Siddiqui v Ruppert Hous. Co., Inc.
2014 NY Slip Op 33581(U)
October 27, 2014
Supreme Court, New York County
Docket Number: 101991/11
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

NADIA SIDDIQUI, an infant, by her father and natural guardian, FAYSAL SIDDIQUI, and FAYSAL SIDDIQUI, individually,
Plaintiffs,

-against-

RUPPERT HOUSING COMPANY, INC.,

Defendant.

INDEX NO. 101991/11

MOTION SEQ. NO. 001

The following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

This is a negligence "slip-and-fall" action brought by Nadia Siddiqui (Nadia or infant-plaintiff), an infant, by her father and natural guardian, Faysal Siddiqui (Faysal), and Faysal Siddiqui, individually (collectively plaintiffs) to recover damages for injuries allegedly sustained to Nadia's left elbow when she slipped on a set of wet concrete stairs located within an outdoor plaza area in the rear of the building owned by Ruppert Housing Company, Inc. (Ruppert or defendant) located at 220 East 93rd Street, New York, New York (subject premises). The plaintiffs allege that the stairs became wet due to overspray from a nearby playground sprinkler.

Before the Court is the defendant's motion for summary judgment, pursuant to CPLR 3212, to dismiss the plaintiffs' verified complaint. It is the defendant's contention that this motion should be granted on the basis that plaintiffs offer nothing more than mere speculation as to the cause of Nadia's accident and that defendant did not create or have notice of any

defect on the staircase where the accident allegedly occurred. Plaintiffs responded in opposition to the motion. Plaintiff asserts that the motion should be denied because triable issues of fact exist, among other things, as to whether defendant caused and created the hazardous and dangerous slippery wet condition that caused Nadia to slip and fall, whether defendant had constructive notice of said condition, and whether the subject staircase and handrails were improperly designed and/or constructed. Defendant submits a reply in which it contends that this Court should not consider plaintiffs' affirmation in opposition because it exceeds the allowed page limit pursuant to the Rules of the Supreme Court, New York County.

In support of its summary judgment motion defendant submits, *inter alia*, a transcript of infant-plaintiff's Examination Before Trial (EBT); a photograph of the accident location; a transcript of plaintiff, Faysal, EBT and a transcript of Mezekiah Dubidad (Dubidad) [agent of defendant] EBT.

In opposition plaintiffs submit, *inter alia*, the affidavit of plaintiff's aunt Laila Elsayd (Elsayd); the affidavit of Robert L. Schwartzberg, P.E. (Mr. Schwartzberg); and a September 14, 2009 consultation report by Mr. Schwartzberg.

BACKGROUND

This action arises out of an accident that occurred on August 20, 2009, around 5:00 pm, when Nadia allegedly slipped and fell on steps located 220/248 East 93rd Street, New York, New York (plaintiff's verified bill of particulars [BP], ¶1,2). These stairs were located in a plaza in the rear of the building where the infant-plaintiff lived, owned by Ruppert (*see* infant-plaintiff deposition [EBT] at p. 12:15-24).

At the time the alleged injury occurred, infant-plaintiff was four years old and with Elsayd (*id.*, at p. 12:2-6, 13:9-23). On the day of the incident infant-plaintiff was wearing sandals, commonly known as "crocs" (*id.*, at p. 17:12-16). Infant-plaintiff testified that she was allegedly injured while descending down the stairs located at the subject premises (*id.*, at p. 16:11-15;

see also plaintiffs verified BP, ¶3). She was carrying a plastic bucket in her hand to bring to her friend, who was playing next to the sprinklers (Infant-plaintiff's EBT at p. 16:16-24, 20:16-22, 21:6-11). Infant-plaintiff testified that she was not holding onto the handrail as she walked down the stairs and was not looking down at the stairs she was walking on (*id.* at p. 29:22-24, 30:17-21). Infant-plaintiff used these stairs "a lot" in the past and also used them on the incident date prior to the accident (*id.* at p. 23:3-5, 25:22-25, 26:15-22). With some familiarity with the stairs due to her prior use, infant-plaintiff asserted that she never fell on the stairs before nor did she have any knowledge of anyone else who may have fell down the same stairs (*id.* at p. 26:25, 27:2-7).

