

Wilson v Montefiore Med. Ctr.
2015 NY Slip Op 30790(U)
April 14, 2015
Sup Ct, Bronx County
Docket Number: 306299/2011
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

JAMES WILSON,

Plaintiff,

-against-

Index No.306299/2011

Present: Hon. Sharon A. M. Aarons

MONTEFIORE MEDICAL CENTER THE UNIVERSITY
HOSPITAL FOR THE ALBERT EINSTEIN COLLEGE
OF MEDICINE, JACK D. WIELER DIVISION,
Defendant.

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

Defendant Montefiore Medical Center (Montefiore) (sued herein as Montefiore Medical Center the University Hospital for the Albert Einstein College of Medicine, Jack D. Wieler Division) moves for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff submits written opposition. The motion is granted.

On April 27, 2011, plaintiff was allegedly injured on defendant's premises when plaintiff tripped and fell on an exterior pathway located at the front entrance of defendant medical center. Plaintiff fell after exiting the medical center, at a point where two steps are located on the concrete path. The plaintiff did not see the condition prior to his fall. He testified that, "As I was coming down the path and I was, you know, walking along looking straight ahead, all of a sudden, you know, I stepped down and I didn't hit anything... I was looking straight ahead, yeah." He did not notice a railing which is located adjacent to the length of the pathway.

In support of the motion, defendant submits the affidavit of its expert, Peter Pomeranz, P.E.;

the pleadings and bill of particulars; the unsworn, uncertified deposition testimony¹ of the plaintiff; the unsigned, certified deposition testimony of defendant's witness Mark Ortlieb, the Assistant Director of Engineering at Montefiore; the report of plaintiff's expert Frederick W. Glaser, P.E.; the report of defendant's expert Peter Pomeranz, P.E.; and color photographs of the accident site authenticated at the deposition by defendant's witness.

Defendant's witness testified that the walkway was located at the front of the main entrance to the medical center, and had been in the condition depicted in defendant's photographs at the time of the accident. Defendant's photographs depict a sloping concrete ramp which approaches two steps. On either side of the ramp are wide concrete curbs, one of which is painted yellow at the top. Extending from the top of the curbs are metal handrails on either side of the steps.

Defendant argues that plaintiff was not aware of the cause of his fall, which warrants summary judgment in its favor. Further, defendant's expert states that there was no violation of any building code, and no requirement that any warning be given of the presence of the stairs.

In opposition, plaintiff submits his expert's findings that "visual clues" should have been present to warn persons that the steps were present, such as dedicated handrails with a change in the height of the handrails, some type of markings or other warning.

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. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). 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

¹ Defects in deposition transcripts, including lack of certification, may be ignored when not raised by the parties. (*Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 119 A.D.3d 45, 984 N.Y.S.2d 401 [2d Dept. 2014]).

establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772, 760 N.Y.S.2d 397 [2003]). The Court's role is solely to determine the existence of any triable issues of fact, and not to determine the merits of any such issues. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]). The Court is required to view the evidence in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626, 480 N.E.2d 740, 491 N.Y.S.2d 151 [1985]).

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. (*Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872, 662 N.E.2d 255, 638 N.Y.S.2d 937 [1995]; *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 386 N.Y.S.2d 564 [1976]). In order to recover damages, a party must establish that the owner created or had actual or constructive notice of a hazardous condition which precipitated the injury. (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 646 N.E.2d 795, 622 N.Y.S.2d 493 [1994]). However, an owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. (*Luciano v. 144-18 Rockaway Realty Corp.*, 32 A.D.3d 505, 506, 820 N.Y.S.2d 139 [2d Dept. 2006]).

Ordinarily, plaintiff's lack of knowledge as to the cause of the fall, or its precise location, generally warrants judgment in favor of the defendant. (*Lee v. Ana Dev. Corp.*, 110 A.D.3d 479, 973 N.Y.S.2d 116 [1st Dept. 2013]). Nevertheless, plaintiffs have been able to avoid an adverse summary judgment determination when they were unable to testify as to the cause of their falls, but

were able to identify the exact location of the site where they slipped, and expert testimony was adduced to identify defective conditions at that spot. (*Rodriguez v. Leggett Holdings, LLC*, 96 A.D.3d 555, 947 N.Y.S.2d 429 [1st Dept. 2012]). In the present case, plaintiff's deposition testimony, viewed in the light most favorable to the nonmoving party (*Negri*, 65 N.Y.2d at 626), can reasonably be interpreted as indicating that plaintiff did not see the stairs, resulting in his fall. The question remains whether any defect has been established at the location of the fall.

Plaintiff argues that defendant's expert affidavit should not be considered based upon defendant's failure to disclose the expert prior to the filing of the note of issue. This appears to be the rule in the First Department (*see Garcia v. City of New York*, 98 A.D.3d 857, 951 N.Y.S.2d 2, [1st Dept. 2012]) despite contrary authority in the Second Department (*see Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 [2d Dept. 2012]). Nevertheless, the absence of expert testimony is not fatal here, as defendant has shown the absence of any defect based upon the testimony of its witness and the submission of photographs depicting the area in question. The testimony of defendant's witness established that the ramp had been used without incident for many years, and that the two steps were protected on either side by handrails. Moreover, the photographs indicate that the presence of the steps was visible and apparent. (*Franchini v. American Legion Post*, 107 A.D.3d 432, 967 N.Y.S.2d 48 [1st Dept. 2013] [in action arising out of plaintiff's fall over a single step, defendant established its entitlement to judgment as a matter of law by submitting testimony and photographs demonstrating that the step was open and obvious, and not inherently dangerous]).

In opposition, the plaintiff's expert fails to cite any violation of any applicable code provision or industry standard. "Plaintiff's expert's finding lacked probative force and failed to raise a triable issue of fact as to the existence of a defective or dangerous condition in the absence of any assertion of a violation of a specific, applicable industry standard which contributed to the accident." (*Bock*

v. Loumarita Realty Corp., 118 A.D.3d 540, 988 N.Y.S.2d 156 [1st Dept. 2014] [citation omitted] [rejecting plaintiff's expert's claim that sidewalk was inherently slippery when wet]). Moreover, plaintiff fails to support his conclusion that "visual clues" were required to warn pedestrians of the obvious presence of steps. (See *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544-545, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002] [expert "did not create a triable issue with respect to the existence of an accepted industry practice or standard," where the professional guidelines the expert referenced were merely recommendations, and the expert "failed to provide any factual basis for her conclusion that the guidelines establish or are reflective of a generally-accepted standard or practice" in the relevant industry]; see also *Veccia v. Clearmeadow Pistol Club*, 300 A.D.2d 472, 752 N.Y.S.2d 84 [2d Dept. 2002] [defendant was entitled to summary judgment where, inter alia, plaintiff's expert "did not sufficiently identify any specific industry standard upon which he relied"]).

Moreover, plaintiff's expert relies on sheer speculation in attributing the cause of the accident to the absence of "visual clues." The plaintiff admitted that he did not notice the railing at all, and thus the expert's testimony that some other configuration of the railing would have alerted the plaintiff to the presence of the step is purely speculative. Rather, plaintiff's testimony that he was looking "straight ahead" establishes that the cause of the accident was solely the plaintiff's own inattentiveness. (*Franchini*, 107 A.D.3d at 432 [plaintiff testified that she did not see the step because she was looking straight ahead at a friend when she fell]).

Accordingly, the motion is granted. It is hereby

ORDERED that the complaint is dismissed, and it is

ORDERED that the defendant shall serve a copy of this ORDER on the plaintiff with Notice of Entry thereon.

Dated: April 14, 2015


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