SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO **PART** IAS MOTION 41EFM

Justice

----------X

IRA ROBBINS,

Plaintiff,

- v -

FLORANAMEL LLC, and INNOVATION CONSTRUCTION NY INC.

Defendants.

----------X

INDEX NO. 153543/2016

MOTION DATE 02/10/2019, 03/17/2019

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 79, 81, 82, 83, 84, 85, 86, 92, 93, 94, 95

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 87, 88, 89, 90, 91, 96, 97, 98, 99

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

In this personal injury action, plaintiff claims to have tripped over a step allegedly protruding from the stoop onto the sidewalk of the premises located at 201 East 61st Street. Defendants move for summary judgment dismissing the complaint and all cross-claims against them.

Defendant Floranamael, LLC ("Floranamel") is a trust which was established by Blair and Isabel Fleming for the purpose of purchasing and owning the premises at 201 East 61st Street, an approximately 100-year-old New York City townhouse. Floranamel purchased the premises in 2010. In 2014, the Flemings hired an architect to render plans for renovating the premises' façade and front stoop. The architect did this work and obtained a permit for the renovation work from the New York City Landmarks Preservation Committee. Thereafter, the Flemings hired defendant Innovation Construction NY, Inc. ("Innovation") to perform the restoration work, which it completed in late 2015. Innovation's work included work on an unrelated stairway to a

garden entrance, pouring a new concrete sidewalk in front of the premises, and applying a brownstone finish to the façade and front stoop.

Plaintiff's accident occurred at approximately 9:30PM on December 5, 2015 in front of defendant's property. Plaintiff alleges that he tripped over a "protrusion," identified as an architectural detail on the bottom step of the stairway in front of the building. Plaintiff testified that on the night of the accident he did not notice the protrusion until after his fall, nor did he notice similar protrusions on the stairways of nearby properties. However, upon returning to the scene, plaintiff acknowledged that there are similar architectural details on front steps of adjacent properties.

Innovation argues it is entitled to summary judgment as no material issue of fact exists regarding plaintiff's claim of negligence against it. Innovation asserts that no actionable defect caused or contributed to plaintiff's accident and instead plaintiff tripped and fell over an open and obvious architectural detail shared by similar nearby properties. Innovation claims that it did not alter the design, shape, or appearance of the bottom step, but simply restored the preexisting structure as dictated by its contract with Floranamel and the permit obtained from the Landmarks Preservation Commission. Innovation further asserts that there is no evidence to support plaintiff's theory that the protrusion created an optical illusion or was camouflaged, as it was clearly visible to anyone making reasonable use of his or her senses.

For its part, Floranamel asserts that it is entitled to summary judgment as it did not create a dangerous or defective condition; it simply restored a preexisting structure. Floranamel asserts that it has no duty to warn plaintiff as the "protrusion" was an open and obvious condition. Further, Floranamel argues that even if the protrusion was not open and obvious, it was maintained in a reasonably safe condition that was free from hazards.

Plaintiff opposes the motions arguing that summary judgment is inappropriate here as there are issues of fact as to whether the protrusion was open and obvious and whether it constituted a dangerous or hazardous condition. Plaintiff alleges that the protrusion was not so obvious as to necessarily be noticed by a careful observer, thereby eliminating the need for a warning. Further, plaintiff argues that even if the protrusion was obvious, the nature and location of the protrusion created an optical illusion or camouflaged it creating a dangerous or hazardous condition that posed an unreasonable risk of injury to plaintiff.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

It has been held that "a landowner has no duty to warn of an open and obvious danger" (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion" (*Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199, 200 [1st Dept 2004]). To be open and obvious the "hazard or dangerous condition must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, making a

posted warning of the presence of the hazard superfluous" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71 [1st Dept 2004]). The fact that a hazard is capable of being discerned by a careful observer is not the end of the analysis, rather the nature or location of the hazard may make it likely to be overlooked (*Westbrook* at 72).

The condition at issue here is a "protrusion" or an architectural detail on the bottom step in front of the premises. More specifically, the condition complained of is the edge or "lip" of the bottom step of the stairway which slightly overhangs the base upon which it sits. This is a relatively common feature found on staircases in New York City and, indeed, throughout the country. Thus, defendants' assertion that the condition was open and obvious is quite understandable.

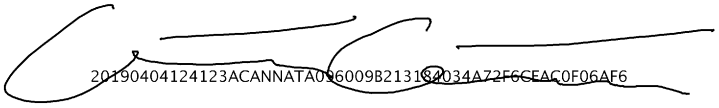
Nevertheless, plaintiff asserts that the location and color of the step, as well as the lighting at the time of the accident, camouflaged the protrusion and created an optical illusion that rendered the protrusion indistinguishable from the sidewalk on which plaintiff was walking, contributing to his trip and fall. In this regard, the issue here is similar that in *Chafoulias v 240 E. 55th St. Tenants Corp.*, where the Appellate Division held that a plaintiff who failed to see unmarked stairs in close proximity to the entrance of a building raised a triable issue of fact about whether the stairs created an optical illusion endangering plaintiff (141 AD2d 207, 210-211 [1st Dept 1998]). So too here, plaintiff has raised a question of fact about whether the nature and location of the condition was open and obvious at the time of the accident.

Plaintiff further argues that defendants did not maintain the premises in a reasonably safe condition. It has been held that "the open and obvious nature of a hazard merely negates the duty to *warn* of the hazard, not necessarily all duty to maintain premises in a reasonably safe condition" (*Westbrook* at 73). Finding that a condition is open and obvious obviates the duty to warn, "but does not eliminate a claim that the presence of the hazardous condition constituted a violation of the

property owner's duty to maintain the premises in a reasonably safe condition" (*Westbrook* at 75). As such, even if a finder of fact were to determine that the condition was open and obvious, they must also consider whether the premises were maintained in a reasonably safe condition. Accordingly, it is

ORDERED that defendants' motions for summary judgment are each denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 490, 111 Centre Street, New York, New York on May 8, 2019, at 2:15PM.



4/4/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE