Brown v Consolidated Bus. Serv. LLC
2021 NY Slip Op 32993(U)
October 22, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 619755/16
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

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THOMAS BROWN,

Plaintiff,

-against-

CONSOLIDATED BUSINESS SERVICE LLC and 328 MAIN, LLC,

Defendants.

-- x

Index No. 619755/16

Motion Seq: 002 MD
Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause............	29-40; 64-65
Answering Papers..	44-52; 66
Reply..	54-59

The defendants move this Court for an Order granting summary judgment dismissal of the complaint that alleges the defendants' negligence was the cause of his trip and fall that resulted in various physical injuries. Specifically, plaintiff alleges that on May 21, 2014, while he was inside the premises known as Consolidated Business Service, conducting a customer service call to check up on a recent wi-fi installation, he tripped and fell on a small step located inside those premises. Plaintiff opposes dismissal of his complaint.

Defendants assert that the plaintiff does not know what caused him to fall, and that the step was open and obvious, and did not constitute a dangerous condition.

Timeliness of the Instant Motion

CPLR § 3212 (a) provides in pertinent part that a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

A movant is required to make "a showing of good cause for the delay in making the motion" by proffering "a satisfactory explanation for the untimeliness" (***Brill v City of New York***, 2 NY3d 648, 652 [2004]). Moreover, "[i]n the absence of a showing of good cause for the

delay in filing a motion for summary judgment, 'the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment'" (***Bargil Associates, LLC v. Crites***, 173 AD3d 958 [2d Dept 2019]; ***Greenpoint Props., Inc. v Carter***, 82 AD3d 1157, 1158 [2d Dept 2011]; *quoting* ***John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold***, 54 AD3d 899, 901 [2d Dept 2008]; ***Brill v City of New York***, 2 NY3d 648, 652 [2004]; ***Planas v. New York City Housing Authority***, 118 AD3d 687 [2d Dept 2014]; ***Bivona v Bob's Discount Furniture of NY, LLC***, 90 AD3d 796 [2d Dept 2011]).

In this case, the plaintiff filed his note of issue on November 18, 2019. The instant summary judgment motion was made on March 18, 2020, one day after the 120-day statutory time limit. Defendants offer the explanation that the one-day delay was occasioned by a "COVID-related staffing shortage." Counsel further explains that "New York On Pause" began on March 15, 2020, and that his office staff was thereby reduced. Although the case is e-filed, counsel avers that some of his file is in "hard-copy," and had to be scanned before being uploaded. Due to the required reduction in office staffing, defense counsel was unable to file the instant motion until March 18, 2020.

The Court notes that on March 7, 2020, New York's Governor declared a state of emergency due to the COVID-19 pandemic, that New York's courthouses were closed to the public at the end of the business day on March 16, 2020, and per Executive Order, State governmental employees were permitted to work from home commencing on March 17, 2020. This Court finds that counsel's explanation and the emergency circumstances then existing in March 2020 constitute good cause for the one-day delay that was not objected to by plaintiff's counsel. As such, the Court will consider the motion on its merits (*see* ***Derby v. Bitan***, 38 Misc3d 516 [Sup Ct Dutchess County 2012]).

Summary Judgment Standard

Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

Premises Liability

A property owner is charged with the duty to maintain the premises in a reasonably safe condition (***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 713 [2d Dept 2011]). A

property owner has no duty, however, to protect or warn against an open and obvious condition that is not inherently dangerous as a matter of law (***Neiderbach v 7-Eleven, Inc.***, 56 AD3d 632, 633 [2d Dept 2008]; (***Gagliardi v. Walmart Stores, Inc***., 52 AD3d 777 (2d Dept 2008); ***Sclafani v. Washington Mutual***, 36 AD3d 682 [2d Dept 2007]). Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition but does not necessarily preclude a finding of liability against a landowner for failure to maintain the property in a safe condition. (***Cupo v Karfunkel***, 1 AD3d 48, 52 [2d Dept 2003]). The fact that a condition may have been open and obvious is relevant only to the issue of the plaintiff's comparative negligence (***Clark v. AMF Bowling Centers, Inc***., 83 AD3d 761 (2d Dept 2011); ***Gradwohl v. Stop & Shop Supermarket Company, LLC***, 70 AD3d 634 [2d Dept 2010]; ***Mazzarelli v. 54 Plus Realty Corp.***, 54 AD3d 1008 [2d Dept 2008]; ***Westbrook v. WR Activities-Cabrera Markets***, 5 AD3d 69 [1st Dept 2004); ***Cupo***, ***supra***). Moreover, whether a condition is open and obvious cannot be divorced from the surrounding circumstances (***Clark***, ***supra*** at 761). A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (***Stoppeli v Yacenda***, 78 AD3d 815, 816 [2d Dept 2010]).

Furthermore, "whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" (***Holmes v. Macy's Retail Holdings, Inc.***, 184 AD3d 811, 811 [2d Dept 2020]); therefore, it is generally the case that "[t]he issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury" (***Gordon v. Pitney Bowes Management Services, Inc.***, 94 AD3d 813, 814 [2d Dept 2012]).

In support of the instant motion on the issue of the condition of the subject premises, the defendants submit, *inter alia*, the pleadings, the deposition transcripts of the parties and the non-party witness (Thomas Doyle, plaintiff's supervisor), and some photographs. Defendants maintain that, "the parties' deposition testimony, photographs of the step and the "Watch Your Step" sign in the premises, and the Affidavit of Timothy Joganich conclusively establish that the (1) step did not constitute a dangerous condition; and (2) the step was an open and obvious condition." There is no affidavit of an individual named "Timothy Joganich" included with defendants' moving papers, although defense counsel states that this individual is a "Certified Human Factors Professional," who inspected the premises and "confirmed that the single step complied with applicable standards for walkway safety" (Affirmation in Support, ¶ 25). Counsel's affirmation is not evidence; there is no affidavit; therefore, there is no proof in this regard.

As noted, whether a condition is dangerous, and open and obvious, is fact-specific and cannot be divorced from the totality of the surrounding circumstances. The plaintiff testified that he was walking alongside the counter before he tripped, and that he never saw the "Watch Your Step" sign. Indeed, the photographs submitted by the defendants of their counter demonstrate that the sign is flush with the counter, affixed to the lower portion of the counter, below eye level, and is located on that portion of the counter that curves; therefore, if an individual approached the step from the side along the counter rather than approaching the step from

straight ahead, it is possible that the trier of fact might find that the individual did not see the sign.

Additionally, plaintiff's supervisor testified that the two-and-one-half-inch to three-inch (2 ½-3) step was carpeted in the same color as the flooring leading up to the step. In contrast, defendants' witness authenticated the submitted photographs as depicting how the step and flooring in front of it looked on the date of the accident, which show a multi-colored/contrasting rug on the floor directly adjacent to the step that also had a metal bullnose on its edge. Thus, there exists a material question of fact as to the condition of the floor and step that can only be determined by the trier of fact who will have the opportunity to see and hear the witnesses and weigh their respective testimony.

While a court may determine that a risk was open and obvious as a matter of law where the established facts compel that conclusion on the basis of clear and undisputed evidence (***Tagle v. Jakob***, 97 NY2d 165, 169 [2001]), the submitted evidence upon the instant motion does not afford this Court the appropriate basis upon which to make such a determination as a matter of law. Also, defendants' belated submission of Timothy Joganich's affidavit in reply will not be considered by the Court since defendants' *prima facie* burden cannot be met by evidence submitted for the first time in its reply papers (*see* ***Tingling v. CINHR, Inc.***, 74 Ad3d 954 [2d Dept 2010]; ***Osborne v. Zornberg***, 16 AD3d 643 [2d Dept 2005]; ***Rengifo v. City of New York***, 7 AD3d 773 [2d Dept 2004]). Accordingly, the defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law as to their claims that the step was open and obvious and did not constitute a dangerous condition.

Plaintiff's Alleged Failure to Identify Cause of His Fall

The Court recognizes that when a defendant demonstrates that a plaintiff does not know what caused her to fall, the defendant has established entitlement to summary judgment as a matter of law. Proximate cause cannot be based upon speculation (***Singh v. City of New York,*** 136 AD3d 641 [2d Dept 2016]; ***Rivera v. J. Nazzaro Partnership, L.P.,*** 122 AD3d 826 [2d Dept 2014]; ***Califano v. Maple Lanes***, 91 AD3d 896 [2d Dept 2012]; ***Miles v. County of Dutchess***, 85 AD3d 878 [2d Dept 2011]; ***Aguilar v. Anthony***, 80 AD3d 544 [2d Dept 2011]; ***Patrick v. Costco Wholesale Corporation***, 77 AD3d 810 [2d Dept 2010]; ***Martone v. Shields***, 71 AD3d 840 [2d Dept 2010]; ***Scott v. Rochdale Village, Inc***., 65 AD3d 621 [2d Dept 2009]; ***Skay v. Public Library of Rockville Centre***, 238 AD2d 397 [2d Dept 1997]; ***Leary v. North Shore University Hospital***, 218 AD2d 686 [2d Dept 1995]; ***Vincio v. Marriott Corporation***, 217 AD2d 656 [2d Dept 1995]).

In this case, however, the plaintiff and his supervisor have each identified the cause of plaintiff's fall as being the subject step. When the plaintiff was asked at deposition, "Do you know, can you say you tripped on something specific?" the plaintiff responded, "A step. There was something there that caused me to trip;" ". . . I don't know how it was built or whatever. When I turned my feet, it caught on it. . ." Plaintiff's supervisor, who was walking behind the plaintiff and who witnessed the accident, was asked if he saw what caused plaintiff's accident, to which Mr. Doyle replied, ". . .a two and a half to three inch step above the normal floor;" "[h]e

tripped over it because he didn't see it."[1] Even if plaintiff had not testified as he did, Mr. Doyle's testimony would, standing alone, have been sufficient to identify the cause of plaintiff's fall (***Moiseyeva v. New York City Housing Authority***, 175 AD3d 1527 [2d Dept 2019]). Based on the foregoing, the defendants have failed to establish, *prima face*, that the plaintiff did not know what caused him to fall.

In view of the foregoing determinations, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

The defendants' summary judgment motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 22, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]

[1] The defendants' witness testified that she did not witness plaintiff's accident; therefore, she does not provide any evidence controverting that it was the step that caused the accident.