

**Saul v Sutton House Associated**

2015 NY Slip Op 31788(U)

September 18, 2015

Supreme Court, New York County

Docket Number: 150927/2013

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - PART 29**

-----X  
**Ralph Saul**

**Petitioner**

**DECISION AND ORDER**

**-against-**

**INDEX NO.: 150927/2013**

**Sutton House Associated, Cornell University,  
the Society of New-York Hospital,  
Memorial Hospital for Cancer and Allied Diseases,  
the Rockefeller University, Manhattan Eye, Ear and  
Throat Hospital, New York Society for the Relief of the  
Ruptured and Crippled, Maintaining the Hospital  
for Special Surgery, Rose Associates, Inc. and  
Rose Associates, LLC**

**Respondent**

-----X  
Robert D. Kalish, J.:

Upon the foregoing papers, the Defendants, Sutton House Associated, Cornell University, the Society of New-York Hospital, Memorial Hospital for Cancer and Allied Diseases, the Rockefeller University, Manhattan Eye, Ear and Throat Hospital, New York Society for the Relief of the Ruptured and Crippled, Maintaining the Hospital for Special Surgery, Rose Associates, Inc. and Rose Associates, LLC's (collectively the Defendants) second motion under sequence number 002 for summary judgment dismissing the Plaintiff's action is granted and the Defendants' first motion under sequence number 001 to vacate Plaintiff's note of issue and certificate of readiness, strike the action from the trial calendar and compel the Plaintiff to provide outstanding discovery is denied as moot as follows:

### Background and Procedural History

The Plaintiff has lived at the subject location 1161 York Ave for about 50 years and alleges in sum and substance that on June 13, 2012, he slipped and fell while walking on a brick walkway in the court yard outside of his building residence. The Plaintiff further alleges that the Defendants maintained said premises including the brick walkway in front of the premises, and that the Plaintiff's accident was caused by the Defendants' failure to maintain the brick walkway in a safe condition. Specifically, the Plaintiff alleges in the verified bill of particulars that he fell on the brick walkway due to the "dangerous, defective, hazardous and raised, depressed broken, and gapped condition of the aforementioned brick walkway located approximately 35 feet from the entrance of 1161 York Avenue". The Plaintiff claims that the Defendants had both actual and constructive notice of the dangerous condition of the walkway for a long period of time prior to the June 13, 2012 accident.

The Defendants filed the motion for summary judgment and the Plaintiff submitted opposition papers. The Defendants filed reply papers, and on September 1, 2015, the Parties appeared before this Court for oral argument on the instant motion.

#### Parties' Contentions:

In support of their motion for summary judgment, the Defendants argue in sum and substance that any "defect" in the brick walkway that may have caused the Plaintiff's accident was trivial, and therefore the Defendants are not subject to liability for the Plaintiff's accident/injuries. Specifically, the Defendants argues that there was nothing on or about the condition of the brick walkway that constituted a trap or nuisance. The Defendants refer to the Plaintiff's deposition testimony, photographs of the walkway (taken by the Plaintiff and the Defendants) and the

videotape of the Plaintiff's accident in support of their argument that the subject walkway was in good condition with no observable defects or tripping hazards. Further, the Defendants point out that the Plaintiff's expert (Stanley Fein PE) measured the leveling between the bricks as 3/8 inches and that the Defendants' expert (Richard Berkenfeld) measured it to be 3/16 inches. The Defendants argue that both measurements reflect a height differential of less than one-half inch, which the Defendants argue is *de minimus*.

In opposition, the Plaintiff argues in sum and substance that based upon the Plaintiff's testimony and the submitted evidence, there are genuine issues of fact as to whether or not the Plaintiff's accident was caused by a *de minimus* defect in the walkway. Initially, the Plaintiff argues that the Court should disregard the affidavit of Defendants' expert, Mr. Berkenfeld, in deciding the instant motion. The Plaintiff argues that the Defendants did not notice Mr. Berkenfeld as an expert witness until April 15, 2015, seven days after the Defendants served the Plaintiff with the instant motion for summary judgment (on April 8, 2015).

The Plaintiff further argues that Mr. Berkenfeld did not examine the subject area until December 11, 2013, nearly eighteen months after the Plaintiff's accident. As such, the Plaintiff argues that there is no basis for Mr. Berkenfeld to conclude that the subject area was in the same condition on the date of his examination as it was on the date of the Plaintiff's accident. The Plaintiff further argues that his own expert, Mr. Fein examined the subject area on June 25, 2012, only thirteen days after the Plaintiff's accident. Plaintiff argues that after examining the subject area, Mr. Fein concluded to a reasonable degree of engineering certainty, that the alleged defect constituted a hazard and/or snare which was likely the proximate cause of the Plaintiff's trip and fall.

The Plaintiff emphasizes in his opposition papers that there is no “minimal dimension test” or “per se rule” to determine if a defect is *de minimus*, and argues that the deposition testimonies and Mr. Fein’s expert affidavit are sufficient to create a triable issue of fact on this point. In particular, the Plaintiff refers to Ms. Susan Nicklin’s deposition testimony. Ms. Nicklin testified that she was the general manager at Sutton Terrace, a complex is located at 450 East 63rd Street. She further testified that the bricks on the subject walkway were not mortared nor caulked together, but set in sand or sand-like material. The Plaintiff’s attorney also refers to the Plaintiffs own deposition testimony wherein he testified that he remembered going back to the site of his accident to see what caused him to fall and noticed that the brick that caused him to fall was mis-leveled by about one-half of an inch. The Plaintiff further states in his affidavit that several of the bricks on the subject walkway were mis-leveled, loose and that he remembered work being done thereat to repair the surface. The Plaintiff argues that said deposition testimonies taken together with Mr. Fein’s expert opinion are sufficient to create an issue of fact as to whether or not the alleged defect was *de minimus*.

In their reply papers, the Defendants reiterate their argument that any alleged defect in the subject walkway was *de minimus*. Specifically, the Defendants argue that the Plaintiff claims that he tripped and fell on a raised brick, however said brick was only raised 3/8" and therefore *de minimus*. The Defendants also refer to the Plaintiff’s photos of the subject area, which were taken a few days after the accident. The Defendants argue that said photographs do not show any unusual characteristics in the walkway that would constitute a trap, snare, nuisance or other tripping hazard. The Defendants also refer to Plaintiffs own expert, Mr. Fein’s report indicating that the brick the Plaintiff tripped upon was raised only 3/8". The Defendants further argue that Mr. Fein’s

conclusions as to the possibility of the bricks in the walkway being loose or shifting are purely speculative. Defendant argues that said conclusions have no bearing on the underlying action as the Plaintiff did not testify at his deposition that he fell due to loose/shifting bricks. The Defendants do not dispute in their reply papers that they filed their notice of expert witness as to Mr. Berkenfeld after the Plaintiff had already filed the Notice of Issue.

At oral argument, the Parties reiterated the arguments presented in their submitted papers.

### Analysis

#### Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 (b)), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 NY2d 557, 562 (NY1980)).

"On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate. We [The Court of Appeals of New York] have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY 1980) citing CPLR §3212(b); Phillips v. Joseph Kantor & Co., 31 NY2d 307 (NY 1972); Indig v. Finkelstein, 23 NY2d 728 (NY 1968); Alvord v Swift & Muller Constr. Co., 46 NY2d 276 (NY 1978); Fried v Bower & Gardner, 46 NY2d 765 (NY 1978); Platzman v American Totalisator Co., 45 NY2d 910 (NY 1978); Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 (NY 1973)).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (Vega v. Restani Constr. Corp., 18 NY3d 499, 503 (NY 2012) citing Alvarez v. Prospect Hosp., 68 NY2d 320 (NY 1986)).

Further "[o]n a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (Udoh v Inwood Gardens, Inc., 897 NYS2d 12, 12 (NY App Div 1st Dept 2010); see also Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 (NY 2007)). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (Sommer v Federal Signal Corp., 79 NY2d 540, 555 (NY 1992)).

The Court will consider the affidavit of Defendants' expert Mr. Berkenfeld in determining the instant motion for summary judgment

Initially, the Court notes that it will be considering Mr. Berkenfeld's expert affidavit in determining the instant motion for summary judgment despite the fact that the Defendants did not notice the Plaintiff that they intended to call Mr. Berkenfeld until after the Plaintiff had already filed the Notice of Issue. "CPLR 3101 (d) (1) (i) does not require a party to retain an expert at any particular time. '[E]ven where one party requests trial expert disclosure during discovery pursuant to CPLR §3101 (d) (1) (I), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony'" (Ramsen A. v. New York City Hous. Auth., 112 A.D.3d 439, 439-440 (NY App Div 1st Dept 2013) citing LaMasa v. Bachman, 56 A.D.3d 340 (NY App Div 1st Dept 2008); Rivers v Birnbaum, 102 AD3d 26 (NY App Div 2nd Dept 2012)). CPLR §3101 does not automatically preclude experts disclosed near the commencement of trial from testifying at trial. Further, there is nothing from the statutory language of CPLR §3101 or the legislative intent in passing the statute to conclude that a Court must reject a party's expert's affidavit or affirmation in support of, or in opposition to, a timely motion for summary judgment solely because the expert

was not disclosed prior to the filing of a note of issue and certificate of readiness, or prior to the motion. (See Rivers v Birnbaum, 102 AD3d 26, 39 (NY App Div 2nd Dept 2012); see also Cohen v Half Hollow Hills Cent. Sch. Dist., 123 AD3d 1081 (NY App Div 2nd Dept 2014).

As such, the Defendants are not precluded from submitting an expert affidavit by Mr. Berkenfeld in support of the instant motion for summary judgment, and this Court will consider said expert affidavit in determining the instant motion. Further, the Plaintiff is in no way prejudiced by the Court's consideration of Mr. Berkenfeld's expert affidavit as the Plaintiff has included his own expert's affidavit with his opposition to the motion and had the opportunity to argue against Mr. Berkenfeld's expert affidavit.

The Defendants are entitled to summary judgment against the Plaintiff dismissing the underlying action

There is no per se rule that whether or not a defect is *de minimus* is based solely upon the height/depth of the defect (e.g. half an inch vs 3/16 or 3/4 of an inch). "Instead, whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (NY 1997) [internal citations and quotation marks omitted]; see also Nigro v. Cervinara, LLC, 106 AD3d 428 (NY App. Div. 1st Dept 2013). "However, a property owner may not be held liable for trivial defects, not constituting a trap, snare, or nuisance, over which a person might merely stumble, stub his or her toes, or trip. In determining whether a defect is trivial, the 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 circumstance of the injury" (Gotay v New York City Hous. Auth., 127 AD3d 693, 695 (NY App

Div 2nd Dept 2015) citing Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (NY 1997); Platkin v County of Nassau, 121 AD3d 879 (NY App Div 2nd Dept 2014); Moses v T-Mobile, 106 AD3d 967 (NY App Div 2nd Dept 2013) lv denied 21 NY3d 865 (NY 2013); Schenpanski v Promise Deli, Inc., 88 AD3d 982 (NY App Div 2nd Dept 2011)).

Defects of one-half-inch or less in height differential have been held to be trivial, in the absence of any evidence showing that the defect presented a significant hazard by reason of location, adverse weather or lighting conditions, or other circumstances giving the defect the characteristics of a trap or snare (See examples Boynton v. Haru Sake Bar, 107 AD3d 445 (NY App Div 1st Dept 2013)[photographic evidence showed that height difference of one-half-inch between level of sidewalk and frame to cellar hatch doors was trivial]; Mangar v Parkash 180 LLC, 99 A.D.3d 607 (NY App Div 1st Dept 2012)[defendant established that half-inch height differential at top of two-step exterior stairway was trivial]; Schwartz v Bleu Evolution Bar & Rest. Corp., 90 AD3d 488 (NY App Div 1st Dept 2011) [gap in sidewalk flags of half-inch in width and height was trivial and plaintiff did not show that defect presented significant hazard]; Gaud v. Markham, 307 AD2d 845 (NY App Div 1st Dept 2003) [height differential of less than inch between defective area and rest of stairway landing leading to entrance of building was trivial]; Palladino v City of New York, 127 AD3d 708 (NY App Div 2nd Dept 2015)[Defendant established, based in part upon the plaintiff's testimony describing the depression in the asphalt abutting the metal plate as being one-half inch deep, that the alleged defect was trivial as a matter of law and did not possess the characteristics of a trap or nuisance, and therefore, was not actionable]; Schiller v St. Francis Hosp., Roslyn, N.Y., 108 AD3d 758 (NY App Div 2nd Dept 2013) [Defendants establish prima facie that the alleged defect that measured no more than one-half inch in height was trivial as a matter of law

based upon photographs depicting the area where the accident occurred as it existed on the date of the accident, and considering all other relevant factors, such as the clear weather at the time of the accident and the lack of any other foot traffic or other obstructions on the walkway at the time of the accident]).

However, height differential alone is not determinative on the issue of whether or not a defect is *de minimus*, and Courts have found that there was a triable issue of fact based upon one-half inch and similar height differentials (See examples Gomez v Congregation K'Hal Adath Jeshurun, Inc., 104 AD3d 456 (NY App Div 1st Dept 2013) [Plaintiff's papers in opposition to summary judgment raised triable issues of fact as to whether a one-half-inch differential between two sidewalk flags was a "substantial defect"]; Greco v. City of Buffalo, 128 AD3d 1461 (NY App Div 4th Dept 2015) [Defendants failed to meet their initial burden of establishing that a one-half of an inch to three-quarters of an inch differential between two sidewalk slabs was trivial and nonactionable as a matter of law]; Herrera v. City of New York, 262 AD2d 120 (NY App Div 1st Dept 1999) [There was a triable issue of fact based upon the Plaintiff's deposition testimony that the area of the sidewalk where she tripped was "unlevel". The photographic record showed the possibility that there was not only an elevation differential of three-quarters to one inch, but also a gap of up to one and a half inches in width]).

Further, photographs that fairly and accurately represent the accident site may be used to establish whether or not a defect is trivial and, therefore, not actionable (Gotay v New York City Hous. Auth., 127 AD3d 693, 695 (NY App Div 2nd Dept 2015) citing Platkin v County of Nassau, 121 AD3d 879 (NY App Div 2nd Dept 2014); Das v Sun Wah Rest., 99 AD3d 752 (NY App Div 2nd Dept 2012)).

Based upon the submitted papers, the Court finds that the Defendants have met their prima facie burden to establish as a matter of law that the alleged defect in the brick sidewalk was *de minimus*. The Plaintiff testified at his deposition in sum and substance that he tripped upon a brick that was raised approximately one-half inch. Further, although the Defendants' expert did not examine the walkway until nearly eighteen months after the Plaintiff's accident, the Plaintiff's expert Mr. Fein examined the area within thirteen days after the Plaintiff's accident and indicated that the brick the Plaintiff tripped upon was raised approximately 3/8th of an inch. As such, the Plaintiff's own expert found that the brick that the Plaintiff tripped upon was raised less than half an inch. Further, upon review of the Plaintiff's photographs of the area and the video of the Plaintiff's accident, this Court finds that there is nothing to indicate that the walkway was in a state of disrepair and/or that there were any other conditions giving the 3/8th inch raised brick the characteristics of a trap or snare.

The Court further finds that the Plaintiff has failed to create an issue of fact in opposition to the motion. Although the Plaintiff states in his affidavit that he observed several "mis-leveled and/or loose" bricks in the walkway, he did not testify at his deposition that he fell due to loose or shifting bricks. The Plaintiff claims in sum and substance that he tripped upon a specific brick that was raised approximately one-half inch from the brick next to it. There is nothing in the pleadings nor the Plaintiff's deposition testimony to suggest that his accident was caused by loose or shifting bricks. Further, the Plaintiff specifically states in his affidavit in opposition to the instant motion that he fell as a result of a one-half inch mis-leveled brick ("the brick that caused my fall") and not due to any other loose or shifting bricks in the walkway. As such, Mr. Fein's indication in his expert affidavit that the bricks in the walkway may be subject to shifting or movement due to normal foot

traffic is speculative and insufficient to create an issue of fact as to whether or not the one-half inch raised brick constituted a *de minimus* defect.

Further, there is no indication from either the video taken of the Plaintiff's accident or the Plaintiff's photos of the subject area to indicate that said defect constituted a trap or snare. Finally, the Plaintiff does not allege, nor is there any indication from the video of the Plaintiff's accident that any outside factors (e.g. weather, other people, wet surfaces etc.) were involved in his accident.

#### Conclusion

Accordingly, upon review of all the facts and circumstances as presented in the Parties' submitted papers and for the reasons so stated, this Court finds that the Defendants have established that the alleged defect was *de minimus* and unactionable as a matter of law. It is hereby


ORDERED that the Plaintiff's underlying action is dismissed in its entirety. It is further

ORDERED that as the underlying action is being dismissed in its entirety, Defendants' first motion under sequence number 001 to vacate Plaintiff's note of issue and certificate of readiness, strike the action from the trial calendar and compel the Plaintiff to provide outstanding discovery is hereby denied as moot.

The foregoing constitutes the Order and Decision of the Court.

Dated:

Sept 18, 2015 ENTER:

  
HON. ROBERT D. KALISH  
J.S.C.