Yellin v Toulaine Owners Corp.
2023 NY Slip Op 32237(U)
July 5, 2023
Supreme Court, New York County
Docket Number: Index No. 152560/2020
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** ***Justice*** **PART** **47**

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SUSAN YELLIN,

Plaintiff,

- v -

TOULAINE OWNERS CORP., HOFFMAN MANAGEMENT CORPORATION

Defendants.

---X

INDEX NO. 152560/2020

MOTION DATE 06/21/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - SUMMARY.

In this slip and fall action, defendants Toulaine Owners Corp. (Toulaine) and Hoffman Management Corporation (Hoffman) move for summary judgment, pursuant to CPLR § 3212, to dismiss plaintiff's complaint arguing the slippery condition on defendants' premises was not defective or inherently dangerous as well as obvious and known to plaintiff (mot seq no 002). Plaintiff opposes the motion arguing that defendants failed to show any evidence that they satisfied their duty of care to maintain a reasonably safe premises and the wet ground is not a dangerous condition. Plaintiff also mentions that her deposition transcript should be deemed inadmissible because defendants did not properly exchange the transcript pursuant to CPLR § 3116 (a).

BACKGROUND

On September 16, 2019, plaintiff, a resident of 130 East 67th Street (the building), slipped and fell when she stepped on a wet grate adjacent to the entrance of the building

(Statement of Material Facts, ¶¶ a, c, NYSCEF Doc No 29). The building is owned by Toulaine and managed by Hoffman (*id.* at ¶ b).

At plaintiff's examination before trial on November 21, 2021 she testified that the grate was level with the sidewalk, was a bright silver color, and she had walked over it at least twice a day for the previous few months without incident (Plaintiff's EBT, pp 43-44, 49-51). She also mentioned that she attempted to step over the grate because she recognized it was wet but ended up getting her shoe slightly caught in it, which caused her to slip and fall (*id.* at p 50).

Francisco Rodriguez, defendants' superintendent, testified on November 15, 2021 that the porters sweep and hose down the sidewalk in front of the building every morning without using soap or chemicals (Rodriguez EBT, pp 17-20, 25, NYSCEF Doc No 34). Typically, after the job is complete, the porters place a yellow "wet floor" sign on the walkway leading to the entrance of the building; however, such a sign was not placed on the wet grate on the date of the incident (*id.* at p 27).

Defendants also submitted an expert affidavit by Andrew Yarmus, P.E., a professional engineer, who testified that the purpose of the grate is to drain water from the adjacent walking surface to prevent puddling which otherwise could cause a slippery walking condition (Yarmus Aff, ¶¶ 1, 3, NYSCEF Doc No 37). Yarmus measured the grate's coefficient of friction, a value that expresses the ratio of the force exerted between an object moving over another surface—0 equates to no resistance to movement and 1 equates to an object not moving (*id.* at ¶ 6). Yarmus found the coefficient of friction of the grate to exceed 0.50, which he stated is accepted by professional engineers as a slip resistant surface (*id.* at ¶ 7).

DISCUSSION

Admissibility of Plaintiff's Affidavit

As a preliminary matter, plaintiff asserts that defendants cannot rely on her affidavit because it was improperly exchanged pursuant to CPLR § 3116 (a). CPLR § 3116 (a) provides that every deposition must "be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed." Here, defendants sent plaintiff's transcript to Lizzette Solrozano, a clerk for plaintiff's attorneys, who had previously sent defendants the transcript of defendants' witness's deposition. Since plaintiff communicated with defendants through Solrozano in the previous exchange they cannot now argue that it was improper for defendants to communicate through that same point person for plaintiff's transcript. Therefore, defendants properly exchanged plaintiff's transcript and did not violate CPLR § 3116 (a) because even though plaintiff did not sign and return the transcript within sixty days of the deposition, the provision permits that the transcript can still be used as if signed after the sixty day period expires.

Negligence

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Pfeuffer v. NYCHA*, 93 AD3d 470, 471 [1st Dep't 2012] [internal citations and quotations omitted]). Here, there is no dispute that defendants created the condition and had notice of the condition; however, defendants argue that the slippery grate is not an actionable dangerous condition. Though defendants proffer cases which hold that a wet metal grate (*Shuttleworth v St. Margaret's R.C. Church in Middle Vil.*, 209 AD3d 786 [2d Dept 2022]) or ramp (*Ceron v Yeshiva Univ.*, 126 AD3d 630 [1st Dept 2015]) from rain

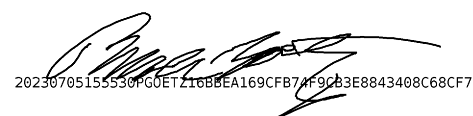
are not actionable dangerous conditions, testimony from their own employee rebuts the argument considering Rodriguez stated that a yellow "wet floor" sign is typically placed in the area after hosing (*see* NYSCEF Doc No 34, p 27). Such a sign would not be placed if defendants did not believe the condition to be dangerous. Additionally, though defendants proffer an expert who testified that the wet metal grate has a coefficient of friction that deems it a slip-resistant surface, such evidence under the circumstances is a matter best left to be weighed by jurors from their common knowledge and experience (*see Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1st Dept 1988]; *see also Infante v Jerome Car Wash*, 52 AD3d 319 [1st Dept 2008]).

And though defendants do not have a duty to warn of open and obvious conditions, such a determination is usually deemed a question of fact not appropriate for deciding on summary judgment (*Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [1st Dept 2007]). Therefore, defendants failed to meet their *prima facie* burden in establishing that no triable issue of fact remains.

Accordingly, defendants' motion for summary judgment will be denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's complaint is denied.



7/5/2023					
DATE			**PAUL A. GOETZ, J.S.C.**		
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	