

Halampalakis v X, LLC
2021 NY Slip Op 33461(U)
July 19, 2021
Supreme Court, Orange County
Docket Number: Index No. EF002898-2019
Judge: Catherine M. Bartlett
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

HELEN HALAMPALAKIS,

Plaintiff,

-against-

X, LLC and LEENTJES AMUSEMENTS CORP.
d/b/a THE CASTLE FUN CENTER,

Defendants.

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.

Index No. EF002898-2019
Motion Date: June 16, 2021

The following papers numbered 1 to 7 were read on Defendants' motion for summary
judgment dismissing Plaintiff's complaint:

- Notice of Motion - Statement of Material Facts - Affirmation / Exhibits - Expert Affidavit . . 1-4
Response to Statement of Material Facts - Affirmation in Opposition 5-6
Reply Affirmation 7

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

I. PERTINENT FACTS

On Sunday, January 15, 2017, plaintiff Helen Halampalakis went with family and friends
to the Castle Fun Center ("CFC") in Chester, New York. Among other facilities CFC has a roller
skating rink where, on Sundays, rolling skating occurs from 1:00 p.m. to 5:00 p.m. About one-
half hour after her arrival, and after five minutes on skates, Plaintiff exited from the rink onto a
carpeted area whereupon she fell and fractured her right wrist. The accident was not reported.

She commenced this action to recover for her injuries, and asserts a cause of action for common law negligence against defendants X, LLC and Leentjes Amusements Corp., CFC's owner and operator. Defendants move for summary judgment on the grounds *inter alia* that they lacked notice of an alleged defective condition of the carpeting, and that Plaintiff cannot without speculation prove that the alleged defect proximately caused her fall and injury.

A. Plaintiff Helen Halampalakis' Testimony

Plaintiff, an occasional roller skater, entered the rink on the right side, skated around several times and then exited from the left side onto the carpeted area, whereupon she slipped and fell backwards, her buttocks and right hand impacting the carpet. Plaintiff did not know what caused her to fall. After the accident, she looked and saw the carpeting "bunched up." She described the condition variously as "overflowed", "layered" and "not flattened out." However, she did not feel her skate strike anything or feel the carpeting bunched up when she fell. Prior to her accident, she was not aware of any problems or complaints regarding the carpet.

B. Joanna Halampalakis' Testimony

Plaintiff's daughter Joanna was skating and left the rink just ahead of her mother. At the time, she did not see any "bunched up" condition of the carpeting. She turned around and saw her mother fall. After the accident, but not before, she saw the carpeting in a condition she described as "crumbled", "smooshed together" and "bunched up."

C. Nikolaos Halampalakis' Testimony

Plaintiff's husband Nikolaos did not witness the accident. Plaintiff afterwards told him that she had "slipped", and he then saw the carpet "crumbled up." However, he had never seen that condition before, he did not know what caused it or how long it had been that way. He was not aware of any complaints about the carpeting.

D. Trevor DiStefano's Testimony

Trevor DiStefano, a friend of the Halampalakis family, was skating for 15 to 30 minutes before the accident occurred. He had entered and exited the rink several times (for breaks) using the exit where Plaintiff's accident subsequently occurred, and had no problem with the carpeting. Skating behind Plaintiff as she exited the rink, Mr. DiStefano saw her fall forward and put her hands out to break her fall. He was right behind her and helped her up "under her arms." After the accident, he saw that the carpet was "stretched" and had a "little bump" about one inch high and a couple feet long. He only saw that condition after Plaintiff's accident, did not know if it was present before the accident, and did not know what caused it. However, claiming prior experience installing residential carpeting in homes he had rehabbed and flipped, Mr. DiStefano testified that it looked to him as if the condition of the carpeting where Plaintiff fell had been there for years.

E. Brian Leentjes' Affidavit

Brian Leentjes, Defendants' principal, averred as follows:

2. The skate guards complete a morning and evening checklist daily to inspect the entire skating rink area, which includes not only the rink, but the entire surrounding area. The checklist includes vacuuming the carpet around the rink.
3. While vacuuming the carpet, the skating rink guards were tasked with checking for any defects or conditions with regard to the carpet surrounding the rink. Annexed hereto is a true and accurate copy of the checklist completed for the days prior to and including the date of the alleged subject accident.
4. In addition to the morning and evening checklist, the skate guards continuously monitor and inspect the roller skating rink and surrounding carpet throughout their entire shifts.

