

Cuminale v 160-55 Crossbay Blvd. LLC
2022 NY Slip Op 35195(U)
October 27, 2022
Supreme Court, Queens County
Docket Number: Index No. 712321/2020
Judge: Phillip Hom
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

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

PRESENT: HON. PHILLIP HOM

PART 14

Justice

-----X

INDEX NO. 712321/2020

RICHARD CUMINALE,

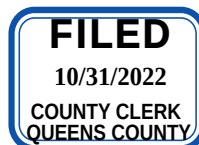
MOTION DATE 8/25/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

160-55 CROSSBAY BOULEVARD LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for

Summary Judgment.

Upon the foregoing documents, it is ordered that this motion by Plaintiff for summary judgment on the issue of liability and this cross-motion by Defendant for summary judgment dismissing the complaint, are determined as follows:

Plaintiff Richard Cuminale ("Plaintiff") commenced this action to recover for injuries allegedly sustained when he fell while descending a boat ramp, owned, and operated by Defendant 160-55 Crossbay Boulevard LLC ("Defendant"), located at 160-55 Crossbay Boulevard in Queens, NY ("Premises").

Plaintiff moves for summary judgment on the issue of liability. Defendant opposes and cross-moves for summary judgment dismissing the Complaint. Defendant asserts that Plaintiff's fall was not caused by any condition of or on the ramp itself; rather, Defendant contends that Plaintiff lost his footing when he ran down the ramp and failed to utilize both handrails provided, causing him to fall. Plaintiff opposes, arguing that he did not contribute to the accident.

In a summary judgment motion, the movant has the initial burden of demonstrating his or her prima facie entitlement to judgment as a matter of law through submission of sufficient evidence eliminating any material issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Plaintiff's Motion for Summary Judgment

"To establish a prima facie case of negligence in a premises liability action, a plaintiff must demonstrate the existence of a dangerous or defective condition that caused his or her injuries, and that

the defendant either created or had actual notice or constructive notice of the condition” (*Robert v Mahopac Central School Dist.*, 38 AD3d 514, 514 [2d Dept 2007]; *see Caldwell v Pathmark Stores, Inc.*, 29 AD3d 847, 847 [2d Dept 2006]; *Cruceta v Funnel Equities, Inc.*, 18 AD3d 693, 694 [2d Dept 2005]; *Goldman v Waldbaum, Inc.*, 248 AD2d 436, 437 [2d Dept 1998]).

A plaintiff is not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018]; *MacKay v Paliotta*, 196 AD3d 552, 558-59 [2d Dept 2021]; *Marks v Rieckhoff*, 172 AD3d 847, 848 [2d Dept 2019]; CPLR 1411 and 1412).

In support, Plaintiff submits, among other things, the video of Plaintiff’s fall (the “Video”) (EF Doc. 24), the Examination Before Trial (“EBT”) transcript of Plaintiff (EF Doc. 25), the EBT transcript of Dennis Croce (“Croce”), member-owner of Defendant (EF Doc. 26), the affidavit of James Pugh, Ph.D., P.E. (“Pugh”) (EF Doc. 27), and Tidal Charts showing low tide and high tide on the date of Plaintiff’s accident as well as the date Pugh inspected the ramp (EF Doc. 28). Plaintiff alleges that the subject ramp was too steep and in poor condition, causing an unsafe condition, which caused his fall.

Plaintiff testified that, on May 7, 2020, he was delivering a drill to his friend, George Contino (“Contino”), who rented a boat slip from Defendant. He attested that, while he was descending the aluminum ramp, he was carrying a bag containing the drill in his left hand and holding onto the handrail with his right hand. Plaintiff said that he was walking down the ramp at a normal pace; however, said ramp was so steep that his upper body was ahead of his lower body, causing him to pick up speed, lose his grip on the handrail, and fall onto the wooden dock below.

The Video is approximately fifteen (15) seconds long and Plaintiff’s fall occurs within the first five (5) seconds. The Video substantiates Plaintiff’s testimony, as it shows Plaintiff descending the ramp while holding a bag in his left hand, attempting to steady himself with his right hand by grabbing the right handrail and, ultimately, falling onto the dock below.

Moreover, Croce’s EBT testimony supports Plaintiff’s entitlement to judgment as a matter of law on the issue of liability. Notably, Croce’s EBT testimony shows that Defendant had actual notice of the condition, i.e., the ramp’s steepness, as Contino complained to Defendant about the steepness of the ramp prior to Plaintiff’s accident. His testimony also shows that the ramp was never inspected after Contino’s complaint, that Defendant did not employ anyone to inspect or maintain the Premises,¹ and that the condition was a potentially dangerous condition.

Additionally, Croce identified Contino as Defendant’s dock tenant who Plaintiff was visiting on the date of the accident. Croce further testified that prior to 2010 a wooden ramp was utilized at the Premises, but Defendant’s members replaced the wooden ramp with the subject aluminum ramp. Croce averred that Defendant’s members measured the wooden ramp to find a replacement ramp and installed the aluminum ramp themselves.

Pugh, Plaintiff’s expert witness, averred that he visited the Premises and inspected the subject ramp on April 23, 2021. Pugh attested that he timed his inspection according to the tidal tables, so that conditions would be as closely matched as practicable to the time of the accident because the tide would

¹ Croce testified that he had an employee who would check the previous wooden ramp to see if any repairs were necessary; however, he testified that no one inspected the new subject ramp.

affect the steepness of the ramp. Pugh stated that safety friction tape was present on the handrails of the ramp to provide adequate hand grip; however, the safety tape had worn and had largely peeled off in a variety of locations. Pugh opined that the tape was likely in this condition at the time of the accident. According to Pugh, the deterioration of the safety tape contributed to the accident as Plaintiff unsuccessfully attempted to grip the right handrail.

