

**Mazzalupo v Long Is. R.R.**

2014 NY Slip Op 31783(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 107046/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

Rosalie A. Mazzalupo,

Plaintiff,

-against-

Long Island Railroad, d/b/a MTA Long Island Railroad (LIRR),

Defendant.

INDEX NO. 107046/11
MOTION DATE
MOTION SEQ. 001
MOTION CAL. NO.

The following papers, numbered 1-4 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3,</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	_____

Upon the foregoing papers, it is ordered that this motion for summary judgment is denied for the reasons set forth below.

BACKGROUND

This is an action to recover damages for personal injuries suffered by the plaintiff Rosalie A. Mazzalupo (plaintiff) in a trip and fall accident on June 26, 2010, caused by an alleged defect in the yellow tactile strip alongside Track 15 in Penn Station. Pending before this court is defendant Long Island Railroad's [d/b/a MTA Long Island Railroad (LIRR)] motion for summary judgment.<sup>1</sup>

<sup>1</sup> While defendant has indicated in its notice of motion that it seeks an order pursuant to CPLR 3211 (a) (5), it appears from its moving papers that defendant is in fact moving for summary judgment of dismissal, pursuant to CPLR 3212. As plaintiff has not opposed defendant's motion on such basis,

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## DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Indeed, it is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted. *Ugarriza v Schmieder*, 46 NY2d 471, 474 (1979). A party seeking summary judgment must affirmatively demonstrate the merit of its claim or defense. *Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 (1st Dept 1994). A moving defendant does not meet its burden by merely citing gaps in the plaintiff's case. *Sabalza v Salgado*, 85 AD3d 436, 437-438 (1st Dept 2011); *DeFalco v BJ's Wholesale Club, Inc.*, 38AD3d 824, 825 (2d Dept 2007); *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 (2d Dept 2003).

### Whether Defendant Had Constructive Notice

On a motion for summary judgment dismissing the complaint, defendant has the initial burden of demonstrating, prima facie, that it did not create the alleged dangerous condition or

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but, rather has supplied opposition to defendant's request for summary judgment, pursuant to CPLR 3212, and, as there is no prejudice to plaintiff, this court will treat defendant's motion as one for summary judgment of dismissal, pursuant to CPLR 3212.

have actual or constructive notice of it. *See Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 (1st Dept 2006); *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 (1st Dept 2001). Here, defendant argues but fails to establish that it lacked constructive notice as a matter of law because it did not unequivocally demonstrate that the alleged condition did not exist for a sufficient period of time prior to the accident in order for its employees to discover and remedy it. *See Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 (1986). Although defendant's Assistant Manager of Facilities Maintenance, Mr. Nordt, testified at his deposition that "[p]latform edges are inspected on a bi-weekly basis" (*id.* at 19, lines 13-14), and that there are computer generated records (work order tickets) for each such inspection (*id.* at 20, lines 9-14), Mr. Nordt admitted that he only had access to maintenance and repair records, which would not contain any records of complaints (*id.* at 52, line 25; at 53, lines 2-13). Consequently, Mr. Nordt's testimony failed to establish that there were no complaints or similar accidents involving the tactile stripping at Track 15, prior to plaintiff's accident. Moreover, according to Mr. Nordt, it would be left to the inspector's own discretion to determine whether a bump was a tripping hazard or safety concern that needed to be repaired (*id.* at 32), thus, without more, defendant failed to conclusively establish that the alleged defect did not exist for a sufficient amount of time prior to plaintiff's accident.

Furthermore, contrary to defendant's counsel's affirmation, the inspection work order tickets reflect that, prior to June 26, 2010, there were 11 instances between August 2007 and December 2008, where repairs were necessary for problems with the tactile stripping at Track 15. *See* affirmation of defendant's counsel at 7, ¶ 24; defendant's exhibit K. Ten of the work orders indicate that the repairs involved reanchoring tactiles. Defendant's exhibit K. In addition, the

inspection work order tickets submitted by defendant only cover the period between June 2007 through May 2010, and remain silent as to any inspections and repairs that may have been completed in June 2010, weeks prior to plaintiff's accident. See defendant's exhibit K. Thus, the burden never shifted to plaintiff to provide evidence sufficient to raise a triable issue with regard to notice. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Whether the Alleged Defect Is Trivial as a Matter of Law

"Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the particular circumstances of each case and presents a question of fact for the jury. However, trivial defects are not actionable, and in determining whether a defect is trivial, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury."

*Mishaan v Tobias*, 32 AD3d 1000, 1001 (2d Dept 2006) (internal quotation marks and citation omitted); see *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 (1997); *Morales v Riverbay Corp.*, 226 AD2d 271, 271 (1st Dept 1996). Here, defendant argues but has "failed to demonstrate its entitlement to summary judgment since it did not establish that the defect in the subject [tactile strip] was trivial as a matter of law." *Dominguez v OCG, IV, LLC*, 82 AD3d 434, 434 (1st Dept 2011). The court notes that, it is defendant's burden on this motion, to establish that the alleged defect which caused plaintiff's fall was in fact trivial, as a matter of law. The evidence submitted by defendant in support of its motion, which includes plaintiff's deposition testimony, plaintiff's testimony from the Public Authorities Law (PAL) hearing, plaintiff's photographs of the tactile strip, and defendant's employee's deposition testimony, is insufficient to sustain its initial burden of proof.

Significantly, the photographs do not conclusively establish any measurements (e.g., of

the width or elevation) of the alleged defect. Moreover, defendant has not provided any other evidence, such as the affidavit of an expert substantiating its position that the defect was trivial, nor has defendant provided any actual measurement of the alleged defect. *See Rivas v Crotona Estates Hous. Dev. Fund Co.*, 74 AD3d 541, 542 (1st Dept 2010); *DeLaRosa v City of New York*, 61 AD3d 813, 814 (2d Dept 2009); *cf. Vazquez v JRG Realty Corp.*, 81 AD3d 555, 555 (1st Dept 2011) (finding defendant was entitled to summary judgment of dismissal where defendant's witnesses stated that area was nearly flat and their expert measured the defect to be the height of a nickel). Furthermore, defendant's witness, Mr. Nordt, testified that it is impossible for him to conclude from the photographic evidence as to the existence of any alleged defect. *See* defendant's exhibit J, Nordt tr at 26-27. Thus, the burden never shifted to plaintiff. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *cf. Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488, 488 (1st Dept 2011) (finding defendants were entitled to summary judgment where the defect was trivial, measuring approximately one-half-inch in width and height differential, and the plaintiff failed to show the defect posed a significant hazard despite being de minimis).

The case relied upon by defendant in support of its argument that the defect is trivial and, therefore, not actionable, *Menendez v Dobra* (301 AD2d 453, 453 [1st Dept 2003]), is distinguishable from the case at bar, in that, in *Menendez*, the court was able to conclude from the record as to the allegedly trivial nature of the defect, noting that it appeared from the record that the alleged defect was "shallow and gently graded and . . . had none of the characteristics of a trap or snare." In contrast, here, defendant has provided nothing more than its own speculation as to the trivial nature of the defect. Defendant has not met its burden and has failed to establish

its right to summary judgment of dismissal. *Delaney v Town Sports Intl.*, 88 AD3d 635, 636 (2d Dept 2011).

DECISION

Accordingly, it is

ORDERED that Long Island Railroad's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

This is the decision and order of the court.

Dated: 7/11/14

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if Appropriate:  DO NOT POST

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