

**Stasinov v S.K.I. Realty Inc.**

2016 NY Slip Op 30771(U)

April 25, 2016

Supreme Court, New York County

Docket Number: 153662/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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GEORGIA STASINOS,

Plaintiff,

-against-

- Index No. 153662/12

S.K.I, REALTY INC, MEMORIAL SLOAN  
KETTERING CANCER CENTER, MEMORIAL  
HOSPITAL FOR CANCER AND ALLIED  
DISEASES, SLOAN KETTERING INSTITUTE  
FOR CANCER RESEARCH. FEDERAL EXPRESS  
CORPORATION, FEDEX CORPORATION,  
and LESLIE J. COBB,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendants S.K.I. Realty Inc, Memorial Sloan Kettering Cancer Center, Memorial Hospital for Cancer and Allied Diseases, Sloan Kettering Institute for Cancer Research (together “the Memorial defendants”) move for summary judgment dismissing the complaint against them (motion seq. 002). Defendants Federal Express Corporation, FedEx Corporation and Leslie J. Cobb (together “FedEx defendants”) separately move for summary judgment to dismissing the complaint against them (motion seq. 003).<sup>1</sup> Plaintiff opposes the motions. The Memorial defendants oppose the FedEx defendants’ motion to the extent that these defendants seek the dismissal of the Memorial defendants’ cross claims.

Plaintiff alleges she was injured on April 28, 2010, at approximately 1:00 pm, when she was struck by a door, while walking in the hallway of Memorial Hospital for Cancer and Allied Diseases (“the Hospital”) located at 1275 York Avenue, in Manhattan. The Hospital is owned and operated by the Memorial defendants. Plaintiff testified at her deposition that on the date of the accident, she entered the Hospital using the entrance at 444 East 68<sup>th</sup> Street (“the 68<sup>th</sup> street

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<sup>1</sup>Motion sequence nos. 002 and 003 are consolidated for disposition.

entrance”) and proceeded to walk in the entrance and then turned left walking down a hallway to a bank of elevators. When she came down the elevators to leave she walked the same hallway towards the 68<sup>th</sup> Street entrance. As she walked the hallway toward the 68<sup>th</sup> Street entrance, the door in question was to her right (Plaintiff Dep, at 62-64). She testified that she had walked down the hallway many times and estimated that she did so over 60 times before the accident (Id., at 65-67, 170). However, she also testified that she had never seen the door opening into the hallway on these prior occasions and did not know before the accident whether the door opened onto the hallway or into the stairwell (Id., at 70). At the time of the accident, plaintiff was walking past the door and when she was towards its center, it opened and hit her causing to fall (Id, at 78-79). She testified that the door was opened with force “like a car hit you...because I felt so much force, like 500 pounds fell on me “(Id, at 82). She also testified that the door “flipped me around,” so that after she was struck she was facing in the opposite direction (Id, at 82-84). As a result of the accident, plaintiff suffered various injuries, including a fractured rib. Plaintiff subsequently learned that the door in question was opened by a FedEx employee, defendant Leslie J. Cobb (“Cobb”). Plaintiff testified that after the accident, the Hospital’s head of security told her “they wanted to change that door a year previous to the accident.” (Id, at 72-73, 88-89).

The accident was witnessed by Lucius Nero (‘Nero’), a security guard employed at the Hospital for 11 years. Nero testified that before the accident, he saw the Stairwell B door open and come in contact with the plaintiff causing her to fall to the ground, and that the door opened less than half way when it hit plaintiff (Nero Dep, at 44).. He described the hallway at issue as approximately 6 feet wide and 75 yards long, with two stairwells designated as A and B (Id, at 25-26). Nero testified that the door opened into the hallway and had a window in the door, and

that from within the stairwell the back of the door, as one opens it, had a sign that said “open door slowly” (Id, at 37). He testified that from the hallway side of the door there was a sign that said “Stairway B” and that the door was a fire exit door. (Id, 65-67, 70-71).

Brian Irving (“Irving”), who has been employed by Memorial for more than ten years as an Environmental Compliance Officer in the Safety Department, was called to investigate the occurrence and filled in an incident report on the date of the accident. He testified at his deposition that he opened the door at Stairway B and confirmed that it worked properly by swinging the door open and also observed that the door contained a sign saying “open door slowly” and that he checked to make sure there was nothing slippery on the floor (Irving Dep, at 20-22). He confirmed that the Stairway B was a fire exit and that he was familiar with building codes requiring that the door open outwards into the hallway because it was the main egress door in the event of fire (Id, at 28-29, 41-43).