Pugh further averred that the Americans with Disabilities Act (“ADA”), NY State Building Code 1012.2, and NYC Administrative Code 27-377 contain standards regarding ramps, mandating a maximum slope of 1 in 12, which is approximately 5 degrees for the angle of the ramp surface to the horizontal. Pugh determined that the angle of the subject ramp surface to the horizontal dock at low tide was approximately 34.4 degrees. Pugh opined that Plaintiff lost his balance due to the steepness of the ramp and could not stop his forward momentum until he fell. Pugh concluded that, to a reasonable degree of engineering certainty, the excessive steepness of the ramp at low tide was the proximate cause of Plaintiff’s accident. Pugh further found that the ramp does not comply with the width requirements under the ADA but failed to opine on how this may have contributed to Plaintiff’s accident.

The Court finds that Plaintiff’s evidentiary submissions demonstrate the existence of a dangerous condition that caused his injuries, and that Defendant either created and/or had actual notice of the condition (*see Robert*, 38 AD3d at 514; *Caldwell*, 29 AD3d at 847; *Cruceta*, 18 AD3d at 694; *Goldman*, 248 AD2d at 437). Thus, Plaintiff sets forth prima facie entitlement to summary judgment on the issue of liability. The Court does not make a finding on whether Plaintiff is free of comparative fault. The burden now shifts to Defendant to raise a triable issue of fact.

In opposition, Defendant submits an attorney affirmation (EF Doc. 32), a counterstatement of facts signed by Defendant’s attorney (EF Doc. 33), and a memorandum of law (EF Doc. 34). Such submissions are not based upon personal knowledge and are of no probative or evidentiary value (*see Zuckerman*, 49 NY2d at 563). Moreover, Defendant does not address Pugh’s assertion that the ramp’s angle caused Plaintiff’s accident. Instead, Defendant offers a separate theory of liability wherein Plaintiff was the sole proximate cause of his injuries when he ran down the ramp without holding onto the handrails.

Defendant further argues that Pugh’s affidavit should not be considered as it is conclusory and speculative, because it is based on an inspection that occurred one year after the accident. Defendant cites to *Mossberg v Crow’s Nest Marina of Oceanside* to support his argument that the affidavit is conclusory (129 AD3d 683 [2d Dept 2015]). In *Mossberg*, the plaintiff slipped on a dock that plaintiff alleged was slippery. The Court found that the plaintiff failed to raise a triable issue of fact as to the defendant’s entitlement to summary judgment because there was no evidence that “the alleged area tested by the expert was in the same condition as it was on the date of the accident” and plaintiff’s expert failed to identify the basis for his “coefficient of friction value” used to reach certain conclusions (*see id*).

Here, unlike in *Mossberg*, Plaintiff’s expert averred that the tidal charts demonstrate that the conditions during his inspection of the subject ramp “were as closely matched as practicable to the date of the accident.” Nevertheless, Plaintiff meets his prima facie burden without Pugh’s affidavit. Thus, Defendant fails to raise a triable issue of fact as to its liability.

Defendant's Cross-Motion for Summary Judgment

“[A] property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition” (*R.B. v Sewanhaka Central High School District*, 207 AD3d 607, 308 [2d Dept 2022], quoting *Kelly v Roy C. Ketcham High School*, 179 AD3d 653, 654 [2d Dept 2020]; see *Locke v Calamit*, 175 AD3d 560, 561 [2d Dept 2019]). In moving for summary judgment to dismiss the complaint, the property owner or party in possession/control bears the burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to have discovered or remedied it (see *R.B.*, 207 AD3d at 608; *Kelly*, 179 AD3d at 654).

In support of its cross-motion, Defendant incorporates by reference “the exhibits attached to Plaintiff’s moving [attorney] affirmation of Thomas Cascione.” This includes, among other things, the Video, the EBT transcript of Plaintiff, and the EBT transcript of Croce.

As stated above, Croce’s EBT testimony shows that Defendant had actual notice of the condition, i.e., the ramp’s steepness, that Defendant did not employ anyone to inspect or maintain the Premises, and that the condition was potentially dangerous condition. As such, Defendant fails to establish prima facie burden, as it fails to show that it neither created the alleged dangerous condition nor had actual notice of its existence for a sufficient length of time to have discovered or remedied it (see *R.B.*, 207 AD3d at 608; *Kelly*, 179 AD3d at 654). Therefore, Defendant’s cross-motion is denied.

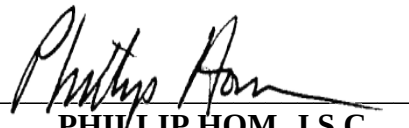
In accordance with the foregoing, it is **ORDERED** that Plaintiff’s motion for partial summary judgment on the issue of liability² is granted; and it is further

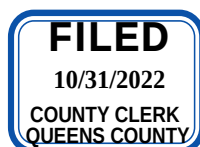
ORDERED that Defendant’s cross-motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry on Defendant within twenty (20) days from the date of entry.

This constitutes the Decision and Order of this Court.

Dated: October 27, 2022


PHILIP HOM, J.S.C.



² The issue of comparative fault shall be determined at the time of trial.