5. In the event a condition is observed, the condition would be fixed immediately, or a warning sign would be placed and the area blocked off until the maintenance crew could fix the condition.
6. On January 15, 2017, there were two (2) to three (3) skate guards assigned to the skating rink area.
7. The skate guards completed the morning checklist prior to the alleged subject accident on January 15, 2017, which included inspecting the carpet surrounding the skating rink.
- 7 bis During the skate guards' shift on January 15, 2017, they continuously monitored the rink and surrounding area, including but not limited to looking for any defects or conditions with regard to the carpet surrounding the skating rink.
8. The carpet surrounding the skating rink is a commercial thin carpet that is glued down. Since the installation of the carpet up until the time of the alleged subject accident, the carpet had not been replaced or altered.
9. Since the installation of the carpet up until the time of the inspection performed by Mark I. Marpet, Ph.D., PE, the carpet had not been replaced or altered.
10. From the date of installation of the carpet up until the time of the alleged subject accident, no portion of the carpet, including at the entrances to the rink, had become bunched up, curled, waved, and/or raised.
11. From the date of installation of the carpet up until the time of the alleged subject accident, no complaints had been made to [Defendants] that any portion of the carpet surrounding the rink, including at the entrances to the rink, had become bunched up, curled, waved, or raised.
12. No one reported Plaintiff's alleged accident to any owner and/or employee of [Defendants].
13. On January 15, 2017, there were no complaints or reports made to [Defendants] that the carpet at any of the entrances to the skating rink had been bunched up, curled, waved, and/or raised.

The closing checklist for the evening of January 14, 2017, the last day prior to Plaintiff's accident, reflects the completion of all tasks including "sweep and vacuum areas around the rink." It is initialed by the employee completing these tasks and the manager.

F. Defendants' Expert

Defendants proffered the affidavit of licensed professional engineer Mark I. Marpet, Ph.D., P.E., whose curriculum vitae reflection numerous publications in the area of ambulation safety. After reciting the pertinent facts, Dr. Marpet opined as follows:

16. On January 12th, 2019, I inspected the roller-skating rink at The Castle Fun Center, located in Chester, New York. My inspection focused upon the carpeted areas adjacent to the four rink entrances.
17. Entrance 1 (nearest to the windows) was 46 inches wide. 24 inches from the entrance was a non-displaced seam. 60 inches from the entrance was a 32-inch long irregularity in the carpet. That irregularity was a maximum of ½ inch high, and completely flattened under light hand pressure.
-
21. *There was nothing at any of the rink entrances that could cause skaters to lose their balance.* The carpet could cause hazard to a skater if something in the carpet slowed a skate (or the skates) to the point where the skater's center of mass moved ahead of the skater's base (defined by the convex outline of the skates' wheels (or skate's wheels, if only one foot is on the ground)). There was nothing at any of the entrances that could slow a skate (or the skates) down. The only anomaly in the carpet in the carpet that projected above the surface at all easily flattened under light hand pressure, and would flatten out under a skate's wheels without slowing those wheels at all. It's worth noting that carpet cannot heal itself; it will only get worse over time. Thus, the condition of the carpet at the time of my inspection might have been worse than at the time of the accident, but it could not have been better.
22. *Plaintiff's description of her fall is inconsistent with a fall precipitated by a defect in the carpet.* A problem in the carpet will cause a forward fall, as a skate (or the skates) is (are) slowed with respect to the rest of the skater. Plaintiff fell backwards, the opposite of a fall precipitated by a floor defect. That kind of fall is caused by a skater not maintaining their center over the skates.
23. *Skating has an inherent risk of a fall far higher than normal ambulation.* This is an obvious point. For the kinesthetic, athletic, and fun benefits of strapping low-friction wheels to one's feet, and roller skating has all of these benefits, one assumes a far higher risk of losing one's balance. Many sports embody similar benefit-risk trade-offs (skiing comes to mind). Skaters assume that risk for the benefits that the sport embodies. In short, falling is an inherent part of skating.

It's not surprising that Plaintiff, who only occasionally skated, and hadn't skated in over five years, fell. Many, if not most falls, result in little besides a bruised ego. Unfortunately, that isn't the case here.

24. *Witness's experience in laying carpet adds nothing to this matter.* DiStefano's laying residential carpet, which comes in wide rolls and is either tacked down or stretched over tackless strips, has nothing in common with the low-pile commercial carpet used in the matter under study, which was supplied in a narrow width and glued down. Because it is glued down, unlike residential wall-to-wall carpeting, it cannot shift. Ultimately the seams of the carpet become visible and the carpet becomes worn-looking. At that point, it is usually replaced. In any case, the witness cannot contribute anything of value to this analysis.

II. LEGAL ANALYSIS

A. General Principles Governing Summary Judgment

A defendant moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). If the defendant establishes *prima facie* entitlement to summary judgment, the plaintiff, to defeat the motion, "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). *See also, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-68 (1979).

B. The Defendant's Burden In A Premises Liability Case

The liability of a property owner is measured by "the single standard of reasonable care under the circumstances." *Basso v. Miller*, 40 NY2d 233 (1976). The defendant must act as a

reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *See, Peralta v. Henriquez*, 100 NY2d 139, 144 (2003). In a common law negligence action based on an unsafe condition of the premises, liability may be predicated on the defendant's having created the hazardous condition, in which case proof of notice is not required. *See, e.g., Johnson v. City of New York*, 102 AD3d 746, 748 (2d Dept. 2013); *Sermos v. Gruppuso*, 95 AD3d 985, 986 (2d Dept. 2012). Liability may also be predicated on notice, actual or constructive, of the hazardous condition. The defendant may be found to have had constructive notice of a hazardous condition if it was visible and apparent and existed for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *See, Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 (1986).

Accordingly, “[a] defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it [cit.om].” *Ash v. City of New York*, 109 AD3d 854, 855 (2d Dept. 2013). *See, Colini v. Stino, Inc.*, 186 AD3d 1610, 1611 (2d Dept. 2020); *Levine v. G.F. Holding, Inc.*, 139 AD3d 910, 912 (2d Dept. 2016); *Hall v. Staples Office Superstore East, Inc.*, 135 AD3d 706 (2d Dept. 2016); *Goldberg v. Village of Mount Kisco*, 125 AD3d 929 (2d Dept. 2015).

“However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of her fall without engaging in speculation [cit.om.]. ‘A plaintiff’s inability to identify the cause of the 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' [cit.om.]." *Ash v. City of New York*, supra, 109 AD3d at 855 (2d Dept. 2013). See, *Theard v. G. Fazio Construction Co., Inc.*, 192 AD3d 942 (2d Dept. 2021); *Theissen v. 7-Eleven, Inc.*, 189 AD3d 1502, 1503-04 (2d Dept. 2020); *Colini v. Stino, Inc.*, supra; *Mitgang v. PJ Venture HG, LLC*, 126 AD3d 863, 864 (2d Dept. 2015); *Goldberg v. Village of Mount Kisco*, supra.

C. Condition Created / Notice

Defendants' principal, Brian Leentjes, avers that from the date of installation up until the time of Plaintiff's accident, the commercial thin carpet that was glued to the floor in the area around the rink had not become bunched up, curled, waved or raised, and Defendants had never received any complaint or report to the contrary. Defendants thereby established *prima facie* that they did not create the alleged hazardous condition of the carpeting. Plaintiff, in opposition, does not contend that Defendants created the condition at issue here.

Defendants also established *prima facie* that they had no notice of the alleged defective condition.

First, Mr. Leentjes explicitly averred that "[f]rom the date of installation of the carpet up until the time of the alleged subject accident, no complaints had been made to [Defendants] that any portion of the carpet surrounding the rink, including at the entrances to the rink, had become bunched up, curled, waved, or raised." See, *Narvaez v. NYCHA*, 62 AD3d 419 (1st Dept. 2009) (defendant demonstrated *prima facie* entitlement to summary judgment by showing there had been no prior complaints about condition prior to accident). Plaintiff and her family and friends confirmed that they made no such complaints and were aware of no such complaints.

Second, and contrary to Plaintiff's assertion, Defendants did not rely solely on "general inspection practices", but proffered "specific evidence as to when the area in question was last cleaned or inspected relative to the time when Plaintiff fell." *Cf., Saporito-Elliot v. United Skates of America, Inc.*, 180 AD3d 830, 832 (2d Dept. 2020); *Herman v. Lifplex, LLC*, 106 AD3d 1050, 1051 (2d Dept. 2013). Defendants' closing checklist for January 14, 2017, the evening before Plaintiff's accident, establishes that the carpeting was then swept and vacuumed. The Saturday evening inspection was reasonably proximate to the time of Plaintiff's fall, since the roller rink was not thereafter open until 1:00 P.M. on Sunday, January 15th, and Plaintiff's accident occurred within one-half hour of her arrival at the rink. *See, Insook Lee v. Port Chester Costco Wholesale*, 82 AD3d 842 (2d Dept. 2011) (record of inspections proffered without objection to admissibility established prima facie absence of notice). *Cf., Perez v. Wendell Terrace Owners Corp.*, 150 AD3d 1162, 1163 (2d Dept. 2017) (defendant failed to establish absence of notice where there was no specific schedule for inspections and no records of inspections).

Third, there is no competent evidence that the alleged defect pre-existed Plaintiff's accident, but assuming *arguendo* it did, the testimony of Plaintiff herself and that of her family and friends demonstrates that it was not visible and apparent. (1) Daughter Joanna, who immediately preceded her mother through the area in question, never saw the "bunching up" of carpeting until after the accident. (2) Plaintiff herself never saw the "bunching up" until after her accident. (3) Friend Trevor DiStefano traversed the area in question several times as he entered and exited the rink and never saw the "bunching up" until after Plaintiff's accident.

The foregoing evidence established *prima facie* that the alleged “bunching up” was not visible and apparent and/or did not exist for a sufficient length of time prior to the accident to permit the Defendants to discover and remedy it. *See, Gordon v. American Museum of Natural History, supra.*

In opposition, Plaintiff contends that “the defect which injured the Plaintiff was a non-transient failure of the rug which DiStefano explained was caused over a period of years due to the repeated use of the rug to stop roller skates.” Mr. DiStefano’s testimony in this regard is *wholly incompetent* because (1) the matter is plainly not within the scope of knowledge of an ordinary lay witness, and (2) Mr. DiStefano’s claimed experience rehabbing houses is insufficient to constitute him an expert in this regard. Contrary to Plaintiff’s assertion, the true expert in this area – licensed professional engineer Mark I. Marpet, Ph.D., P.E. – not only contested the relevance of DiStefano’s supposed expertise, but demonstrated *with no rejoinder from DiStefano* why his opinion is of no probative value in the circumstances present here:

Witness’s experience in laying carpet adds nothing to this matter. DiStefano’s laying residential carpet, which comes in wide rolls and is either tacked down or stretched over tackless strips, has nothing in common with the low-pile commercial carpet used in the matter under study, which was supplied in a narrow width and glued down. Because it is glued down, unlike residential wall-to-wall carpeting, it cannot shift. Ultimately the seams of the carpet become visible and the carpet becomes worn-looking. At that point, it is usually replaced. In any case, the witness cannot contribute anything of value to this analysis.

(Marpet Aff. ¶24) Dr. Marpet’s affidavit stands un rebutted.

Therefore, Mr. DiStefano’s testimony in this regard – the lynch pin of Plaintiff’s case on the issue of notice – must be rejected as incompetent. Plaintiff’s evidence is therefore insufficient as a matter of law to demonstrate the existence of any triable issue of fact on an

essential element of her claim, to wit, Defendants' notice of the alleged hazard. Consequently, Plaintiff's complaint must be dismissed.

D. Causation

A defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of her fall without engaging in speculation. (*See*, Point II[B], above) Here, Plaintiff does not know what caused her to fall. After the accident, she looked and saw the carpeting "bunched up", but did not feel the carpeting bunched up when she fell and never felt her skate strike anything.

Plaintiff's counsel's assertions that Mr. DiStefano "observed the Plaintiff fall forward *when the Plaintiff contacted the defect*" and that "he watched the Plaintiff fall *upon contact with the defect*" constitute grievous misrepresentations of the record. Mr. DiStefano testified that he only saw the "bunched up" condition of the carpeting after Plaintiff's accident, did not know if it was present before the accident, and did not know what caused it. Never, in words or substance, did he claim that he saw Plaintiff make contact with the alleged defect. There is in fact no direct evidence of the cause of Plaintiff's fall. Indeed, as noted above, there is no competent evidence that the alleged defect pre-existed Plaintiff's accident.

"Although proximate cause can be established in the absence of direct evidence of causation [and]...may be inferred from the facts and circumstances underlying the injury, mere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action." *Theard v. G. Fazio Construction Co., Inc.*, *supra*, 192 AD3d 942 (2d Dept. 2021). *See, Ash v. City of New York*, *supra*, 109 AD3d 854, 855 (2d Dept. 2013). The proof "must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict

based not upon speculation, but upon the logical inferences to be drawn from the evidence..”