#### The Memorial Defendants’ Motion

The Memorial defendants move for summary judgment, arguing that they have met their burden of making prima facie showing based on evidence that the door at issue was in compliance with the New York City Building Code, which required that a fire door open into the hallway. They also argue that the door was an open and obvious condition and that plaintiff was aware of the door before the accident since she admitted to walking in the hallway 60 times before the accident. In addition, the Memorial defendants argue that they did not have notice of any defective condition, and submit Irving’s affidavit in which he states he was not aware of any complaints about that door and had not been informed or notified by any one in the security department of any complaints or accidents involving fire and/or exit doors at the Hospital that

open onto hallways, including Stairwell B. He also states that before the accident, he was not aware of any violations received pertaining to the fire and/or exit doors, and that he also was not notified of any accidents involving delivery persons. Alternatively, the Memorial defendants argue that any negligence on their part was not a proximate cause of the accident since the sole cause of the accident was the force of the door being opened by Cobb.

In further support of their motion, the Memorial defendants submit an affidavit from Scott Derector, P.E., (“Derector”) a licensed professional engineer in various states, including New York. Derector reviewed various documents and pleadings related to the action and conducted an inspection of the doors in Stairwell B and Stairwell A on July 24, 2013, and opines that “within a reasonable degree of engineering and safety standards...that the door designated as Stairway B was within code at the time of the plaintiff’s accident and that there were no violations of any safety standards that caused or contributed to plaintiff’s claimed accident” (Derector ¶ 2). He also states that the various provisions of the New York City Building Code and New York State Property Maintenance Code referenced in plaintiff’s Bill of Particulars are inapplicable. He states that the door he inspected was the “same size and type of door as on the date of plaintiff’s accident, except that at the time of my inspection the door opened inwards towards the stairwell as opposed to outwards into the hallway...” (Id ¶ 3). He states that the reason for the change was that the 68 Street entrance at issue “was redone sometime in 2012 and a new exit/fire door was created such that Stairwell B was no longer the exit/fire door and was no longer required to open into the hallway” (Id ¶ 3).

He further states that the doors in Stairwell A and Stairwell B were identical and “had self-closing mechanisms to control the speed the doors closed [and that] [there is no NYC

Building Code requirement for the swing timing of fire or exit doors” (Id ¶ 4). He also states that his “testing of the door revealed a door that was within applicable codes for the City of New York pertaining to fire and exit doors [and that][b]ased on the evidence, along with my inspection, the Stairwell B door was open and obvious to anyone traversing the hallway” (Id). He further opines that “it is my opinion that both the Stairwell A door and Stairwell B door, as it existed on the date of the accident, were within good and accepted safety standards and not dangerous or defective in any manner” (Id).

Plaintiff opposes the motion, arguing that the Memorial defendants have not made a prima facie showing that the door was an open and obvious condition, pointing to plaintiff’s testimony that she did not see the door open during the many times she walked down the hallway before the accident, that she never used the stairway to Stairwell B before the accident, and that she did not know the doorway opened out into the hallway until after the accident. In addition, plaintiff argues that as the door is not a stationary object, which was not defective except for the way in which it moved, it cannot be said to constitute an open and obvious condition. At the very least, plaintiff argues, issues of fact exist as to the Memorial defendants’ liability for failing to use reasonable care to prevent the insufficiently controlled door from causing injuries.

Plaintiff also argues that the Memorial defendants did not meet their burden as to lack of notice, and the presence of a warning sign in the stairwell is evidence of such notice, and also points to her testimony that the security guard who witnessed the accident told her the Hospital wanted to change the door that hit her. Plaintiff also submits her own affidavit and the affidavit of her son. Plaintiff states after the accident “the hospital’s head of security told me that the hospital had wanted to change the door for the past year” (Plaintiff Aff., ¶ 4). Plaintiff also

submits the affidavit of her son, Peter Stasinos, who states that after the accident, the security guard at the scene told him that “the hospital had wanted to change the direction in which the door involved in the accident was opened, and the force with which it opened” (P Stasinos Aff., ¶ 2). Plaintiff further argues that the Memorial defendants created the condition by having the door installed. With respect to causation, plaintiff argues that Cobb’s actions do not constitute an intervening act as a matter of law.

In further support of her opposition, plaintiff submits an affidavit from expert, Stuart Sokoloff, P.E. (“Sokoloff”), a licensed professional engineer in various states including New York. Sokoloff, who reviewed the file in this action and on July 31, 2013 inspected the location including the door involved in the accident. Sokoloff states that since the Hospital was constructed in approximately 1940, it would be subject to either the 1922 or 1938 New York City Building Codes, depending on when the construction plans were filed and accepted by the City. He opines that the doorway violated various provisions of the Building Codes of 1922, 1938 and 1968, as revised in 2000,<sup>2</sup> by obstructing the hallway and that these violations were a direct cause

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<sup>2</sup>From the 1922 Building Code, Sokoloff cites Section 158-1 entitled “Hanging Doors” which states, in part, that “doors of any doorway...shall be so hung and arranged that when opened they shall not in any way obstruct the required width of hallways.” From the 1938 Building Code, Sokoloff relies on section C26-284.0(b), which provides in part, “[d]oors serving as required means of egress...shall open outwardly and shall be so hung and arranged when opening or opened such doors shall not reduce the widths of hallways or passageways.” From the 1968 Building Code as revised in 2000, Sokoloff cites Section 27-369, entitled “Corridors” which states “[c]orridors shall be kept readily accessible and unobstructed as all times,” section 27-369(a) Capacity, which states that “[the capacity and minimum width of corridors shall be listed in table 6-1. Width shall be measured in the clear between the narrowest points produced by and the projections such as...door.. swings except such width may be reduced up to 18 inches wide, and section 27-370 which states, “[e]xit passageways shall be maintained free of obstructions at all times.”

of the accident. He also states that contrary to the opinion of the Hospital's expert, that the Building Code requires doors to open into the hallway, such requirement would not permit the Hospital to violate other code provisions. He further opines that defendants "should have constructed or modified the door in such a way as to be in compliance with all sections of the Building Code. For example, they could have constructed an alcove as protection around the door..." (Sokoloff Aff. ¶8 ).

In reply, the Memorial defendants argue, *inter alia*, that the court should not consider Sokoloff's expert affidavit as he was not disclosed as an expert during discovery. They also argue that his affidavit is vague and conclusory and insufficient to raise an issue of fact, asserting that the 1922 code provisions relied on by Sokoloff is outdated and does not apply to a building constructed in 1940, and that, in any event, the tables to the subsequent code provisions relied on by Sokoloff demonstrate that the 96 inch width of relevant hallway is in compliance with the Building Code requirement.

In plaintiff's sur-reply, which was submitted with permission of the court at oral argument, plaintiff argues that the court should consider their expert affidavit as the failure to previously identify him as an expert was not wilful and the Memorial defendants cannot show that they have been prejudiced by the delay.

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (1st Dept. 2012) (internal quotation marks and citation omitted). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment." Id. "Once this

showing has been made, 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). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

As a preliminary matter, the Memorial defendants are not entitled to summary judgment on the ground that the door’s swinging outward into the hallway constituted an open and obvious condition. “Whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion.” Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d 69, 72 (1st Dept 2004). Moreover, a finding that a condition is open and obvious “merely eliminates the property owner’s duty to warn of the hazard but does not eliminate a property owner’s duty to maintain the premises in a reasonably safe condition.” Id , at 70. In certain instances the courts have granted summary judgment “where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous.” Boyd v New York City Hous. Auth. , 105 AD3d 542, 542-543 (1st Dept), lv denied 22 NY3d 855 (2013).

However, to establish that a condition is open and obvious a defendant must prove that the hazard “could not reasonably be overlooked by anyone in the area whose eyes were open.” See Powers v. 31 E 31 LLC, 123 AD3d 421, 422 (1<sup>st</sup> Dept 2014) (internal citation omitted). Moreover, “the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked.... [t]he burden is on the defendant to

demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses ” Id. (internal citations and quotations omitted); see also Thornhill v. Toys “R” Us NYTEX, Inc., 183 AD2d 1071 (3rd Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which plaintiff fell was an open and obvious condition even though plaintiff initially saw the platform and avoided it). In addition, “whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case.” See Powers v. 31 E 31 LLC, 123 AD3d at 422 (internal citation and quotation omitted).

