

**Ruiz v New York City Tr.**

2023 NY Slip Op 32133(U)

June 27, 2023

Supreme Court, New York County

Docket Number: Index No. 159447/2015

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X

RUIZ, LEONARDO

Plaintiff

- v -

NEW YORK CITY TRANSIT

Defendant

-----X

INDEX NO. 159447/2015

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY

For the reasons that follow, the motion for summary judgment by Defendant New York City Transit Authority is granted.

Background

This personal injury matter arises out of a slip and fall incident on a subway station staircase. Plaintiff alleges that on June 26, 2015, while descending a staircase at the Madison Avenue and 53rd Street subway station in New York County, he slipped and fell on a step due to water and suffered injuries.

Plaintiff's Notice of Claim (a requirement before bringing a negligence action against a government entity), alleges that he fell due to the staircase step being defective in that it was "chipped, depressed, hazardous, unlevel, irregular, uneven, unsafe, loose, wobbly, cracked, improperly designed, improperly installed, holey, improperly constructed, broken, mis-leveled, misaligned and/or badly repaired"

Plaintiff brings this negligence action against Defendant in its capacity as lease holder/owner of the subway system, alleging Defendant was negligent in creating a defective condition and/or having actual and/or constructive notice of a defective condition and not resolving the condition.

Defendant now post note of issue, moves for summary judgment on the grounds that the evidence submitted shows that a defective condition did not exist at the time of the Plaintiff's accident and that it did not have constructive or actual notice of such defect. In support, of this Defendant submits the Notice of Claim, Bill of Particulars, the Transit Authority Discovery Report, the Service Call Report, transcripts of Plaintiff's testimony at the Statutory Hearing and Examination Before Trial, photographs and transcripts of Defendant's employees, Structure Maintainer Frank Blandina, Transit Authority Cleaner Elizabeth McFadden, and Station Supervisor Akhteruzzaman Khan. Defendant also relies on Second Department cases such as *Kudrina v 82-04 Leffets Tenant Corp*, 110 AD3d 963 [2<sup>nd</sup> Dept 2013] and *Davis v Sutton* 136 Ad3 731 [2<sup>nd</sup> Dept 2016]. Plaintiff opposes.

#### *Discussion*

A party moving for summary judgment pursuant to CPLR 3212, has the high burden of establishing entitlement to judgment as a matter of law (see CPLR §3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). While this burden does not shift until established, in negligence actions, plaintiff's contradicting theories as to the proximate cause of the accident will be considered (see e.g. *Hoovis v Grand City 99 Cents Store, Inc.*, 146 AD3d 866 [2<sup>nd</sup> Dept 2017]; *Mtigang v PJ Venture HG, LLC*, 126 AD3d 863 [2<sup>nd</sup> Dept 2015]; *Rivera v J. Nazzaro Partnership. L.P.*, 122 Ad3d 826 [2<sup>nd</sup> Dept 2014]). Once the movant establishes this burden, opposing papers will be considered for evidence that sufficiently creates questions of material fact requiring a trial (*Alvarez*, 68 NY2d 320).

In considering opinion evidence to raise material questions of fact, the opinion evidence must be based on facts personally known to the expert or based on facts in the record assumed to be true without speculating (*see e.g. Ward v. John T. Mather Mem'l Hosp. of Port Jefferson*, New York, Inc., 215 A.D.3d 994 [2d Dept 2023]; *see also Oboler v. City of New York*, 31 AD3d 308 [1<sup>st</sup> Dept 2006]; *Aetna Cas. & Sur. Co. v. Barile*, 86 AD2d 362 [1<sup>st</sup> Dept 1982]; *Santiago v. Burlington Coat Factory*, 112 AD3d 514 [1<sup>st</sup> Dept 2013]).

Here, Defendant's reports and employee testimonies establish entitlement to judgment as a matter of law. Based on the service reports and the testimony of Defendant's employee, Mr. Blandina, he testified that service calls involve calls/complaints made by others and that upon reviewing their records there were no complaints about the first step of the staircase. He further testified that while there was a complaint about a clogged drain at the bottom of the subject staircase, it was repaired on February 3, 2015. Mr. Bladina was also questioned by Plaintiff about a step raiser complaint. He explained that a step riser is the part between the steps, but there wasn't any reference that this complaint was related to the first step of the staircase. Mr. Baldina also testified that a complaint dated November 2, 2014, regarding chipped nosing in that staircase was investigated and concluded to be unfounded.

Further, Defendant's employee, Elizabeth McFadden testified that she was assigned to clean the part of the staircase where Plaintiff's accident occurred and that her job also requires to report defects. Through her testimony she confirmed that based on her cleaning report and her review of the staircase after the accident, there were no defects to the staircase or step on the that day. In addition, subway station supervisor who prepared the incident report and examined the area after the accident, Mr. Khan, testified that upon inspection, he did not see any cracks or defects on the step. Thus, this Court will now consider Plaintiff's opposition.

In opposition, Plaintiff relies primary on an affidavit from an expert, a licensed engineer, Vincent Pici to allege that questions of fact exist as to whether Defendant had notice of the defect. Pici alleges examining the evidence, photographs and google view images of the entrance of the staircase two months after Plaintiff's accident. Pici, in his opinion relying primarily on photographs, without once visiting the subject staircase, concludes that the photographs establish that the top stair was in poor condition and readily observable.

Plaintiff also argues that the photograph shown to him reveal a chipped or cracked condition on the step and that Defendant had to have notice of this condition.

Upon further review, this Court finds that Plaintiff has not raise a material question of fact requiring a trial. While an affidavit from an expert, may raise questions of fact, here the expert did not visit the scene, meet with Plaintiff, and relies on photographs not taken by him nor taken on the day of Plaintiff's accident, to speculate the Defendant had notice of the defect (*Ward*, 215 AD3d 994; *Oboler*, 31 AD3d 308; *Aetna Cas. & Sur. Co.*, 86 AD2d 362; *Santiago*, 112 AD3d 514). Notably, the photographs submitted by Plaintiff are unclear copies.

In addition, Plaintiff's Notice of Claim was filed on July 23, 2015 alleging that he fell due to a defect on the step. Plaintiff specifically testifies at the statutory hearing on August 25, 2015, that the step had a hole but he did not see it. Less than three months after the serving the Notice of Claim, on September 14, 2015, Plaintiff through his attorneys alleges now that he slipped on the first step of the staircase due to water.

Thus Plaintiff's opposing evidence, consisting of poor copies of photographs that do not allow for discerning details, an expert affidavit requiring speculation since the photographs he relies upon are not fairly inferable, nor recently taken or established by who they were taken, and based on Plaintiff's conflicting theories of negligence, is insufficient to raise material

questions of fact that that on date of the accident, Defendant had notice or should have had notice of the alleged defect nor does it raise a material question of fact as whether a defect existed (*see Ward, 215 AD3d 994*).

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is granted.

6/27/2023

DATE

CHECK ONE:

CASE DISPOSED

X

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

X

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ  
J.S.C.