

<b>Silber v Sullivan Props., L.P.</b>
2019 NY Slip Op 30533(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 160664/2015
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

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**INDEX NO. 160664/2015**

ELLIOT SILBER

**MOTION DATE 01/15/2019**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

SULLIVAN PROPERTIES, L.P.,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 63, 66

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by Defendant Sullivan Properties, L.P. pursuant to CPLR 3212 for summary judgment dismissing the complaint of Plaintiff Elliot Silber is granted. Cross-motion by Plaintiff for leave to amend his bill of particulars is denied.

**BACKGROUND**

Plaintiff commenced the instant action on October 19, 2015, by e-filing a summons and verified complaint. The complaint alleges, in sum and substance, that Plaintiff slipped and fell on a marble “saddle”, which is the raised bottom threshold part of a door frame, on January 25, 2014. The accident allegedly occurred at the entrance of 119 Sullivan Street, New York, New York (the “Premises”), a building originally built in 1900, due to the negligence of Defendant, allegedly the owner of the Premises.

At his deposition, Plaintiff testified that he lived at the Premises since May 1990. Plaintiff testified that, just before his fall, he had gone up the outside stairs to the Premises and arrived at the landing outside the main entranceway and door. Plaintiff further testified that, just before his fall, both of his feet were on the saddle at the main entranceway threshold leading into the building. Plaintiff then testified that, as he took a step forward off the saddle with his left foot, his right foot, which was still on the saddle, slipped backward toward the outside. Plaintiff next testified that he “grabbed the right handrail with [his] right hand, [his] body twisted, and [he] landed in [his] hip area on the point or edge of a step.” (Affirmation of Lechleitner, exhibit E [Silber EBT] at 28, lines 15–18.) When asked at his EBT, “[a]s you sit here today do you know what caused you to fall?, Plaintiff answered, “[t]he saddle was wet and slippery.” (*Id.* at 34, lines 12–14.) Plaintiff testified that the accident occurred in the late afternoon, that it was not dark out at the time, and that the weather was “rain” at the time. (*Id.* at 22, line 13.) Plaintiff further testified that in his 24 years living at the Premises he never fell in the entranceway before this

accident, and he did not know of a prior accident or occurrence in the area where he fell. Plaintiff was approximately 65 years old at the time of his alleged accident.

Defendant produced its former handyman and current building superintendent Adnan Utic for a deposition. Mr. Utic began working for Defendant as a handyman in 2013 at a building other than the Premises. In 2015, Mr. Utic became the superintendent of approximately 10 of Defendant's buildings, including the Premises. Mr. Utic testified, in sum and substance, that he regularly visited the Premises as superintendent and that the subject stairs and saddle are not slippery. Photographs of the subject stairway are annexed to the motion as exhibit G.

Defendant now moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing the complaint. Defendant annexes to its motion papers the affidavit of Mr. Stanley Fine, an engineer. Mr. Fine avers, in sum and substance, that the subject stairs are safe to walk on and are adequately nonslip, even when wet. Mr. Fine bases these conclusions on his June 22, 2017 inspection of the subject stairs and saddle, which included the taking of measurements with an American Slip Meter. The measurements allegedly indicate that the coefficient of friction of the subject saddle ranged from .60 when dry to .53 when wet. Mr. Fine states that a surface having a static coefficient of friction of .5 or greater is considered to have adequate slip resistance. (Aff of Fine ¶ 9.)

Defendant argues in its moving papers, in sum and substance, that Defendant did not cause, create, or have actual or constructive notice of a defective condition that caused Plaintiff's injury. Defendant relies primarily upon Mr. Fine's affidavit and argues that, even if the stairs were wet, they were not dangerous. Defendant further argues that no other person has ever reported an accident on the subject saddle.

Plaintiff argues in opposition that the subject stairs were dangerous and defective because the stairs were uneven and at different heights from one another, there was not adequate handrailing, the saddle was not beveled, and the saddle was dangerously slippery when wet. Plaintiff submits its own expert's affidavit from Mr. Fred DeFilippis, who inspected the subject stairs and saddle on June 26, 2017. Mr. DeFilippis stated in his affidavit that he "detected a smooth and slippery feel upon running [his] fingers over the surface of the . . . marble door saddle." (Aff of DeFilippis at 2.)

Mr. DeFilippis argues in his affidavit that the 1968 Building Code applies to the subject area based upon his review of building department records, not submitted with the instant motion, indicating that "there is no certificate of occupancy on file" and "New Building applications were filed in 1988 and 1994, which require that the design and construction comply with the 1968 Building Code, and the issuance of a new Certificate of Occupancy." (*Id.* at 1-2.) Plaintiff argues there were violations of the Code relating to, among other things, the size of the landing, the placement and availability of handrails, and the adequacy of nonskid materials on the steps. Specifically, the steps were allegedly uneven or of differing heights, the required handrails were not present, and nonskid strips had been placed on the stairs previously but had worn away over time and were nearly gone as of the inspection. Mr. DeFilippis argues that Plaintiff suffered "undue stress as he climbed the stairs, contributing to his accident." Mr. DeFilippis also notes that the edges of the saddle were not beveled and that beveling is typical to

ensure a smooth and obstruction-free passage over the saddle, although he does not cite to any Code provision requiring such beveling.

Mr. DeFilippis questions Mr. Fine's use of the American Slip Meter with respect to the procedure followed for taking the measurements, the device's calibration, and whether the user was properly trained and certified by its manufacturer. Mr. DeFilippis also states that Mr. Fine failed to address the Code violations raised in Mr. DeFilippis's own affidavit.

