

Cassidy v Friedland
2017 NY Slip Op 31711(U)
August 15, 2017
Supreme Court, New York County
Docket Number: 150074/2014
Judge: Kelly A. O'Neill Levy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

-----X

CAROL CASSIDY,

Plaintiff,

INDEX NO. 150074/2014

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

LAWRENCE FRIEDLAND, FRIEDLAND PROPERTIES, INC.,
ESTATE OF MELVIN FRIEDLAND, IFC THEATRES, LLC, IFC IN
THEATRES, LLC, AMC NETWORKS INC.,

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this application to/for _____

Defendants Lawrence Friedland, Friedland Properties, Inc., Estate of Melvin Friedland, IFC Theaters, LLC, IFC in Theaters, LLC, and AMC Networks Inc. seek summary judgment dismissing the complaint or in the alternative precluding Plaintiff's expert witness from testifying. Plaintiff opposes these applications.

FACTS

Plaintiff, Carol Cassidy, alleges that she sustained personal injuries following an incident at a movie theater owned by Defendants, IFC Center, on February 22, 2013. IFC Center (the "Premises") is located at 323 Sixth Avenue, New York, NY 10014.

Plaintiff testified at her examination before trial that the accident occurred on the Premises in the basement hallway (the "Hallway") that leads to the bathrooms. On the right side of the Hallway are the women's and men's bathrooms. At the bottom of the wall on the left side of the Hallway is a light structure made of cement that holds lightbulbs. While on her way to the women's bathroom, Plaintiff encountered three men coming out of the men's bathroom. As she stepped to the left to avoid them, Plaintiff's toe first struck the lighting structure, her knee then struck the corner of same, and she fell on her back. Plaintiff claims that she did not see the structure as she was walking down the hallway before she fell because the lights affixed to it shine upward. Plaintiff also alleges that the lights on the day of the incident were not as bright as in the picture of the Hallway presented to her by Defendants' counsel at her deposition. Plaintiff contends that she was injured due to Defendants' negligence in failing to maintain and keep the Hallway in a safe and proper condition.

At the time of the incident, Defendants' employee Todd Verow was an assistant manager at the Premises. At his examination before trial, Mr. Verow testified that the lighting that comes from the concrete lighting structure in the Hallway never changes in intensity and that the lightbulbs are never turned off. Mr. Verow also testified that a review of the building's records revealed no written complaints or accident reports involving the Hallway light structure at the Premises.

Defendants submitted the January 12, 2017 expert affidavit from Robert L. Grunes, P.E., a Professional Engineer who conducted an inspection of the Hallway on November 21, 2014. In his affidavit, Mr. Grunes concluded that the Hallway in question was not in violation of any governing building codes or regulations, and was properly illuminated. He stated that the Certificates of Occupancy that apply to the Hallway where Plaintiff's alleged accident occurred

do not specify the number of “maximum persons permitted” in the area. Therefore, “there is no required ‘Means of Egress’ under the building code and so the minimum illumination level and other obligations under those provisions are inapplicable in the present instance.” According to Mr. Grunes’ findings, the Hallway’s illumination at the floor level ranged between 1.33 to 1.55 foot candles¹ and was “reasonable and proper for the intended use.”

In opposition, Plaintiff submitted an expert affidavit dated March 14, 2017 from William Marletta, Ph.D., a Certified Safety Professional. Mr. Marletta conducted an inspection of the Hallway on September 12, 2013 and on April 19, 2016. He concluded in his affidavit that the Hallway’s illumination levels violated the New York City Building Code’s “Public Places of Assembly” requirements, including Industrial Code Rule 36 and Building Code 27-381(a) (1968) for corridors and exits, which require illumination of at least 2 foot candles. Mr. Marletta measured the illumination of the Hallway at 1.01 to 1.17 foot candles. Additionally, he claims that the lighting level did not meet industry standards set by the Illuminating Engineering Society (IES), requiring a minimum of 10-20 foot-candles as specified by the Lighting Handbook 1981 Application Volume. He opined that “failure to provide adequate lighting was dangerous.”

Mr. Marletta also claims that the low height of the lighting structure created a tripping hazard, especially in low light conditions, because “low height hazards on walking surfaces are particularly difficult to distinguish due to the normal cone of vision and top view perspective of the pedestrian” and that “conditions are ripe for a trip and fall occurrence when the walking conditions are contrary to our expectation.” (Marletta Aff. ¶ 11 & 13, March 14, 2017).

¹ A foot candle is a unit of illuminance or light intensity; it conveys the illuminance cast on a surface by a one-candela source one foot away.

Additionally, he opined that the lighting structure's placement created an obstruction and narrowing of the Hallway's passageway leading to an exit because it created an illusion that the Hallway's width seemed wider than it really was. He further disagrees with Mr. Grunes' opinion that the Hallway is not a "required Means of Egress."

Plaintiff also submitted the affidavit of John Philip Fox, an architect who reviewed the records maintained by the New York City Department of Buildings and Mr. Grunes' affidavit. Mr. Fox concluded in his affidavit that the Hallway's width of 42.5 inches, measured by subtracting the width of the light enclosure from the width of the Hallway wall to wall, does not comply with the minimum required width of 44 inches. He also found that the lighting structure violated Building Code Section 27-369(a) because it exceeds five percent of the area of the wall. Additionally, he concluded that Mr. Grunes' illumination readings of 1.55 foot candles is below the minimum level of 2 foot candles under Section 27-381 of the Building Code.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to demonstrate the absence of any material issues of fact. *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the moving party makes this showing, the burden shifts to the opposing party to raise a triable issue of fact. *Id.* On a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion. *Id.* Here, while Defendants presented a prima facie case for dismissal, they failed to overcome the issues of fact raised by Plaintiff in opposition.

I. Negligence

Defendants are not entitled to summary judgment because material issues of fact remain. In order to prevail on a summary judgment motion, the property owner must make a prima facie showing that it maintained the premises in a reasonably safe condition, did not create a dangerous condition that posed a foreseeable risk of injury, and did not have actual or constructive notice of the dangerous condition. *Washington v. Autumn Props. II, LLC*, 134 A.D.3d 456, 457 (1st Dep't 2015); *see also Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 (1st Dep't 2004). An owner may be liable for injuries resulting from a dangerous condition on the property if the owner created or had actual or constructive notice of, and a reasonable time to remedy, such condition. *Pappalardo v. N.Y. Health & Racquet Club*, 279 A.D.2d 134, 142 (1st Dep't 2000). To establish that a defendant had constructive notice of a dangerous condition, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986) *Pappalardo*, 279 A.D.2d at 142. However, an owner is not required to protect against or warn of an open and obvious condition that is not inherently dangerous. *See Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 71 (1st Dep't 2004).

Proof that a dangerous condition is open and obvious does not preclude a property owner from liability for failure to maintain the property in a safe condition but could be relevant to the issue of plaintiff's comparative negligence. *Id.* at 73. Such a hazard may be "rendered a trap for the unwary where the condition is obscured . . . or the plaintiff's attention is . . . distracted." *Mauriello v. Port Auth.*, 8 A.D.3d 200, 200 (1st Dep't 2004). Additionally, compliance with the applicable statutes and building codes is not dispositive on the question of an owner's duty when

plaintiff's claims are premised on common-law negligence principles. See *Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872 (1995); *Maldonado v. 1992 Fulton Realty Corp.*, 23 A.D.3d 177, 177 (1st Dep't 2005).

Defendants argue that Plaintiff has not presented sufficient evidence to establish that Defendants had actual or constructive notice of any defective condition in the Hallway. According to Defendants, Plaintiff's expert merely listed building code and Americans with Disabilities Act violations with no explanation as to their relevance and has provided no additional proof of actual or constructive notice.

According to Defendants' expert witness, Mr. Grunes, the Hallway was not in violation of any governing building codes or regulations; rather the cause of Plaintiff's accident was that Plaintiff was startled by the persons exiting the men's room and unaware as to her surroundings.

Plaintiff argues that there are relevant factual issues in dispute and that summary judgment should be denied because Defendants' and Plaintiff's expert witnesses disagree on certain material facts such as whether the Premises violated the maximum occupancy requirement, egress requirements, illumination level requirement, and other building code violations. According to Plaintiff's expert, Mr. Marletta, Plaintiff's injury was caused by a confluence of factors including a tripping hazard in the Hallway, inadequate illumination, hazardous exit passageway, a low height hazard, and the fact that the lighting structure was contrary to expectation.

As such, summary judgment is denied because there are questions of fact regarding the cause of Plaintiff's accident and whether the Premises was in violation of any building codes or regulations.

II. Preclusion of Plaintiff's Expert

Plaintiff's expert witness, Mr. Marletta, Ph.D., a Certified Safety Professional, should not be precluded from testifying. An expert must possess the "requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward*, 48 N.Y.2d 455, 459 (1979). The expert's opinion must be reasonably certain and not based on suspicion or speculation. *See id.* at 460. In order for a plaintiff to establish a material issue of fact through the use of an expert's affidavit, "the expert must base his or her opinion upon some empirical data or foundational facts." *Bellinger v. Ballston Spa Cent. School Dist.*, 57 A.D.3d 1296, 1298 (3d Dep't 2008); *see also Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002).

New York follows the *Frye* test to determine whether an expert's opinion is based on "principles that are sufficiently established to have gained general acceptance as reliable." *Nonnon v. The City of New York*, 32 A.D.3d 91, 102 (1st Dep't 2006). Under this test, "a proponent of scientific evidence must establish that the theory and method used by a particular witness is generally accepted in the scientific community." *Id.* The Court may grant a motion *in limine* to permit a party to exclude inadmissible, immaterial, or prejudicial evidence or limit its use before such evidence is introduced to the trier of fact. *State v. Metz*, 241 A.D.2d 192, 198 (1st Dep't 1998).

Defendants argue that Plaintiff's expert witness, Mr. Marletta, a Certified Safety Expert, is unqualified to issue an expert opinion because he does not have experience with design or construction. They argue that Mr. Marletta lacks the requisite knowledge, skill, experience, training, or education in the safety and design of hallways to make his testimony admissible. Defendants also argue that that Mr. Marletta's testimony on the floor structure and lighting

conditions of the hallway are solely based on his opinions, that he did not cite specific violations of the New York City Building Code, and that he never stated the cause of the incident or what regulatory provisions are violated or how. Additionally, Defendants claim that Mr. Marletta's opinion is based on speculation rather than reasoned analysis and should have no probative value.

Plaintiff argues that Mr. Marletta is qualified to testify because of his decades-long experience in evaluating and determining the cause of incidents that are similar to the subject incident. Additionally, Mr. Marletta has numerous certifications and degrees in safety and active membership on the committees that write safety rules incorporated into code, rules, and/or regulations promulgated by the American National Standards Institute and American Society of Testing and Materials. Plaintiff also claims that Defendants' arguments in support of their summary judgment motion were based on Plaintiff's response to Defendants' Demand for Expert Information dated September 8, 2016 that identified Mr. Marletta as an expert, not on Mr. Marletta's affidavit itself. Plaintiff submitted Mr. Marletta's affidavit along with Plaintiff's opposition to Defendants' summary judgment motion. Defendants did not reply to Plaintiff's opposition.

Plaintiff's witness should not be precluded because Defendants' failed to show that Mr. Marletta's expert opinion is based on speculation or that he lacks the requisite knowledge to opine on the subject accident. Because Defendants' arguments were not based on Mr. Marletta's affidavit, and Defendants have not replied to Plaintiff's opposition, Defendants have not tendered sufficient evidence to warrant preclusion of Plaintiff's witness.

CONCLUSION AND ORDER

Defendants' summary judgment motion is denied because they have not met their burden of demonstrating the absence of any material issue of fact. Additionally, Plaintiff's expert witness should not be precluded because Defendants failed to show that the expert lacks the requisite knowledge to opine on the subject accident and that his opinion is based on speculation. For the foregoing reasons, it is hereby

ORDERED that Defendants Lawrence Friedland, Friedland Properties, Inc., Estate of Melvin Friedland, IFC Theaters, LLC, IFC in Theaters, LLC, AMC Networks Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the court.

8/15/2017
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
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	