

Cruz v 1575 GC LLC.

2022 NY Slip Op 34977(U)

September 30, 2022

Supreme Court, Bronx County

Docket Number: Index No. 27902/2017E

Judge: Alison Y. Tuitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART:

-----X
Lillian Cruz, et al

Index No. 27902/2017E

ALISON Y. TUITT

-----X
1575 GC ^{against-} LLC, and Angelos
Deli-Grocery NO-2 Corp.

Hon. _____
Justice Supreme Court

The following papers numbered 65-131 Read on this motion, (Seq. No. 3) for
Summary Judgment noticed on January 10, 2022.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>65-79</u>
Answering Affidavit and Exhibits	No(s). .
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the annexed memorandum
decision.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: 9/30/22

Hon. A Y Tuitt

, J.S.C.

1. CHECK ONE.....
 CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS.....
 GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE.....
 SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5**

-----X
Lillian Cruz, et al,

Index No. 27902/2017E.

Plaintiffs,

-against-

Hon. **Alison Y. Tuitt**

Justice Supreme Court

1575 GC LIC., and Angelo's Deli-Grocery No. 2
Corp.,

Defendants.

-----X
The following papers NYSCEF Doc. 65-131 were read on this motion (NYSCEF Seq No. 3) to
Summary Judgment noticed on **January 10, 2022**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (Angelo Deli)	Nyscef No(s). 65-79
Answering Affidavit and Exhibits	Nyscef No(s). 103-110
Answering Affidavit and Exhibits	Nyscef No(s). 122-128
Replying Affidavit and Exhibits	Nyscef No(s). 120-121
Notice of Cross Motion - Exhibits and Affidavits Annexed (1575)	Nyscef No(s). 82-100
Answering Affidavit and Exhibits	Nyscef No(s). 102
Answering Affidavit and Exhibits	Nyscef No(s). 111-118
Replying Affidavit and Exhibits	Nyscef No(s). 131

Upon the foregoing papers, defendant Angelo's Deli-Grocery No. 2 Corp., (Angelo Deli) moves for summary judgment and dismissal of plaintiff's complaint on the grounds that as a tenant and not an owner of the property, it had no statutory duty to maintain and repair the subject steps and no common law duty either because it did not create nor have actual or constructive notice of the alleged defective condition of the steps and, alternatively, that the alleged condition was trivial. Angelo Deli also moves for summary judgment to dismiss co-defendant 1575 GC Lic., (1575) cross claims for contractual indemnification and common law contribution.

Both plaintiff and 1575 oppose the motion. Similarly, 1575 moves for summary judgment to dismiss plaintiff's complaint because it did not create nor have actual or constructive notice of the alleged defective condition of the steps and, alternatively, that the alleged condition was trivial. 1575 also moves for summary judgment against Angelo Deli on its claim for contractual indemnification and contribution. Plaintiff and Angelo Deli oppose the motion.

Plaintiff alleges that on October 18, 2016 she suffered personal injuries when, while descending the exterior front entrance steps at Angelo Deli's store which is located in a building owned by 1575, she tripped and fell as a result of a worn, rounded and smooth step. Angelo Deli had a lease agreement with 1575 for a portion of the premise to operate a store. According to plaintiff's deposition, on the day of the accident, she had entered the store through the same entrance and used the same steps in order to accompany her co-worker to purchase a drink. As she entered the store, she did not notice any defect or debris on the steps. She did not make any complaints about the condition or appearance of the steps. Plaintiff then testified that as she exited the store, she took three to four steps looking straight ahead, her right foot twisted and she fell. Plaintiff then observed that the edges of one of the steps was rounded and worn which she attributes as the cause of her fall.

Darris Guerrero testified on behalf of Angelo Deli. She testified that she is the owner of Angelo Deli since 2015 when she purchased the store from her cousin Angelo Guerrero. According to Ms. Guerrero, prior to plaintiff's accident she never had repairs to the subject steps nor did she receive any complaints, citation or violations from the City of New York regarding the subject steps. During the deposition, Ms. Guerrero was shown a photograph (defendant's Exhibit J) of the subject exterior front entrance steps, and she testified that the condition of the steps depicted in said photograph is the same as it was at the time of the accident. Ms. Guerrero further testified that prior to purchasing the subject store from her cousin, she regularly visited the store and the subject exterior front steps had looked the same.

Fidel Herrera testified on behalf of 1575 as manager of the building. He testified that he made daily visits to the subject building Monday through Friday and had never received a complaint about the condition of the subject steps. He further testified that he regularly used the subject steps with no issue.

A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. (*Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006].) Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof. (*Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]; *Bosman v Reckson FS Ltd. Partnership*, 15 AD3d 517 [2nd Dept 2005].) “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). “[O]n its motion for summary judgment, the defendant [bears] the initial burden of demonstrating that it did not receive any prior complaints concerning the alleged dangerous condition,” (*Nelson v Cunningham Assoc., L.P.*, 908 NYS2d 713, 715).

Here the defendants Angelo Deli and 1575 have met their burden in establishing their right to entitlement to summary judgment to dismiss the complaint. Even though plaintiff argues that defendants had constructive notice since the condition of the steps had existed for years, the Court finds that it is irrelevant whether defendants had notice of the rounded worn step since there is no evidence that it was a dangerous condition that should have been corrected. Courts have held that a worn step is too trivial a condition upon which to attach liability. *See, e.g., Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 (finding that “a small, worn, rectangular-shaped area on the metal safety treads at the edge of the step ... was too trivial to be actionable”); *Joseph v NYCTA*, 66 AD3d 842 (finding that “plaintiff’s contention that the steps were worn and smooth is merely conclusory and was insufficient to raise a triable issue of fact as to whether the defendant had constructive notice of the slippery condition of the staircase”); *Tryon v Chalmers*, 205 AD 816, 818 (finding that “where a structure, not obviously dangerous, has been in daily use for years, as had this stairway in question, and has uniformly been safe, its use may be continued without the imputation of culpable imprudence and carelessness”). This Court notes that plaintiff has not submitted an expert affidavit from an engineer indicating a defect in the step (cf. *Garcia v New York Tr. Auth.*, 269 AD2d 142 [1st Dept 200])

Accordingly, the motion and cross motion by the defendants Angelo Deli and 1575, pursuant to CPLR § 3212, seeking an order granting summary judgment dismissing the within

complaint is granted and the complaint is dismissed against all defendants. In addition, all other relief sought in defendants' motions are denied as moot in light of the dismissal of plaintiff's complaint.

This constitutes the decision and order of this Court.

Dated: 9/30/22

Hon. A. G. Smith

J.S.C.

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY ACTIVE CASE STILL ACTIVE

2. MOTION IS.....

GRANTED OTHER DENIED GRANTED IN PART

3. CHECK IF APPROPRIATE.....

SETTLE ORDER APPEARANCE SUBMIT ORDER SCHEDULE APPOINTMENT FIDUCIARY APPOINTMENT REFEREE APPOINTMENT