defendants.

Index No. 1874-11
(RJI No. 01-11-105467)

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

This a motion for summary judgment by defendant Afrim Sports, Inc. ("Afrim Sports" or "defendant") seeking dismissal of plaintiff's personal injury complaint.[1]

Plaintiff Lydia Flanger alleges that she sustained injury when she slipped and fell on March 22, 2008 while exiting the Afrim Sports facility, which is located on property owed by 2461 Elm Realty. According to plaintiff's deposition testimony, the accident occurred when she failed to notice a curb and fell forward onto the pavement. Plaintiff argues principally that "optical confusion" resulting from faded yellow paint around the curbing and the shadow cast by an overhead awning represented a dangerous condition in and about the exit area. It is defendant's contention that any such condition was open and obvious and not inherently dangerous.

It is well established that summary judgment is a drastic remedy and should only be granted if there are no material issues of disputed fact (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In evaluating a motion for summary judgment, a court should simply determine whether material issues of disputed fact preclude the grant of judgment as a matter of law (*S. J. Capelin Assoc. v Globe Manufacturing Corp.*, 34 NY2d 338 [1974]). The party moving for summary judgment has the initial burden of coming forward with admissible evidence to support the motion, so as to warrant the Court directing judgment in movant's favor; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action (*see Zuckerman v City of New York*, 49 NY2d

[1] The other defendant, 2461 Elm Realty, Corp., appears to be in default and did not take part in the instant motion practice.

557 [1980]).

For defendants to prevail on this motion, they must make a *prima facie* showing that "the complained-of-condition was both open and obvious . . . and not inherently dangerous". (*Zegarelli v Dundon*, 102 AD3d 958, 958 [2d Dept 2013]). Defendant offers both the deposition testimony of the plaintiff, as well as photographs of the accident scene.

Plaintiff testified that she entered the facility through a ramp leading up to the entrance from the left. She did not observe the curbing to her right as she entered the building, and she did not recall seeing any yellow paint on the curb running along the ramp and walkway. Plaintiff exited the facility through the same door through which she had entered. A number of other individuals were leaving the facility at the same time. Although she considered turning to the right when she exited the facility, since her car was located in that direction, she continued to walk forward due to the crowd of people around her. Plaintiff was looking ahead and did not see anyone in front of her step off the curb or observe the yellow markings on the curb. She fell when she stepped out from what she mistakenly believed to be level ground. However, plaintiff testified that the overhead awning and the contrast between the bright sun and the shaded walkway, together with the faded yellow curb painting, caused her to suffer from "optical confusion". Plaintiff was not aware of any other accidents occurring in the area prior to her fall or any prior complaints made to defendant regarding the exit area.

Defendant also submits the deposition testimony of Harold Dawson, the general manager of Afrim Sports at the time of the accident. Dawson testified that Afrim Sports was responsible for the maintenance of the walkway and awning at the entrance to the facility and did not contract with any outside vendor to perform general maintenance. He testified that he was unaware of

any accidents or complaints involving the area of plaintiff's fall prior to the subject accident. Dawson went on to testify that the top of the curb in front of the walkway was probably painted in the summer of 2007, about one year prior to the accident. Finally, Dawson testified that the awning at issue was destroyed by winter weather sometime after the accident and was not replaced.

In addition to the foregoing, defendant submits the affidavit of Chet J. Zaremba, P.E., a principal in an engineering firm located in Troy, New York.[2] Mr. Zaremba testified, in pertinent part:

> 2. On September 20, 2012, at 12:30pm I inspected the Afrim Sports premises . . . . I selected that inspection date and time because that was when the angle of the sun was at the same position as it was on the date and time of plaintiff's accident. Therefore the lighting on the curb an sidewalk would be similar at the time of my inspection as it was at the time of Ms. Flanger's accident . . . . My inspection did not reveal any unusual shading conditions that would create an unsafe walking condition.
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> 3. During my inspection, I measured and photographed the subject step and entry. I noted that the curb step height measures approximately six inches and was painted yellow. The entrance was covered by a canopy that is approximately eight feet wide. The sidewalk in front of the building is uniformly shaded by the building wall soffit overhang an the entrance canopy. The current canopy is in a similar location to where the previous canopy was on the date of the accident and there were no unusual shading conditions that would create an unsafe walking condition.

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[2] Defendant concedes untimely disclosure of this expert under the Expert Disclosure Rule of the Third Judicial District. Plaintiff argues that due to such untimeliness the Court should not consider the expert affidavit. However, the Court will consider the expert's affidavit in light of its broad discretion to excuse an untimely disclosure (*Washington v Albany Housing Authority*, 297 AD2d 426, 428 [3d Dept 2002]), the brief period of delay and the lack of demonstrable prejudice to plaintiff.

> 4. The walking surface of the sidewalk that I observed was in good state of repair with no evidence of defect.
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> * * *
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> 7. Based upon my inspection, review of the codes and my experience as an engineer, I conclude and opine with a reasonable degree of engineering certainty that there is no building code or safety violations with regard to the front entry sidewalk and curb step. There were no violations found of the Property Maintenance Code or Fire Code of New York State. Those codes also have no specific retroactive regulations for the entry step. Such curb steps at the edges of sidewalks are common and not prohibited.
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> 8. The entry canopy casts a shadow over the entire sidewalk and beyond curb. Such shadows occur naturally . . . . There are no regulations regarding shadows due to natural sunlight. Moreover, the area under the canopy was adequately illuminated at the time of the accident due to natural outdoor light.

The Court determines that defendant's submissions are sufficient to establish, *prima facie*, that the complained of condition was open and obvious and "could have been readily observed by the reasonable use of [plaintiff's] senses" (*Monahan v New York City Dept. of Educ.*, 47 AD3d 690, 691 [2d Dept 2008] [internal quotations omitted]). In so determining, the Court relies upon plaintiff's testimony, wherein she testified to looking straight ahead of her and not looking down for any possible height differential or hazard, and wherein she further testified to not noticing the individuals in front of her stepping down off of a curb. The Court further relies upon the photographs submitted by defendant, which show yellow paint on the curbing (though faded in portions) and as well as the testimony establishing the lack of any other prior accidents or complaints. Additionally, the expert affidavit establishes the lack of any building code or safety violations, although the absence of such violations does not establish defendant's lack of negligence as a matter of law (*Baity v General Elec. Co.*, 86 AD3d 948, 951 [4th Dept

2011]).

The burden then shifts to plaintiff to demonstrate the existence of triable issues of material fact. Plaintiff submits the affidavit of Conrad P. Hoffman, a professional engineer, who avers, in pertinent part:

> 8. . . . the yellow strip painted over the top edge of the curb was worn to the extent that it was no longer easily observable by someone exiting the building. Further, the color and texture of the concrete sidewalk was the same as that of the step-down area. As such, there was otherwise no contrast that would provide a visual cue to pedestrians that would indicate there was a height differential.
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> 9. . . . In this case, the yellow warning strip had become worn and no longer adequately served as visual cue of the step and no other warning signs or visual cues were in place.
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> * * *
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> 14. In this case, the facts provided are that Ms. Flanger was in a crowd that restricted her visibility, traveling a route different from when she entered the building . . . and that she was unable to detect the hazard posed by the curb drop off. There were also people on both her right and left which limited her ability to turn to either the right or left where there were ramps, and there were people in front of her. Lastly, when she realized that her foot had stepped into space, she was unable to react in time to prevent her falling.
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> 16. . . . it is my opinion, with a reasonable degree of engineering certainty, that the placement of the canopy extending over the sidewalk curb and into the recessed paved area without adequate demarcation of the height differential presented as a dangerous and defective condition at the time of the accident as it created a non-visual sudden drop off . . . .

In addition, Mr. Hoffman references alleged violations of national standards and codes, which he concedes"are not expressly part of the New York State Building, Property, Maintenance or Fire Codes". However, Hoffman claims that it is "good and accepted safety custom and practice in New York State to adhere to and follow those referenced standards and codes."

The Court concludes that plaintiff's submissions are insufficient to withstand summary judgment. In particular, plaintiff's theory that she fell due to "optical confusion" is not supported by the record. A step or curb "may be dangerous where the conditions create 'optical confusion' – the illusion of a flat surface, visually obscuring the step" (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012] [internal citation omitted]). However, the photographs submitted by the parties establish that the curbing was an open and obvious condition that readily was observable by plaintiff. Indeed, plaintiff's own testimony establishes that she was looking ahead as she was exiting the facility and did not look downward, so any failure to see the curbing cannot be attributable to optical confusion. And plaintiff does not claim that optical confusion played any role in her inability to see the individuals in front of her step down off of the curb. Thus, even if "optical confusion" could have created the illusion of a flat surface and visually obscured the step, a contention that lacks adequate support in the record, it is apparent that any such confusion did not play a substantial role in bringing about plaintiff's accident. Accordingly, plaintiff's proof is insufficient to establish that the allegedly dangerous condition was anything other than an open and obvious one that could readily have been observed by a reasonable use of plaintiff's senses. Moreover, plaintiff's own testimony establishes that any such optical confusion did not play a role a substantial role in bringing about her fall.

Accordingly, it is

ORDERED that defendant Afrim Sports, Inc.'s motion for summary judgment is granted, and the complaint is dismissed against Afrim Sports, Inc. in all respects.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for the defendant Afrim Sports, Inc.; all other papers are being transmitted to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule

Dated: Albany, New York
April 16, 2013

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated December 21, 2012;
Affirmation of Paul A. Hurley, Esq., dated December 21, 2012, with attached exhibits A-H;
Affidavit of Chet J. Zaremba, P.E., sworn to December 20, 2012;
Affirmation of John R. Seebold, Esq., dated February 6, 2013, with attached exhibits A-J;
Affidavit of Conrad P. Hoffman, sworn to February 6, 2013, with attached exhibit A;
Reply Affirmation of Thomas A. Sica, Esq., dated February 12, 2013 with attached exhibit A.