

**Ritzcovan v Port Auth. of N.Y. & N.J.**

2022 NY Slip Op 31134(U)

April 7, 2022

Supreme Court, New York County

Docket Number: Index No. 156529/2018

Judge: Arlene Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

*Justice*

-----X

ODELIA RITZCOVAN, JAMES RITZCOVAN

Plaintiffs,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY, AFCO AVPORTS MANAGEMENT LLC.,

Defendants.

-----X

INDEX NO. 156529/2018

MOTION DATE 04/06/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendants for summary judgment dismissing this action is denied and the cross-motion by plaintiffs to amend their bill of particulars is denied.

**Background**

This action arises out of an alleged trip and fall by plaintiff Odelia Ritzcovan at Stewart Airport in Orange County, New York. She claims that she fell when her rolling luggage got stuck in between two sidewalk flags in the long-term parking lot at the airport.

Defendants contend that the alleged defect, a raised sidewalk flag, is a non-actionable trivial defect. They insist the change in elevation between the two flags is physically insignificant. According to defendants, the difference in elevation was about the height of a quarter (.955 inches). Defendants argue that Ms. Ritzcovan walked over the slab without issue,

the incident happened in broad daylight and the alleged defect was clearly visible. They also point out that after the incident, Ms. Ritzcovan entered the terminal and boarded her flight.

Defendants also contend that Ms. Ritzcovan failed to sufficiently identify the defect, because she initially testified that her suitcase got caught on the side of the sidewalk and then claimed it was a piece of raised sidewalk. They argue that it was not possible for her to be injured the way she claims the incident occurred—that her suitcase got caught, which caused her to fall forward. Defendants attach the affidavit of Dr. Gupta, a biomechanical expert, who claims that Ms. Ritzcovan’s account of the incident could not result in her falling (NYSCEF Doc. No. 79).

In opposition and in support of their cross-motion to amend, plaintiffs argue that there are questions of fact that compel the Court to deny defendants’ motion. They insist that the uneven sidewalk flags, combined with missing caulk between the flags, caused an actionable defect. Plaintiffs rely on their expert, who insists that the sidewalk flag differential was 1 ¼ inch (NYSCEF Doc. No. 86). Plaintiffs contend that defendants had sufficient notice because the defect at issue was created over an extended period of time and so there is an issue of fact with respect to whether the accident was foreseeable.

Plaintiffs also cross-move to amend their bill of particulars and to add specific statutes, ordinances, rules and regulations. They claim defendants will suffer no prejudice if this amendment is permitted and that they do not allege any new facts.

In reply, defendants insist that there is no evidence the defect was difficult to see and claim that Ms. Ritzcovan was able to clearly see the defect because she walked over it.

## Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by

an elevated brick or slab need be submitted to a jury” (*id.*). A court must examine “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

“There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises . . . and even a trivial defect may constitute a snare or trap” (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657 [1st Dept 2000] [internal citations omitted]). “While a gradual, shallow depression is generally regarded as trivial the presence of an edge which poses a tripping hazard renders the defect nontrivial” (*id.* [internal citations omitted]).

“A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). “The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances” (*id.* at 80).

The Court denies the motion by defendants for summary judgment. As an initial matter, the Court observes that plaintiff’s expert contends that Ms. Ritzcovan’s luggage “struck the exposed 1-1/4 inch high exposed vertical surface between two adjacent walkway flags . . . at a 1 inch-wide expansion joint with deteriorated sealant” (NYSCEF Doc. No. 86 at 3). This creates an issue of fact regarding whether the defect at issue was actionable. This is not a situation where the difference between the flags was so minimal that it can be considered trivial as a matter of law (*c.f. Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488, 935 NYS2d 10 [1st Dept 2011] [awarding defendants summary judgment in a trip and fall case where the

differential between sidewalk flags was about half an inch]). And the Court observes that even defendants contend that the differential between the sidewalk flags was about an inch (.955 inches to be exact). The Court cannot find that this height differential combined with the photographs of the alleged defect submitted on this motion, require the Court to grant defendants' motion.

