

Tretola v Brookfield Props. OLP Co. LLC
2020 NY Slip Op 32358(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 152746/2017
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

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

Justice

-----X

INDEX NO. 152746/2017

RICHARD TRETOLA,

MOTION SEQ. NO. 001, 002, 003

Plaintiff,

- v -

BROOKFIELD PROPERTIES OLP CO. LLC, BROOKFIELD
FINANCIAL PROPERTIES, L.P., COOPER, ROBERTSON
& PARTNERS ARCHITECTS, LLC, and KUGLER NING
LIGHTING DESIGN, INC, FORMERLY KNOWN AS
KUGLER TILLOTSON ASSOCIATES,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 73, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 91, 92, 96, 99, 109, 111

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 88, 90, 93, 97, 103, 104, 105, 106, 107, 108, 110

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 75, 89, 94, 95, 98, 100, 101, 102

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

In this personal injury action, defendants Kugler Ning Lighting Design, Inc., formerly known as Kugler Tillotson Associates ("Kugler") (motion sequence 001), Brookfield Properties OLP Co. LLC ("Brookfield OLP") and Brookfield Financial Properties, L.P. ("Brookfield Financial") (collectively "the Brookfield defendants") (motion sequence 002), and Cooper, Robertson & Partners Architects, LLC ("Cooper Robertson") (motion sequence 003) move, pursuant to CPLR 3212, for an order seeking summary judgment, dismissing the complaint and

all cross claims asserted against them (Docs. 22, 39, 56). Plaintiff Richard Tretola ("Tretola") opposes the motions and cross-moves, pursuant to CPLR 3042(b), for leave to amend his supplemental bill of particulars to allege specific statutory violations (Docs. 76-86, 111). Kugler, the Brookfield defendants, and Cooper Robertson oppose the cross motion (Doc. 99, 100, 103). After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 14, 2014, Tretola allegedly fell down a flight of stairs in Zuccotti Park in Manhattan ("the Park") due, *inter alia*, to defective steps and improper lighting (Docs. 1 ¶¶ 6-17; 47). In March 2017, Tretola commenced this action by filing a summons and complaint against Brookfield OLP, the alleged owner of the Park, and as against Brookfield Financial, the Park's property manager (Doc. 1). In April 2017, Tretola amended his complaint to add as a defendant Cooper Robertson, the architectural firm that designed the subject staircase, and Kugler, the company responsible for the Park's lighting design (Doc. 3 ¶¶ 12-13). In his amended complaint, Tretola claimed that "[d]efendants, its agents, and its employees were reckless, careless, and negligent in designing, causing, creating, and/or permitting the dangerous and defective conditions of the subject stairs and surrounding lighting to exist and remain" at the premises (Doc. 3 ¶ 15).

Cooper Robertson filed an answer to the first amended complaint on May 16, 2017, raising several affirmative defenses and cross claims against its co-defendants based on (1) contribution and/or indemnification; (2) contractual indemnification; and (3) failure to procure insurance (Doc. 6). On May 19, 2017, Kugler filed an answer to the amended complaint and it, too, raised several affirmative defenses and cross claims (Doc. 7). The Brookfield defendants interposed an answer

on October 11, 2017, raising several affirmative defenses and cross claims based on contribution and indemnification (Doc. 11).

Tretola filed a note of issue on August 2, 2019, representing that all discovery in this action was complete (Doc. 21). On September 26, 2019, Cooper Robertson moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it (Doc. 22) (motion sequence 003). Kugler and the Brookfield defendants moved for similar relief on September 30 and October 1, 2019, respectively (Docs. 29, 56) (motion sequences 001 and 002). Tretola opposed defendants' motions and cross-moved to amend his supplemental bill of particulars to allege specific code violations (Doc. 76).

LEGAL CONCLUSIONS:

1.) Tretola's cross motion to amend the supplemental bill of particulars.

As an initial matter, this Court grants Tretola's motion to amend his supplemental bill of particulars. It is well-settled that "leave to amend a bill of particulars, even following the filing of the note of issue, is ordinarily freely given absent surprise or prejudice to the defendants" (*Castillo v Akdeniz Realty LLC*, 2014 NY Slip Op 31245[U], 2014 Misc LEXIS 2202, *23-24 [Sup Ct, NY County 2014] [citations omitted]; see CPLR 3025 [b]; *Torres v NY City Tr. Auth.*, 78 AD3d 419, 419 [1st Dept 2010]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]; *Sahdala v NY City Health & Hosp. Corp.*, 251 AD2d 70, 70 [1st Dept 1998]). "In the absence of prejudice, mere delay is insufficient to defeat the amendment" (*Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]; see *Zejneli v Sekons*, 2014 NY Slip Op 30958[U], 2014 NY Misc LEXIS 1720, *6-7 [Sup Ct, NY County 2014]). Although this Court acknowledges Tretola's delay in seeking to amend his supplemental bill of particulars, defendants

have failed to articulate any prejudice by the amendment. Thus, applying the aforementioned principle, this Court grants Tretola leave to amend the supplemental bill of particulars in the form annexed to the cross motion (Doc. 85).

2.) Defendants' motions seeking summary judgment.

It is well-established that “[t]he 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, 853 [1985] [citations omitted]; see CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (see *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

a.) Kugler's motion for summary judgment (Motion Sequence 001).

Kugler argues, *inter alia*, that it is entitled to summary judgment because (1) it owed no duty of care to Tretola; (2) it had/has no contractual duty to maintain, replace or repair lighting fixtures in the Park and/or the stairs where Tretola fell; (3) there is no proof that Kugler had notice of a dangerous condition; (3) the lighting design was not the proximate or substantive cause of

Tretola's fall and injuries; and (4) it did not create the alleged lighting condition which caused Tretola's injuries (Doc. 40 ¶ 67).

Specifically, Kugler argues that the lack of contractual privity between it and Tretola is prima facie proof that no duty was owed to the latter and, moreover, that none of the exceptions that impose a duty to third parties, including where a defendant launches a force or instrument of harm by creating or exacerbating a dangerous condition, are applicable here (Doc. 41 ¶ 23). Moreover, Kugler maintains that it was not involved in the installation of the light design, which was completed by an electrical contractor, and that its design plan complied with the City/Park rules and regulations (Docs. 41 ¶ 27; 52 at 39). Moreover, insofar as no complaints were made with respect to the lighting design prior to Tretola's injuries, Kugler argues that it did not have actual or constructive notice of any dangerous condition (Doc. 41 ¶ 35- 38).

In support of its motion, Kugler submits, *inter alia*, its design proposals (Doc. 49); Tretola's bill of particulars and supplemental bill of particulars (Doc. 47); Tretola's deposition testimony (Doc. 50); the deposition testimony of Stephen McGann ("McGann"), the senior property manager of the Park (Doc. 51); Jackson Ning ("Ning"), Kugler's sole proprietor (Doc. 52); the deposition testimony of Donald Clinton ("Clinton"), an architect and partner at Cooper Robertson (Doc. 53); and the expert affidavit of Scott Cameron ("Cameron"), a registered architect (Doc. 55).

At his deposition, Tretola testified that, on April 14, 2014, at approximately 8:00 p.m., he left 115 Broadway Avenue, turned left on Broadway Avenue, crossed to the north side of Cedar Street and Broadway Avenue, and walked underneath the *Joie de Vivre*, a sculpture located in the Park's outer perimeter ("the sculpture") (Doc. 50 at 34, 60-64). After walking through the sculpture, Tretola encountered a handrail and a curved staircase that led down into the Park (Doc. 50 at 63, 68-70). As Tretola attempted to descend into the Park, his foot landed on two steps at

the same time, causing him to stumble, fall forward, and hit the handrail with his shoulder (Doc. 50 at 70-71, 78-80). Although the handrail was located to Tretola's left when he started to go down the staircase, it was three (3) to four (4) inches away from his fully extended left hand when he started to fall (Doc. 50 at 72). Tretola was not sure whether the handrails were illuminated, but he claimed that it was dark (Doc. 50 at 83-84). However, he did see lights at the base of the staircase (Doc. 50 at 84). He further claimed that "improper lighting" prevented him from seeing the uneven condition of the steps (Doc. 50 at 118). Tretola appeared for a second deposition in April 2019 and testified, in relevant part, that a spotlight located underneath the sculpture, as well as rectangular lights located at the base of the staircase, blinded him temporarily and contributed to his fall (Doc. 50 at 18-29).

The design proposal reflects that Kugler was hired in June 2003 to provide lighting design services for the Park, which included designs for in-ground "up-lighting" fixtures for the sculpture, lighting in the ground/floor of the Park, and lighting within the handrails (Docs. 49; 52 at 43, 47, 56).

Ning testified, *inter alia*, that the lighting in the handrails met the two-foot candles standard as set forth in the City of New York Building Codes (Doc. 52 at 53). Moreover, he asserted that Kugler followed the "Illuminating Engineering Society Best Practices Guidelines" when producing the calculations for the lighting design (Doc. 52 at 53). Ning further claimed that the lighting design provided the required levels of illumination for the stairs (Doc. 52 at 73).

Cameron opines, in relevant part, that, based on a light meter reading taken at the Park in April 2018 at 8:10 p.m., the approximate time of Tretola's alleged fall, "the lighting in and around the area of where [Tretola] reportedly met with his accident was not only Code compliant, but was also safe and more than adequate to properly illuminate the plaza level sidewalk near the top of

the handrails, as well as the steps leading into the Park" (Doc. 55 ¶ 15). Moreover, Cameron avers that the light readings complied with recommended levels for outdoor lightings as established by the Illuminating Engineering Society of North America ("IESNA"), which recommends that outdoor lighting in public spaces be within one (1) to five (5) foot candles (Doc. 55 ¶ 16). Cameron inspected the premises again in September 2018 following subsequent allegations that Tretola was temporarily blinded by a circular up-lighting fixture near the base of the sculpture (Doc. 55 ¶ 20). He concludes that the nearest circular up-lighting fixture was three feet and five inches away from the top of the subject handrail; and that it was "safe and non-distracting" and fully "[b]uilding [c]ode compliant" (Doc. 55 ¶ 21, 23).

In opposition to Kugler's motion, Tretola contends, *inter alia*, that Kugler should have known that the installation of the upward facing spotlight immediately adjacent to the steps could cause unwanted glare to pedestrians, and that its close proximity to the "non-conforming" stairs created a dangerous condition (Doc. 77 at 12-22). Tretola furnishes, *inter alia*, the expert affidavit of Douglas Korves ("Korves"), a registered architect who asserts, as relevant to this defendant, that, since Cameron failed to measure the illumination levels in the plaza, he cannot affirm that it complied with the 2 foot candle requirement (Doc. 84 ¶ 16). Korves also claims that the lights in the handrails provided inadequate light (Doc. 84 ¶ 18) and that the location of the sculpture near the uneven stairs, especially considering the surrounding lights, posed a risk of injury (Doc. 84 ¶ 19-20).

Generally, a contractual obligation does not give rise to tort liability in favor of a third party (*see Eaves Brooks*, 76 NY2d 220, 226 [1990]). However, under certain circumstances, "a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 [2002]), such as "(1) where the

contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]; see *Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015]).

Kugler's motion for summary judgment is denied. Kugler's assertion that "the lighting design did not create a dangerous condition" (Doc. 41 ¶ 24) is belied by Tretola's deposition testimony that both the spotlight underneath the sculpture and the rectangular lights at the bottom of the staircase impaired his ability to see the steps, causing him to fall, and that the premises, as designed, were dimly lit. Thus, this Court finds that Kugler has failed to establish its prima facie entitlement to summary judgment as a matter of law.

Assuming, *arguendo*, that Kugler satisfied its prima facie burden for summary judgment, this Court nevertheless finds that Tretola has, at the very least, raised an issue of fact as to whether Kugler's lighting design launched an instrument of harm thereby creating a dangerous condition (see *Dale v City of New York*, 2016 NY Misc LEXIS 3370, *12 [Sup Ct, NY County 2016]). Despite Kugler's proof that it neither installed the lights, nor played any role in their maintenance after the project was completed in 2006, there is a question of fact as to whether the lighting design in the plaza was a dangerous condition that contributed to Tretola's injuries because, although Cameron describes the rectangular lights as "a visually attractive but not distracting lighting application," Tretola's deposition testimony and Korves' affidavit suggest otherwise.

Moreover, although Kugler maintains that the lights in the handrails provided the minimum 2-foot candles required along all walkable and sitting areas (Doc. 40 ¶ 10), Korves claims, *inter*

alia, that the handrails are 11 feet and 4 inches apart from each other and, thus, that the handrail lights only covered 4 feet of the width of the stairs, leaving 65% of the width of the staircase unilluminated (Doc. 84 ¶ 65). This poor light, claims Korves, "exacerbates and magnifies the areas of lighting distraction, lighting contrast, perceived brightness, discomfort glare, disability glare and temporary blindness" (Doc. 84 ¶ 18, 65).¹ Based on the foregoing, the motion is denied.

b.) The Brookfield defendants' motion for summary judgment (motion sequence 002)

Relying on similar proof submitted by Kugler, the Brookfield defendants argue that they neither caused nor created a dangerous condition at the Park, nor did they have notice of any dangerous condition (Doc. 57 ¶ 52-53). Thus, they maintain that they did not breach their duty to maintain the premises in a reasonably safe condition (Doc. 57 ¶ 64). They also argue that they had no duty to protect or warn Tretola against an open and obvious condition which was not inherently dangerous (Doc. 57 ¶ 65-69). The Brookfield defendants further claim that, assuming, *arguendo*, that they breached a duty owed to Tretola, they are nevertheless entitled to summary judgment on liability because Tretola failed to allow the temporary blindness condition to pass before

¹ In opposition to the cross motion and in reply to Tretola's opposition papers, Kugler submits the affidavit of Ning, who asserts, *inter alia*, that Kugler did not select the placement of the sculpture (Doc. 99). Kugler also submits the affidavit of Stan Pitera, a civil engineer who inspected the premises on September 19, 2019 (Doc. 99). Pitera opines that the handrail light fixtures, installed by a third party, were not compliant with the 2-foot candle standard at the time of Korve's inspection because it was "either altered subsequent to the original installation, or not constructed to the specifications of [Kugler's] plan" (Doc. 99). Pitera also asserted that there were non-functioning handrail lights within the left handrail, which reduced the illumination to the stairway surface (Doc. 99). However, insofar as this proof was submitted in a reply, this Court will not consider them (*see Phillips v One E. 57th St., LLC*, 2020 NY Slip Op 31661[U], 2020 NY Misc LEXIS, *38 [Sup Ct, NY County 2020]; *New Life Holding Corp. v Turner Constr. Corp.*, 2014 NY Slip Op 32590[U], 2014 NY Misc LEXIS, *23 [Sup Ct, NY County 2014]).

attempting to descend the staircase and that his conduct was thus the sole proximate cause of his injuries (Doc. 57 ¶ 70-74).

Clinton confirmed that Cooper Robertson designed the steps at issue in this case (Doc. 70 at 22). He testified that the inclined steps at the location of Tretola's fall were designed to accommodate for the changes in grade; that he assumed that the steps and the design of the Park were up to code; and that, to his knowledge, Cooper never received any complaints about the steps, handrails, or lighting (Doc. 70. at 25-27, 30-31, 37-38). The lack of complaints with respect to the condition of the Park was corroborated by McGann's deposition testimony (Doc. 68 at 28).

Cameron maintains that Tretola's accident was not caused by any type of structural defect or any other weather-related condition (Doc. 72 ¶ 16). Cameron insists that the steps and the curved staircase follow the natural grade and topography of the area; that the steps provide consistent tread depths and varying riser heights to accommodate for the significant grade change and the sixteen-foot grade differential between Broadway Avenue, on the eastside of the Park, and Church street, on the westside of the Park (Doc. 72 ¶ 17). Moreover, Cameron maintains that the curved design and steps were designed with good and accepted architectural and engineering practices for transitioning between the topographical grades and that the curved staircase and steps were in no way defective (Doc. 72 ¶ 17). Moreover, Cameron asserts that "the staircase and each of its steps, including those with varying riser heights in and around where [Tretola] claims his accident occurred, met all applicable City of New York Building Codes" when they were constructed and still comply with all codes (Doc. 72 ¶ 18). He also affirms that eight (8) silver handrails surrounding the staircase served as "visual cues" to alert pedestrians using the Park at night of the height differential and, thus, that an individual using his or her senses would not experience "optical confusion" when trying to enter the Park (Doc. 72 ¶ 19).

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" and, as such, "landowners generally owe a duty of care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty" (*Mccolgan v Chand Realty Assoc.*, 2020 NY Slip Op 32012[U], 2020 NY Misc LEXIS 2955, *16-17 [Sup Ct, NY County 2020] [internal quotation marks, brackets and citations omitted]; see *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006])). "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" (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-632 [1st Dept 2015] [citations omitted]; see *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [1st Dept 2004]).

The Brookfield defendants' motion is denied insofar as they have failed to establish their prima facie burden for summary judgment. It is undisputed that the subject staircase was sloped or "feathered" to the pavement. And, as previously discussed, the close proximity of the lit sculpture to the alleged nonconforming staircase, as well as the alleged distracting effect of the lights located at the base of the steps, which Tretola claims contributed to his temporary blindness, preclude the granting of summary judgment in this action.

Even if, *arguendo*, this initial burden was met by said defendants, issues of fact remain as to whether the premises were reasonably safe, especially considering the alleged condition of the staircase and handrails. Although Cameron maintains that the subject staircase met all applicable City of New York Building Codes, Tretola nevertheless raises an issue of fact with respect to this issue because Korves insists that the subject steps violated the New York City Privately Owned Public Spaces ("POPS"), Article III, § 37-725 and the Americans with Disabilities Act ("ADA") §

504.2 (Doc. 84 ¶ 51-56). POPS provides, in relevant part, that all steps in any public plaza must have a minimum height of four (4) inches and a maximum height of six (6) inches (Doc. 84 ¶ 52). Moreover, the ADA requires that all steps have uniform riser heights and uniform tread depths (Doc. 84 ¶ 27). Based on his inspection of the premises and photographs taken at the scene of Tretola's accident, Korves concludes that the subject staircase did not comply with POPS or the ADA because Tretola lost his balance and fell at a point in the staircase that was sloped and that ultimately became 'feathered' to the pavement (Doc. 84 ¶ 54).² Thus, the risers at said location ranged from "flush or zero, to less than the required 4 inches," creating a tripping hazard (Doc. 84 ¶ 29, 55). Korves also claims that the handrails, which he affirms do not reach the first step where Tretola fell, should have extended an additional 12 inches horizontally to allow a pedestrian approaching the "non-conforming" steps to comply with the ADA guidelines/ NYC guidelines for a compliant railing (Doc. 84 ¶ 63).

The facts here do not compel this Court to find that the alleged dangerous condition, as encountered by Tretola at the time of his injuries, was open and obvious as a matter of law and of a "nature that could not reasonably be overlooked by anyone in the area whose eyes were open" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72 [1st Dept 2004]). This question is best reserved for the jury (*see Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200-201 [1st Dept 2004]; *Mauriello v Port Auth.*, 8 AD3d 200, 200-201 [1st Dept 2004]; *e.g. Mordkovich v Home Depot U.S.A., Inc.*, 2017 NY Slip Op 30271[U], 2017 NY Misc LEXIS 497, *7 [Sup Ct, Kings County 2017]).

² In a reply memorandum of law, the Brookfield defendants contend that POPS is irrelevant to this action because this section did not go into effect until October 2007, after the construction of the subject staircase (Doc. 103 ¶ 36). However, this Court finds that, assuming the section applies to the Park, its present noncompliance with POPS lends support to Tretola's argument that the staircase was dangerous as designed.

This Court also rejects the Brookfield defendants' argument that Tretola's familiarity with the allegedly dangerous condition, having testified that he had walked through the vicinity several times before his accident, warrants the granting of summary judgment in their favor (Doc. 57 ¶¶ 70-74). This question is generally related to the question of comparative negligence at trial (*see Barley v Robert J. Wilkins, Inc.*, 122 AD3d 1116, 1118 [3d Dept 2014]; *Lang v Vandelay Realty LLC*, 51 Misc 3d 1228[A], 2016 NY Slip Op 50854[U], 2016 Misc LEXIS 2050, *7-8 [Sup Ct, Ulster County 2016]).

Similarly, "[t]he issue of proximate cause is ordinarily a question of fact for the jury to resolve" and it may only be resolved as a matter of law, in rare circumstances, when only one conclusion can be drawn from the established facts (*Reed v NY State Elec. & Gas Corp.*, ___AD3d___, ___, 2020 NY Slip Op 03054, *10 [3d Dept 2020] [internal quotation marks, brackets and citations omitted]; *see Lebron v NY City Hous. Auth.*, 158 AD3d 503, 505 [1st Dept 2018]). Under the present facts, this Court cannot determine, as a matter of law, that Tretola's failure to wait for his vision to clear before attempting to descend the steps was the sole proximate of his injuries (*see Sciara v Morey*, 67 AD3d 481, 481 [1st Dept 2009]; *Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267 [1st Dept 2007]). Thus, the Brookfield defendants' motion is denied.

c.) Cooper Robertson's motion for summary judgment (motion sequence 003)

In addition to the arguments raised by its co-defendants, which this Court rejects, Cooper Robertson claims that it is entitled to summary judgment dismissing the complaint and all cross claims against it because, *inter alia*, the steps posed no reasonably foreseeable hazard insofar as the design of the Park incorporated plainly visible physical cues that alerted pedestrians of the location of the staircase and any changes in elevation (Doc. 38 at 15-16). Cooper Robertson also

argues that it cannot be held liable for the alleged lighting deficiency because its contract with Brookfield specifically excluded lighting design from the scope of services that Cooper Robertson was retained to perform at the Park (Doc. 38 at 17).

Cooper Robertson submits, *inter alia*, the deposition testimony of Alexander Cooper ("Cooper"), a founding member of Cooper Robertson, who affirms that the handrails were building code compliant (Doc. 34 at 27-28); that the handrails were clearly visible due to their silver finish (Doc. 34 at 52-53); and that there were no complaints about the handrails prior to Tretola's injuries (Doc. 34 at 52).

This Court finds that, since it is unclear from its proof whether it was Cooper Robertson's decision to place the sculpture with up-lighting fixtures near the staircase, and whether this, in effect, created a dangerous condition, Cooper Robertson has failed to establish its prima facie entitlement to summary judgment. Even assuming, *arguendo*, that this Court was persuaded that the varying visual cues located near and around the staircase, including the silver handrails, alerted pedestrians of the steps and the change in topography surrounding the Park, Tretola has, at the very least, raised an issue of fact with respect to the conformity of the staircase, as previously discussed, and, thus, Cooper Robertson's motion for summary judgment must be denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Richard Tretola's cross motion for leave to amend the bill of particulars is granted and the amended bill of particulars, in the form annexed as "Exhibit 8" of his motion papers in opposition to defendants' summary judgment motions and in support of the cross motion (Doc. 85), shall be deemed served upon service of a copy of this order with notice of entry upon defendants; and it is further

ORDERED that the motion for summary judgment by defendants Brookfield Properties OLP Co. LLC and Brookfield Financial Properties, L.P., pursuant to CPLR 3212, is denied; and it is further

ORDERED that the motion for summary judgment by defendant Cooper Robertson & Partners Architects, LLC, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the motion for summary judgment by defendant Kugler Ning Lighting Design, Inc., pursuant to CPLR 3212, is denied; and it is further

ORDERED that, within 30 days, plaintiff Richard Tretola shall serve a copy of this order with notice of entry on the defendants and on the Clerk of the Court (60 Centre, 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

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

7/20/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE