

Peterkin-Ford v 272 Gates Ave. Hous. Dev. Fund Corp.

2020 NY Slip Op 32613(U)

August 7, 2020

Supreme Court, Kings County

Docket Number: 512310/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

CAROLYN PETERKIN-FORD,

Plaintiff,

-against-

**272 GATES AVENUE HOUSING DEVELOPMENT
FUND CORPORATION,**

Defendant.

X

DECISION / ORDER

Index No. 512310/2018

Motion Seq. No. 1

Date Submitted: 7/16/20

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>18-28</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34-41</u>
Reply Affirmation.....	<u>42</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is an action for damages following a trip and fall accident that occurred on August 18, 2017. Plaintiff Peterkin-Ford, who had been visiting a friend, was leaving an apartment building located at 272 Gates Avenue, Brooklyn, NY, when she tripped on an allegedly defective marble door saddle in the doorway of the vestibule's inner door. She testified at her EBT [Page 36] that her right foot "went into that crack, and it twisted because - it went into the crack and hit, and I fell down the two steps and landed" [on her knees]. Plaintiff provides photos which indicate there are cracks in the saddle and pieces missing, and that the floor on one side of the saddle appears to be at a different height than the floor on the other side

of it. The plaintiff brought this action against the corporation that owns the building. The plaintiff contends that the door saddle in question constituted a “dangerous, trap-like and hazardous condition,” and that the corporation is liable for her injuries by virtue of its negligent maintenance of the premises, failure to warn pedestrians of this hazard, and its failure to take appropriate steps to remedy the defect. The plaintiff also claims that the building owner has failed to comply with the applicable building and fire codes, statutes, and regulations. She claims this is evidence of the defendant’s breach of the duty owed to persons coming and going from the property at 272 Gates Avenue.

Defendant corporation moves for summary judgment dismissing the complaint. It avers that the plaintiff’s testimony reveals she was not paying attention to where she was walking at the time of the accident and is unable to identify the cause of her accident without “pure speculation.” The defendant claims that the actual cause of the plaintiff’s accident was her inattention to where she was walking. Further, the defendant claims that if there was a dangerous condition, the plaintiff has failed to demonstrate that the defendant had actual or constructive notice of it. The defendant also contends that discovery is not complete, but has not moved to strike the note of issue “prematurely” filed. To be clear, the notice of motion states at the top that it is a motion to strike the note of issue, but there is no mention of this relief in the list of the relief requested, and in any event, a request for this relief was not timely made.

In response, the plaintiff argues that she did in fact identify the cause of her fall as the defective door saddle, and she submits an affidavit from an expert, Harold Krongelb, an engineer, who visited the building less than a year after the accident and found the condition had not changed. He also reviewed the pictures taken closer in time to the accident, and

concluded that there are two distinct defective conditions related to the door saddle which could cause a pedestrian to trip and fall. Mr. Krongelb provides an illustrated affidavit to explain his opinion. The plaintiff further claims that the superintendent of the building established that the defendant had actual notice in his deposition, wherein he stated that the door saddle had not been repaired or replaced in the seventeen years he has lived there, and that he admitted knowing that the door saddle was defective. Specifically, when shown a photo, he testified that “it has a small damage to it” [Page 34 Line 16].

In its reply affirmation, the defendant’s counsel argues that the plaintiff’s expert’s opinion about the door saddle is irrelevant to the question of causation, since two witnesses, the super and plaintiff’s friend¹, have testified that the accident was caused by the plaintiff’s own misstep and inattention. The defendant further contends that the plaintiff did not identify the saddle as the cause of her accident at the time of the incident, and argues that her certainty now relies on speculation.

Conclusions of Law

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988];

¹ The affidavit from plaintiff’s friend [Efile Doc 28] states that she was watching plaintiff leave from her second floor apartment doorway, saw plaintiff say hello to someone and that while watching plaintiff leave the building, plaintiff tripped “because she was not paying attention.”

