

**Reyes v Latin Am. Pentecostal Church of God Inc.**

2019 NY Slip Op 32154(U)

July 18, 2019

Supreme Court, New York County

Docket Number: 157297/2016

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM**

*Justice*

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**INDEX NO. 157297/2016**

DIANA REYES, JOSE REYES,  
  
Plaintiff,

**MOTION DATE 09/05/2018**

**MOTION SEQ. NO. 005**

- v -

LATIN AMERICAN PENTECOSTAL CHURCH OF GOD  
INC., AMERICA COUNCIL PENTECOSTAL CHURCH OF GOD  
INC., LATIN AMERICAN COUNCIL OF THE PENTECOSTAL  
CHURCH OF GOD INC.

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 207, 208, 209, 210, 211, 212, 253, 254

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is

Plaintiff Diana Reyes (“plaintiff”) brought this action with her husband Jose (together “plaintiffs”) against defendant Latin American Pentecostal Church of God Inc. (the “Church”) seeking damages for an alleged dangerous condition in the Church, after falling in the bathroom while heading to the toilets. For the purposes of this motion, the following facts are not in dispute. On February 14, 2014, plaintiffs went to the Church for a baptism. The weather that day was wintery and there was snow on the ground. The bathroom was off the main sanctuary. To get to the bathroom, people had to go across the carpeted room. The bathroom floor was covered by white tile. The bathroom was on two different levels. The “upper” level contained the bathroom entrance, a sink, a baby changing station, a single handicap accessible stall and a garbage. There was also an access doorway to the “lower” level of the bathroom which contained multiple toilet stalls. To get down the lower level, plaintiff went from the upper level floor, down one stair and then down one more step to the lower level floor.

Right after first entering the Church, plaintiff went to the bathroom. Plaintiff traversed the bathroom and the stairs without any problems. Plaintiff testified that she had no difficulty or incidents in the bathroom and did not see any water on the floor in the bathroom. About two hours later, plaintiff again went to the bathroom. This time, while going down the stairs, plaintiff fell and was injured.

Plaintiff testified when she entered the bathroom, nothing looked different and she headed toward the staircase to the lower level. She was standing on the floor of the upper level and when she stepped down onto the stair, she slipped. Plaintiff attempted to stop the fall by using the walls but was unable to do so. Plaintiff also stated that there were no handrails for her to grab onto. Plaintiff said that as she was walking to the stairs and then while stepping down she was looking down at the floor and steps and did not notice anything on them. When asked what caused her to fall, plaintiff did not know and did not state that she fell on water.

Defendant moved for summary judgement. Defendant argues that as a matter of law, this case should be dismissed because (1) there was no dangerous condition; (2) even if there was some type of condition, defendant did not create it, nor have any knowledge of it; and (3) as plaintiff could not articulate what she slipped on or identify the cause of her fall. In support of the motion, defendant attached various deposition transcripts and the affidavit of Michael Kravitz, a professional engineer, who opined that there were no building code violations in the bathroom, including the lack of handrails, non-skid materials and differential in the risers. Kravitz also measured the coefficient of the tiles and opined that "tile flooring within the women's restroom is a safe surface based on the slip resistance value measured." Plaintiff opposes dismissal and advances several theories. First, there was testimony that the area was wet. Additionally, there was a lack of handrails, that stairs were sloped and have different height

differentials and that even if there were no building code violations defendants had a common law duty to keep the premises safe. Finally, plaintiff points to the fact that currently there are rubber mats, treads, handrails and warning signs at the staircase.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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 Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For a property owner to be liable to an injured plaintiff as a result of an incident on their premises, the plaintiff must establish that a dangerous or defective condition existed at the time of the injury and that the property owner either created the condition or had actual or constructive notice of the alleged dangerous or defective condition and had time to remedy it (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-38 [1986]; *Zuk v Great Atlantic & Pacific Tea Co., Inc.*, 21 AD3d 275 [1st Dept 2005]; *Mejia v New York City Transit Auth.*, 291 AD2d 225, 226 [1st Dept 2002]; *Leo v Mt. St. Michael Academy*, 272 AD2d 145, 146 [1st Dept 2000]). A defendant

seeking summary judgment has the initial burden of making a prima facie showing that it did not create the dangerous condition, nor had actual or constructive notice of its existence (*Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]; *Garcia v Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept 2009]).

Defendant's motion for summary judgment is granted. Defendant has established its prima facie entitlement that there was no dangerous condition through the expert affidavit of the professional engineer, that found that the woman's restroom has a safe walking surface, that no code violations existed based on the friction coefficient associated with the tiles covering the floor and that that the subject floor tiles are not a slip hazard. The expert also opined that defendant complied with the applicable Building Code with respect to the handrails and risers. Defendant also submitted the deposition testimony of various Church personnel who stated that they were not aware of any other prior instances of someone falling or complaining about the slipperiness of the floor.

As defendant has established its prima facie entitlement to summary judgment, the burden has shifted plaintiff to raise a genuine issue of fact. However, as stated above, plaintiff did not know why or what caused her to fall. She was looking down and did not see any condition on the steps, including water (*see Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011] [It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury] *citing see Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 [2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]; *Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [2005]). However, this does not end the inquiry. Summary judgment will not be granted if "the evidence identifies the defect or hazard itself and provides

sufficient facts and circumstances from which causation may be reasonably inferred” (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]). However, there must be a defect or dangerous condition from which the other facts and circumstances can be inferred (*Kovach v PJA, LLC*, 128 AD3d 445 [1st Dept 2015]).

Plaintiff points to the testimony of an eyewitness to the fall, Sasha Calderon who testified that she saw patches of water in the area and that the cardboard on the floor of the second (lower) level was wet. However, aside from the fact that plaintiff did not see water where she slipped, a closer reading of this eyewitness testimony reveals that at the specific location where plaintiff slipped, this witness did not see water. Rather, the water was located on and near the cardboard by the floor of the lower level, where there is no dispute that plaintiff had not stepped.

Similarly, plaintiff’s expert, Neil B. Schmelkin’s statement that the floor would “be slippery when wet,” is without consequence. It is common sense that something will be more slippery when it is wet and plaintiff’s opinion does not contradict defendant’s expert opinion that the slip coefficient met all requirements. In any event, there was no evidence that the stair upon which plaintiff slipped was wet. The difference in the risers, even setting aside defendant’s expert opinion is also without consequence as plaintiff only had traversed one step down and not the second. Hence, any difference did not impact plaintiff’s fall (*see Kane v Estia Greek Rest., Inc.*, 4 AD3d 189 [1st Dept 2004][even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate]). Plaintiff’s expert’s conclusory statements that the physical conditions of the bathroom were “not constructed to ordinary standards” and that the bathroom “conditions are contrary to good and accepted engineering practices” are not supported

by reference to specific, applicable safety standards or practices and are without consequence (*Griffith v ETH NEP, L.P.*, 140 AD3d 451 [1st Dept 2016]).

To the extent that plaintiff asks this Court to consider statements by defendant’s apparent custodian as raising a question of fact as to notice of the dangerous condition, such statements were made in connection with the reason for the installation of rubber mats on the floor, signs and handrails, are post-remedial and thus appropriate for consideration.<sup>1</sup> Further, a handrail was not required for this type of internal staircase not leading to an exit. In *Hernandez v Callen*, the Appellate Division First Department held that dismissal of a complaint was warranted where the plaintiff alleged that he was injured when he fell while ascending a two-step configuration that led from a corridor to restrooms (134 AD3d 654 [1st Dept 2015]). The Court reasoned that the code provisions did not require handrails or uniform riser heights on the stairs on which plaintiff fell, as they are not part of an “interior stair” (*id.*). Plaintiff’s citation to *Branch v SDC Discount Store, Inc.* (127 AD3d 547 [1st Dept 2015]) is not persuasive, as in that case, the plaintiff was able to point to other defects, such as poor lighting, that contributed to the fall that the Court found to raise an issue of fact. Here, plaintiff was unsure of what caused her fall and no defect or dangerous condition has been identified or observed in the location where plaintiff slipped. Accordingly, it therefore

ORDERED that defendant’s motion for summary judgment is granted; and it is further

ORDERED that the clerk shall enter judgment for defendant dismissing this action.

7-18-2019  
[Redacted]  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
 GRANTED  DENIED  GRANTED IN PART  OTHER

<sup>1</sup> While Mr. Cruz stated that the dates for such work was prior to the accident, for purposes of this summary judgment motion, the Court has viewed the evidence in the light most favorable to plaintiff who argues that the safety materials had not been installed prior to the accident. To the extent that the testimony raises an issue whether the safety materials had been installed prior, such installation would result in the dismissal of this action.

APPLICATION:

  

SETTLE ORDER

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SUBMIT ORDER

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CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE