SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART 52**

Justice

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EDWIN BAYON,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION

Defendant.

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INDEX NO. 450082/2019

MOTION DATE 03/10/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT.

Edward Bayon (plaintiff) brings this negligence action against his former employer, the New York City Department of Sanitation (DOS) and the City of New York (the City) (together, defendants). Plaintiff alleges that on February 5, 2018, while he was on duty as a sanitation field supervisor at Bronx 7 District sanitation garage (Bronx 7 garage or the garage) located at 432 West 215th Street, New York, New York, he stepped in a hole in the garage floor, fell, and sustained permanent injuries.

Plaintiff now moves for summary judgment against defendants as to liability on the negligence claim[1] on the grounds that defendants failed to maintain the garage floor in a reasonably safe condition and that defendants had actual and constructive knowledge of the dangerous condition of the garage floor. Plaintiff also moves to dismiss defendants' affirmative defense that plaintiff was comparatively negligent. Defendants oppose on the grounds that material issues of

[1] Plaintiff does not move for summary judgment on his Labor Law claim.

fact exist as to negligence and that plaintiff fails to establish that their comparative negligence defense is meritless.

I. Alleged Facts

a. Plaintiff's Testimony

In his Notice of Claim, plaintiff alleges that he was injured in the course of his employment on February 5, 2018, when he allegedly tripped and fell due to a "broken, damaged, cracked, uneven, and defective floor" at the Bronx 7 garage. (*See* Notice of Claim, Defendant's Exhibit A). On August 16, 2018, at a hearing held pursuant to General Municipal Law 50-h (50-h hearing), plaintiff testified that he worked for the Department of Sanitation (DOS) for 27 years. (*See* Defendants' Exhibit D). He further testified that on the date of the accident at issue, he twisted his ankle in a hole in the garage floor.

Asked when he first saw the hole, plaintiff replied, "I didn't see it until I stepped into it." (Defendants' Exhibit D at 8, lines 20-23). Plaintiff also testified at his 50-h hearing that he had never noticed this hole at any other time that he was in the garage and that he never made any complaints about the garage floor prior to his alleged accident. At plaintiff's subsequent Examination Before Trial (EBT), plaintiff described the hole as eight inches in diameter and three inches deep. (*See* Plaintiff's Exhibit D, Plaintiff's EBT Testimony). Plaintiff also testified at his EBT that he had never seen this hole before and that he was not aware of any other accidents involving this hole.

b. DOS Supervisor Robert Weiss' Testimony

DOS Supervisor Robert Weiss appeared at an EBT on behalf of defendants. Mr. Weiss testified that he has been employed with DOS for 37 years and his current title is supervisor. (*See* Plaintiff's Exhibit E, Weiss EBT Transcript). Weiss stated that he has worked for Bronx 7 District

for 25 years. Specifically, Mr. Weiss is a garage supervisor, a position he has held for 19 years. Mr. Weiss testified that a garage supervisor's role is to care for both the equipment and the garage itself, and that, as part of his duties he would walk around the garage to make sure that everything was in its proper place. He testified that he would also check the general condition of the garage.

Mr. Weiss further testified that he walks around the Bronx 7 garage throughout the course of the day and that as garage supervisor, he does not leave the facility. He confirmed that he would look for any holes or other issues with the garage floor during these inspections. According to Mr. Weiss, if someone working in the garage saw a hazard, they would bring it to Mr. Weiss' attention. He further testified that if he saw a hole that was deep enough for someone to trip over, he would put up a cone or cordon it off so that no would get injured.

During his EBT, Mr. Weiss explained that he had put in prior work orders for the concrete floor of the garage because it would sometimes crack due to the coming and going of various trucks. According to Mr. Weiss' testimony, he believes that he put in a few work orders for the area where plaintiff allegedly fell before plaintiff s accident. Mr. Weiss also testified that plaintiff fell in the middle of the main floor of the garage, which is an area that he would have inspected that day.

