Caloia v Target Corp.
2020 NY Slip Op 35102(U)
November 16, 2020
Supreme Court, Westchester County
Docket Number: Index No. 70941/2018
Judge: Linda S. Jamieson
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To commence the statutory time period 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.

Disp _____ Dec __x___ Seq. No.__1____ Type __SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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PATRICIA CALOIA and JOSEPH CALOIA,

Plaintiffs,

-against-

TARGET CORPORATION d/b/a TARGET STORES, GINSBURG DEVELOPMENT COMPANIES, LLC and G&S MOUNT VERNON,

Defendants.

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Index No. 70941/2018

DECISION AND ORDER

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

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Reply Affirmation	3

The remaining defendants, Ginsburg Development Companies, LLC and G&S Mount Vernon, LLC (the "moving defendants"), bring this motion for summary judgment dismissing this trip-and-fall action. The moving defendants are the owners and managers of the Target Shopping Center in Mount Vernon, New York. There is no dispute that the accident occurred when Patricia Caloia and her husband were going to shop at the Target store, after parking on the third level of the shopping center and then taking the elevator down to the ground level. They had exited the

elevators, located in the center of the parking lot on a raised cement pad, and turned to the left towards the store. Directly to the left of the elevator bank is a parking space, which was empty on this occasion. Mrs. Caloia testified at her deposition that she intended to walk through the empty parking spot to the store entrance, the shortest distance.

As she turned to the left and proceeded towards the empty parking spot, Mrs. Caloia stepped off the end of the raised cement pad and tripped, falling and injuring herself seriously. There is no dispute that there is a slope from the elevator doors to the edge of the elevated cement pad. There is also no dispute that in the area where Mrs. Caloia fell, the slope ends[1] and there is a curb of about two and a half inches to the ground level parking spot. Mrs. Caloia testifed at her deposition that the lighting in that area was "very poor." She also testified that "the Target fellow" who came out to help her also commented that it was very dark in the area. There is very little natural light there because of the other parking levels above. (The moving defendants' expert states in his report that he measured the light levels, which ranged from one to six footcandles. But

[1]Thus, the moving defendants' statement in reply that "even plaintiff concedes that she knew she was on an elevated ramp from the elevator pad down to the surface of the parking deck" is not entirely accurate. While it is true that from the front of the elevator doors facing forwards, the ramp sloped down to the ground level, it is also true that it did **not** slope down to the ground level on the left side, which is where the accident occurred.

he fails to explain to the Court what a footcandle is, and what a well-lit room measures.)

The moving defendants contend that they are not liable for the accident because they did not create any dangerous condition, nor have any actual or constructive knowledge of a dangerous condition. Indeed, they argue that there was no dangerous condition, and that "the curb of the ramp involved in the subject accident is clearly an open and obvious condition that is not an inherently dangerous condition." This suffices to establish the moving defendants' prima facie case. *See Mauro v. Rosedale Enterprises*, 60 A.D.3d 401, 873 N.Y.S.2d 627, 628 (2d Dept. 2009) ("Defendants established prima facie entitlement to summary relief by demonstrating that the condition of the curb and of the adjacent grassy area was readily observable by the reasonable use of one's senses.").

In opposition to this showing, however, plaintiffs contend that the defendants fail to address the real issue in this action: that from Mrs. Caloia's vantage point, as she exited the elevator and turned left towards the store, the ramp did not slope down to the ground level. Instead, she contends that the shadows cast by the edge of the concrete pad on to the surface of the parking spot below made it impossible for her to discern that there was a step – even a small one – between the pad and the parking spot. Mr. Caloia testified at his deposition that there

was no way to discern that there was a height differential, as there was no yellow paint on the curb, or a handrail. (The existence of the ramp and the slope of the ramp, which the moving defendants' expert focuses on are irrelevant, as this is not where Mrs. Caloia fell.) This is enough to warrant a trial on the issue of whether or not there was a dangerous condition, or whether it was open and obvious. *Morreale v. 105 Page Homeowners Ass'n Inc.*, 78 A.D.3d 1026, 1027, 913 N.Y.S.2d 236, 237 (2d Dept. 2010) ("In opposition, the plaintiff raised a triable issue of fact as to whether the defendants either created or had notice of the" alleged dangerous condition).

As for the moving defendants' assertion that "allegedly insufficient lighting or shadows being cast on the subject ramp should be disregarded by this Honorable Court, as the plaintiff did not plead insufficient lighting in her Complaint nor her Bill of Particulars," the Court finds that these are **not** new issues. In their deposition testimony, plaintiffs made it clear that this was their theory of the case, even if they did not state it as plainly. *See Warden v. Orlandi*, 4 A.D.3d 239, 241, 772 N.Y.S.2d 299, 302 (1st Dept. 2004) ("raising a new assertion in opposition to summary judgment is permissible when it raises no new theory of law or new factual assertion and does not prejudice the moving party."). The moving defendants were well aware that plaintiffs had testified that the lighting was very poor, that there was no

yellow stripe on the edge of the concrete pad, and that they did not see the step down prior to the accident.

The Court thus denies the moving defendants' motion for summary judgment in its entirety. The parties are directed to appear for a Settlement Conference in the Settlement Conference Part at a date to be selected.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
November 16, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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