

Cuevas v Post Ave., LLC
2021 NY Slip Op 30555(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 511917/2017
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of February 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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ALBERTO CUEVAS,

Index No.: 511917/2017

Plaintiff,

DECISION & ORDER

-against-

POST AVENUE, LLC, POST AVENUE ASSOCIATES and MOSHE PILLER, as managing agent,

Defendants.

-----X

Plaintiff commenced the instant action for personal injuries allegedly sustained on February 11, 2017, when he slipped and fell on the stairs inside the premises located at 107 Post Avenue, New York, NY. Defendants move for summary judgment, sequence number five, alleging that (1) plaintiff is unable to identify the specific defective condition which caused his fall; (2) there was no defective condition on the stairs; (3) defendants had no notice of any defective condition; (4) the alleged defective condition was trivial, as a matter of law; and (5) at the time of the incident, there was a storm in progress, so defendants “were under no obligation to clear any snow, ice or water from the subject stairwell” (NYSCEF Doc. # 77 at 7 of 28). Plaintiff opposes this application.

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As an initial matter, defendants established good cause for late filing of the instant motion (*see Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 [2004]). Here, defendants failed to meet their burden and establish entitlement to summary judgment as a matter of law.

Snow/Water

Defendants contend that plaintiff could not identify what caused him to fall. “A plaintiff’s inability to identify the cause of his or her 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” (*Razza v. LP Petroleum Corp.*, 153 A.D.3d 740, 60 N.Y.S.3d 325 [2 Dept., 2017]). “Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation” (*Mallen v. Dekalb Corp.*, 181 A.D.3d 669, 121 N.Y.S.3d 331 [2 Dept., 2020]). Here, plaintiff clearly testified and that he slipped on water, snow and salt on the stairway and that it snowed that day or the day prior to the accident (see NYSCEF Doc. # 85 at 83, 150-151).¹ He further testified that he slipped on “the very first step down from the floor where Mr. Camilo’s mother’s apartment is” (*id.* at 146-147).

Defendants further failed to establish that they had no constructive notice of the defective condition. “While a defendant [is] not required to cover all of its floors with

¹ Although plaintiff also testified that the stairs themselves were worn, counsel for plaintiff clarified, at oral argument, that the theory of plaintiff’s case is based on tracked in water/snow/salt and the slippery nature of the stair when wet, not the general condition of the buildings stairs.

mats, nor to continuously mop up all moisture resulting from tracked-in rain, a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action [internal citations and quotation marks omitted] (*Murray v. Banco Popular*, 132 A.D.3d 743, 18 N.Y.S.3d 92 [2 Dept., 2015]). “A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it” (*Zimmer v. Cty. of Suffolk*, -- A.D.3d --, 2021 N.Y. Slip Op. 00331 [2 Dept., 2021]).

Here, defendants established lack of actual notice of the defective condition, as Carlos Acevedo, the buildings superintendent, testified that he had never received complaints that there was a water condition on the first floor of the premises during a snow or rainstorm (*see* NYSCEF Doc. # 87 at 74-75). However, “the defendants did not submit any evidence regarding specific cleaning or inspection of the area in question, or any other affirmative proof to demonstrate how long the condition had existed. Rather, they merely provided evidence regarding the general cleaning practices and inspection procedures employed by the building superintendent, which is insufficient to establish a lack of constructive notice” (*Lebron v. 142 S 9, LLC*, 151 A.D.3d 835, 54 N.Y.S.3d 679 [2 Dept., 2017]). Acevedo testified to the cleaning schedule prior to the date of the accident; the porter swept and mopped the building daily from 9:00 a.m. to 11:00 a.m. (*see id.* at 36-38). The porter did not keep a cleaning log (*see id.*). Acevedo did not

testify as to whether and when the stairs were cleaned on the date of the accident.

Therefore, this court is unable to determine whether defendants had time to take remedial action.

Additionally, even assuming defendants' contention that that the storm in progress rule relieves them of the obligation to clean water/snow from the interior staircase of the building, is correct, defendants failed to establish that there was a storm in progress. Further, plaintiff, in opposition, provided the Local Climatological Data Chart from February 2017, which shows that it did not snow at all on February 11, 2017 (see NYSCEF Doc. # 101).

Accordingly, defendant's motion for summary judgment is denied. Anything not addressed herein is denied.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

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