

**Conklin v 500-512 Seventh Ave., LLC**

2017 NY Slip Op 31714(U)

August 15, 2017

Supreme Court, New York County

Docket Number: 159014/14

Judge: Jennifer G. Schechter

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NYSCEF DOC# 103  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

RECEIVED NYSCEF: 08/16/2017

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CHARLES CONKLIN,

DECISION AND ORDER  
Index No. 159014/14

Plaintiff,

-against-

500-512 SEVENTH AVENUE, LLC,

Defendant,  
-----x

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Charles Conklin commenced this action against 500-512 Seventh Avenue, LLC (Building) the owner of the building where he was injured.

Motion Sequence Number 001

Pursuant to CPLR 3212, Conklin moves for partial summary judgment on liability. His motion is granted.

Conklin was a maintenance worker employed by Newmark--the Building's managing agent. On June 30, 2014, at his employer's direction, Conklin went to the building's lower level (Sub-basement) to install a string of temporary lights. He descended down three steps onto a landing on a steel staircase and the platform collapsed. Conklin fell 20 feet, landed in sewage and shattered bones and ligaments in his foot (Affirmation in Support [Supp], Ex 4 at 28, 29; Ex 5 at ¶¶ 2-3).

Conklin had worked at the building for years. At his deposition he testified that water issues had plagued the Sub-basement that whole time. He explained that "there was a broken waterline that was running to a fire hydrant . . . that had been leaking down . . . for the nine years that [he] was there and water was constantly accumulating" (Supp, Ex 4 at 57). He explained that the situation was so bad that tenants complained about mosquitos and that in the year before the accident he had to bring a pump to the area to drain the water about once a month (*id.* at 60). He testified that water ran down the platform from which he fell "like a waterfall" and that the stairs had been rusty for years (*id.* at 64, 72).

Richard Clinton, the building's superintendent who was working with Conklin and witnessed the accident, confirmed that while Conklin was standing on the platform "he fell right through there" and dropped down the shaft (Supp, Ex 6 at 43). Clinton explained that it "could have been him, it could have been me" who fell through the platform that day (*id.* at 44). Clinton acknowledged that there were problems with leaks in the area and that there was rust on the stairs (*id.* at 57, 62, 72-73). Clinton stated that workers did not "go down there much because, . . . as you can see it is not a safe area" (*id.* at 73).

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Pictures of the stairs show rust and corrosion.\*

Like in *Sterbinsky v 780 Riverside Drive, LLC*, 139 AD3d 458 (1st Dept 2016), defendant failed to rebut the presumption of negligence arising from the collapse of the platform due to the corroded condition of the metal. Defendant's assertion that the condition was "hidden from the naked eye" or latent (Opp at ¶¶ 77-78) is belied by the evidence and its claim of no notice is unavailing (*Sterbinsky*, 139 AD3d at 458).

Motion Sequence Number 002

Plaintiff's motion to amend his bill of particulars to include *res ipsa loquitur* is granted. Significantly, defendant was given notice of plaintiff's invocation of the theory and a full and fair opportunity to address it on summary judgment. Plaintiff's motion to strike the answer based on spoliation of evidence because the staircase was not preserved is denied as inspection of the staircase is unnecessary given the posture of the case.

Accordingly it is,

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\* Defendant's expert states that rust is a "corrosive process" (Affirmation in Opposition [Opp], Ex A at ¶ 4). Although the exact measure and extent of the rust may never be known, no one disputes the existence of corrosive rust.

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ORDERED that plaintiff's motion for partial summary judgment on liability is GRANTED; and it is further

ORDERED that plaintiff's motion to amend his bill of particulars is granted and his motion to strike the answer is denied.

This is the decision and order of the court.

Dated: August 15, 2017

  
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HON. JENNIFER G. SCHECTER