

Gonzalez v 104 Elliot Place Corp.

2022 NY Slip Op 31844(U)

April 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 507314/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of April 2022.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X
ALBERTO JOSE GONZALEZ,

Index No.: 507314/2018

Plaintiff,

-against-

DECISION AND ORDER

104 ELLIOT PLACE CORP., and 105 ELLIOT LLC,

Motions Sequence #3

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	69-82,
Opposing Affidavits (Affirmations).....	86-90,
Reply Affidavits (Affirmations)	91-92

After a review of the papers and oral argument, the Court finds as follows:

The instant action results from an alleged trip and fall accident that occurred on January 11, 2018. Plaintiff Alberto Jose Gonzalez (hereinafter the "Plaintiff") allegedly injured himself after tripping, while he was walking up interior stairs at the premises known as 105 Elliot Place, in Bronx, New York (hereinafter the "Premises"). The Premises are apparently owned by Defendant 105 ELLIOT LLC¹ (hereinafter "Defendant").

The Plaintiff now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability with respect to Defendant 105 ELLIOT LLC's negligence.

¹ Defendant 104 ELLIOT PLACE CORP.'s motion to dismiss was granted without opposition on January 23, 2019 (NYSCEF #30).

The Plaintiff contends that the Defendant had a duty to maintain the Premises in a good state of repair and in safe condition, it breached that duty and that Defendant's negligence was a proximate cause of Plaintiff's injuries. Further, the Plaintiff contends that the condition at issue was a defect as a matter of law. The Defendant opposes the motion. The Defendant contends that there is a material issue of fact as to whether it had actual or constructive notice of the defect. What is more, the Defendant contends that there is an issue of fact as to whether the alleged defect was the proximate cause of the Plaintiff's injuries.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment 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. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires

denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, “[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case...” if they can show “...that the defendant's negligence was a proximate cause of the alleged injuries.” *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Generally, in an action for negligence, a plaintiff must prove that the defendant owed him or her a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. *See Akins v. Glens Falls City School Dist.*, 53 NY2d 325, 333, 441 NYS2d 644, 648 [1981]. To impose liability upon a defendant for a plaintiff's fall, there must be evidence that a dangerous or defective condition existed, and that a defendant had actual or constructive notice of the condition and failed to remedy it within a reasonable time. *See Christopher v. New York City Transit Authority*, 300 AD2d 336, 752 NYS2d 76 [2d Dept 2002]; *Brown-Phifer v. Cross County Mall Multiplex*, 282 A.D.2d 564, 723 N.Y.S.2d 393 [2d Dept 2001]; *Bonilla v. Starrett City at Spring Cr.*, 270 A.D.2d 377, 704 N.Y.S.2d 619 [2d Dept 2000]. “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.” *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646, 647 [1986].

Turning to the merits of the motion made by the Plaintiff (motion sequence #3), the Plaintiff argues that his motion should be granted given that the Defendant had actual or constructive notice of the condition of the stair at issue. The Plaintiff also contends that the Defendant's failure to comply with the applicable building codes constitutes negligence *per se*. In support of his motion, the Plaintiff relies on

the deposition testimony of the Plaintiff, the deposition testimony of Francisco Vega (superintendent of the Premises), the deposition testimony of Usher Anshel Egert (employee of property manager Meyers Management), an affidavit from Vincent Pici, P.E., and images of the alleged defect.

During his deposition, the Plaintiff states that he was walking up the stairwell at the Premises and tripped “when I started going from the third to the fourth floor, since it was so dark, which was the one that I tripped on and fell.” (See Plaintiff’s Motion, Exhibit E, Page 16). During his deposition, the Plaintiff identified the defect by identifying photographs of the defect. When asked if the photographs depict the condition of the stairway at the time of his accident, the Plaintiff stated “yes.” (See Plaintiff’s Motion, Exhibit E, Page 27 through 29).

Francisco Vega, superintendent of the Premises, testified that he mopped and swept the interior stairways two times a day, seven days a week. (See Plaintiff’s Motion, Exhibit G, Page 21). Mr. Vega also testified, after identifying photographs of the stairs, that some of the stairs had been changed but that he was not the one who replaced any of the marble steps. “There are several of the stairs that have been changed.” He additionally stated that the landlord ordered a few stairs to be changed but that he was unaware of how the landlord came to determine the need to repair the steps. (See Plaintiff’s Motion, Exhibit G, NYSCEF #79, Pages 54-55). Usher Anshel Egert, employee of property manager Meyers Management, who testified on its behalf, acknowledged, after reviewing photographs of the stairs, that one of the steps had been repaired (See Plaintiff’s Motion, Exhibit H, Page 69-70).

This testimony, taken together, is sufficient for the Plaintiff to show that the Defendant had constructive notice. “A photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as is shown in the photographs.” *Lustenring v. 98-100*, 1 AD3d 574, 577, 768, N.Y.S.2d 20 [2d Dept 2003]. In the instant matter, the Plaintiff was able

to testify that the photographs reflect the condition of the stairs at the time of the accident. In *Gonzalez v. New York City Transit Auth.*, the Court held that constructive notice could be shown by identifying a defect through photographs taken five days after the alleged accident. *See Gonzalez v. New York City Transit Auth.*, 87 AD3d 675, 677, 929 N.Y.S.2d 159, 162 [2d Dept 2011]; *Kniffin v. Thruway Food Markets, Inc.*, 177 AD2d 920, 921, 576 N.Y.S.2d 678, 679 [3rd Dept 1991]; *Farrar v. Teicholz*, 173 AD2d 674, 675, 570 N.Y.S.2d 329, 330 [2d Dept 1991]. As a result, the Plaintiff has provided sufficient evidence that the Defendant had constructive notice of alleged defective condition for a period of time prior to the accident to meet his *prima facie* burden.²

However, the Plaintiff has not proven as a matter of law that the condition alleged constituted a dangerous and defective condition and was not *de minimis*.³ “The question of whether or not a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is a question of fact for the jury...” *See Guerrieri v. Summa*, 193 AD2d 647, 598 N.Y.S.2d 4 [2d Dept 1993]. Even assuming the depth of the alleged defect, that measurement in itself does not render the condition defective or dangerous as a matter of law. In *Trincere v. County of Suffolk* (90 N.Y.2d 976, 977, 688 N.E.2d

² The Court notes that while the Plaintiff did provide the Court with a Statement of Material Facts Upon Which There is No Genuine Issue Pursuant to 202.8-g, the Defendants did not. Accordingly, the statement of facts set forth by the Plaintiff is deemed admitted for the purposes of this motion. However, this does not alter the Court’s determination, as the facts stated do not show that the Defendants had constructive notice of the alleged defect at issue. Moreover, much like a notice to admit, a Statement of Material Facts Upon which there is No Genuine Issue Pursuant to 202.8-g is not meant to address issues that “were at the heart of the controversy” in this case.” *Nacherlilla v. Prospect Park All., Inc.*, 88 A.D.3d 770, 772, 930 N.Y.S.2d 643, 645 [2d Dept 2011]. In addition, legal conclusions and opinion are not proper matters for the 202.8-g Statements. *See Lolly v. Brookdale Univ. Hosp. & Med. Ctr.*, 45 AD3d 537, 844 N.Y.S.2d 718 [2d Dept 2007]; *Taylor v. Blair*, 116 AD2d 204, 206, 500 N.Y.S.2d 133 [1st Dept 1986].

³ The Court finds the expert opinions by both Vincent Pici, P.E., for the Plaintiff, and Gang Yang, M.D., Ph.D., for the Defendant, to be conclusory and speculative. Neither expert inspected the Premises and although they both reach conclusions regarding the alleged defect at issue, neither explain how they came to this conclusion. What is more, the Defendant’s expert failed to examine the Plaintiff. *See Wass v. Cty. of Nassau*, 166 AD3d 1052, 1053, 87 N.Y.S.3d 310, 312 [2d Dept 2018]. Moreover, any purported violations of the Codes referenced by Vincent Pici, P.E., do not constitute negligence *per se*, but rather serve as some evidence of negligence. *See Elliott v. City of New York*, 95 NY2d 730, 734, 747 N.E.2d 760, 762 [2001].

489, 490 [1997]) the Court of Appeals held that “there is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable.” (*Id* at 977). Therefore, granting summary judgment to a defendant “based exclusively on the dimensions of the ...defect is unacceptable.” (*Id* at 977-978). In fact, no measurements were provided.

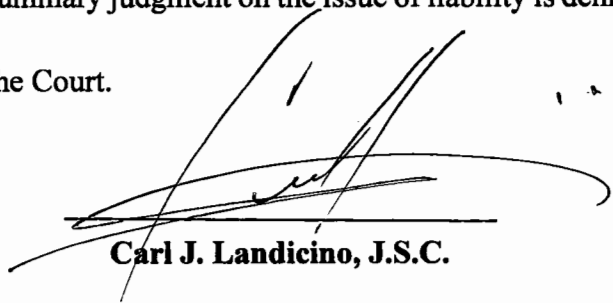
In opposition, the Defendant has failed to rebut the Plaintiff’s establishment that the Defendant had notice of the condition of the stairwell. The Defendant argues that the testimony of both Anshel Egert, employee of property manager, Meyers Management, and Francisco Vega, superintendent of the Premises, create an issue of fact regarding whether the Defendant had constructive notice of the condition at issue. However, this testimony was vague and failed to “demonstrate when the subject staircase was last inspected relative to the Plaintiff’s accident.” *Hanney v. White Plains Galleria, LP*, 157 A.D.3d 660, 661, 68 N.Y.S.3d 522, 524 [2d Dept 2018]; see also *Buckshaw v. Oliver*, 197 A.D.3d 691, 150 N.Y.S.3d 576, 577 [2d Dept 2021]. Moreover, the Plaintiff identified the condition of the steps by means of a photograph. Although the Court cannot determine whether the stairwell was defective, the nature of the condition at issue indicates a condition caused over a period of time during which the Defendant would be expected to discover and repair it. Accordingly, Plaintiff’s motion for summary judgment on the issue of liability is denied, however the question of whether the Defendant had constructive notice of the condition of the stairway is answered in the affirmative for purposes of trial.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Plaintiff (motion sequence #3) for summary judgment on the issue of liability is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

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KINGS COUNTY CLERK