

<b>Santos v Central Amusement Intl., LLC</b>
2017 NY Slip Op 31539(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 155304/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY  
*Justice*

PART 19

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VALERIE SANTOS  
  
Plaintiff,

INDEX NO. 155304/2014

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 002

CENTRAL AMUSEMENT INTERNATIONAL, LLC,  
  
Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this application to/for \_\_\_\_\_

Upon the foregoing documents, it is

Defendant Central Amusement International, LLC, moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing Plaintiff Valerie Santos' complaint against it.

Plaintiff opposes and requests reverse summary judgment pursuant to CPLR 3212(b).

**BACKGROUND**

Plaintiff seeks to recover for personal injuries allegedly sustained on July 20, 2013 when she fell on a painted sidewalk abutting Cyclone Roller Coaster Ride Facilities at Surf Avenue and West 10th Street in Brooklyn, which is operated and maintained by Defendant. Plaintiff argues that Defendant created a defective condition created when it negligently painted the sidewalk by failing to properly prepare the sidewalk surface for painting, applying paint to an area of sidewalk already coated with layers of paint, and by failing to add sand to the paint to make it slip resistant.

Defendant contends that there is no evidence that it created a dangerous, defective, hazardous, or slippery condition; rather Defendant argues it followed the manufacturer's painting instructions and properly applied the paint.

### DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

To impose liability upon a defendant in a slip and fall action, there must be evidence tending to show (1) the existence of a dangerous or defective condition and (2) that the defendant either created the condition or had actual or constructive knowledge thereof. *Bock v. Loumarita Realty Corp.*, 40 Misc. 3d 1232(A), 3-4 (Sup. Ct., New York County 2013) (citing *Richardson v. Campanelli*, 297 A.D.2d 794, 794 (2d Dep't 2002)). In a negligence cause of action with respect to a slippery floor, the application of paint to the floor in a non-negligent manner will not, standing alone, support such negligence cause of action. *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 374 (2d Dep't 2010). Further, courts have granted summary judgment to defendants dismissing a slip and fall claim where a painted sidewalk was slippery when wet from rain but there was no evidence the paint was defective, contained improper materials or had been improperly applied. *Bock v. Loumarita Realty Corp.* at 4, (Sup. Ct., New York County 2013) (citing *Phillips v. 630 McKinley*

*Square Corp.*, 285 A.D. 18, 19 (1st Dep't 1954) ("No proof was adduced to establish that the paint was in anywise defective or contained improper materials or had been improperly applied. To hold abutting owners and the city liable in such state of facts would be to impose an intolerable burden"). Thus, to survive summary judgment, Plaintiff must establish that Defendant's application of paint to the sidewalk was in some way negligent.

According to the instructions from U.C.P. Paint, Inc. who manufactured the paint for distribution by Statewide Coatings: "Surfaces must be clean, dry and free of grease, scaling paint and mildew. Fill all holes and cracks with patching compound, allow to dry. Sand properly and remove residue using a solvent wipe. Bare surfaces should be primed." See Statewide Coatings subpoena response, Ex. 4.

Defendants offer the affidavit of David Lynch, Defendant's maintenance technician who painted the sidewalk area at issue, in which he testifies that "[t]here was no need to fill any holes or cracks with a patching compound in that area," "[t]he area was clean, dry and free of grease, scaling paint and mildew prior to the painting," and he "primed the sidewalk prior to painting" it.

Notwithstanding the paint instructions and Mr. Lynch's affidavit, Plaintiff contends that Defendant painted over an already painted surface and did not take the necessary precautions, thereby creating a defective condition. Plaintiff offers the affidavit of expert Herman Silverberg, P.E., in which he testifies that by "painting the sidewalk as it did" Defendant "violated the manufacturer's recommended surface preparation requirements and accepted engineering and safety standards and practices." Mr. Silverberg explains that "[a]pplying the paint to an already painted concrete sidewalk does not comply with the required standard of surface preparation and creates a smooth enamel surface finish that inhibits the concrete surface finish from providing the required friction to prevent slips and falls." Indeed, Mr. Silverberg testified that he spoke with Jay Sederoff from U.C.P. Paint, Inc., who stated that it was not recommended to use this paint in multi-layer coats on concrete as it can be a slippery condition when wet. Mr. Silverberg further testified that

Defendant failed to take the necessary precautions by adding sand, a good and accepted engineering and safety standards and practice, to make the sidewalk slip resistant.

Furthermore, Mr. Silverberg testifies that by painting over an already painted area, Defendant violated New York City Standard Highway Specifications Section 4.13.4(I), which requires that “[t]he top surfaces shall be finished to true smooth planes by screeding, and finally by wooden floats, then lightly broomed to a uniform texture.” According to Mr. Silverberg, painting several layers of enamel paint on a concrete walkway surface interferes with the required broomed finish “that provides a required friction and gives the required traction in order to prevent a pedestrian to slip and fall.” Mr. Silverberg also testifies that Defendant violated New York City Building Code 1003.4, which states in pertinent part that “[w]alking surfaces of the means of egress shall have a slip-resistant surface.” He explains that by painting over an already painted area, Defendant failed to have a slip resistant surface as required under section 1003.4.

Defendant argues that there were not multiple layers of paint over the concrete area at issue and offers the examination before trial testimony of Jennifer Tortorici, Defendant’s Director of Operations, who testified as follows (Tr. Tortorici at 38):

Q. Could you tell me approximately how long before July 20, 2013 it was first painted?

A. I think it was painted in March of 2013.

Q. Before March of 2013, was it just that area, was it finished concrete with no painting on it?

A. Yes.

However, the testimony of each of Plaintiff, Mr. Lynch, and Valerio Ferrari, the shareholder and the president of Defendant, along with photographs admitted into evidence, raise a question of fact as to whether there were multiple layers of paint on the concrete on which Plaintiff slipped and fell.

Mr. Ferrari, testified as follows (Tr. Ferrari at 22):

A. If you notice from this picture, there is two different coloring of the pavement.

Q. Of the paint?

A. Yes.

Q. I think there's a better picture to show that. You could look in Photograph H.

A. The ticket booth was sitting in the lighter painted area of this corner.

Ms. Santos testified as to several photographs shown, including those shown to Mr. Ferrari in which he indicated there were two different colorings of pavement, and that they accurately depicted the location of the painted sidewalk where she slipped and fell. Tr. Santos at 67-80.

Mr. Lynch testified at his examination before trial as follows (Tr. Lynch at 21):

Q. The sidewalk in that area, was it already painted before he told you to paint it?

A. I am not sure. I am not sure. It has been a long time.

He later testified by affidavit that "[t]he area was clean, dry and free of grease, scaling paint and mildew prior to the painting." Thus, at his examination before trial, Mr. Lynch testified that he is not certain whether the sidewalk area had already been painted, but in his affidavit, he testified that the area was free of scaling paint. Though not directly inconsistent, these statements in conjunction raise an issue as to whether there was or was not already a layer of paint on the concrete. In addition, Mr. Lynch testified that he did not add sand to the paint. Tr. Lynch at 24.

Plaintiff's expert's testimony, along with the testimony of Mr. Ferrari, Plaintiff, Mr. Lynch, and the photographs admitted into evidence, are sufficient to raise questions of fact as to whether Defendant painted over an already painted area at the location of Plaintiff's incident and whether that constitutes a negligent application of paint to a sidewalk. Accordingly, Plaintiff has submitted sufficient evidence to raise a question of fact as to whether the paint on the sidewalk contributed to the incident or created a more hazardous condition than would be found had Defendant not painted the sidewalk.

Defendant offers the report of expert Scott Derector, P.E., who states that, pursuant to the ASTM F609 standard, he used a Horizontal Pull Slipmeter to conduct a dry static slip-resistance test, measuring the static coefficient of friction, and found there was no difference in slip resistance between concrete painted with paint that included paint thinner and paint that did not. Report of Scott Derector, P.E., Ex. K. However, the test did not account for slip resistance when there are multiple layers of paint, and it did not consider a wet surface.<sup>1</sup> See ASTM F609-05 Section 4.1 “Significance and Use” (“The HPS cannot be used on wet surfaces. Slip Index can be affected by ... presence of water ... Slip Index, as determined by HPS, most likely will not give useful information for evaluating liquid contaminated surfaces”).

Mr. Derector also stated that New York City Building Code 1003.4 should not apply because a public sidewalk is not a means of egress as defined under the code; rather the sidewalk was part of a public way.<sup>2</sup> Nevertheless, Mr. Silverberg’s opposing testimony is sufficient to raise a question of fact as to whether section 1003.4 should apply.

Accordingly, Defendant’s motion for an order granting summary judgment should be denied due to the factual questions at issue, and, for the same reasons, Plaintiff’s request for reverse summary judgment should be denied. Moreover, Plaintiff testified at her examination before trial that it began to rain around 6:30-7:00 p.m. and that at the time of the fall it was “raining heavily.” Tr. Santos at 19, 30. She was wearing “flip flops” and “walking fast” when she turned the corner, stepped on a painted section of the sidewalk and fell. Id. at 19, 27, 30. Plaintiff testified that her right foot slipped but that she could not recall if her flip flop stayed on her foot when she fell. Id. at

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<sup>1</sup> As discussed below, Plaintiff testified that it was raining heavily at the time of her incident. Tr. Santos at 30.

<sup>2</sup> According to Mr. Derector, under 2008 New York City Building Code Section 1002.1, entitled “Definitions,” Means of Egress is defined as “[a] continuous and unobstructed path of vertical and horizontal egress travel from any occupied portion of a building or structure to a public way. A means of egress consists of three separate and distinct parts: the exit access, the exit and the exit discharge.” A Public Way is defined as “[a] street, alley or other parcel of land open to the outside air leading to a street, that has been deeded, dedicated or otherwise permanently appropriated to the public for public use and which as a clear width and height of not less than 10 feet (3048mm).”

30. Plaintiff's testimony raises a question of fact as to whether she was the cause of her injuries or at least contributorily negligent.

CONCLUSION AND ORDER

For the reasons stated above, the court finds that there are issues of fact yet to be resolved.

Accordingly, it is

ORDERED that Defendant Central Amusement International, LLC's motion for an order granting summary judgment is denied; and it is further

ORDERED that Plaintiff's request for an order granting reverse summary judgment is denied.

This constitutes the decision and order of the court.

7/21/2017  
DATE

*Kelly O'Neill Levy*  
KELLY O'NEILL LEVY, J.S.C.  
HON. KELLY O'NEILL LEVY  
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	