

Bestani v Northwell Health Inc.
2022 NY Slip Op 35253(U)
December 30, 2022
Supreme Court, Orange County
Docket Number: Index No. EF006989-2019
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at the Orange County Court House,
285 Main Street, Goshen, New York 10924 on the 30th day of December 2022.

To commence the
statutory time for
appeals as of right
(CPLR 5513 [a]), you
are advised to serve a
copy of this order, with
notice of entry, on all
parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
MICHAEL BESTANI,

Plaintiff,

-against-

DECISION & ORDER
Index No.: EF006989/2019
Motion date: 6/10/2022
Motion Seq. #2

NORTHWELL HEALTH INC., HIP HOSPITAL INC.,
and FOREST HILLS HOSPITAL,

Defendants.

-----X
VAZQUEZ-DOLES, J.S.C.

The Defendants move by Notice of Motion, pursuant to CPLR §3212 seeking an Order granting summary judgment, dismissing plaintiff's complaint in its entirety, with prejudice, and directing the clerk to enter judgment accordingly, or in the alternative, granting an Order pursuant to CPLR §3212 (e) and (g) granting partial summary judgment, dismissing all claims for which plaintiff is unable to raise an issue of fact in opposition, thereby limiting the issues for trial, and granting such and other further relief as this Court deems just and proper.

The following papers were read on this motion by Defendants:

Defendant's Notice of Motion/Affirmation in Support/Statement of Material Facts/ Exhibits..1-24
Affirmation in Opposition/Response to Material Facts/Plaintiff's Statement of Material
Facts/Exhibits.....25-35
Affirmation in Reply.....36

Upon the foregoing, Defendants' motion for full and/or in the alternative for partial summary judgement is **DENIED**.

The plaintiff allegedly sustained personal injuries on August 21, 2018, when he was caused to trip and fall on a purportedly dangerous loading dock at the subject premises, Forest Hills Hospital. The plaintiff commenced this action by the filing of a Summons and Verified Complaint on September 3, 2019 alleging, *inter alia*, that defendants were negligent in allowing, causing and/or dangerous, hazardous and unsafe conditions to exist on the loading dock, that defendants acted with reckless disregard in hiring inept, incompetent and/or unskilled employees, and that the defendants had actual and/or constructive notice of the dangerous and defective conditions in that the conditions existed for a sufficient length of time prior to the happening of the incident. In his Bill of Particulars, plaintiff alleges, *inter alia*, that defendants were negligent in allowing, causing and/or permitting ruts, holes and/or depressions to exist on the loading dock, in allowing, causing and/or permitting a portion of the loading dock to be "broken up" (*see* Defendants' affirmation in support, pg. 5.), not level, depressed and uneven so as to create dangerous, hazardous and unsafe condition to persons walking on the parking lot, and in creating a trap in failing to provide proper warnings of existing conditions to persons lawfully thereon.

Defendants move for summary judgment, arguing that the damaged concrete identified by the plaintiff as the dangerous condition of damaged concrete was not a dangerous condition, but an incidental occurrence common to loading docks like the subject loading dock. Additionally, Defendants contend that they did not have actual or constructive notice and that they did not have a duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. Moreover, defendants assert that the alleged dangerous condition on the loading dock was not the proximate cause of plaintiff's injuries but instead was plaintiff's own negligence and that the surveillance video shows plaintiff stumbling forward, caught himself, stood for a short time, and then slowly lowered himself to the ground and leaned against the pole on his own volition.

Section §3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of

action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Section §3212(b) further states that “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact” (*Anyanwu v Johnson*, 276 AD2d 572 [2nd Dept., 2000]). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party (see *Kutkiewicz v Horton*, 83 AD3d 904 [2nd Dept., 2011]).

In support of their motion, defendants submit, among other things, a copy of plaintiff’s EBT transcript; a copy of the EBT transcript of David Schowerer, employee, on behalf of Long Island Jewish Forest Hills Hospital, which is purportedly owned by Northwell Health, Inc.; Affidavit of Anthony E. Dolhon, P.E., a civil engineer; Affidavit of Donald L. Hess, a professional consultant in the transportation industry field; and photographs taken on the date of the incident. Defendants’ submissions support their contention that they were not negligent in either their maintenance of the loading dock or in their hiring of employees. Additionally, defendants’ submissions also support their assertion that they were not negligent by allowing or causing a portion of the loading dock to be broken up.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Plaintiff claims that in his capacity as a truck driver he tripped and fell at defendants’ hospital facility. He testified that he was stepping out of his truck and facing the truck and when he turned around, he stepped into a pothole of broken concrete and twisted his ankle and fell back, he tried to reach for a cart with his right arm to break his fall, but the cart was a laundry cart and rolled away.

Photographs of the loading dock submitted on the motion, taken on the date of the incident, show that the subject loading dock area of the incident had broken up concrete and depressions, was not level, that the condition was longstanding, and that these conditions in the concrete could present a hazard.

An owner of premises may not be held liable for a dangerous condition on the property unless such owner had notice of the defect or in the exercise of due care, should have had such notice (*Brandon v Hallivis*, 97 AD3d 618 [2d Dept 2009]). To permit a finding of constructive notice, “a condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it” (*Deveau v. CF Galleria at White Plains, LP*, 18 A.D.3d 695, 695; see *Bolloli v Waldbaum*, 71 AD3d 618 [2d Dept 2010]; *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938 [2d Dept 2017]). Here, plaintiff rebutted defendants’ burden by raising a triable issue of fact that warrants denial of defendants’ summary judgment motion.

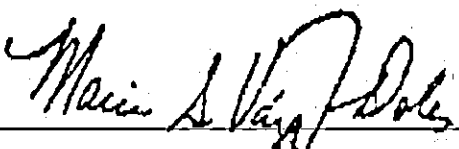
Based upon the foregoing, it is hereby:

ORDERED that Defendant’s motion for summary judgment is **DENIED**.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 30th 2022
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: All Counsel via NYSCEF