Of course, here, the issue is not just the height differential but also that plaintiff stepped over the defect before her suitcase got caught up in it. The Court finds it is conceivable that someone walking on the sidewalk while rolling a suitcase behind could step over a defect but then lose her balance and fall when her suitcase gets caught or momentarily jammed. Of course, the Court makes no finding that this is what happened or that a fact finder might conclude it does not believe Ms. Ritzcovan's account. But that is a question for the fact finder, not this Court on a motion for summary judgment.

Also, a matter for the fact finder is to evaluate the account of Ms. Ritzcovan. Defendants argue that Ms. Ritzcovan offered conflicting versions of the incident. First, she claimed that her suitcase "stopped very quickly. It got caught on the side of the sidewalk and I went down fast" (NYSCEF Doc. No. 69 at 25). Then she claimed the "part [of the sidewalk that] caught my wheel was missing like caulking" while also claiming that "[t]here was a piece that was raised on the sidewalk and my rolling wheel got caught and it thrust me forward" (*id.* at 26, 27). These accounts are not so wildly inconsistent that this Court must grant summary judgment to defendants. A jury must sort through what to credit. The Court observes that a witness who fails to speak with exacting precision at a deposition is not a reason to dismiss this case. The general theory of what happened is very clear—the suitcase got caught between two sidewalk flags and that led plaintiff to lose her balance and fall forward.

Similarly, the fact finder must consider whether (and how much) to credit the testimony of Mr. Ritzcovan who testified at his deposition that his wife “was walking, I was walking and then all of a sudden, she was on the ground” but also admitted that he was about three car lengths behind her when the accident happened (NYSCEF Doc. No. 85 at 11, 34).

The expert affidavit offered by defendants does not compel a different outcome. Defendants can argue before the fact finder that the accident could not have happened the way Ms. Ritzcovan says it did but, on a summary judgment motion, where credibility is not determined, her account is plausible.

There is also an issue of fact about notice and foreseeability. A fact finder will have to determine whether there was constructive notice; uneven sidewalk flags do not usually appear overnight. And as for foreseeability, the jury will have to decide whether it is foreseeable that someone with suitcases might be walking along the sidewalk from an airport parking lot to the terminal and might lose her balance when a suitcase’s wheels get caught between two uneven sidewalk flags. Quite simply, it is up to the jury to decide.

### **Cross-Motion to Amend**

“Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise. Where there is extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion. In the absence of prejudice, mere delay is insufficient to defeat the amendment. Prejudice requires “some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his

position” (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365, 841 NYS2d 277 [1st Dept 2007] [internal quotations and citations omitted]).

Here, the original bill of particulars is dated March 19, 2019 and now plaintiffs seek to amend more than three years later. But, of course, delay itself is not sufficient to justify denying the cross-motion even though the note of issue was filed on September 7, 2021. The issue for this Court is the nature of the proposed amended bill of particulars and the prejudice it will undoubtedly cause to defendants. In the amended bill of particulars, plaintiffs now add 22 statutes, codes and regulations they intend to rely on in this case. It would be manifestly unfair to defendants to permit this amendment.

The parties have conducted discovery in this matter since 2018 and now, only after plaintiffs contend that discovery is finished (by filing the note of issue), do plaintiffs suddenly seek to add nearly two dozen specific rules and regulations. Clearly, plaintiffs’ reliance on these statutes would have shaped defendants’ preparation of their defense, how they would have deposed witnesses and potentially picked experts. Although plaintiffs argue that they have alleged no new facts, that raises a question as to why they did not identify these 22 statutes, regulations and code sections before defendants made a post-note dispositive motion.

It is not sufficient that defendants had a general awareness of plaintiffs’ theory of this case. They were entitled to know the specific statutes, ordinances, rules and regulations upon which plaintiffs would rely. And the Court emphasizes that this is not a situation in which plaintiffs provided some specifics in the original bill of particulars and they are merely seeking amendment to conform to the evidence. In fact, the original bill of particulars did not reference a single rule or statute. To go from none to 22 at this late stage of the litigation is improper.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing this case is denied; and it is further

ORDERED that the cross-motion by plaintiffs for leave to amend their bill of particulars is denied.

4/7/2022  
DATE

  
ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: