SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

----------X

RYAN EAVENSON,

Plaintiff,

- v -

THE TRUSTEES OF THE COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

----------X

INDEX NO. 158103/2017

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, defendant The Trustees of the Columbia University in the City of New York moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Ryan Eavenson opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured on February 13, 2017, when he tripped and fell on a defective sidewalk located in front of 240 West 118th Street, New York, New York, a building owned by defendant. Doc. 1. On September 11, 2017, plaintiff commenced the captioned action by filing a summons and verified complaint, in which he claimed that he was injured due to defendant's negligence. Doc. 1.

Defendant joined issue by its verified answer filed October 16, 2017. Doc. 3.

In his bill of particulars, plaintiff alleged, inter alia, that defendant was negligent in its ownership, operation, design, construction, and maintenance of the sidewalk. Doc. 27. Specifically, plaintiff claimed that the sidewalk was "uneven, unlevel, cracked, [and] broken . . ." Doc. 27 at par. 4. He further alleged that defendant created and had actual and/or constructive notice of, the condition. Doc. 27 at par. 4.

At his deposition on July 13, 2018, plaintiff, a graduate student and teaching assistant at Columbia University, testified that the incident occurred at approximately 9:30 p.m. Doc. 46 at 7, 9, 14, 28. Just prior to the incident, plaintiff had been studying at the Lehman Library in the International Affairs Building. Doc. 46 at 24, 27. He left the building and fell approximately 10-20 steps from the exit. Doc. 46 at 35, 44-45. He recalled that it was dark outside when he fell and that the area was dimly lit. Doc. 46 at 35.

Plaintiff circled on defendant's Exhibits B and C, marked at his deposition, the area where he allegedly fell. Doc. 46 at 37-40; Doc. 47. He maintained that the sidewalk was raised in that area, causing his right toe to get caught, thereby propelling him forward. Doc. 46 at 45-46, 76-77. Plaintiff admitted that he never complained about the condition because he never saw it prior to the date of the accident, even though he had previously walked in that area. Doc. 46 at 81-82.

Sheldon Robinson, Paint and Mason Supervisor for defendant, appeared for a deposition on August 9, 2018. Doc. 48. In that role, he was responsible for maintaining and repairing public sidewalks adjacent to university buildings. Doc. 48 at 9-10. He and other members of his department performed daily walkthroughs of the campus to ascertain whether any repairs were needed. Doc. 48 at 10-11. This included the sidewalks adjacent to 420 West 118th Street, a building owned by defendant. Doc. 48 at 11. During these walkthroughs, however, he never noticed that any portion of the sidewalk depicted by defendant's Exhibit B was higher or lower than an adjacent

portion. Doc. 48 at 27-31. He was not aware of any repairs made to, or complaints made about, the sidewalk in that area prior to the date of the alleged incident. Doc. 48 at 36-37, 40-41. Nor was he aware of any other accidents which occurred in that area. Doc. 48 at 41. Although he searched for records regarding any repairs in the area, he found none. Doc. 48 at 45.

The note of issue was filed on May 8, 2019. Doc. 37.

On June 24, 2019, defendant filed the instant motion seeking summary judgment dismissing the complaint. Doc. 40. In support of the motion, defendant submits, inter alia, an attorney affirmation; the pleadings; the bill of particulars; plaintiff's deposition transcript, including exhibits marked at that deposition; Robinson's deposition transcript; and the report of defendant's proffered expert engineer Jeffrey Schwalje, P.E. Docs. 40-49.

In support of the motion, defendant argues that the alleged defect in the sidewalk was trivial, since Schwalje measured the difference in elevation between the two slabs to be 0.4375", or less than ½ inch, which did not constitute a tripping hazard. Doc. 49. Defendant further argues that the complaint must be dismissed because it neither created, nor had actual or constructive notice of, the alleged defect.

In opposition to the motion, plaintiff submits, inter alia, an attorney affirmation; an affidavit by plaintiff (Doc. 54) in which he attests, inter alia, that the sidewalk was crowded and dimly lit at the time of the accident, and that the portion of the sidewalk on which he tripped was raised at least one inch; a color photograph of the accident scene; the affidavit of its expert, Nicholas Bellizzi, P.E., a civil engineer, accident reconstructionist and licensed professional engineer, who opines, inter alia, that there was a "vertical height differential between the two portions of the sidewalk of at least one inch", in violation of New York City Administrative Code

section 19-152 (Doc. 57 at par. 15) and that the coloration and wear on the sidewalk reflect that the condition existed for several years (Doc. 57 at par. 16).

In opposition to the motion, plaintiff argues that defendant failed to establish its prima facie entitlement to summary judgment since it failed to submit any evidence in admissible form in support of its motion. Plaintiff argues that Schwalje's report is not only unsworn, but fails to set forth his basic credentials, including whether he is a licensed engineer. Further, plaintiff argues that, since the photographs taken at the scene by Schwalje are not authenticated and were never exchanged prior to the filing of the note of issue in May 2019, they cannot be considered on this motion. Additionally, plaintiff argues that neither his nor Robinson's deposition transcript can be used in support of defendant's motion since both were neither signed nor sworn. Plaintiff further asserts, in effect, that, if defendant established its prima facie entitlement to summary judgment, then issues of fact exist which preclude this Court from granting the motion.

In reply, defendant reiterates its argument that it did not create, or have actual or constructive notice of, the alleged defective condition and that plaintiff failed to raise an issue of fact in opposition to the motion. Defendant also submits an affidavit by Schwalje attesting to the truth of his report and asserts that it cures the fact that his report is not sworn. Defendant further maintains that its failure to submit the sworn deposition transcript of plaintiff is cured by the fact that plaintiff submits his sworn deposition transcript as an exhibit in opposition to the motion. Additionally, defendant maintains that Robinson's deposition transcript is admissible, since a letter annexed to the reply affidavit proves that he was sent his transcript to sign in accordance with CPLR 3116(a).

LEGAL CONCLUSIONS:

Evidentiary Considerations

Contrary to plaintiff's contention, his unsigned deposition transcript, submitted in support of the motion, may be considered by this Court since the transcript was certified by the reporter (Doc. 46 at 85) and plaintiff does not challenge its accuracy. *See Singh v New York City Hous. Auth.*, ___ AD3d ___ (1st Dept, November 14, 2019); *Tsai Chung Chao v Chao,* 161 AD3d 564 (1st Dept 2018); *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 (1st Dept 2013).

This Court may also consider Robinson's unsigned deposition transcript because defendant adopted his testimony as accurate by submitting it in support of its motion for summary judgment. *See Singh v New York City Hous. Auth., supra; Castano v Wygand*, 122 AD3d 476, 477 (1st Dept 2014). In any event, Robinson's unsigned transcript was admissible because defendant submitted proof, annexed to its reply affirmation, that the transcript had been submitted to Robinson for signature and that he failed to return it within 60 days and, further, plaintiff did not prove, or even claim, that he was prejudiced by the submission of this proof with defendant's reply. Doc. 58 at par. 6; Doc. 61. *Castano v Wygand*, 122 AD3d at 477.

However, plaintiff correctly asserts that Schwalje's unsworn report is inadmissible as evidence in support of the motion. *See Accardo v Metro-North R.R.*, 103 AD3d 589 (1st Dept 2013). "This [is] an error that [cannot] not be cured by submitting a sworn affidavit by this expert in reply papers", as defendant attempts to do. *Accardo v Metro-North R.R.*, 103 AD3d at 589.

Plaintiff's contention that the photographs submitted with defendants motion are unauthenticated, and thus inadmissible, is without merit, as plaintiff clearly identified the area depicted in those photographs, marked as Exhibits B and C at his deposition, as the location of the accident.

The Merits of the Motion

"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 (CPLR 3212, subd [b]); and he must do so by tender of evidentiary proof in admissible form." *Zuckerman v New York*, 49 NY2d 557, 562 (1980). If this showing is made, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

> To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury *(see Mercer v City of New York*, 88 NY2d 955, 956 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (*see Manning v Americold Logistics*, LLC, 33 AD3d 427 [1st Dept 2006]).

Ceron v Yeshiva Univ., 126 AD3d 630, 631-632 (1st Dept 2015).

Defendant established its prima facie entitlement to summary judgment by submitting the deposition testimony of plaintiff, who authenticated photographs marked as Exhibits B and C at his deposition by stating that they depicted the area where he fell. Doc. 46 at 37-40; Doc. 47; Doc. 54 at par. 10; Doc. 55. Plaintiff also admitted that he never saw the defect in the sidewalk prior to the date of the accident, despite having traversed that area on prior occasions.

Additionally, defendant submits the testimony of Robinson, who, along with other members of his department, performed daily walkthroughs of the campus to ascertain whether any

repairs were needed, including the area of the sidewalk adjacent to 420 West 118th Street. Robinson never noticed that any portion of the sidewalk depicted in defendant's Exhibit B was higher or lower than the adjacent portion.[1] Nor was he aware of any repairs made to, complaints made about, or accidents occurring in, that area of the sidewalk prior to the date of the alleged incident. Additionally, although he searched for records regarding any repairs in the area, he found none.

Given the foregoing testimony, this Court finds that defendant fulfilled its prima facie burden by demonstrating that it did not create the alleged defect or have actual or constructive notice of the same. *See Schulman v City of New York*, 157 AD3d 548, 548-549 (1st Dept 2018).

In opposition, plaintiff fails to raise an issue of fact sufficient to defeat the motion. Although plaintiff submits Bellizzi's sworn affidavit, in which he states, inter alia, that the accident was caused by a height differential of at least one inch which caused plaintiff to trip, his affidavit is of no probative value, since he never visited the accident site or took any measurements. *See Landahl v Stein*, 162 AD3d 1563 (4th Dept 2018); *Salman v L-Ray LLC*, 93 AD3d 568 (1st Dept 2012). Similarly, although plaintiff "estimate[s]" that the height differential was at least an inch, his affidavit is silent regarding whether he actually measured the same (Doc. 54 at par. 20) and is thus insufficient to raise an issue of fact. *See Garcia v 549 Inwood Assoc., LLC*, 136 AD3d 555, 556 (1st Dept 2016).

Bellizzi opines that the "vertical height differential between the two portions of the sidewalk [was] at least one inch", thereby violating New York City Administrative Code section

[1] Although plaintiff claims that the photographs marked at his deposition do not depict the *exact* location of his fall (Doc. 54 at pars. 21-22), they were clearly sufficient to enable Robinson to identify the area such that he could testify whether he was familiar with that location. In any event, given Robinson's testimony regarding routine inspections he and members of his department routinely made of the sidewalk adjacent to the premises, it was not necessary for plaintiff to pinpoint exactly where he fell.

19-152 (Doc. 57 at par. 15), and that the coloration and wear on the sidewalk reflect that the condition existed for several years. Doc. 57 at par. 16. However, in rendering this opinion, he claims to have relied, inter alia, on what plaintiff claims are unauthenticated photographs taken by Schwalje (which, plaintiff testified, represented the area of the accident), as well as color copies of photographs of the scene taken during discovery and a color copy of Exhibit 1 marked at Robinson's deposition. Doc. 57 par. 6. However, there is no exhibit from Robinson's deposition attached to the motion papers, and the only other photograph annexed to plaintiff's affirmation in opposition is labeled in NYSCEF as "Pltf color photo accident site" (Doc. 56), which is extremely grainy and reveals no readily observable defect.[2] Although not argued by defendant, this Court finds it incredible as a matter of law that Bellizzi was able to determine from a photograph of such poor quality that there was a height differential of one more than one inch. *See Carthen v Sherman*, 169 AD3d 416 (1st Dept 2019).

This Court finds it necessary to address an additional point which defendant did not raise. Bellizzi's opinion that there was a height differential of at least one inch is set forth in his affidavit dated August 1, 2019. Doc. 57. However, since Bellizzi did not visit the site and thus took no measurements, and since this Court does not believe that it was possible for him to discern the height differential from a blurry photograph, it appears that he relied on plaintiff's affidavit in opposition to the motion in opining as to the height differential of "at least one inch". Doc. 54 at par. 20; Doc. 57 at par. 15. However, since plaintiff's affidavit in opposition to the motion was not executed until August 5, 2019, *after* Bellizzi signed his affidavit, this Court can discern no basis for Bellizzi's opinion about the height differential.

[2] Although plaintiff maintains that Doc. 54 consists of two photographs of the accident scene, there is only one photograph in NYSCEF associated with that number. Additionally, plaintiff's papers do not mention who took the photograph or when.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant The Trustees of the Columbia University in the City of New York for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

12/20/2019
DATE

KATHRYN E. FREED, J.S.C.

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