Here, Memorial defendants have not met their burden of showing that the door was an open and obvious condition, since the hazard posed by the door could not be ascertained unless the door was observed opening outwardly into the hallway, particularly as there was no warning sign or other indication on the hallway side of the door as to how it opened . In any event, even if the Memorial defendants had met their burden, plaintiff has controverted this showing based on her testimony that before the accident, she had not observed the door opening, or used the door on the stairway side containing the warning to open it slowly, and thus did not know the door opened outwardly until she was struck by it.

Next, contrary to the Memorial defendants’ position, the court may consider Sokoloff’s affidavit despite plaintiff’s failure to previously identify him as an expert since there is no indication that such failure “was intentional or willful and there is no showing of prejudice” to defendants. Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992). Nor does the

court find that Sokoloff's opinion to be unsupported by facts so as to lack probative value as to whether the door is defective. See Hyatt v. Price Chopper Operating Co., Inc., 90 AD3d 1218, 1220 (3d Dept 2011). In addition, while it is unclear from the record whether the Building Code provisions cited by plaintiff's expert were violated and/or are applicable here, even assuming that the Memorial defendants complied with the applicable code provisions, such compliance "is not dispositive of the question whether it satisfied its duties under the common law." Kellman v. 45 Tiemann Associates, 87 NY2d 871, 872 (1995); see also, Maldonado v. 1992 Fulton Realty Corp., 23 AD3d 177 (1<sup>st</sup> Dept 2005)(noting that [e]ven if defendant landowner complied with the applicable statutes and regulations, that circumstance would not, under the facts at bar, be dispositive of whether defendant discharged its common-law duty to maintain its premises in reasonably safe condition").

With respect to whether the Memorial defendants breached any duty owed to plaintiff, "[i]t is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106 (1st Dept 1996). To impose liability for a breach of this duty, it must be shown that "the owner or possessor either created the condition, or ha[d] actual or constructive knowledge of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (2d Dept. 2000). To constitute constructive notice, a defect must be visible, apparent, and exist for a sufficient length of time prior to an accident to permit the owner or its agents to discover and remedy it. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986).

As for the issue of notice, assuming *arguendo* that the Memorial defendants met their burden as to notice based on, inter alia, the statements in the affidavit of their Environmental Compliance Officer that he was unaware of any complaints about the subject door, plaintiff has controverted this showing. First, the sign warning users of the door in the stairwell to open the door slowly raises an issue of fact as to whether the Memorial defendants had actual notice that the door swinging open onto the hallway posed a risk of harm to those in the hallway. See Rosado v. Phipps Houses Services, Inc., 93 AD3d 597 (1<sup>st</sup> Dept 2012)(presence of caution cones raised a triable issue of fact as to prior actual notice of slippery condition); Felix v. Sears, Roebuck and Co., 64 AD3d 499 (1<sup>st</sup> Dept 2009)(finding that the presence of a warning sign sufficient to raise issue of fact as to whether defendant had actual notice of hazardous condition that cause plaintiff to fall). In addition, there is evidence of actual notice based on the plaintiff's testimony and the statement in her affidavit and that of her son that the security guard at the scene of the accident stated that the Hospital had wanted to change the door for a year before the accident. See Cenniglia v. Loza Restaurant Corp., 98 AD3d 933 (2d Dept 2012).

Furthermore, the record raises triable issues of fact as to whether the Memorial defendants created the defective condition based on their placement of the outward swinging door in a hallway of a Hospital, without any warning signs on the exterior of the door. See Siciliano v. Henry Modell & Co, Inc., 85 AD3d 524 (1<sup>st</sup> Dept 2011)(reversing trial court's grant of summary judgment to defendant store owner finding that "the presence of a metal box at eye level on the exit door, in conjunction with the fast closing of the door, is enough to permit a trier of fact to conclude that defendant was negligent under the common law"); Torres v. New York City Housing Authority, 270 AD2d 100, 100 (1<sup>st</sup> Dept 2000)(issues of fact existed as to whether defendant created a dangerous or defective elevator door that swung open, pinning child's hand

against wall was defective); See Zeder v. Church of St Stanislaus, 275 AD 796 (1<sup>st</sup> Dept 1949)(jury issue raised as to whether the placement of outwardly swinging doors which when closed provided no means for ascertaining whether anyone was on the other side constituted a dangerous condition); Ford v. Wanamaker, 165 AD 284 (1<sup>st</sup> Dept 1914)(granting plaintiff a new trial, finding that the defendant department store was potentially liable for negligence based on the proximity of a swinging door, which struck and injured plaintiff, to the aisle of the store); but see, Hunter v. Riverview Towers, Inc., 5 AD3d 249 (1<sup>st</sup> Dept 2004)(affirming trial court's dismissal of complaint based on evidence that stairwell door which struck plaintiff was not defective, and that defendant did have constructive or actual notice of any defect prior to the accident).

Next, the Memorial defendants' argument that Cobb's forceful opening of the door was an intervening act which relieves them of liability is also unavailing. "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant." Kush v. City of Buffalo, 59 NY2d 26, 33 (1983). "[L]iability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 315 (1980). Here, triable issues of fact exist as to whether Cobb's alleged negligence including opening the door forcefully, and apparently ignoring the warning sign on the door, were an intervening cause of plaintiff's injuries or a foreseeable result of Memorial defendants' alleged negligence. Torres v. New York City Housing Authority, 270 AD2d at 100-101 (finding that triable issues of fact existed as to "whether the unidentified elevator passenger's act of forcefully opening the elevator door and, in so doing, pinning the

child's hand, was an intervening and superseding cause of the infant plaintiff's harm"); see generally Kriz v. Schum, 75 NY2d 25, 34 (1989) ("because the determination of legal causation turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve")(internal citation and quotation omitted).

Accordingly, the Memorial defendants' motion for summary judgment is denied.

#### The FedEx Defendants' Motion for Summary Judgment

The FedEx defendants argue that they are entitled to summary judgment as the record is devoid of evidence that Cobb was negligent when he opened the door and struck the plaintiff.<sup>3</sup> Specifically, they point to Cobb's testimony that before he opened the door, he looked through the rectangular window in the door and observed that the doorway was clear, and that this testimony was consistent with the small size of the window. The FedEx defendants also argue that there is no evidence that Cobb opened the door using excessive force or in an unsafe manner, asserting that the mere fact that "an accident occurred does not mean that a defendant is liable unless plaintiff can show how the defendant's breach of some duty caused or contributed to the accident," citing Braithwaite v. Equitable Assurance Society, 232 AD2d 352 (2d Dept 1996).

In opposition, plaintiff argue that the FedEx defendants have not demonstrated their lack of negligence as a matter of law, have improperly shifted the burden to plaintiff to prove that Cobb was negligent, and that the issue of whether Cobb used reasonable care raises an issue of fact for the jury.

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<sup>3</sup>In its decision and order dated April 4, 2014, the court denied FedEx defendants' motion to dismiss as premature as discovery was in its early stages and issues of fact existed as to whether under the circumstances a duty existed and whether Cobb breached such a duty to use reasonable care in opening a doorway from a stairwell onto a public corridor.

Here, even assuming *arguendo* that FedEx defendants met their burden of showing Cobb was not negligent, plaintiff has controverted this showing by pointing to evidence that the door struck plaintiff with sufficient force to flip her around and break her rib, despite a warning sign on the stairwell side of the door to open the door slowly. See e.g. Ramos v. New York City Transit Authority, 90 AD3d 492 (1<sup>st</sup> Dept 2011)(finding that the [t]he jury reasonably concluded that defendant's bus was negligent in striking the partially opened door and front panel of plaintiff's car"); Gramegna v. Rubsam & Horrman Brewing Co., 252 AD 777 (2d Dept 1937)(in action for injuries sustained when cellar doors of premises were suddenly opened without warning to plaintiff, question of negligence of the owner of the building and employee of brewing company who allegedly opened the doors, was for the jury).

Accordingly, FedEx defendants' motion for summary judgment is denied, as is its request to dismiss the Memorial defendants' cross claims against them for common law contribution and indemnification.

### Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendants S.K.I. Realty Inc, Memorial Sloan Kettering Cancer Center, Memorial Hospital for Cancer and Allied Diseases, Sloan Kettering Institute for Cancer Research (motion seq. 002) is denied; and it is further

ORDERED that the motion by defendants Federal Express Corporation, FedEx Corporation and Leslie J. Cobb (motion seq. 003) is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: April 25 2016

  
 HON. JOAN A. MADDEN  
 J.S.C.