Schneider v. Kings Highway Hospital Center, Inc., 67 NY2d 743, 744 (1986). See, *Hartman v. Mountain Valley Brew Pub, Inc.*, 301 AD2d 570 (2d Dept. 2003). “Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation.”

Theard v. G. Fazio Construction Co., Inc., *supra*; *Colini v. Stino, Inc.*, *supra*, 186 AD3d 1610, 1611 (2d Dept. 2020); *Mitgang v. PJ Venture HG, LLC*, *supra*, 126 AD3d 863, 864 (2d Dept. 2015); *Goldberg v. Village of Mount Kisco*, *supra*, 125 AD3d 929, 929-930 (2d Dept. 2015); *Ash v. City of New York*, *supra*.

Defendant’s expert provided un rebutted evidence that there was nothing at any of the rink entrances that could cause skaters to lose their balance:

There was nothing at any of the rink entrances that could cause skaters to lose their balance. The carpet could cause hazard to a skater if something in the carpet slowed a skate (or the skates) to the point where the skater’s center of mass moved ahead of the skater’s base (defined by the convex outline of the skates’ wheels (or skate’s wheels, if only one foot is on the ground)). There was nothing at any of the entrances that could slow a skate (or the skates) down. The only anomaly in the carpet that projected above the surface at all easily flattened under light hand pressure, and would flatten out under a skate’s wheels without slowing those wheels at all. It’s worth noting that carpet cannot heal itself; it will only get worse over time. Thus, the condition of the carpet at the time of my inspection might have been worse than at the time of the accident, but it could not have been better.

(Marpet Aff. ¶21)

Defendant’s expert also provided un rebutted evidence that Plaintiff’s description of her fall is inconsistent with a fall precipitated by a defect in the carpet:

Plaintiff’s description of her fall is inconsistent with a fall precipitated by a defect in the carpet. A problem in the carpet will cause a forward fall, as a skate (or the skates) is (are) slowed with respect to the rest of the skater. Plaintiff fell backwards, the opposite of a

fall precipitated by a floor defect. That kind of fall is caused by a skater not maintaining their center over the skates.

(Marpet Aff. ¶22) Thus, the trier of fact could not make a finding of proximate cause in this case *without flatly rejecting Plaintiff's own account of her accident.*

Finally, Defendant's expert provided un rebutted evidence that skating involves an inherent risk of falling that is far higher than that involved in normal ambulation:

Skating has an inherent risk of a fall far higher than normal ambulation. This is an obvious point. For the kinesthetic, athletic, and fun benefits of strapping low-friction wheels to one's feet, and roller skating has all of these benefits, one assumes a far higher risk of losing one's balance. Many sports embody similar benefit-risk trade-offs (skiing comes to mind). Skaters assume that risk for the benefits that the sport embodies. In short, falling is an inherent part of skating. It's not surprising that Plaintiff, who only occasionally skated, and hadn't skated in over five years, fell. Many, if not most falls, result in little besides a bruised ego. Unfortunately, that isn't the case here.

(Marpet Aff. ¶23) The inherent risk of a roller skater's losing her balance and falling is well recognized in New York law. *See, Shakurat v. City of New York*, 116 AD3d 596, 597 (1st Dept. 2014); *Mor v. Yakov*, 256 AD2d 393 (2d Dept. 1998).

In view of the foregoing, it is at least as likely, and perhaps more likely, that Plaintiff's fall resulted from a loss of balance than from the alleged defect in the carpeting. A determination to the contrary cannot be reached by logical inferences from the evidence, but only by an exercise in sheer speculation. Since, on the evidence presented, a finding that Defendants' purported negligence proximately caused Plaintiff's injuries would be wholly speculative, Defendants are entitled to summary judgment on the element of causation. For this reason too, then, Plaintiff's complaint must be dismissed.

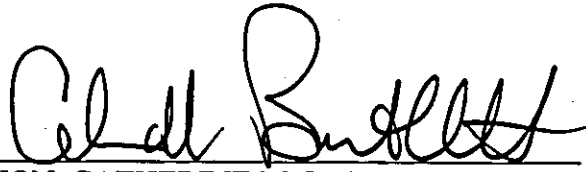
It is therefore

ORDERED, that Defendants' motion for summary judgment is granted, and Plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: July 19, 2021
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE