Deluigi v Town Sports Intl., LLC
2020 NY Slip Op 32605(U)
August 10, 2020
Supreme Court, New York County
Docket Number: 160324/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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ANTHONY DELUIGI,

Plaintiff,

- v -

TOWN SPORTS INTERNATIONAL, LLC,D/B/A NEW YORK SPORTS CLUB

Defendant.

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INDEX NO. 160324/2017

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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

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

Motion by Defendant Town Sports International, LLC d/b/a New York Sports Club ("Defendant") seeking an order, pursuant to CPLR 3211 and 3212, for summary judgment and dismissal of the Complaint of Plaintiff Anthony DeLuigi ("Plaintiff") as against it is granted for the reasons stated herein.

BACKGROUND

A. Overview

On November 15, 2016, at approximately 1 PM, Plaintiff allegedly slipped and fell on leaves on the stairs leading to the basement of Defendant's fitness club located at 1637 Third Avenue, New York, New York. Plaintiff commenced the instant lawsuit against Defendant alleging that the accident was caused due to the negligence of Defendant.

Defendant moves for summary judgment dismissing the complaint, arguing that it met its prima facie burden of proof of showing a lack of notice of the alleged dangerous condition. Defendant argues that "the evidence in the record, including the sworn testimony of Plaintiff, Anthony DeLuigi, and Defendant TSI's employee Marion Easley, establish that Defendant conducted numerous daily inspections of the entire club, including the subject staircase, . . . Furthermore, Mr. DeLuigi is unable to articulate how long the leaves were allegedly on the stairs prior to this incident. Finally, and most notable, Mr. Easley traveled the same exact flight of stairs at most fifteen (15) minutes prior to Mr. DeLuigi's incident and he did not see the presence of any foreign object[.]" (Affirm in Supp at 7-8.) Defendant also argues that the alleged condition is not a dangerous condition. (*Id.* at 14.)

In opposition, Plaintiff argues that Defendant's employee Easley was unable to testify if there was a schedule for the cleaning team outlining when the stairs were inspected and cleaned. (Affirm in Opp at 4.) Additionally, Plaintiff argues that Easley's credibility should be determined by a jury. (*Id.* at 15.)

In reply, Defendant argues that it "has shown that there is no evidence of a dangerous or hazardous condition at the time of, or prior to, Plaintiff's incident, let alone sufficient notice of the same." (Affirm in Reply at 1.)

B. Testimonies

1. EBT of Plaintiff

Plaintiff stated that on November 15, 2016, he "walked into the gym, checked in, and [he] was walking down the steps holding the railing [with his left hand], and [there is] a double-step there. First you go down, then you hit a landing, and then it goes down. And [he] was holding the railing, [he] was walking down the stairs normally, holding the railing . . . [his left] leg [slipped on the last step] . . . and flew out, and [his right] leg was on its way down [to that last step], and that is when it broke . . . [he] went . . . about 15 feet across the gym floor." (Plaintiff EBT at 21:12-24:13; 44:19-45:05; 54:08-09; 62:22-64:25.)

Plaintiff was asked if he recalled what he slipped on. He stated that he "didn't see what [he] slipped on until [he] was put on a bench by two bodybuilders [who] picked [him] up and put [him] on a bench." (*Id.* at 67:14-24.) When asked if *after the accident* he knew what he slipped on, Plaintiff replied, "Yes. Leaves. On the bottom step. Yellow and red leaves on the bottom step." (*Id.* at 67:22-68:05.) "About five leaves . . . little leaves… About, two inches, each, . . . they might have been dry . . . Maybe dry." (*Id.* at 68:03-69:17; 70:09-10.)

Plaintiff stated that he did not have any leaves on his shoes when he walked into the gym on the date of the accident. (*Id.* at 75:09-13; 79:10-13.) He added that "when he slipped, there might have been one [leaf] on his shoe… [He] didn't look." (*Id.* at 73:01-07; 75:04-17.) He also stated that he "[did] not know if there [were] any leaves on [his] shoe." (*Id.* at 77:04-20.) He assumed there was not any because he "made it all the way to the last step and there [were] no leaves behind." (*Id.* at 78:11-22.)

Plaintiff stated that months after the alleged accident, he has observed people using the last step of the stairs as an "exercise point," and that they deposit leaves from their shoes on the step as they step on the last step. (*Id.* at 79:14-25; 82:19-83:08.) He further stated that "one day there were a lot of leaves on that last step. And that was a long time after when [he] went back to the gym… And [he] noticed that there were still leaves on the bottom step again and not on all the rest." (*Id.* at 82:13-83:08.)

2. EBT & Affidavit of Defendant's Witness Marion Easley

Marion Easley ("Easley") was working at Defendant's premises as a personal trainer at the time of the incident as well as when he was deposed and submitted an affidavit in this action.

(Easley EBT at 8:04-12.) In his deposition, Easley was asked about his duties as a personal trainer to which he responded:

> "Duties are to generate business. Make programs for clients and pretty much motivate clients by training them physically, by exercise. [And,] like general duties. If you see something on the floor, towel, pick it up especially in walkways."

(*Id.* at 9:17-24.) Easley also stated that there is a "clean team . . . in charge of the cleaning of the gym." (*Id.* at 13:17-19.) He stated that he does not know if the clean team keeps any logs or reports. (*Id.* at 14:09-17.) He stated that someone from the clean team will periodically "mop and sweep" the staircase "throughout the day." (*Id.* at 16:07-13.)

Easley stated that at the time of the alleged accident, he was training a client at the basement of the gym, which is the weight room, when he saw from his peripheral vision that Plaintiff fell coming down the stairs on the left side. Easley stated that he went over to Plaintiff, who was on the floor and seemed in pain, helped him on to the bench, and eventually called an ambulance. Easley stated that after Plaintiff's accident, he did not see any leaves or any other foreign objects on the stairs. (*Id.* at 17:22-21:19.)

Easley further stated that since he started working at Defendant's premises—starting sometime approximately three years before the accident—he has never seen leaves on the staircase or heard somebody tell someone from the clean team that there was anything on the steps that needed to be picked up. He stated that he has seen people doing calf raises on the bottom floor on the staircase. (*Id.* at 21:09-22:11.) He stated that if somebody comes in with wet shoes, the clean team member, who would be walking up and down the steps, would mop it up or the manager who is walking around would notify the clean team to mop the floor. (*Id.* at 22:12-23.) Easley stated that he was not aware of a schedule for the managers as to when they would walk the floor. (*Id.* at 23:07-12.) He stated he was likewise not aware of a schedule for the clean team but that they had shifts. (*Id.* at 23:13-20.)

Easley also submitted an affidavit, dated January 17, 2020, wherein he notes that he was still working at Defendant's premises at the time of his affidavit. (Easley Aff ¶ 2.) In his affidavit, Easley stated the following:

> I walked down the exact same staircase that Mr. DeLuigi allegedly slipped on, at most fifteen (15) minutes prior to Mr. DeLuigi's incident. As a matter of practice in the course of my employment, when I walk down the stairs at TSI, I look down to see if there are any foreign items/substances on the stairs. On the date of Mr. DeLuigi's incident, when walking down the stairs, which was at most fifteen (15) minutes prior to Mr. DeLuigi's incident, I followed my same routine of looking down to see if there were any foreign objects on the stairs. I did not see the presence of any foreign substance, let alone leaves on the subject stairs.

(*Id.* ¶ 4.)

DISCUSSION

A. Summary Judgment Standard

"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 University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) Once this showing has been made, the burden shifts to the nonmoving party 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].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff ... the court on a summary judgment motion must indulge all available inferences[.]" (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

B. Premises Liability

Generally, a property owner "must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotations and citations omitted]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].) In particular, property owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of those on their premises. (*Russo v Home Goods, Inc.*, 119 AD3d 924, 924 [2d Dept 2014] [internal citations omitted].)

In order to be held liable, a property owner must be aware of the alleged dangerous condition, either by having created it, having actual knowledge of the condition, or constructive notice of it. "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986].)

A defendant property owner moving for summary judgment in a slip and fall action has the initial burden of establishing prima facie that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (*Ross v Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421 [1st Dept 2011].) To meet its initial burden on the issue of constructive notice, a defendant property owner must tender some evidence establishing when the area in question was last cleaned or inspected prior to the plaintiff's slip and fall. (*See Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 572 [1st

Dept 2014]; *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2d Dept 2011]; *McPhaul v Mut. of Ameria Life Ins. Co.*, 81 AD3d 609, 610 [2d Dept 2011]; *Zambri v Madison Sq. Garden, L.P.*, 73 AD3d 1035, 1036 [2d Dept 2010]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598 [2d Dept 2008].)

C. Application

In the present case, Defendant established prima facie that it did not create and did not have actual or constructive notice of the alleged dangerous condition. There is no evidence that Defendant affirmatively created the alleged dangerous condition. It is also undisputed that Defendant was not put on actual notice of the alleged dangerous condition. Further, given Plaintiff's testimony that he did not observe any leaves prior to his accident, Defendant demonstrated that the condition did not exist for a sufficient period of time for Defendant to discover and remedy it. Defendant's employee Easley stated in an affidavit that "when walking down the stairs, which was at most fifteen (15) minutes prior to Mr. DeLuigi's incident, [he] followed [his] same routine of looking down to see if there were any foreign objects on the stairs. [He] did not see the presence of any foreign substance, let alone leaves on the subject stairs." This establishes prima facie that Defendant lacked constructive notice of the alleged dangerous condition. (*See Kennedy v 30W26 Land, L.P.*, 179 AD3d 556, 557 [1st Dept 2020]; *Hamilton v Natl. Amusements, Inc.*, 177 AD3d 449, 450 [1st Dept 2019]; *Valenta v Spring St. Nat.*, 2017 N.Y. Slip Op. 30589[U], 2, 7 [N.Y. Sup Ct, New York County 2017], *affd*, 2019 N.Y. Slip Op. 04118 [1st Dept 2019] [granting summary judgment in favor of defendant restaurant where "defendants' manager received no complaints concerning the floor and saw nothing on the floor when he inspected in the morning or later, around ten minutes before plaintiff fell"]; (*Gomez v J.C Penny Corp., Inc.*, 113 AD3d 571, 571-72 [1st Dept 2014] [granting summary judgment in favor of defendant department store where supervisor "testified that she conducted an inspection of the entire second floor, including the area where plaintiff fell, within the hour preceding plaintiff's accident, and saw no wet or dangerous condition"].)

Further, Easley added that since he started working at Defendant's premises, he has never seen leaves on the staircase or heard somebody tell someone from the clean team that there was anything on the steps that needed to be picked up. He stated that he has seen people doing calf raises on the bottom floor on the staircase. (Easley EBT at 21:09-22:11.) Easley further stated that the clean team would mop and sweep the staircase throughout the day or the manager who is walking around would notify the clean team to mop the floor. (*Id.* at 16:07-13; 22:12-23; *see also Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 472 [1st Dept 2012] ["A defendant cannot be expected to patrol its staircases 24 hours a day."] [internal citations and quotation marks omitted].) The record contains no evidence that anyone, including Plaintiff, observed the leaves on the stairs prior to the accident. Nor did Plaintiff describe the leaves in any way that would indicate to a factfinder that the leaves had been on the stairs for a long period of time. (*Gordon v Am. Museum of Nat. History*, 67 NY2d at 838.) On the evidence presented, the leaves could have been deposited there only minutes or seconds before the accident and any other conclusion would be mere speculation. (*See McDuffie v Fleet Fin. Group, Inc.*, 269 AD2d 575 [2d Dept 2000] ["[I]n the absence of proof as to how long a puddle of water was on the floor, there is no evidence to permit an inference that the defendant had constructive notice of the condition in question."]. *Compare with Kelsey v Port Auth. of New York and New Jersey*, 52 AD2d 801 [1st

Dept 1976] ["[T]he jury could reasonably infer that the condition present when she first descended the stairway remained unchanged for 15 to 20 minutes and was the proximate cause of the fall."].)

Although Plaintiff testifies that he noticed leaves immediately after his fall, this testimony is insufficient to create an issue of fact as to whether Defendant had notice of the leaves. Here, Easley states that there were no leaves present on the stairs when he inspected them fifteen minutes before the alleged accident. Plaintiff's testimony does not contradict that of Easley's that there were no leaves fifteen minutes before the accident.

Plaintiff argues that months after the date of the accident, he realized that "the leaves became deposited on the last step because members of the gym use the bottom step as 'an exercise point' for leg exercises." (Plaintiff EBT at 79:17-24.) Since the date of the accident, Plaintiff stated that he "has witnessed leaves being deposited on the last step by members doing leg exercises." (*Id.* at 80:14-16.) However, such a general awareness that the last step was being used as an exercise point and that there might be some leaves on the last step from gym-goers' shoes is not legally sufficient to charge Defendant with constructive notice of the leaves that Plaintiff fell on. (*Gordon*, 67 NY2d at 838; *McDuffie*, 269 AD2d at 575.) Although there is no specific testimony as to specific cleaning procedures, Defendant has set forth eyewitness testimony that the subject stairway was inspected fifteen minutes before the alleged accident, which is sufficient to establish its initial burden of demonstrating that it did not have constructive notice of the alleged dangerous condition. (*Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 572 [1st Dept 2014].) Again, Easley stated that he inspected the stairs before the subject alleged accident and there were no foreign objects or leaves on the stairs. As such, in response to Defendant establishing its prima facie entitlement to summary judgment, Plaintiff has failed to raise a triable issue fact.

Accordingly, Defendant's motion for summary judgment is granted, and the instant action is dismissed. The Court has considered the parties' other arguments and finds them to be unavailing.

CONCLUSION

Accordingly, and for the reasons so stated, it is hereby

ORDERED that the motion by Defendant Town Sports International, LLC d/b/a New York Sports Club seeking an order, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the Complaint of Plaintiff Anthony DeLuigi as against it is granted, with costs and disbursements as taxed by the clerk of the court; and it is further,

ORDERED that counsel serve a copy of this order with notice of entry upon all parties within 20 days of the filing of this order; and it is further,

ORDERED that the clerk shall enter judgment accordingly, upon being served with a copy of the decision and order with notice of entry.

The foregoing constitutes the decision and order of the Court.

8/10/2020
DATE

ROBERT DAVID KALISH, 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