

Crane v Brookdale Hosp. Med. Ctr.
2020 NY Slip Op 33454(U)
September 30, 2020
Supreme Court, Kings County
Docket Number: 508050/13
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 508050/13
Motion Date: 8-3-20
Mot. Seq. No.: 4

-----X
BONNY B. CRANE,

Plaintiff,

-against-

DECISION/ORDER

THE BROOKDALE HOSPITAL MEDICAL CENTER,

Defendant.
-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a trip/slip and fall accident that occurred on a stairway in defendant’s premises, the defendant moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint. The defendant maintains that the motion should be granted because the plaintiff does not know what caused her to fall, there was no dangerous or defective on the stairs and the defendant lacked actual and/or constructive notice of any dangerous or defective that may have caused the accident.

The plaintiff commenced this action claiming that she suffered personal injuries as a result of a trip/slip and fall accident that occurred on May 13, 2013, at approximately 4:00 p.m., as she was descending a stairway located at defendant’s premises at the 98th Street entrance/exit. At her deposition, the plaintiff testified that before she began her descent down the stairs, she “took a look at the stairs...and...didn't notice anything odd about the stairs.” She testified that

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after going down three steps, she “felt something near my heel of the boot and I pitched forward slightly and I started to fall backwards a little with the back of my foot underneath my thigh still holding onto the rail but I think it is just probably the moment, um I slipped down, slipped forward with my knee pointing forward and I felt a pop in my knee. I didn't know what that was but it hurt but I was still holding onto the railing and I was slipping and my friend's husband came around to my right side to get me but I couldn't get back up because the pain was excruciating.” Plaintiff was asked the following questions and gave the following answers:

Q. Now, you said that when you started to fall - you had felt something at the heel of the boot?

A. Yes.

Q. Were you able to figure out what that was after the fall?

A. No.

Q. Was there any loose debris, napkin, piece of paper, anything like that that you could see on the floor?

A. No. No, there wasn't.

At her deposition, plaintiff was presented with a photograph of the stairs and circled the third step down from the top as the step on which her she lost her balance. She maintained that the stairs shown in the photograph fairly and accurately depicted the stairs as they existed at the time of the accident. The plaintiff submitted a copy of the photograph in opposition to the motion as proof that plaintiff was able to identify the location of the alleged defective stair and as proof that there was a dangerous and defective condition on the step where she lost her balance.

In his affirmation in opposition, plaintiff's counsel stated as follows:

The photograph annexed hereto as Exhibit A clearly shows that the third stair from the top is defective. As can be seen from the photograph and as admitted to by defendant's maintenance supervisor, the third stair from the top, which caused plaintiff to fall, is defectively capped over the step below, it is buckled and it is not flush with the staircase.

The photograph on file with the Court is of poor quality and does not clearly show whether there is an obvious defect on the step. Notwithstanding this, at his deposition, defendant's maintenance supervisor, Richard Cantey, was shown a photograph of the step and testified that the one-piece capping over the step "[l]ooks like a little out." Mr. Cantey also testified that the photograph fairly and accurately depicted the condition of the step at the time of the accident.

In a premises liability case, a defendant establishes its prima facie entitlement to judgment as a matter of law by showing that the plaintiff cannot identify the cause of his or her accident (*see Kerzhner v. New York City Tr. Auth.*, 170 A.D.3d at 983, 96 N.Y.S.3d 298) or by showing that that it did not create the hazardous condition which allegedly caused the accident and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*see Kravets v. New York City Hous. Auth.*, 134 A.D.3d 678, 679, 20 N.Y.S.3d 587, 588; *Mehta v. Stop & Shop Supermarket Co., LLC*, 129 A.D.3d 1037, 1038, 12 N.Y.S.3d 269; *Sperling v. Wyckoff Hgts. Hosp.*, 129 A.D.3d 826, 827, 12 N.Y.S.3d 131; *Kiskiel v. Stone Edge Mgt., Inc.*, 129 A.D.3d 672, 673, 11 N.Y.S.3d 207). To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff slipped and fell (*see Bergin v. Golshani*, 130 A.D.3d 767, 768, 14 N.Y.S.3d 98; *Mehta v. Stop & Shop*

Supermarket Co., LLC, 129 A.D.3d at 1038, 12 N.Y.S.3d 269; *Sperling v. Wyckoff Hgts. Hosp.*, 129 A.D.3d at 827, 12 N.Y.S.3d 131). Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice (see *Mehta v. Stop & Shop Supermarket Co., LLC*, 129 A.D.3d at 1038, 12 N.Y.S.3d 269; *Barris v. One Beard St., LLC*, 126 A.D.3d 831, 832, 6 N.Y.S.3d 262; *Arcabascio v. We're Assoc., Inc.*, 125 A.D.3d 904, 904–905, 4 N.Y.S.3d 125).

A defendant also demonstrates entitlement to summary judgment in a premises liability case by demonstrating that the premises were reasonably safe as a matter of law and were not dangerous or defective. 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 unless the defect is trivial as a matter of law (see *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489; *Fisher v. JRMR Realty Corp.*, 63 A.D.3d 677, 880 N.Y.S.2d 187; *DeLaRosa v. City of New York*, 61 A.D.3d 813, 877 N.Y.S.2d 439). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the “width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury” (*Trincere v. County of Suffolk*, 90 N.Y.2d at 978, 665 N.Y.S.2d 615, 688 N.E.2d 489, quoting *Caldwell v. Village of Is. Park*, 304 N.Y. 268, 274, 107 N.E.2d 441; see *Fontana v. Winery*, 84 A.D.3d 863, 864–865, 923 N.Y.S.2d 594). There is no “minimum dimension test” or “per se rule” that the condition must be of a certain height or depth in order to be actionable (see *Trincere v. County of Suffolk*, 90 N.Y.2d at 977, 665 N.Y.S.2d 615, 688 N.E.2d 489; *Ricker v. Board of Educ. of Town of Hyde Park*, 61 A.D.3d 735, 876 N.Y.S.2d 658).

Here, viewing the evidence in the light most favorable to the plaintiff as the nonmoving party (see *Matadin v. Bank of Am. Corp.*, 163 A.D.3d 799, 800, 80 N.Y.S.3d 439; *Giraldo v. Twins Ambulette Serv., Inc.*, 96 A.D.3d 903, 903, 946 N.Y.S.2d 871), the defendant failed to establish, prima facie, that the plaintiff could not identify what caused her to fall. While the plaintiff did not see the conditions on the step which she claims caused her accident prior to her fall, she clearly identified the step on which she fell. This is not a situation where the plaintiff cannot identify where she fell.

The defendant did not establish as a matter of law that it lacked actual notice of the alleged dangerous and defective condition and that it did not cause or create the condition. With respect to the issue of constructive notice, the defendant did not offer any evidence of when the stairway in question was cleaned or inspected relative to the time of plaintiff's accident. The evidence submitted by the defendant concerning general maintenance procedures was insufficient to demonstrate a lack of constructive notice.

Finally, the defendant did not demonstrate as a matter of law that the stairway was reasonably safe. Defendant's own witness testified that the capping on the step upon which plaintiff claims she lost the balance was "a little bit out." The court cannot determine on the record presented that this was a trivial defect as a matter of law. The affidavit of Mark I. Marpet was insufficient to demonstrate that the stairs were safe on the day of the accident. While he opined that the stairs were safe and in good condition at the time of his inspection, he did not state when he performed his inspection. It would be sheer speculation that the stairs were in the same condition at the time of his inspection as they were at the time of the accident.

Accordingly, for all of the above reasons, it is hereby

ORDRED that defendant's motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: September 30, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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