

<b>Castaldo v Manhattan Mini Storage</b>
2022 NY Slip Op 30660(U)
March 3, 2022
Supreme Court, New York County
Docket Number: Index No. 159271-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CORRECTED DECISION/ORDER

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MICHAEL CASTALDO et al.

INDEX NO. 159271-2018

- v -

MOT. DATE

MANHATTAN MINI STORAGE et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s).

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s).

Replying Affidavits

ECFS Doc. No(s).

This is a personal injury action. Plaintiffs move for summary judgment on the issue of liability and an immediate trial on the issue of damages. Defendants oppose the motion and cross-move for summary judgment dismissing the complaint. Plaintiffs oppose the cross-motion. Issue has been joined and the motion and cross-motion were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

At the outset, the court must address defendants' procedural arguments. Defense counsel points out that plaintiffs failed to serve a Statement of Undisputed Material Facts with the motion-in-chief and failed to respond to defendants' Statement of Undisputed Facts as required by Court Rule 202.8-g (a), (b) and (c). On reply to the cross-motion, defense counsel maintains that plaintiffs' opposition is untimely and should not be considered by the court and further that plaintiffs' counsel has also failed to annex any certification by counsel to certify compliance with Court Rule 202.8-b(c).

Despite these procedural issues, defendants' motion must be granted because they have established prima facie that there was no notice of the alleged condition which caused plaintiff's accident. In turn, even if the court were to consider plaintiffs' opposition to the cross-motion, they have failed to raise a triable issue of fact sufficient to defeat defendants' motion.

The relevant undisputed facts are as follows. Plaintiff Michael Castaldo's accident occurred on October 5, 2017 at a Manhattan Mini Storage located at 541 W 29th Street, New York, NY 10001 (the "premises"). Specifically, plaintiff slipped and fell while attempting to traverse an exterior stairway at the premises.

At his deposition, plaintiff testified that when he first arrived at the premises after 8pm, he walked up the set of exterior stairs without incident and proceeded to his storage locker which was in the sub-basement. Plaintiff's accident occurred when he attempted to walk down those same stairs later that evening.

Dated: 3/3/22

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

According to plaintiff, there were four to six stairs that led from the ground to a door that opened into a “[h]allway lobby office area”. When plaintiff first went up the stairs, he testified that “It was dry. It wasn’t raining. No issues. No problem.” Plaintiff proceeded to his storage locker and spent approximately 45 minutes to an hour there. After he loaded a cart with items he intended to place into his car, he exited the building and slipped and fell on the landing at the top of the stairs.

Q. Did you slip when you were attempting to go onto the first step down?

A. I slipped on the first landing.

Q. Did you slip on the landing or did you slip on the steps?

A. On the landing.

Q. Had you placed either of your feet down on the first step before you slipped?

A. No.

Q. So you slipped before you even stepped down onto any of those steps?

A. Exactly.

...

Q. What happened after you slipped?

A. I braced myself to protect my head and slipped down the stairs.

Q. All of them?

A. I would say midway.

...

Q. What caused you to slip on the landing that was on top of the stairs?

A. After the fact, I looked and there was slimy, muddy debris with water from the rain. So it was debris, muddiness, slippery. Slimy. Remember I said that there was construction going on?

Q. Was there construction going on that night?

A. Not that night, but you know...

Q. Where was construction going on?

A. It was going on – from what I remember construction began about six, seven months earlier and I have allergies –

Q. I just asked whether –

A. Yeah, I’m just telling you that I told management that this is ridiculous the amount of dust that’s going on because of the construction.

Q. Was construction taking place on October 5, 2017?  
Did you see any active construction that day?

A. Not at that time.

Q. When had you last been at Manhattan Mini Storage before the day of your accident?

A. I can't recall.

Q. The day before, a week before –

A. No.

Q. – a month before?

A. Maybe a month, two months before. Sometimes I'll go often. Sometimes I won't go for long periods of time.

Q. Do you know when you were last there?

A. Before October 5<sup>th</sup>?

Q. Correct.

A. I don't remember.

There were no witnesses to plaintiff's accident. Plaintiff took a photo after he fell of the condition which caused his accident. That photo was marked as Defendant's Exhibit "A" at his deposition and has been provided to the court. Plaintiff circled the area where he slipped and claims that there is a smudge with a partial footprint reflected in the photo. To the court, the photo depicts what appears to be droplets and some pooling of water which appears to reflect light against a concrete surface. Plaintiff testified that when he fell, there was light rain.

Q. When you got back to the loading dock platform with those items that you were going to put in your car and you saw it was raining –

A. Yeah.

Q. – how hard was it raining?

A. Very light. I mean I could see like water drops. Almost like a mistiness, but you can see that – because my car was wet.

...

Q. Had it rained earlier in the day?

A. I don't think so. No.

...

Q. These stairs, were they outside the building?

A. Yes.

Q. Was there anything covering the stairs?

A. No.

Q. The stairs were under open sky?

A. Yes.

Well, the landing, part of it is covered by the door – by the door and then the rest of the stairs, the landing and the stairs are outside.  
Does that make sense?