Plaintiff indicates that, as a result of Mr. DeFilippis's inspection, Plaintiff served a supplemental bill of particulars on Defendant alleging that Defendant violated the 1968 Building Code, specifically, sections 27-375 (d), 27-375 (e), 27-375 (f), 27-375 (h), and 27-376. A few weeks later, Defendant served a notice of rejection of the supplemental bill of particulars.

For these reasons, Plaintiff now cross-moves for leave to amend his supplemental bill of particulars. Plaintiff argues, in sum and substance, that he has submitted a detailed affidavit from his expert that has led to his reliance on these particular code sections. Plaintiff further argues that he has a reasonable excuse for his delay in supplementing his bill of particulars in that he retained this expert, at this time, for the purpose of opposing the instant motion. Plaintiff then argues that his reliance upon the code sections is meritorious based upon Mr. DeFilippis's detailed affidavit.

Defendant opposes the instant cross-motion. Defendant argues that Plaintiff has waited an unreasonably long time to assert these specific code violations and that, now that the note of issue has been filed, it is unfairly prejudiced. Defendant further argues that the new claims are without merit because the cited code provisions are inapplicable both on the law and on the facts of this case. Defendant also reiterates its arguments regarding its motion for summary judgment in its reply papers.

At the November 14, 2018 oral argument on the motion and cross-motion, the Court indicated that it would not permit Plaintiff to amend his bill of particulars "unless [the Court] know[s] that the [19]68 code applies, end of story, since [the Court] knows for a fact the building was built in 1900 and if it was built in 1900, it is not under the code." (Tr at 12, lines 11-14.) The Court indicated further that there was nothing submitted to the Court regarding whether an exception would apply that would render the 1968 Building Code applicable such as construction exceeding 60 percent of the building in one year. The Court also indicated that it was Plaintiff's burden to show such a basis for that the 1968 Building Code applies at the Premises and that this has not been done on the papers submitted.

### DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact

from the case.” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*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].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

In the first instance, the Court will disregard the evidence from both experts’ affidavits as conclusory, in that they are both based on examinations or observations of the subject saddle approximately three years after the incident. Both affidavits fail to establish whether a hazardous condition did or did not exist “on the day of the incident or that defendants had any notice, actual or constructive, of the alleged hazardous condition.” (*Drillings v Beth Israel Med. Ctr.*, 200 AD2d 381, 382 [1st Dept 1994]; *see also Duffy v Universal Maintenance Corp.*, 227 AD2d 238, 239 [1st Dept 1996].) Moreover, all the testimony in Mr. DeFilippis’s affidavit relating to abrasive strips, handrails, or the differing sizes of the steps is unrelated to the saddle surface Plaintiff was standing on with both feet just before he fell. Plaintiff himself testified at his EBT that he fell because the saddle was wet and slippery. Further, Plaintiff successfully grabbed an available handrail but fell anyway. None of the other alleged code violations, the applicability of which is discussed more fully below, relate to the proximate cause of the accident as alleged by Plaintiff himself as to how the accident occurred, which was because the marble saddle was wet and slippery.

“It is well settled that absent proof of the reason for plaintiff’s fall other than the ‘inherently slippery’ condition of the floor, no cause of action for negligence can properly be maintained.” (*Kruimer v Natl. Cleaning Contrs., Inc.*, 256 AD2d 1, 1 [1st Dept 1998].) “Nor does plaintiff’s additional allegation that the marble floor became dangerously slippery when wet afford a basis for liability, absent a showing that defendants had actual or constructive notice of a dangerous condition resulting from a combination of these factors.” (*Waiters v Northern Trust Co. of New York*, 29 AD3d 325, 327 [1st Dept 2006].) Here, Defendant has shown prima facie that it had no actual or constructive notice of a dangerous condition resulting from a combination of an inherently slippery marble saddle and its wetness from the rain by means of Mr. Utic’s EBT and Plaintiff’s own testimony that he neither had issues with the saddle prior to his accident nor was aware of any other accidents in the same place. The burden having shifted, Plaintiff has failed to raise a genuine issue of material fact in response.

Furthermore, Plaintiff has failed to submit adequate proof both for the purposes of his opposition on the motion and his cross-motion that the 1968 Building Code applies to the Premises. As to Plaintiff’s argument that Defendant should have had adequate handrails and that Plaintiff reached for a handrail before he fell, Plaintiff has failed to establish as a matter of law that Defendant had a duty to have handrails next to the subject stairs of this 1900 building, and at any rate, Plaintiff himself testified that he did in fact grab a handrail successfully as he fell, which likely lessened the impact of his fall. In the absence of a showing that Plaintiff had such a

statutory duty under the Code, or some other basis to sustain a cause of action, the complaint must be dismissed. (See, e.g., *Gaston v NYCHA*, 258 AD2d 220, 224 [1st Dept 1999].)

**CONCLUSION**

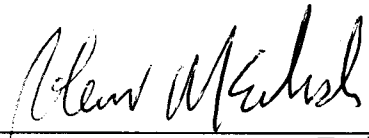
Accordingly, it is

ORDERED that Defendant's motion pursuant to CPLR 3212 is granted, the complaint is dismissed, and the cross-motion is denied; and it is further

ORDERED that Defendant shall, within 30 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on Plaintiff and on the clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

2/28/2019  
DATE

  
ROBERT D. KALISH  
**HON. ROBERT D. KALISH**

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE