

**Napoli v Moretta**

2020 NY Slip Op 31996(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 154876/2017

Judge: W. Franc Perry

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

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

-----X

JOHN NAPOLI

Plaintiff,

- v -

MARIA MORETTA,

Defendant.

-----X

**INDEX NO.** 154876/2017  
**MOTION DATE** 11/20/2019  
**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

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

This is an action for personal injuries allegedly sustained by Plaintiff John Napoli on October 11, 2014, when he tripped and fell in the backyard of Defendant Maria Moretta while delivering food for an event. Defendant now moves for summary judgment on the grounds that Plaintiff is unable to identify the reason why he fell. Additionally, Defendant moves for leave to amend her Verified Answer to assert the affirmative defense of worker’s compensation. The motion has been fully submitted.

**BACKGROUND**

On the date of the incident, Plaintiff was employed by A&S Italian Fine Foods in Huntington Station, New York, while Defendant served as the president of that A&S franchise. Defendant requested catering for her daughter’s engagement party from A&S and Plaintiff was responsible for making the delivery to Defendant’s house. Plaintiff was carrying a platter of food in the backyard when he fell, allegedly causing injuries predominantly on the right side of his body. (NYSCEF Doc No. 41 at ¶ 6.) Plaintiff filed his Verified Complaint on May 26, 2017 and Defendant now moves for summary judgment.

## DISCUSSION

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].) The court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].) “It is settled that negligence cases by their very nature do not lend themselves to summary dismissal since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination.” (*McCummings v New York City Transit Auth.*, 81 NY2d 923, 926 [1993], quoting *Ugarrizza v Schmieder*, 46 NY2d 471, 474 [1979].) Although the issue of proximate cause is “almost invariably a factual issue . . . a plaintiff’s inability to identify the cause of a fall is fatal to an action because a finding that the defendant’s negligence proximately caused a plaintiff’s injuries would be based on speculation.” (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017] [internal citations omitted].)

It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition.” (*Rodriguez v. 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [2010]).

...

A condition that is visible to one “reasonably using his or her senses” is not inherently dangerous (*Tagle*, 97 N.Y2d at 170). However, a step may be dangerous where the conditions create “optical confusion”—the illusion of a flat surface, visually obscuring the step (*Brooks v Bergdorf–Goodman Co.*, 5 AD2d 162, 163 [1st Dept 1958]). “[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition” (*Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263, [1st Dept 1966]).

(*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012].)

Once a defendant has made a prima facie showing, the burden shifts to the plaintiff to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Here, the court finds that Defendant established her prima facie entitlement to summary judgment by submitting evidence demonstrating that the step in question was not inherently dangerous to one reasonably using his or her senses. Defendant testified that there was nothing wrong with the walkway, as she regularly used it and inspected it shortly before hosting the engagement party, and that she had never received any complaints prior to the date of the party. (NYSCEF Doc No. 46, Maria Moretta deposition tr at 20:11-24; 21:14-17.) Defendant also cites to Plaintiff’s March 29, 2018 deposition, wherein he testified that he could see where he was going and that he had initially traversed the area in which he fell without incident, but that he fell upon his second trip into that area. (NYSCEF Doc No. 39 at ¶¶ 16, 18, citing NYSCEF Doc No. 44, John Napoli deposition tr at 29-36.)

Additionally, Defendant argues that Plaintiff is unable to identify what defect caused his injury. Plaintiff testified at his deposition as follows:

Q *Were you caused to fall, due to some condition that was on the stair or due to the fact that you were unable to see the stair or something else?*

...

A *I tripped and then the step happened to be there. That's why I lost my balance.*

Q *Did you trip because of the step or before the step?*

A *It had to be before.*

Q *Do you know what you tripped on?*

A *There was something. I know that.*

Q After you fell, did you turn around to see what you had tripped on?

A No.

Q Before you fell, did you see what you ultimately tripped on?

A No.

Q *At any time, while you were present at Ms. Moretta's on the day of the incident, did you see what you tripped on?*

A *No*, because I was in so much pain.

Q As you sit here today, do you know what you tripped on?

A No.

Q *Just for the record, the step did not cause you to trip and fall; is that right?*

A *Yes*. It was unexpected. *I tripped and then the step was there and I went down.*

Q Something before the step caused you to fall and you ultimately fell down?

A Caused me to stumble and the step made me go down.

(NYSCEF Doc No. 44, John Napoli deposition tr at 36:19 – 38:6 [emphasis added].)

In opposing summary judgment Plaintiff contends, for the first time, that the pathway in question created “optical confusion.” (NYSCEF Doc No. 51 at 1.) In support, Plaintiff submits an aerial photo of the house’s backyard and a screenshot of the property from Google Maps to demonstrate the color of the pathway. (NYSCEF Doc No. 53.) However, these photos fail to hold evidentiary value as they do not depict the step over which Plaintiff alleges he fell and as such, fail to raise an issue of fact.

Additionally, Plaintiff’s affidavit, dated September 13, 2019, submitted in opposition, indicates that he fell upon his second trip into the backyard. Specifically, Plaintiff states; “I was unable to see the third step as it appeared that the pathway was flat, the same color as the pathway, and there was absolutely no indicator that the third step was there. I was not able to see the change it [sic] height because it looked flat.” (NYSCEF Doc No. 52, ¶ 7.) However, in direct contradiction to his sworn deposition, he now alleges that on his first trip he did not traverse the area in which he ultimately fell. (NYSCEF Doc No. 52 at ¶¶ 5-7.) In further contradiction of his prior testimony that he tripped due to some unknown defect and then fell because “the step happened to be there,” Plaintiff now claims that he fell down the step because it was “the same

color as the pathway” and there was no indicator warning him of the change in elevation. (*Id.* at ¶ 7.)

The court finds Plaintiff’s proffered evidence insufficient to defeat summary judgment. “Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment.” (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007].) Plaintiff is unable to identify the cause of his fall and he is unable to provide any evidence “from which causation may be reasonably inferred.” (*Haibi*, 156 AD3d at 147.) To the extent that Plaintiff alleges that his fall was due to “optical confusion,” the court finds that the step was open and obvious, particularly because “plaintiff had traversed the area in the opposite direction moments before and he cannot identify the cause of his fall and, accordingly, cannot show that optical confusion caused his accident.” (*Bittar v New Growing, Inc.*, 2011 WL 11068309, \*2 [Sup Ct, NY County 2011].)

Because the court has determined that defendant has met her burden demonstrating her entitlement to summary judgment, the court need not address the part of the motion seeking leave to amend the answer to assert an additional affirmative defense.


### CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant’s motion for summary dismissal of the Verified Complaint is hereby granted and the Verified Complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>6/26/20</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE