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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

RICHARD GRECO and ANNA MARIE GRECO,
Plaintiff,

-against-

LUIGI PISANIELLO and MARIA ROSARIA PISANIELLO,
Defendants.

Index No. 301406/2010
DECISION AND ORDER

HON. SHARON A.M. AARONS. J.S.C.:

Defendants LUIGI PISANIELLO and MARIA ROSARIA PISANIELLO move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff s submit written opposition. The motion is denied.

On November 14, 2009, plaintiff was allegedly injured when he slipped and fell on an exterior stairway on premises located at 852 Rhinelander Avenue, a two-family dwelling in Bronx County. Photographs of the accident location indicate that the plaintiff fell on stairway located at the side of the dwelling, which consisted of four steps and a landing. The landing and the steps were covered terra cotta tiles. The nosing of each step was flush with, and did not extend beyond, the face of the riser beneath.

In support of the motion, defendant submits the pleadings; the verified bill of particulars; the certified, unsworn deposition testimony of the plaintiff; [1] the certified, unsworn deposition testimony

[1]The plaintiff observes that he defendants submitted unsworn transcripts. Nevertheless, the defendants' depositions are admissible under CPLR 3116 (a), since that transcripts was submitted by the party deponents themselves and therefore were adopted as accurate. *Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d 935, 937 N.Y.S.2d 602 (2d Dept. 2012); *Ashif v. Won Ok Lee*, 57 A.D.3d 700, 868 N.Y.S.2d 906 (2d Dept. 2008). The unsigned deposition transcript may be used as an admission against plaintiff since plaintiff does not challenged the accuracy of the testimony as transcribed, and it was certified as accurate. *Martin v. City of New York*, 82 A.D.3d 653, 919

of defendant Luigi Pisaniello; the certified, unsworn deposition testimony of defendant Maria Rosaria Pisaniello; the report of plaintiff's expert consulting engineer Stanley H. Fein, P.E.; the note of issue; the supplemental bill of particulars; and various documents relating to discovery in this action. The plaintiff's deposition testimony indicates that the plaintiff was a business acquaintance of defendant Luigi Pisaniello, and that he was delivering a check to Luigi Pisaniello on the day of the accident; that the plaintiff ascended the stairway without any difficulty; that it was raining lightly at the time of the accident; that the plaintiff delivered the check to defendant Luigi Pisaniello, who stood in the doorway; that the plaintiff turned his right foot to descend; that while he was still standing on the landing, his right foot suddenly slipped, and he fell down the staircase. The plaintiff was not aware of what caused him to fall, and that he did not see anything which caused him to fall. The fall was "sudden. I went right down in a split second."

The plaintiff's expert's report states that the tiles used on the landing and stairway were for interior use, not exterior use, and were not comprised of nonskid materials; that the coefficient of friction of the steps was measured at 0.32 when dry, which is below the minimum requirement of 0.5; that the stairway lacked proper handrails; and that the riser heights and treads were not uniform.

Defendant argues that there is no evidence that the defendants caused or created any dangerous condition, or that such a condition existed. They argue that the generalized findings of the plaintiff's expert as to the possible causes of the accident are based on surmise and speculation. In addition, the defendants maintain that the expert failed to state how he calculated the step's coefficient of friction; they argue that the step, but not the landing, was measured; and they observe that no authority is cited for the expert's statement that terra cotta tile should not be used for the exterior of the premises.

In opposition, plaintiff submits photographs of the subject stairway, and the affidavit of

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N.Y.S.2d 330 (1st Dept. 2011).

plaintiff's expert. Plaintiff's expert states, again, that the use of terra cotta tiles is not acceptable on exterior stairs, "based on my extensive knowledge and experience...." He recited that he used an American Slip Meter and an English XL slipmeter, performed a coefficient of friction test multiple times at multiple locations, and calculated the coefficient of friction to be 0.32, which is less than the .5 which is required by the guidelines of the American Society of Testing and Materials (ASTM) and other organizations. He further asserted that treads or landings should be made of "nonskid materials" pursuant to NYC Admin. Code 27-375(h). Lastly, plaintiff argues that because cans of cooking oil were stored outside, oil may have been present on the landing.

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994]. "To 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 defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *(Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455,

987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

Defendants established prima facie their entitlement to judgment by submitting evidence, including plaintiff's deposition testimony, demonstrating that plaintiff was unable to identify the cause of his fall. (*Scott v Rochdale Vil., Inc.*, 65 AD3d 621, 883 NYS2d 726 [2d Dept. 2009] [plaintiff was unable to identify the cause of her accident without engaging in speculation]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 818 NYS2d 58 [1st Dept. 2006] [no reasonable inferences existed as to causation based upon plaintiff's expert's opinion that the staircase violated several provisions of the New York City Administrative Code, in the absence of any evidence connecting the alleged violations to plaintiff's fall], *lv denied* 8 NY3d 801, 861 NE2d 108, 828 NYS2d 292 [2007]).

The mere fact that plaintiff did not know the cause of the fall is not fatal to plaintiff's claim. For example, in *Rodriguez v. Leggett Holdings, LLC* (96 A.D.3d 555, 947 N.Y.S.2d 429 [1st Dept. 2012]), plaintiff, who slipped and fell as he ascended the interior stairs of defendants' building, raised triable issues of fact by the submission of the affidavit of an expert engineer ,who inspected the subject stairs and found a variety of defects and building code violations, particularly at the top tread of the step before the landing, which plaintiff identified as the spot here he slipped. (See also, *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 906 N.Y.S.2d 528 [1st Dept. 2010] [the injured plaintiff's testimony that she slipped on the top step of the subject stairway, coupled with her expert's testimony of the slippery condition of such steps due to worn-off treads, provided sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition]).

The issue, then, is whether the plaintiff's expert has raised an issue of fact as to a defect in the

landing which a jury could reasonably find was the cause of the fall.

As to the use of terra cotta tiles on the exterior of the building, the plaintiff's expert has not cited to any source for his statement that terra cotta tiles may not be used in exterior applications. His mere statement to that effect, which is entirely unsupported by any outside source, must be rejected as insufficient on this motion. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Buchholz v. Trump 767 Fifth Ave.*, LLC, 5 N.Y.3d 1, 831 N.E.2d 960, 798 N.Y.S.2d 715 [2005]; *Romano v Stanley*, 90 N.Y.2d 444, 451-452, 661 N.Y.S.2d 589, 684 N.E.2d 19 [1997] ["In some situations, the nature of the subject matter or the expert's area of special skill will suffice to support the inference that the opinion is based on knowledge acquired through personal professional experience. In other situations, an expert's affidavit may be deemed sufficiently probative to defeat summary judgment if it makes reference to outside material " 'of a kind accepted in the profession as reliable in forming a professional opinion' " and such reference is accompanied by evidence establishing the out-of-court material's reliability"].)

In the present case, the expert's unsupported opinion that terra cotta tiles should not be used in exterior applications requires some basis in fact, and is not the type of statement which may be based on mere "say so." Thus, for example, in *Romano v Stanley* (90 N.Y.2d at 452), the Court found the plaintiff's expert's opinion to be insufficient as "plaintiffs' expert's affidavit was devoid of any reference to a foundational scientific basis for its conclusions. No reference was made either to [the expert's] own personal knowledge acquired through his practice or to studies or to other literature that might have provided the technical support for the opinion he expressed." An expert was held to have properly relied on his own expertise at trial in *People v. Oddone* (22 N.Y.3d 369, 3 N.E.3d 1160, 980 N.Y.S.2d 912 [2013]), but in that case the parties agreed there was no empirical data on the subject, and

the expert relied on his own observations in performing numerous autopsies. Here, on the other hand, there is no agreement that there is an absence of proof on the subject of the exterior use of terra cotta tiles, and the expert simply failed to offer any concrete evidence in support of his opinion, or any evidence that he possessed the requisite knowledge of the use and properties of terra cotta tile.

The plaintiff's expert asserted that the measured coefficient of friction was below the accepted standard. Although he made reference to ASTM, and other organizations, he did not identify any particular section, guideline, or standard which stated that the minimum acceptable ratio was 0.50. (*Sarmiento v. C & E Assoc.*, 40 A.D.3d 524, 837 N.Y.S.2d 57 [1st Dept. 2007) [the motion court further erred in finding a triable issue of fact as to the alleged defective condition of the stairway ; while the engineer's affidavit referenced the "ASTM Standard F609-96" in defining the "Static Coefficient of Friction" (SCOF) ratio, it did not reference any specific standard in asserting that a "minimum SCOF of 0.5 is the commonly accepted value for a non-slip (non-skid) surface" (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360, 784 NYS2d 32 [2004] [no triable issue where expert did not identify the basis for the 0.5 coefficient-of-friction value he utilized as a standard]; *Suarez v. D&C Mgmt. Assocs.*, 284 A.D.2d 706, 726 N.Y.S.2d 763 [3d Dept. 2001] [expert's statements, including statement that parking lot surface was "only marginally above the accepted bare minimum coefficient of friction required for safety, which is 0.5," was conclusory and failed to identify or reference specific industry safety standards]).

Plaintiffs' expert's affidavit alleges that the stairs violated the Building Code, which explicitly requires that "[t]reads and landings shall be built of or surfaced with nonskid materials" (Administrative Code of City of NY § 27-375 [h]). In *Sarmiento v C & E Assoc.* (40 A.D.3d 524, 525, 837 N.Y.S.2d 57 [1st Dept 2007]) and *Bolton v. ABM 75 Realty LLC* (2012 N.Y. Misc. LEXIS 3547, 2012 NY Slip Op 31941(U) [Sup. Ct., N.Y. Co., July 17, 2012]), the court found issues of fact as to whether violations of Administrative Code of City of NY § 27-375(h) existed, where the interior staircases were

made of marble. That section, however, applies to "interior stairs." Section § 27-376 ("Exterior stairs") states that, "Exterior stairs may be used as exits in lieu of interior stairs provided they comply with all of the requirements for interior stairs...." The stairway here is not the type of "exterior stairs" used in lieu of an interior stairway as a means of egress to which that section of the Code applies. *(Gaston v. New York City Hous. Auth.*, 258 A.D.2d 220, 695 N.Y.S.2d 83 [1st Dept. 1999] ["a common example of the type of staircase contemplated by the Code becomes readily apparent, namely, the metal staircases that are frequently connected to, and run along, the exterior walls of many theaters and serve as emergency exits from the upper portions of the theater"].) Accordingly, *Sarmiento v C & E Assoc.* and *Bolton v. ABM 75 Realty LLC* are not applicable because the present stair is neither an "interior stair" or an "exterior stair" used as a required exit, which would require nonskid materials.

As to the absence of a handrail, where there is, as here, no evidence that the plaintiff attempted to grab a handrail, there is no causation. (*Robinson v. 156 Broadway Assoc.*, LLC, 99 A.D.3d 604, 952 N.Y.S.2d 445 [1st Dept. 2012] ["Plaintiff slipped immediately upon placing her foot on the stairway, and never attempted to find or hold the handrail. Thus, any violation of the Building Code was not a proximate cause of her fall."])

Lastly, there was no evidence of the presence of cooking oil on the landing.

Accordingly, the motion is granted. It is accordingly,

ORDERED that the complaint is dismissed in its entirety.

Dated: November 24, 2014

SHARON A.M. AARONS. J.S.C.