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[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 demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385

[2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

More specifically, “a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it” (see *Burke v Umbaca*, 163 AD3d 618, 618 [2d Dept 2018]; *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). While it is true that in a trip-and-fall case, a plaintiff’s inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation (see *Phillips v LSS Leasing LLC*, 176 AD3d 750, 751 [2d Dept 2019]), the court does not find that here the plaintiff was unable to identify the cause of her trip and fall. She testified that she had to leave the building right after the

accident, as she was going with a family member for a court-ordered visit with his child at a nearby McDonald's. Thus, she did not call for an ambulance or stay to discuss the matter with the superintendent. However, she testified that her foot was swollen when she was in the car going home to Maryland, and when her son asked her what happened "I said, because I went to walk and then, looking straight, and my foot went into that crack" [Page 57]. Plaintiff's complaint, her bill of particulars, and her EBT testimony all state that the door saddle in the vestibule was defective and that it was the cause of her fall. Thus, defendant's counsel's claim that "while plaintiff has listed a variety alleged defects to the stairway [sic], it is clear she does not know whether any of them caused this accident or in fact her own misstep and inattention was a factor" is unsupported.

If the condition of the door saddle was dangerous and/or defective, defendant has not established that it did not have actual or constructive notice of it. The main entrance to a building is seen by the superintendent and all employees every time they come in or go out. Defendant's superintendent testified that he was aware of the cracks, and that no repairs had been made to the saddle in the seventeen years he had been living there. This was not a transitory condition. The cracked saddle had been there long enough for the property owner to have notice of it and to have fixed it.

Defendant does not provide any evidence or argument that there was no defective condition, or, if there was one, that it was trivial. Defendant does not have an affidavit from an expert. The affidavit from plaintiff's friend, who was watching her leave, would only have seen plaintiff from the back of plaintiff's head, and could not know what plaintiff was looking at as she left. In any event, inattention can be determined by a jury to have contributed to the accident, or can be determined to have been the sole cause of the accident, but this is

not a question for the court.

Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (see *Trincere v County of Suffolk*, 90 NY2d 976, 688 NE2d 489, 665 NYS2d 615 [1997]; *Ayala v Gutin*, 49 AD3d 677, 677 [2d Dept 2008]; *Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533, 818 NYS2d 593 [2d Dept 2006]). Here, the defendant does not argue that the crack in the saddle was trivial, but that the accident was solely the plaintiff's fault. In New York, we apply the law of comparative negligence. Therefore, in order to obtain summary judgment dismissing the complaint, the defendant has to establish that the allegedly defective condition did not contribute even 1 percent toward the happening of the accident. Defendant has not done so here.

Although the building's superintendent testified that he periodically inspected the area and did not believe the defect was a tripping hazard, this testimony is insufficient to establish that the defect is trivial as a matter of law and thus not actionable (*Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 619 [2d Dept 2010]). The defendant has submitted photographs of the alleged defect, but included no measurement details. In *Maldonado v 2121 Shore Condominium*, an analogous trip-and-fall case, the defendant argued that the alleged defect was trivial as a matter of law, citing a photograph of the defect and deposition testimony from both the building's superintendent and the plaintiff as evidence (138 AD3d 789, 790 [2d Dept 2016]). The Appellate Division, Second Department held that this evidence was insufficient to demonstrate the defendant's prima facie entitlement to summary judgment on these grounds (*id.*). In the absence of any specific details regarding the dimensions of the alleged defect, or any expert affidavit providing such information, the defendant has failed to meet its *prima*

facie burden of showing that the defect was trivial as a matter of law and thus nonactionable.

Because the defendant has failed to establish its *prima facie* entitlement to summary judgment, there is no need examine the sufficiency of the opposing party's papers.

However, had defendant made a *prima facie* case for summary judgment, plaintiff's papers, with her testimony and her expert's affidavit, would have been found to overcome the motion and raise an issue of fact.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: August 7, 2020

ENTER:



Hon. Debra Silber, J.S.C.