Infant-plaintiff does not know what caused her fall (*id.* at p. 30:22-24). Although, she explained that the bottom steps were wet at the time of her fall due to the water coming from the sprinkler (*id.* at p. 40:13-25, 41:11-16,21-25, 42:2-8; *see also* plaintiffs verified BP, ¶4). When she fell down the stairs she landed on the padding that sits below the bottom step (*id.* at p. 31:9-13, 18-20, 25, 32:2-4). Upon the fall, Elsayd came over to help (*id.* at p. 32:5-13). Infant-plaintiff explained how her left arm hurt after the fall (*id.* at p. 32:23-25, 33:2). Thereafter, Nadia was brought to the hospital (*id.* at p. 34:6-8). As a result of the fall, infant-plaintiff suffered the following personal injuries: "closed fracture of humerus supracondylar, left; k-wire and internal fixation to the left elbow; closed reduction with percutaneous pinning of the left elbow; three surgical pins transverse the fracture of the left elbow; left sided supracondylar fracture with significant distraction of the fracture fragments; and internal fixation for supracondylar fracture" (plaintiffs verified BP, ¶7).

Faysal, the infant-plaintiff's father, recalled that he received a phone call the day of the accident and was informed the infant-plaintiff was injured (Faysal EBT at 24:2-6). After arriving at the hospital, Faysal asked the infant-plaintiff's Aunt how the incident occurred (*id.* at 28:14-21). He was then told that infant-plaintiff slipped on the stairs in front of the sprinklers (*id.*). He

contends that the Aunt told him the stairs were wet, but not specifically as to whether that was the reason for the infant-plaintiff's fall (*id.* at 33:3-16, 35:7-17). Thereafter, Faysal testified that he often took his children to the plaza area on weekends (*id.* at 19:7-16). Further, he confirmed that the staircase was well equipped with handrails on both sides and each step also had non-skid material on the edge (*id.*, 22:10-15, 23:15-21).

In addition, Dubidad, agent/employee of Ruppert, was deposed after the accident and professed that Ruppert never received any complaints or problems with the subject stairs, metal nose strips or handrails prior to this incident (Dubidad EBT at 66:3-21). He further claims that he was unaware of any previous repairs that may have occurred to the staircase in question (*id.* at 68:5-9, 17-23; 69:2-16). Further, there were never any complaints relating to the plaza sprinklers prior to this action (*id.* at 66:3-21).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

"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 [1st Dept 2008]). In order 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 allow the defendant to discover and remedy it (*see Perez v. Bronx Park S. Assocs.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500 [1st Dept 2008]). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599 [1st Dept 2010]).

DISCUSSION

The defendants herein move for summary judgment pursuant to CPLR 3212 to dismiss the plaintiff's complaint on the basis that plaintiffs offer nothing more than mere speculation as to the cause of the infant-plaintiff's accident (defendant's aff in supp, ¶3; infant-plaintiff EBT at

p. 30:22-24). Ruppert contends that they did not create nor have notice of any defect on the staircase where the accident allegedly occurred (defendant's aff in supp, ¶3). Therefore, as a matter of law defendants proffer they have established their prima facie case and are entitled to summary judgment. Moreover, defendants argue that the alleged Administrative Code violations are either insufficient to establish liability or are inapplicable herein.

"It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454-455 [1st Dept 2011]). In the instant matter, the infant-plaintiff is unable to offer anything more than speculation as to the cause of her accident (infant-plaintiff EBT at p. 30:22-24). "Although a plaintiff bears no burden to identify precisely what caused [her] slip and fall, mere speculation about causation is inadequate to sustain the cause of action" (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009]; *see also Acevedo v York International Corporation*, 31 AD3d 255, 256 [1st Dept 2006]; *Segretti v Shorenstein Co., East, LP*, 256 AD2d 234 [1st Dept 1998]; *Pagan v Local 23-25 Int'l Ladies Garment Workers Union*, 234 AD2d 37 [1st Dept 1996]). "In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Dennis v Lakhani*, 102 AD3d 651, 652 [2d Dept 2013], citing *Capasso v Capasso*, 84 AD3d 997, 998 [2d Dept 2011]; *see also Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]; *McFadden v 726 Liberty Corp.*, 89 AD3d 1067, 1068 [2d Dept 2011]; *Alabre v Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287 [2d Dept 2011]; *Rajwan v 109-23 Owners Corp.*, 82 AD3d 1199, 1200 [2d Dept 2011]; *Aguilar v Anthony*, 80 AD3d 544, 545 [2d Dept 2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 811 [2d Dept 2010]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact

as to causation would be based upon sheer conjecture" (*Dennis*, 102 AD3d at 652; *see Alabre*, 84 AD3d at 1287; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2d Dept 2006]).

Here, infant-plaintiff's deposition demonstrates that she is unable to identify what caused her to fall, whether she tripped on something or not, or what precisely happened that caused the injury (infant-plaintiff EBT at 16:11-15, 30:22-24). In addition, Faysal Siddiqui, testified that Elsayd, who was present at the time, advised him that the stairs were wet but that he was not specifically told whether infant-plaintiff slipped on that water or anything else (Faysal EBT at 33:3-16, 35:7-17). It is well settled that "the mere fact that...[an] exposed [concrete] stairway was wet...is insufficient to establish a dangerous condition" (*Gomez v David Minkin Residence Housing Development Fund Co., Inc.*, 85 AD3d 1112, 1113 [2nd Dept 2011]; *see also Joseph v New York City Tr. Auth.*, 66 AD3d at 843 [2d Dept 2009]; *King v New York City Tr. Auth.*, 266 AD2d 354 [2d Dept 1999]).

If the infant-plaintiff was able to proffer something further than speculation, the plaintiff is required to establish that (1) the defendants had either actual or constructive notice of the defective condition or created such condition, and that (2) the defendants had a reasonable amount of time within which to correct the condition (*Lewis v Metropolitan Transportation Authority*, 99 AD2d 246 [1st Dept 1984]).

In order 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 allow the defendant to discover and remedy it (*see Perez v Bronx Park S. Assocs.*, 285 AD2d 402, 403 [1st Dept 2001]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). The mere happening of an accident does not establish liability on the part of the defendant (see *Lewis*, 99 AD2d 246 [1st Dept 1984]; *Perez v NY Telephone Co.*, 161 AD2d 191 [1st Dept 1990]). Defendant established, through the plaintiffs' deposition testimony, that it did not create or have any actual or constructive notice of any alleged defect with the stairs. Further, Mr. Dubidad, an agent of

Ruppert, contends that they never received any complaints or problems with the subject stairs, metal nose strips or handrails prior to this action and there have never been previous repairs made (Dubidad EBT at 66:3-21; 68:5-9, 17-23; 69:2-16). In addition, there were no complaints relating to the plaza sprinklers prior to this action (*id.*).

The plaintiffs allege that defendants were in violation of the following rules, codes, regulations, statutes and ordinances pertaining to the reasonable care, ownership, operation, maintenance and control over the demised premise:

> [I]ncluding but not limited to: NYC Administrative Code [Admin Code] §§ 27-375, 27-375(h), 27-376, 27-127, 27-128, NYS Building Code §§ 1240 and 1245, the Building Code of City of New York, Property Maintenance Code of NYS § 302; C26-604.9; 27-376; C26-604.8; Article 6 of the Administrative Code, entitled Maintenance, Section (C26-105.1) 27-127; (C26-105, 2) 27-128 Owner responsibility; the Property Maintenance Code of New York State, Section 302 Exterior property areas, paragraph 302.3" (plaintiffs amended verified BP, ¶14).

However, the Admin Code of the City of New York Section 27-375, entitled "interior stairs" regulates only "interior stairs." "Interior stair[s]" are defined as "stair[s] within a building, that serve[] as a required exit" (Admin Code § 27-232). "Exit" is defined as "[a] means of egress from the interior of a building to an open exterior space . . ." (*id.*).

> [A]lthough the definition of 'interior stair' does not require that the 'exit' be immediately adjacent to or connected to the 'interior stair,' the definition makes clear that the stair must be a means of egress from the *interior* of the premises 'to an open exterior space,' and 'open exterior space' is defined as a 'street' or 'other public space' i.e., an 'open space outside of a building.'" (*Westra v Ten's Cabaret, Inc.*, 2009 N.Y. Misc. LEXIS 6020 [2009] [emphasis added]).

As the deposition testimony and photographs submitted to the court reflect, the steps used by infant-plaintiff merely ran from an upper level of an outside plaza to a lower level of the plaza (plaintiff aff in supp, exhibit E). Therefore, the subject stairs do not serve as a direct mean to an exit and therefore do not qualify as "interior stairs" under § 27-375 or any other current codes (*see Gomez v Brodsky Org., Inc.*, 38 Misc 3d 1223[A], 2013 NY Slip Op 50239[U] [NY Sup Ct 2013]; *Cusumano v City of New York*, 15 NY3d 319, 324 [2010] ["the stairs from where

plaintiff fell did not serve as an exit' as defined by the Admin Code, but rather as a means of walking from the first floor to the basement"] [citation omitted]. "Accordingly, [contrary to the plaintiff's contention,] the safety requirements of Administrative Code of the City of New York § 27-375 governing the condition of "interior stairs" [are] inapplicable" (*Mansfield v Dolcemascolo*, 34 A.D.3d 763 [1st Dept 2006]; *see* Admin Code §§ 27-232, 27-375; *see also Maksuti v Best Italian Pizza*, 27 AD3d 300 [1st Dept 2006]; *Weiss v City of New York*, 16 AD3d 680, 681-682 [2d Dept 2005]; *Walker v 127 W. 22nd St. Assoc.*, 281 AD2d 539, 540 [2d Dept 2001]; *Schwartz v. Hersh*, 50 AD3d 1011 [2d Dept 2008]).

Consequently, the plaintiffs' claim under Section 27-376 fails for the same rationale. The Court has held, "if the stairs are not an exit, by definition they do not fall within the ambit of section 27-376" (*Gaston v NYC Housing Authority,* 258 AD2d 220, 224 [1st Dept 1999]). Furthermore, the plaintiffs allege violations of the Admin Code sections 27-127 and 27-128, which encompass a wide array of vague and general safety requirements; however, these general safety provisions are insufficient to forestall a summary judgment motion since no specific statutory violation was identified (*see Boateng v Four Plus Corp.*, 22 AD3d 323 [1st Dept 2005], citing *Dixon v Nur-Home Realty Corp.*, 254 AD2d 66, 67 [1st Dept 1998]; *see also* Admin Code §§ 27-127, 27-128). In addition, the remaining provisions that plaintiffs rely upon, which includes the NYS Building Code Sections 1240 and 1245 and the Property Maintenance Code of NYS Section 302.3, are also too general and insufficient. There is no evidence proffered of any violation on defendant's part to maintain the general safety of the building and subject premises.

As a result of the foregoing, the defendant has met its burden to establish its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiffs are unable to identify the cause of the fall without resorting to speculation. In opposition, the plaintiffs failed to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557

[1980]). Although the defendant raises an issue in reply regarding the September 14, 2009 report of plaintiff's expert Mr. Schwartzberg, to wit that it is unsworn to and thus not competent evidence sufficient to raise an issue of fact on a motion for summary judgment, the Court finds that the affidavit of Mr. Schwartzberg is sufficient to incorporate the September 14, 2009 report and thus it can be considered by this Court. However, both the report and affidavit fail to raise a triable issue of fact herein because although Mr. Schwartzberg asserted that the stairway violated various rules, codes, regulations, statutes and ordinances, this fails to raise a triable issue of fact for the reasons stated above and because plaintiffs fail to raise an issue of fact as to whether those alleged violations contributed to the infant-plaintiff's fall (*see Gomez*, 85 AD3d at 1113 [2d Dept 2011]; *Rajwan v 109-23 Owners Corp.*, 82 AD3d 1199 [2d Dept 2011]). Accordingly, this Court grants the summary judgment motion for the defendant and dismisses the complaint in its entirety.

CONCLUSION

Upon the foregoing, it is

ORDERED that defendant Ruppert Housing Company, Inc.'s motion for summary judgment dismissing the plaintiffs' complaint is granted and the complaint is hereby dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this order with Notice of Entry upon the plaintiffs and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

OCT 29 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/27/14

PAUL WOOTEN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

101991/2011

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

GWENDOLYN MADDEN, being duly sworn, deposes and says, that she is in the employ of MARGARET G. KLEIN & ASSOCIATES, the attorney for the parties indicated on the attached papers, is not a party herein; is over the age of 18 years; and resides in Bronx County, State of New York; that on the 13th day of November, 2014 she served the attached **ORDER WITH NOTICE OF ENTRY** upon:

JACOB ORESKY & ASSOCIATES, PLLC
Attorney For: Nadia Siddiqui
155 East 149th Street
Bronx, NY 10451
Phone: (718) 993-9999
Fax: (718) 993-0142

being attorney(s) for the party(ies) named after his/her/their name, by depositing a true copy thereof in the Branch Post Office Box at 200 Madison Avenue, New York, N. Y. 10016, the same being one of the regular branch post-office boxes of the General Post Office, enclosed in a securely sealed wrapper, with the postage thereon prepaid, addressed to said attorney(s) at the address designated by him/her/them in the last papers served by him/her/them herein.

GWENDOLYN MADDEN

Sworn to before me this
13th day of November, 2014

NOTARY PUBLIC
CAROL HINTON
Notary Public State of New York
NO.01hi6031201
Qualified in Kings County
Commission Expires Sept. 27, 2017