

**St. Robert v Azoulay Realty Corp.**

2023 NY Slip Op 32024(U)

June 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 518984/2017

Judge: Devin P. Cohen

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This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York  
County of Kings**

**Index Number** 518984/2017  
Seq. 014

Part 91

**DECISION/ORDER**

\_\_\_\_\_  
MARIE L. SAINT ROBERT,

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

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed. . . .	<u>2</u>
Answering Affidavits . . . . .	<u>3</u>
Replying Affidavits . . . . .	<u>   </u>
Exhibits . . . . .	<u>   </u>
Other . . . . .	<u>   </u>

AZOULAY REALTY CORP.,

Defendants.  
\_\_\_\_\_

Upon the foregoing papers, defendants’ motion to renew (Seq. 014) is decided as follows:

**Factual Background and Procedural History**

Plaintiff commenced this action to recover damages for an accident that occurred on defendant’s premises on August 9, 2017. Plaintiff testified that she tripped on an exposed wire on the steps of defendant’s building (Saint Robert EBT at 23-25, 30, 31, 53).

By order, dated June 25, 2020, Justice Lawrence Knipel directed defendant to provide certain discovery on or before July 27, 2020, or defendant would be “precluded from testifying at trial [absent good cause shown].” Plaintiff moved for summary judgment on February 28, 2020, arguing that defendant was precluded from testifying at the time of trial for failure to provide requisite discovery. By decision and order dated August 12, 2020, I denied the motion, saying that plaintiff had not established that defendant was precluded and finding questions of fact regarding defendant’s creation and/or notice of the alleged dangerous condition.

Plaintiff then moved on September 30, 2020, for an order precluding defendant based upon Justice Knipel's prior June 25, 2020 order. By order, dated October 26, 2020, Justice Knipel granted the motion and precluded defendant from testifying at trial.

Defendant moved on November 24, 2020, to renew and reargue Justice Knipel's decision and the court granted reargument but adhered to its prior decision on December 14, 2020.

Plaintiff then moved on December 31, 2020 to renew her motion for summary judgment before me, and that motion was granted on March 15, 2022. I held that Justice Knipel's order precluded the defendant from testifying at trial, and therefore the evidence defendant previously offered to create a question of fact was not properly before the court.

The December 2020 preclusion order was appealed to the Second Department, and the appellate court modified that order. The Second Department held that preclusion was proper "only to the extent of precluding the defendant from offering evidence at trial that is responsive to the plaintiff's disclosure demand dated July 31, 2019," but did not uphold absolute preclusion from testifying at trial.

Defendant now seeks to renew my March 15, 2022 order on the basis of the Second Department's decision.

### **Analysis**

A motion to renew must be based upon new facts not offered on the prior motion, with a reasonable justification for the failure to present such facts, or a change in the law, that would change the prior determination (*Everhome Mtge. Co. v Aber*, 195 AD3d 695, 695 [2d Dept 2021]). Defendant's basis for renewal is the Second Department decision modifying the previous order. In light of this modification, renewal is granted.

Pursuant to the Second Department's order, defendant's preclusion is limited to those

items contained in plaintiff's post-EBT demands, dated July 27, 2020. To that end, the defendant's effort to rely on an affidavit from its principal to demonstrate that there was no on-going work must fail, as testimony about "ongoing work" is precluded by the Appellate Division's order.

Second, defendant seeks to rely on the depositions of the parties. The defendant owner, Isaac Azoulay, testified that he was responsible for maintenance, repair, and cleaning of the building (Azoulay EBT at 41). He testified that he spent 40 minutes every Saturday or Sunday inspecting the property (*id.* at 58–59). Defendant testified that he never had any issues with the stairs during his inspections, nor did he see any wires as depicted in plaintiff's photographs or receive complaints about any wires (*id.* at 99–101). Defendant further testified that he personally changed the lightbulbs and that, upon his inspections, the light on the second floor always worked (*id.* at 105–106).

Plaintiff's son, Gregory Pecion, testified that he saw the wire approximately four days prior to the accident and immediately called Mr. Azoulay, leaving a message (Pecion EBT at 38, 44). Mr. Azoulay testified that he never received a call from Mr. Pecion (Azoulay EBT at 104). Ms. Saint Robert testified that neither she nor her sons complained about the wire, and that her sons had not mentioned the wire to her (Saint Robert EBT at 54, 68).

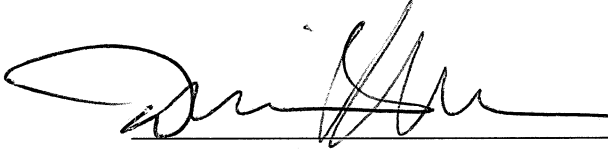
Ultimately, even given defendant's limited preclusion, issues of fact remain as to whether defendant had notice of a dangerous condition based on the conflicting testimony of the parties.

### **Conclusion**

Defendant's motion for renewal (seq. 014) is granted and, upon renewal, the prior amended order, dated February 24, 2022, which granted plaintiff summary judgment is hereby vacated. All interest that has accrued due to summary judgment is hereby expunged.

This constitutes the decision and order of the court.

June 12, 2023  
\_\_\_\_\_  
**DATE**

  
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**DEVIN P. COHEN**  
Justice of the Supreme Court

[Final page of decision and order granting motion sequence 014 of *Saint Robert v Azoulay Realty Corp.*, 518984/2017.]