Plaintiff now moves for summary judgment on the grounds that defendants are solely liable for plaintiff's injuries. Plaintiff maintains that defendants had actual or constructive notice of the defect, that the subject garage floor was not reasonably safe, and that defendants did not exercise reasonable care in that they failed to repair the subject garage floor, did not take suitable precautions, and/or failed to give adequate warning, all of which resulted in plaintiff's accident. Defendants oppose, arguing that numerous issues of fact exist which preclude summary judgment.

II. Analysis

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

A. Statement of Material Facts Pursuant to 22 NYCRR § 202.8-g

As a threshold matter, plaintiff argues that defendants' requisite statement of material facts, annexed to their attorney's affirmation in opposition, fails to include citations to the record and/or a statement of counter-facts, in contravention of the Uniform Rules for the Supreme and the County Court (22 NYCRR) § 202.8-g. However, given that defendants' affirmation in opposition includes counter-facts with appropriate citations, plaintiff has not been prejudiced by defendants' failure to annex a separate statement of counter-facts. Therefore, the Court deems such defect *de minimus* and turns to the merits of the parties' arguments. *See* CPLR 2101 (f).[2]

[2] "A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given." CPLR 2101 (f).

B. Negligence Claim

A property owner has a duty to exercise reasonable care to keep the premises in a reasonably safe condition for the use of a person such as the plaintiff coming on the premises. *Basso v Miller*, 40 NY2d 23 (1976). To prove that the City was negligent for the allegedly defective condition on its property, "...a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence." *Lewis v. Metropolitan Transp. Authority*, 99 AD2d 246, 249 (1st Dept. 1984). Actual notice may be found where a defendant either created the condition or was aware of its existence prior to the accident. *Id.*; *see also Atashi v Fred-Doug 117, LLC.*, 87 AD3d 455 (1st Dept 2011). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

In support of his motion, plaintiff submits a copy of the summons and complaint (Exhibit A); defendants' answer and combined demand for bill of particulars and discovery (Exhibit B); plaintiff's bill of particulars (Exhibit C); plaintiff's deposition transcript (Exhibit D); deposition transcript of defendants' witness, Robert Weiss (Exhibit E); the exhibits marked at Robert Weiss' deposition (Exhibit F); the affidavit of professional engineer Joel Schacter (Exhibit G); Joel Schacter's expert disclosure (Exhibit H); and plaintiff's notice to admit and documents attached thereto (Exhibit I). As discussed below, plaintiff's submissions fail to establish the prima facie requirement that defendants had actual or constructive notice of the alleged defects in the garage floor.

i. *Impermissible Expert Affidavit*

Plaintiff relies on the expert affidavit of Mr. Schacter to establish that the area in question was not reasonably safe and that the City had actual notice of the alleged defect. (*See* Plaintiff's Exhibit F). Mr. Schacter purportedly reviewed the discovery in this case and states in his expert disclosure that it is his opinion, within a reasonable degree of engineering certainty, that poor maintenance of the garage floor made it dangerous and unsafe for pedestrians to walk on. (*Id.* at 13-14). Based on the description of the hole, Mr. Schachter also concludes that the defendants violated multiple rules and regulations, including various provisions of the Labor Law, New York City Building Code, Proper Maintenance Code of New York State, and the Administrative Code of the City of New York. (*Id.* at ¶ 8, 12).

Defendants argue that Mr. Schecter's expert affidavit should not be considered, because it is speculative and improperly expresses legal conclusions. Notably, as argued by defendants, Mr. Schacter did not visit the Bronx 7 garage site. Moreover, Mr. Schacter's affidavit fails to include any specific scientific or technical analysis or facts in support of his conclusions. Rather, Mr. Schacter's affidavit sets forth legal conclusions. See *Robinson v Hess Retail Stores*, LLC, 197 AD3d 517, 518 (2nd Dept 2021) (holding that affidavit of plaintiff's expert, who never visited the accident site and relied on Google images of the accident scene was insufficient to demonstrate constructive notice of the defect); *Nevins v Great Atl & Pac Tea Co*, 164 AD2d 807, 808-09 (1st Dept 1990) (concluding that it was error for the expert to testify as to the ultimate issue in the case, thereby usurping the function of the jury); *Measom v Greenwich & Perry St Hous Corp*, 268 AD2d 156, 159 (1st Dept 2000) (finding that, "[e]xpert testimony as to a legal conclusion is impermissible." [internal citations omitted]). Therefore, Mr. Schacter's affidavit is insufficient to establish plaintiff's entitlement to summary judgment.

ii. *Issues of Fact as to Actual or Constructive Notice*

In opposition to the motion, defendants submit plaintiff's Notice of Claim (Defendants' Exhibit A); a court notice regarding the transfer of the case to New York County (Defendants' Exhibit B); the City's response to plaintiff's Notice to Admit (Defendants' Exhibit C); and plaintiff's 50-h testimony (Defendants' Exhibit D). Defendants argue that multiple questions of fact exist as to the issue of notice, highlighting that plaintiff had never complained about the garage floor prior to his incident and that he did not see the alleged hole until after his fall. The record is also devoid of any facts to illustrate how long the alleged hole existed in the garage before plaintiff's fall. Supervisor Weiss testified that he inspected the area that morning prior to plaintiff's fall and that the area at issue was inspected by garage supervisors on a daily basis. In both instances, no defects in the garage floor were found.

Plaintiff has provided no evidence that prior to plaintiff's fall, Supervisor Weiss or anyone else, including plaintiff, was aware of the hole for a sufficient amount of time to constitute notice. *See Gordon,* 67 NY2d at 837 (a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owners'] employees to discover and remedy it"). Although Supervisor Weiss testified that he had submitted previous maintenance repair requests for the area, plaintiff does not submit any proof to establish that the condition of the garage floor was an ongoing hazard which defendants failed to rectify. *See Verges v Concourse Residential Hotel, Inc*, 187 AD3d 532 (1st Dept 2020); *see also Covington v New York City Hous. Auth*, 135 AD3d 665, 666 (1st Dept 2016). Therefore, plaintiff has failed to put forth sufficient evidence to show the absence of any material issue of fact, and his motion for summary judgment is denied.

C. Defendants' Comparative Negligence Claim

Plaintiff also moves to dismiss defendants' affirmative defense of comparative negligence. On a motion to dismiss an affirmative defense pursuant to CPLR 3211(b), the Court must evaluate whether any legal or factual basis for the assertion of the defense exists. *See Matter of Ideal Mut Ins Co,* 140 AD2d 62, 67 (1st Dept 1988). The First Department has held that, "[c]omparative negligence is usually a jury question and should only be decided as a matter of law where there is 'no valid line of reasoning and permissible inferences' which could lead a rational jury to conclude that the plaintiff was negligent." *Charleston v City of New York*, 100 AD3d 471, 472 (1st Dept 2012) citing *Cohen v Hallmark Cards*, 45 NY2d 493, 499 (1978); *see also Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 516-517 (1980); *Johnson v New York City Tr. Auth.*, 88 AD3d 321, 324 (1st Dept 2011).

Plaintiff has failed to show that the City's affirmative defense that the accident occurred due to plaintiff s own negligence and/or culpable conduct, is without merit. Plaintiff does not make any colorable argument that he is without fault for the accident, other than emphasizing defendants' ostensible liability. Plaintiff testified that he did not see the hole before the accident, which does raise a question of fact as to whether he was paying attention to his surroundings or may otherwise have contributed to his alleged accident. As such, plaintiff has not established that he is free from comparative fault or that the City's affirmative defense is without merit. That part of plaintiff's motion seeking to dismiss defendants' affirmative defense of comparative negligence is therefore denied. Plaintiff's remaining contentions are unavailing.[3]

[3] The court declines to review plaintiff's request to deem as admitted its Notice to Admit (Plaintiff's Exhibit I) at this time. Plaintiff's request is improperly raised in its reply papers, and such relief is not requested in its notice of motion.

III. Conclusion

Accordingly, for the reasons stated above, it is ORDERED that Plaintiff Edwin Bayon's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.[4]

7/8/2022
DATE

LESLIE A. STROTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[4] The Court would like to thank Sabrina M. Tann, Esq. for her assistance in this decision.