

Malach v Barnes & Noble Booksellers, Inc.
2014 NY Slip Op 32372(U)
August 25, 2014
Supreme Court, Bronx County
Docket Number: 304691/11
Judge: Brigantti-Hughes
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
ESTHER MALACH,

Plaintiff,

-against-

DECISION / ORDER

Index No. 304691/11

BARNES & NOBLE BOOKSELLERS, INC.,

Defendants

-----X
The following papers numbered 1 to 6 read on the below motion noticed on November 26, 2013 and duly submitted on the Part IA15 Motion calendar of **June 27, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defendants' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Def.'s Reply Aff. with Exhibits	5,6

Upon the foregoing papers, the defendant Barnes & Noble Booksellers, Inc. ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Esther Malach ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged trip-and-fall incident that occurred on July 17, 2008, in the entrance way of Defendant's retail store located in Yonkers, New York. At her deposition, Plaintiff testified that she was wearing a sandal with a one-inch heel on the date of her accident. She opened the entrance door and held it open for a woman and a small child, who entered the store first. Plaintiff then went to enter herself, but her heel got caught in the metal saddle in the doorway, causing her to fall. She later observed that the door saddle was not "flush to the ground." Plaintiff identified photographs of the metal saddle at her deposition, and testified that they accurately depicted the store entrance on the date of her fall.

David Apfel testified on behalf of Defendant. Mr. Apfel was the manager of the store on the date of the accident. He was not aware of any prior incidents involving anyone tripping over the door saddle. Kevina Ayala, who was a cashier at the store on the date of the accident,

testified that no one had tripped on the metal door saddle in the last two years she had been working there, and no one ever complained about the condition of the entranceway. Defendant also produced the affidavit of its Risk Manager, who avers that Defendant has no record of any similar accident over a period of ten years prior to this accident.

Defendant also provides an affidavit from Mark Marpet, Ph.D., P.E., a licensed professional engineer. He reviewed Plaintiff's deposition testimony and photographs, and conducted an inspection of the premises. Dr. Marpet took measurements of the door and door saddle, and found that the maximum height differential between the door saddle and the carpet that bordered it inside of the store was about $\frac{1}{2}$ inch. The maximum height differential between the door saddle and the concrete that bordered it outside of the store was between $\frac{15}{16}$ th of an inch to 1 inch. He stated that the door saddle did not violate any applicable regulation or construction code and conformed to accepted and prevailing engineering standards.

Plaintiff opposes the motion. Plaintiff's counsel notes that the fact that no previous incidents occurred at this location are not relevant to the issue of whether a hazardous condition existed. Plaintiff does not dispute Defendant recitation of the procedural history or Defendant's characterization of the relevant testimony. Instead, Plaintiff primarily relies on an affidavit from William Marletta, Ph.D., a Certified Safety Professional who was retained in order to oppose the instant motion (Pl. Aff. In Opp, Par 17). Dr. Marletta states that he conducted an inspection of the subject door saddle, and agrees with Dr. Marpet that its highest point measures $\frac{15}{16}$ th - 1 inch above the concrete in front of it. Dr. Marletta, however, opines that this height differential constituted a dangerous condition and violated certain relevant safety standards and codes. Specifically, states that the door saddle did not conform to New York State Fire Prevention and Building Code of 1984, which required door saddles to be a maximum of $\frac{3}{4}$ of an inch high. He also opines that the door saddle violated a certain generally-accepted architectural text, as well as "ASTM" guidelines for "Standard Practice fo Safe Walking Surfaces." Dr. Marletta cites various publications which detail tripping hazards in places with insufficient foot ground clearance, and opines that abrupt changes in level above $\frac{1}{4}$ of an inch are hazardous if improperly transitioned. At a minimum, he posits that there should have been precautions or warnings in the area until permanent changes could be made. He concludes that Defendant

departed from good and accepted safe practice as set forth in ASTM publication F1637, and violated the Property and Maintenance Code of New York State.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

To be considered “open and obvious,” a hazard must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous (*Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69 [1st Dept. 2004]). A hazard that is open and obvious “may be rendered a trap for the unwary where the condition is obscured or the plaintiff’s attention is otherwise distracted (*Mauriello v. Port Auth. of N.Y. and N.J.*, 8 A.D.3d 200 [1st Dept. 2004]). Whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and

obvious as a matter of law when the facts compel such a conclusion, where the basis is clear and undisputed evidence (*Westbrook, supra*, citing *Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Even so, that would only determine the issue of breach of duty to warn, and not dispose of a landowner's duty to maintain the premises in a safe condition (*Cohen v. Shopwell, Inc.*, 309 A.D.2d 560 [1st Dept. 2003])[holding that liability may be premises on a breach of duty to maintain a reasonably safe condition even where the obviousness of the risk negates any duty to warn]). Still, a court is not precluded from granting summary judgment, where the condition complained of is, as a matter of law, not inherently dangerous (*Boyd v. New York City Housing Auth.*, 105 A.D.3d 542 [1st Dept. 2013]). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property" (*Id.*, citing *Cupo v. Karfunkel*, 1 A.D.3d 48, 52 [2d Dept. 2003]).

In New York, there is no "minimum" actionable defect dimension (*Trincere v. County of Suffolk*, 90 N.Y.2d 976 [1997]). Instead, whether a dangerous condition exists so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury (*Id.*, citing *Hecht v. City of New York*, 60 N.Y.2d 57 [1983]). Where an alleged environmental defect is caused by a height differential, the proper inquiry is whether the defect "had the characteristics of a trap or a snare" such as an "edge" (*Spiegel v. Vanguard Construction and Development Co.*, 50 A.D.3d 387 [1st Dept. 2008]); *Glickman v. City of New York*, 297 A.D.2d 220 [1st Dept. 2002]). Cases where summary judgment have been granted in favor of defendant primarily involve environments where an alleged height differential, and nothing more, caused the injury (*Gaud v. Markham*, 307 A.D.2d 845 [1st Dept. 2003])[summary judgment proper where a small height differential on concrete stairway was alleged to have caused plaintiff's fall]; *Wallace v. Riverbay Corp.*, 264 A.D.2d 329 [1st Dept. 1999])[summary judgment proper where only an alleged minimal unevenness in a sidewalk caused the fall]; *Figuroa v. Haven Plaza Housing Development Fund Co., Inc.*, 247 A.D.2d 210 [1st Dept. 1998][holding a 1/2 inch depression in a walkway not actionable in this circumstance]).

In this matter, Defendant's submissions, including Plaintiff's testimony, the photographic evidence, and expert affidavit, satisfies Defendant's initial burden of demonstrating that this alleged defect was trivial, the store entrance was not inherently dangerous, and thus the condition

was not actionable as a matter of law (*see Etheridge v. Marion A. Daniels & Sons, Inc.*, 96 A.D.3d 436 [1st Dept. 2012]). The evidence, including photographs, confirm that the door saddle did not have the characteristics of a trap or a snare (*Trincere v. County of Suffolk*, 90 N.Y.2d at 976; *Nussbaum v. Broken Down Valise Pub.*, 115 A.D.3d 718 [2nd Dept. 2014]). Plaintiff testified that she had traversed the area multiple times in the past without incident. Defendant provided testimony from various employees and its Risk Manager indicating that no complaints had ever been made regarding this condition and there were never any previous incidents. The expert affidavit, based on his personal inspection as well as experience and knowledge, that the saddle was in full compliance with applicable building code and standards, further carried Defendant's initial burden (*Bullock v. Anthony Equities Ltd.*, 12 A.D.3d 326 [1st Dept. 2004], Bronx County Index No., 23792/2001, *see* expert affidavit of Jeffrey Schwaje, P.E.).

