

**Castillo v Doaba Malwa, Inc.**

2023 NY Slip Op 31791(U)

May 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 502778/2021

Judge: Debra Silber

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.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

\_\_\_\_\_X  
**ALFONSO DOMINGO NUNEZ CASTILLO,**

**Plaintiff,**

**- against -**

**DOABA MALWA, INC.,  
G.P. NORTHERN BLVD. SERVICE KINGS CENTER INC.  
and EXXON MOBIL CORPORATION,**

**Defendants.**  
\_\_\_\_\_X

**DECISION/ORDER**

**Index No. 502778/2021  
Motion Seq. No. 1, 2  
Date Submitted: 5/18/23**

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment on liability and defendants' cross motion for summary judgment***

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>29-40</u>
Notice of Cross Motion and Exhibits Annexed.....	<u>57-65</u>
Opposition to Motion.....	<u>46-56, 82-84</u>
Opposition to Cross Motion.....	<u>74-77</u>
Reply Affirmation.....	<u>69-73; 78</u>

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

In motion sequence #1, plaintiff moves for summary judgment on the issue of liability in this action which arises from a trip and fall on December 29, 2020, at a gas station located at 1193 Myrtle Avenue in Brooklyn, NY. In motion sequence #2, all of the defendants join in cross-moving for summary judgment dismissing the complaint. Defendants also seek sanctions and attorneys' fees.

**Plaintiff's motion**

In support of plaintiff's motion, he submits counsel's affirmation, the pleadings, an affidavit with a certified translation, a copy of the deed to defendant Doaba Malwa, Inc., a surveillance video of the plaintiff's accident, photographs of the area where plaintiff fell, and an affidavit of a licensed professional engineer.

Plaintiff states in his affidavit [Doc 11] that he had never been to this gas station before, and that he got out of the vehicle while his friend pumped gas to go to the convenience store for a snack. He states at Pages 1-2, “the front of my right foot struck a raised concrete slab which caused me to trip over the raised concrete slab, fall forward and hit the ground. I noticed that the defective concrete slab that caused me to trip was raised above the adjacent concrete block by approximately 2 inches. The tip of my right foot got caught over the raised concrete slab because of the difference in height.”

Plaintiff’s engineer, Harold Krongelb P.E., provides a lengthy affidavit, which reflects that he conducted a site visit on December 16, 2021, and concludes [Doc 40 Page 11] that, inter alia, “it is my professional opinion with a reasonable degree of engineering certainty that a substantial cause of Alfonso Domingo Nunez-Castillo’s trip and fall and subsequent injury is the concrete slab that is elevated by approximately 2 inches above the abutting concrete slab.” He also states “It is my professional opinion with a reasonable degree of engineering certainty that the concrete slab is elevated by approximately 2 inches above the abutting concrete slab is inherently dangerous because a pedestrian cannot recognize the hazard with sufficient time and space to avoid tripping and falling. Based on the images associated with paragraph 5 on page 6 of this report, it is my professional opinion with a reasonable degree of engineering certainty that the hazardous condition that caused Alfonso Domingo Nunez-Castillo to trip and fall existed for at least six years before the incident” [id.].

### **Defendants’ motion**

In support of defendants’ cross-motion, they submit counsel’s affirmation, the pleadings, the same surveillance video of the plaintiff’s accident as was submitted by

plaintiff, and an affidavit of a biomechanical engineer. Counsel avers [Doc 58] that plaintiff did not trip and fall, but that his accident was a “self-inflicted act” of “violently precipitating himself to the ground” [id. ¶4]. Counsel proceeds to accuse plaintiff of fraud [id. ¶12], and claims that the complaint must be dismissed as the accident was “staged”. The defendants’ expert, Carl Jewell, PhD, opines that “On December 29, 2020, Mr. Alfonso Domingo Nunez Castillo reportedly underwent a trip and fall event at an Exxon gas station located at 1193-1199 Myrtle Avenue in Brooklyn, New York. Based on a kinematic analysis of the available video of the subject incident, Mr. Castillo did not undergo a fall as a result of a trip initiated due to the seam between the adjacent cement flags. . . [his kinematics] are more consistent with a controlled fall initiated with a forward lean of his torso and upper extremities. Mr. Castillo’s final position lying prone on the ground at a distance from the seam is consistent with a controlled fall and a forward push from his lower extremities.” Counsel next states “We are willing to accept that Counsel was unaware that Plaintiff’s right foot never came into contact with the raised cement slab at the time of commencement of this action,” [id. ¶16] and “Unless Plaintiff can present a plausible argument to refute the evidence presented to this Court, we respectfully ask that Counsel discontinue this action or, in the alternative, ask to be recused from representation. If no such plausible argument is forwarded, we will seek sanction up to \$10,000 pursuant to CPLR §8303-a(c)[1][ii], along with attorneys’ fees incurred pursuant to 22 NYCRR 130-1.5, for the remainder of this litigation” [id. ¶18]. He concludes “We have no doubt that Plaintiff’s Counsel would not unwittingly want to be participants in a fraud” [id. ¶19].

## Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable

inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

## Discussion

Plaintiff contends he tripped and fell due to mis-leveled concrete flags at the defendants' gas station. He claims the defendant Doaba Malwa Inc. owns the property, and that the owner had actual or constructive notice of the defective condition. He provides an engineer's report that the height differential at the location was two inches, which is significant, as anything more than one-half inch is a violation of the NYC Administrative Code (§19-152). Plaintiff makes a prima facie case for summary judgment. If the motion were granted, plaintiff's comparative fault, if any, would need to still be determined at trial. Defendant opposes the motion and avers that plaintiff "staged" the accident, committed fraud, and did not trip and fall on a raised sidewalk flag, but was a "self-inflicted act" of "violently precipitating himself to the ground."

However, "[t]he function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Reyes v S. Nicolia & Sons Realty Corp.*, 212 AD3d 851, 852-853 [2d Dept 2023]). Here, viewing the evidence in the light most favorable to the defendants as the nonmoving parties (*see Stukas v Streiter*, 83 AD3d 18, 22, 918 NYS2d 176 [2011]), the court is constrained to find that defendants overcome the motion and raise a triable issue of fact (*Flaccavento v John's Farms*, 173 AD3d 1141, 1142 [2d Dept 2019]). Viewing the video, as both sides urge, was unavailing. The court could not determine for certain whether the plaintiff fell when he contacted the mis-leveled concrete, or if something else caused him to fall.

"To hold a defendant liable in common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty,

and (3) that the breach constituted a proximate cause of the injury" (*Lynfatt v Escobar*, 71 AD3d 743, 744, 896 N.Y.S.2d 450; see *Pulka v Edelman*, 40 NY2d 781, 782, 358 N.E.2d 1019, 390 N.Y.S.2d 393; *Marazita v City of New York*, 202 AD3d 951, 952, 163 N.Y.S.3d 219). "[I]t is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society [in general]. The scope of any such duty of care varies with the foreseeability of the possible harm" (*Tagle v Jakob*, 97 NY2d 165, 168, 763 N.E.2d 107, 737 N.Y.S.2d 331; see *Montalvo v Texas Roadhouse Holdings, LLC*, 200 AD3d 986, 987, 159 N.Y.S.3d 116). Foreseeability does not define duty; it merely determines the scope of the duty once a duty is found to exist (see *Smith v Dutchess Motor Lodge*, 213 AD3d 881, 881-882 [2d Dept 2023]; *Pulka v Edelman*, 40 NY2d at 785; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 18, 115 N.Y.S.3d 368).

Owners and parties in possession of a property are under a duty to maintain their property in a reasonably safe condition in view of the existing circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (see *Smith v Dutchess Motor Lodge*, 213 AD3d 881, 882 [2d Dept 2023]; *Peralta v Henriquez*, 100 NY2d 139, 144, 790 N.E.2d 1170, 760 N.Y.S.2d 741; *Basso v Miller*, 40 NY2d 233, 241, 352 N.E.2d 868, 386 N.Y.S.2d 564). "However, there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" (*Lore v Fitness Intl., LLC*, 211 AD3d 722, 722, quoting *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 799, 113 N.Y.S.3d 235).

On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and

competing contentions of the parties (*see Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003]), citing *Myers v Fir Cab Corp.*, 64 N.Y.2d 806, 476 N.E.2d 321, 486 N.Y.S.2d 922 [1985]). Summary judgment is inappropriate where questions of fact or credibility are raised that require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 N.Y.2d 439, 293 N.Y.S.2d 93, 239 N.E.2d 725 [1968]).

A plaintiff moving for summary judgment must prove all elements of the cause of action. The court finds that plaintiff makes a prima facie case for summary judgment on the issue of liability. However, defendant raises a triable issue of fact whether the raised flag, a breach of the duty of care, was what proximately caused the plaintiff's accident, the third prong, with the affidavit of the biomechanical engineer.

Turning to defendants' motion, a defendant that moves for summary judgment in a trip and fall case "has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice" of it for sufficient time to remedy the condition (*Ellis v Newmark & Co. Real Estate, Inc.*, 2022 NY Slip Op 31232[U], \*4 [Sup Ct, NY County 2022]). Here, defendants have instead come up with a new basis for a motion for summary judgment, that the accident was "staged" and did not happen. That is not the law in New York. A defendant cannot make a prima facie case for summary judgment with anything other than the required proof. There is not one case in the Second Department that the court could find which supports "staged accident" as a basis for a summary judgment motion by a property owner in a trip and fall case. An affidavit from a biomechanical engineer, whether he did or did not perform a site inspection, cannot satisfy a property owner's requisite burden of proof. As defendants

have not made a prima facie case for summary judgment, the court need not consider the plaintiff's papers in opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316).

Accordingly, both motions are denied.

This constitutes the decision and order of the court.

Dated: May 25, 2023

ENTER:



---

Hon. Debra Silber, J.S.C.