Q. The landing that's at the top of the stairs?

A. Exactly.

Q. The stairs themselves and the landing at the top are under open sky?

A. Half of the landing is under open sky. The other half is under a doorway.

Defendants produced two witnesses for deposition. Defendants produced Denis Sutterlin, their Vice President for Security who testified that in the approximate 80 times that he had been to the premises prior to the date of plaintiff's accident, he never saw any debris, dirt, or substances on the landing at the top of the stairs or on the stairs themselves. Defendants also produced Patricio Toribio, general manager in charge of the building where plaintiff's accident occurred. Toribio testified that prior to plaintiff's accident, there were no complaints about the stairs or dust, dirt or debris on the stairs, no accidents were reported on the stairs and there was no work going on in the area of the landing/stairs on the date of plaintiff's accident.

Plaintiffs have submitted an unsworn report by Nicholas Bellizzi, P.E. on the motion-in-chief as well as a sworn affidavit from Bellizzi in connection with their opposition to defendants' cross-motion. Bellizzi claims that the subject steps violated the New York City Building Code because they did not have a "nonskid surface when wet." Bellizzi further states:

The subject exit stairway's painted platform and tread surfaces were not slip resistant when wet. They were not textured, the paint did not contain an abrasive additive, they were not crosscut, grooved, or ribbed and had no treatment to cause the tread surfaces to be slip resistant, which was in violation of nationally accepted ASTM Standards For Safe Walking Surfaces. In addition, the tread nosings were not slip resistant, as required for a safe walking surface on stairs.

Defendants have submitted the affidavit of Stan A. Pitera P.E., who concludes with a reasonable degree of engineering certainty that the stairway landing was properly maintained, safe, and violated no known, enforceable codes or standards. Pitera disputes Bellizzi's opinion and maintains that the upper landing where plaintiff's accident occurred was slip-resistant, even in a wet state. Pitera further states:

I conducted wet dynamic slip resistance testing (Dynamic Coefficient of Friction [DCOF]) of the upper stairway landing pursuant to the current American National Standards Institute (ANSI) A326.3 standard entitled "American National Standard Test Method for Measuring Dynamic Coefficient of Friction of Hard Surface Flooring Materials." The testing revealed Dynamic Coefficient of Friction ("DCOF") values of 0.52, 0.51 and 0.51, or an average of 0.51 in the location of Mr. Castaldo's accident. According to the ANSI A326.3 Standard, a walking surface with a DCOF value of 0.42 or greater provides a slip-resistant surface. It should be noted that Mr. Bellizzi does not mention in his report conducting any Coefficient of Friction testing. As such, Mr. Bellizzi has provided no engineering basis to support his opinion that the subject landing was slippery.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Defendants have established *prima facie* that they did not have either actual or constructive notice of the condition which caused plaintiff to slip and fall – rain water on the landing of exterior steps open to the sky which existed thereon for less than an approximately an hour, at most. Plaintiff clearly testified that he did not notice anything on the steps when he first walked up them an hour before his accident (p. 156). Plaintiff never made any complaints about the condition of the stairs before his accident and is unaware of anyone else who slipped and fell due to a slippery condition on the landing of the stairs. To the extent that plaintiff theorizes that construction dust or debris existed on the stairs, this claim is mere speculation as to where the dust came from (p. 165), and otherwise contradicts plaintiff's admission that there was nothing on the stairs when he first went up them approximately an hour before his accident. Even if there was "dust" and/or "debris" on the stairs at the time of his accident, plaintiff cannot show that the dust/debris existed for a sufficient period of time so as to constructively charge the defendants with notice of that specific condition.

As for Bellizzi's expert opinion, the court agrees that it is insufficient to raise a triable issue of fact, even if the court were to properly consider his affidavit submitted in connection with plaintiffs' untimely opposition to the cross-motion. Pitera's opinion establishes that the stairs were properly maintained, safe, and violated no known, enforceable codes or standards. As for Bellizzi's opinion that the stairs should have had a nonskid surface, this opinion is conclusory and lacks a proper foundation as defense counsel points out because Bellizzi did not state that he performed slip resistance testing, measured the coefficient of friction or performed any other type of scientific test and thus his opinion is unsubstantiated and lacks a proper basis from which a reasonable factfinder could properly conclude that the stairs were not designed, constructed or maintained in a reasonably safe condition. Thus, plaintiffs have failed to raise a triable issue of fact sufficient to defeat defendants' motion.

In light of the court's determination on the substantive arguments raised in defendants' cross-motion, the court denies plaintiffs' motion-in-chief and declines to consider the parties' procedural arguments as moot.

In accordance herewith, it is hereby **ORDERED** that defendants' cross-motion for summary judgment is **granted** and plaintiff's motion-in-chief is denied as moot; and it is further

**ORDERED** that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/3/22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.