In opposition to the motion, Plaintiff does not dispute Defendant's recitation of the accident or the condition of the entranceway on the day in question. Instead, Plaintiff exclusively relies on the affidavit of her expert engineer to raise an issue of fact as to whether the door saddle as it existed constituted a dangerous condition. Dr. Marletta also measured the door saddle, and agreed with Dr. Marpet that "total height of the door saddle is 15/16th to one inch high." He does not allege anywhere in the affidavit that the door saddle had the characteristics of a "trap" or a "snare." Dr. Marletta, however, disagrees with Dr. Marpet that this door saddle complied with applicable safety code or practices. Rather, he opines that "[t]his saddle is excessively high (approximately 1")" and thus departs from good and accepted safe workmanship or practice. In order to competently raise an issue of fact, Dr. Marletta had to support this conclusion with reference to specific, currently applicable safety standards or practices that he believed were violated (*Jones v. City of New York*, 32 A.D.3d 706 [1st Dept. 2006]). This could have taken the form of either a published industry or professional standard or in the form of evidence that such a practice had been generally accepted in the relevant industry (*Id.*, citing *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544-545 [2002]). It must have been more than a nonmandatory guideline or a mere recommendation (*Diaz, supra.*, *Hotaling v. City of New York*, 55 A.D.3d 396 [1st Dept. 2008]).

After careful review, this Court finds that Dr. Marletta failed to adequately support his

conclusions and has therefore failed to raise a triable issue of fact. Dr. Marletta states that the door saddle is in violation of New York State Fire Prevention and Building Code of 1984, §765.4a-7, which states that door saddles shall not be more than 3/4 of an inch high, with the edges ramped and beveled. This Code, however, is not applicable to the door saddle at issue – rather, it explicitly only applies to exit stairways (*see* 9 NYCRR 765.4[a]; *DeSantis v. Lessing's, Inc.*, 46 A.D.3d 742 [2nd Dept. 2007]). Dr. Marletta next states that *The Architectural Graphic Standards* reference text “illustrates door saddle designs and limits design heights to 5/8” maximum as recommended practice.” Dr. Marletta does not, however, state that this is mandatory in nature or anything more than a recommendation (*Diaz*, 99 N.Y.2d 544, *supra*). The expert next avers that the American Society of Testing and Materials (“ASTM”) F1637 standard requires that changes in level greater than 1/2 of an inch shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances. While the full text has not been provided to the Court, the particular passage cited makes no explicit reference to door saddles. There is no competent proof that installation of a ramp or stairway would be reflective of a generally-accepted standard or practice under these circumstances (*see Walker v. Commack School Distr.*, 31 A.D.3d 752 [2nd Dept. 2006], citing *Diaz*, 99 N.Y.2d at 545]). Dr. Marletta also does not explain how this guideline is applicable to door saddles such as the one at issue, especially in light of the fact that he originally opined that a door saddle 3/4 of an inch high (thus greater than 1/2 of an inch) would have been in compliance with building code.

Dr. Marletta's later citations to various publications are insufficient, since they do not impose “a particularized mandate or a clear legal duty” (*see Cambio v. City of New York*, 118 A.D.3d 577 [1st Dept. 2014]). The cited standards of the American National Standard Institute / American Society of Safety Engineers A1264.2-2006 “Standard for the Provision of Slip Resistance on Walking/Working Surfaces,” found in the affidavit, are inapplicable here where this matter involves an alleged tripping, not slipping hazard. Moreover, as indicated in reply, this standard explicitly applies only to “industrial and workplace situations.” Finally, Dr. Marletta relies on only general, nonspecific safety provisions of the New York Property Maintenance Code, which do not constitute a sufficiently specific predicate for liability (*see, e.g., Miki v. 335*

Madison Ave., LLC., 93 A.D.3d 407 [1st Dept. 2012]).

In light of the foregoing, this Court finds that Plaintiff has failed to raise a triable issue of fact as to whether the alleged defect was actionable, and Defendant's motion must be granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the summary judgment motion of defendant Barnes & Noble Booksellers, Inc., dismissing Plaintiff's complaint, is granted, and Plaintiff's complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated:

8/25/14

Mary Ann Brigantti

Hon. Mary Ann Brigantti-Hughes, J.S.C.