

**Ferraro v Lidia Malaki LLC**

2022 NY Slip Op 35000(U)

December 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 511725/2020

Judge: Odessa Kennedy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

P R E S E N T :

HON. ODESSA KENNEDY

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 2

ROCCO FERRARO

Plaintiff,

Index No: 511725/2020

-against-

LIDIA MALAKI LLC and  
SHIMON REALTY CORP.,

**ORDER**

Defendants.

2022 DEC 15 AM 9:30  
KINGS COUNTY CLERK  
FILED

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

<b>Papers</b>	<b>NYSCEF Document No.</b>
---------------	----------------------------

**Motion Sequence No. 2**

Notice of Motion, Affirmation in Support	36 - 60
Opposition	61 - 72
Reply	73 - 75

Upon review of the foregoing papers, plaintiff’s motion for summary judgment on the issue of liability is decided as follows:

In an action to recover for personal injuries, plaintiff contends that on March 4, 2019 at approximately 12:00 P.M. during the scope of his employment with Verizon he slipped as he attempted to descend an outdoor staircase leading from the courtyard of defendant’s premises to the basement, where he intended to go to repair the building’s cable lines. Plaintiff testified that he received the subject work assignment by way of a ticket that his supervisor at Verizon provided him regarding the subject premises, a “multi-family” building. The ticket contained the names, contact information and complaint reports of six “customers” at the building.

Prior to arriving at the subject premises, in contemplation of gaining access to the building, plaintiff called one of the “customers” listed on the ticket. The customer

informed plaintiff that he was leaving for work, and that plaintiff could ring the doorbell of the building's "super" to gain entry.

Plaintiff thereafter arrived at the building and rang the doorbells of all the customers who were identified in his work ticket, and the superintendent. No one answered their doorbell. Plaintiff then contacted a resident who let plaintiff into the building and directed him to the "super's room." After knocking on the door of that room, the superintendent's wife opened the door and informed plaintiff that the superintendent was not at the premises. Plaintiff displayed to the superintendent's wife his Verizon identification and stated that he needed access to the basement to fix the building's cables. The superintendent's wife stated that the basement is open and directed plaintiff to gain entry to the basement through the "back doors." Plaintiff then exited the building, walked to the courtyard, and found the stairway, that led to the basement. The stairway was covered by a "few inches of snow." As plaintiff attempted to take his "first step down," he slipped and fell down the stairway landing at the bottom step.

Plaintiff testified that when he started to slip, he reached toward a handrail, but that the handrail was loose and the "fence" to which the railing was attached was bent. Following the incident, plaintiff observed a plastic bag on the second step from the bottom of the staircase which he had not seen before the incident despite having looked down the steps before the incident. Plaintiff infers that the plastic bag had been under the snow on the part of the step where plaintiff had planted his foot when he slipped, and that the plastic bag traveled down the steps with plaintiff when he fell.

In support of the motion, plaintiff's counsel also relies on an affidavit of a meteorologist who based on his review of certified and uncertified weather data, stated that the snow was on the subject steps approximately 7 hours and forty minutes prior to the incident.

In opposition, defense counsel submits the deposition testimony of the superintendent and his wife. The superintendent testified that he was responsible for clearing snow, ice and garbage from the premises but does not have a set schedule as to when he performs those tasks. He lacks any records of the work he performs and does not recall whether he removed snow or applied salt to the subject stairway within days prior to, or on, the date of the alleged incident.

The superintendent's wife testified that she does not know whether a Verizon worker came to the subject premise on March 4, 2019, but if Verizon workers come to the building, it is her customary practice to let them in.

Defendants contend that plaintiff impermissibly gained access to the premises through the superintendent's wife. Plaintiff testified that pursuant to a contract, if a

Verizon technician was unable to make contact with the superintendent or a customer listed on the work ticket, the “job gets returned as a no access.” Since the superintendent’s wife was not listed on the work ticket, and plaintiff failed to make contact with the superintendent or any of the customers listed on the work ticket, he should not have entered the premises, and should have reported the job to Verizon as a ‘no access.’

As the party moving for summary judgment, plaintiff has the initial burden of coming forward with sufficient proof to make out a prima facie case. *Zuckerman v City of New York*, 49 NY2d 557 (1980). The burden then shifts to defendants to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact. *Gesuale v Campanelli & Associates, P.C.*, 126 AD3d 936, 937 (2d Dept 2015). In deciding a summary judgment motion, the court’s function is not to make factual or credibility determinations but to identify material issues of fact or lack thereof. *Vega v Restani Constr. Corp.*, 18 NY3d 499 (2012).

In the case at bar, there is an issue of fact as to whether the alleged dangerous condition of the stairway was open and obvious, thus, negating defendants’ duty to protect or warn. A condition is open and obvious where it is readily observable through the reasonable use of senses based on the existing circumstances. *Sebagh v Cap. Fitness, Inc.*, 202 AD3d 853, 855 (2d Dept 2022). Whether a condition is “open and obvious” is generally a question for the fact finder to resolve. *See Robbins v 237 Ave. X, LLC*, 177 AD3d 799 (2d Dept 2019); *Sarab v. BJ's Wholesale Club*, 174 AD3d 933 (2d Dept 2019).

Plaintiff testified that before descending the subject stairway, he looked down and observed about 2-3 inches of snow on the steps, and despite having observed the snow, he opted to go down the stairway. Plaintiff’s knowledge of the existence of the snow on the steps prior to the incident, creates an issue of fact as to whether defendants had the duty to warn plaintiff of the allegedly hazardous condition.

In addition, plaintiff describes multiple other alleged conditions which may have caused him to fall, including a plastic bag which he believes was concealed beneath the snow under his foot at the top of the stairs that could have caused him to slip, the condition of the handrail, and the “fence” to which the handrail was attached. Plaintiff has not conclusively established what condition or combination of conditions caused his fall. However, if the concealed plastic bag, the poor condition of the handrail, and the fence contributed to plaintiff’s fall, plaintiff has the duty to establish notice with respect all of those conditions, which he has not.

Plaintiff’s expert report includes ambiguities which further preclude summary judgment. The meteorologist’s report states that at 7:26 A.M. on March 4, 2019, the National Weather Service issued a statement that “precipitation had ended.” Despite

stating that precipitation had ended on the morning of March 4, 2019, the report also states that “the last time new ice formed prior to the time of the incident was March 2, 2019.” There is no clarification as to the expert’s conclusion that ice stopped forming on March 2, 2019 when precipitation continued for two additional days. The report’s reference to “new ice” is further ambiguous. Moreover, the expert seems to have relied both on certified and uncertified weather reports which further adds to the ambiguities.

Based on the foregoing, plaintiff’s motion for summary judgment is denied.

This constitutes the Order of the Court.

Dated: December 14, 2022

ENTER :

  
\_\_\_\_\_  
HON. ODESSA KENNEDY

Hon. Odessa Kennedy

2022 DEC 15 AM 9:30  
KINGS COUNTY CLERK  
FILED