

McCafferty v New York Sports Club, Inc.

2020 NY Slip Op 35087(U)

May 5, 2020

Supreme Court, Westchester County

Docket Number: Index No. 61673/2018

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MAUREEN MCCAFFERTY,

Plaintiff,

DECISION and ORDER

-against-

Motion Sequence No. 1
Index No. 61673/2018

NEW YORK SPORTS CLUB, INC., TSI WEST 14
LLC, and TSI WEST 14, INC.,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion by defendants for summary judgment dismissing the complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - G and	1
Affirmation in Opposition, Exhibits 1 – 9	2
Reply Affirmation	3

This is an action for personal injuries allegedly sustained by plaintiff in a trip-and-fall accident on February 8, 2018, while at the New York Sports Club (NYSC) located at 34 West 14th Street, New York, New York (the “premises”).¹ At the time of the accident plaintiff was a member of NYSC. On the day of the accident plaintiff entered the premises, and upon entering walked directly to the treadmill area and used the treadmill for ten to fifteen minutes. She then got off the treadmill and walked toward an exercise studio located a few feet from the platform. While walking toward the studio, plaintiff was looking straight ahead at a schedule posted by the

¹ Defendant TSI West 14 LLC is the parent company of New York Sports Club, sued herein as New York Sports Club, Inc. and TSI West 14, Inc. (“TSI”).

studio, and fell off the elevated platform area. She was unaware that the treadmill was located on an elevated area and thought she was walking on the floor because it was the same color as the platform. She testified that she did not recall seeing yellow tape around the edge of the platform. Prior to the date of the accident, the only other time plaintiff had been at the premises was when she went there to enroll as a member in early February 2018, at which time she did not use any of the club facilities, and was not given a tour of the club by an NYSC employee. Plaintiff contends that the elevated platform presented a dangerous condition and that defendants failed to properly mark and illuminate the transition between the elevated platform and floor below. Plaintiff contends this caused “optical confusion” because the elevated platform and the floor below were made of a material that was of the same color and texture. Plaintiff also contends that defendants failed to provide her with notice or warning of the elevated platform.

In moving for summary judgment dismissing the complaint, defendants contend that the elevated platform was an open and obvious condition that would have been apparent to plaintiff if she acted as a reasonable person, and as such, they had no duty to warn her. They submit photographs which were introduced at plaintiff’s deposition of the elevated area which appear to show yellow tape on the edge of the platform where plaintiff fell. Defendants contend that the yellow tape and a silver metal lip on the edge of the platform render the elevated platform distinguishable from the floor below it. Defendants contend that they took all reasonable measures to warn plaintiff and that the condition was open and obvious, and not inherently dangerous. They submit plaintiff’s deposition testimony that she did not look down when walking from the treadmill area to the studio.

In opposition, plaintiff submits the affidavit of Andrew R. Yarmus, a professional engineer and New York State Certified Code Enforcement Official who opined based on his

inspection of the accident location, that there was a drop from the elevated platform to the floor ranging from 9 1/8 inches to 10 1/8 inches and that this variation presents a tripping hazard. He stated that it is customary to provide a uniform riser height. Additionally, he opined by way of analogy to New York City's building code requirements regarding staircase risers that the height of the platform well exceeds the expected height of the step by 2 1/2 inches to 3 inches. He further opined that the lack of an alternate path between the platform and the floor left plaintiff no choice but to step down. He specifically asserts based on a reasonable degree of engineering certainty, that the lack of warning as to the non-uniform height was the proximate or major contributive cause of plaintiff's accident.

Plaintiff also contends that the motion must be denied because it is not supported by an affidavit of a person with personal knowledge of the facts. Plaintiff argues that the deposition testimony of defendants' witness is inadmissible because he lacked first-hand knowledge of the accident and moreover, was unable to confirm that he was present at the premises on the day of the accident. Plaintiff emphasizes that the uniform color of the platform and the floor below created the "optical confusion" which made it difficult to distinguish one from the other. She states that the false impression of a continuous flat surface was further contributed to by the close proximity of the cardio exercise machines to the edge of the platform. Plaintiff further argues that the motion should be denied because whether the platform was "open and obvious" is a question of fact.

In reply, defendants repeat that they were under no duty to warn against an open and obvious condition that was not inherently dangerous. They argue that plaintiff's assertion of "optical confusion" is not supported by her testimony that she was not looking down when she fell but was looking straight ahead. Defendants state that plaintiff's expert has failed to raise an

issue of fact. They argue that the expert failed to provide any information as to where or how the measurements were taken. Additionally, although the expert states that it was the differential in height of the platform that caused plaintiff's fall, defendants contend that this is unsupported by the record. According to the complaint and plaintiff's deposition testimony, defendants argue, it is plaintiff's position that she fell because she was unaware she was on a platform, not because the platform's height lacked uniformity. Defendants argue that the accident was solely attributable to plaintiff's own conduct of not looking where she was walking.

Analysis

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]). Once the movant has presented a prima facie showing of its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Whether a dangerous condition is open and obvious and not inherently dangerous is fact-specific and cannot "be divorced from the surrounding circumstances" (*Shah v Mercy Medical Center*, 71 AD3d 1120, 1120 [2d Dept 2010]). This is a question usually for the jury to determine (*id.*). Moreover, a "condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is

obscured or the plaintiff is distracted (*Pelligrino v Trapasso*, 114 AD3d 917, 918 [2d Dept 2014]). The evidence presented by defendants is insufficient to establish, prima facie, their entitlement of judgment as a matter of law based on their claim that the platform was open and obvious and not inherently dangerous under the circumstances of this case.

All arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, regardless of whether any specific reference is made thereto.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part, in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601 to schedule a trial, on a date to be subsequently announced by the Settlement Conference Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 5, 2020



HON. TERRY JANE RUDERMAN, J.S.C.