

Stevenson v 897 Park Ave. Deli Inc.

2023 NY Slip Op 32785(U)

July 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 502436/2020

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, Brooklyn, NY 11201, on the ___ day of _____ 2023.

JUL 26 2023

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 99

**DECISION
 and
 ORDER**

-----X
 VICKY STEVENSON,

Plaintiff,
 -against-

Index No.: 502436/2020
 Motion Date: 3/22/2023
 Mot. Seq. 2&3

897 PARK AVE DELI INC., and 842 BROADWAY REALTY
 CORP.,
 Defendants.

-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Defendant 842 Broadway Realty Corp.'s Motion for Summary Judgment, dated September 8, 2022, pursuant to CPLR 3212 dismissing the complaint and declaring that the code provisions cited by the plaintiff in her Bill of Particulars and Complaint were neither applicable to, nor violated by the defendant regarding the accident that took place in subject transition area; Statement of Material Facts; Affidavit of Rudi O. Sherbansky, P.E., F. NSPE, sworn to on September 6, 2022; Exhibits A-B; Memorandum of Law in Support; Attorney Affirmation of Karen C. Higgins, Esq., affirmed on September 8, 2022; Exhibits A-I.....(MS#2)	36-51
Plaintiff's cross motion pursuant to CPLR 3025(b) to amend its pleadings to add a violation of Section 406 of the ADA as promulgated by the NYC Administrative Code; Affidavit of Michael Kravitz, PE, DFE, sworn to on March 7, 2023; Exhibits A-B..(MS#3)	59-63
Defendant 842 Broadway Realty Corp. Attorney Affirmation of Karen C. Higgins, Esq., affirmed on March 14, 2023, in opposition to the cross motion; Attorney Affirmation of Karen C. Higgins, Esq., affirmed on March 14, 2023, in reply.....(MS#2)	64, 66
Plaintiff's attorney affirmation of Paul A. Nembach, Esq., affirmed on March 21, 2023 in reply.....(MS#3)	70

MONTELIONE, RICHARD J., J.

This is an action for personal injuries suffered on March 8, 2019 as a result of an alleged defective ramp causing plaintiff to trip and fall. The action was commenced by filing the complaint on January 30, 2020. Issue was joined by defendant 842 Broadway Realty Corp. by service of its answer with cross claims on June 14, 2021.

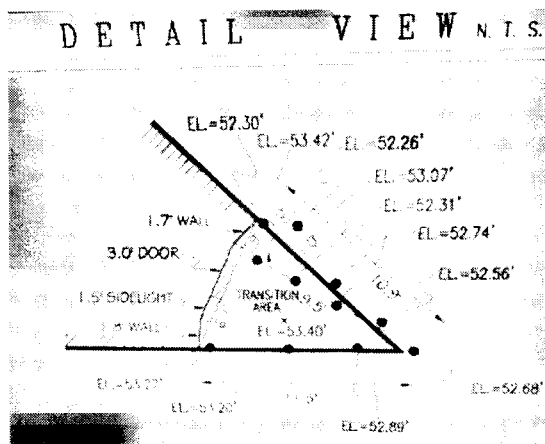
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Defendant 842 Broadway Realty Corp. moves for summary judgment and provides the court with an affidavit from Rudi O. Sherbanky, a licensed professional engineer who incorporates by reference his report. The plaintiff likewise provides the court with an affidavit from plaintiff's expert, Michael Kravitz, PE, DFE. Except for the description of "front yard," the court finds the following facts uncontested (see defendant's Expert Report, photo and detail view; plaintiff's expert report):

g. The sloped transition pavement area that the plaintiff fell over, which varies in slope of about 7% to 33%, is abutting along the 10.9' feet long Broadway side of the front yard and varies in elevation between 13" inches next to the building's wall corner to zero (0") between the Madison Avenue Sidewalk and yard's walking surface.

h....

i. The "hump" or pavement slope that the plaintiff fell over was created by a maximum difference in ground elevation of about 13" inches between the Park Avenue sidewalk level and the Broadway sidewalk level respectively.



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Although defendant's expert describes the area where the fall occurred as a "front yard transition area," the court finds that it is part of a sidewalk that can be described as a ramp leading to the entrance of the defendant's building where the deli is located. The following section of New York City, N.Y., Rules, Tit. 34, § 2-09, New York City, N.Y., Rules, Tit. 34, § 2-09 applies:

(x) Sidewalk grades: Unless the Department grants a waiver of grade, permanent sidewalks shall be laid to the legal curb grades.

(xi) Transverse slope: Sidewalks shall be laid to pitch from the building line toward the curb except in special cases as noted. The minimum slope, calculated on a line perpendicular to the curb, shall be 1" in 5', and the maximum shall be 3" in 5'. Minimum slopes shall be used wherever possible...

(xii) *Longitudinal slope*: The longitudinal slope of the sidewalk shall be uniform and parallel to the curb at the curb's proper grade.

The court finds that the maximum slope of 3" in 5' required under this section of the regulations was not met because the slope is abutting 10.9' along the Broadway side and varies in elevation between 13" next to the building's wall corner and zero inches between the Madison Avenue Sidewalk and the subject area's walking surface. The plaintiff may use New York City, N.Y., Rules, Tit. 34, § 2-09, New York City, N.Y., Rules, Tit. 34, § 2-09 (x), (xi) and (xii) as some evidence of negligence. *See Conte v Large Scale Dev. Corp.*, 10 NY2d 20, 176 NE2d 53, 217 NYS2d 25 [1961].

The plaintiff concedes the following rules or regulations are not applicable: NYC DOT Standard Details of Construction, §19-112, Curbs on ramps; §19-129 Board or plank walks; §27-376 Exterior stairs; §27-109 Building matters covered; §27-110 Matters not provided for; §27-1021 Protection of sidewalks (construction); §27-1051 Ramps and runways (construction); §27-2005 Duties of owner (housing); FC §1027.3.3 Maintenance of means of egress; §27-2027

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Drainage of roofs and courtyards. The court further finds that NYC Administrative Code §19-152 and NYC Rules, Tit. 34, § 2-09, New York City, N.Y., Rules, Tit. 34, § 2-09 (iv), regarding a trip hazard where the vertical differential between adjacent flags is greater than or equal to 1/2", do not apply because this accident did not take place between two flags but on the slope of the sidewalk itself.

There was no DOT, DOB, ECB or HPD violation notices issued to the building regarding the area where the accident occurred. Neither party provided the court with an affidavit from a safety expert.

The court finds that the plaintiff's motion to amend the complaint adding a claim for the violation of the Americans with Disability Act ("ADA") must be denied as this law does not create a private cause of action and this law does not constitute evidence of negligence because plaintiff is not within a protected disabled class. Plaintiff directs the court's attention to *Lugo v St. Nicholas Assoc.*, 2 Misc 3d 212, 772 NYS2d 449, 2003 NY Slip Op 23829, 2003 WL 22515420 [Sup Ct 2003], *aff'd*, 18 AD3d 341, 795 NYS2d 227, 2005 NY Slip Op 04140, 2005 WL 1215968 [1st Dept 2005] which cites *A.L. v Chaminade Mineola Socy. of Mary, Inc.*, 203 AD3d 1033, 166 NYS3d 186, 402 Ed Law Rep 340, 2022 NY Slip Op 01994, 2022 WL 852026 [2d Dept 2022], in support of its position that a violation of the Americans with Disability Act ("ADA") constitutes some evidence of negligence, but *Lugo* found that the plaintiff, a health care worker who assisted a wheel chair bound individual, was an "associated person" entitled to the safety standard imposed by the ADA. But plaintiff is not an "associated person" and the ADA is not applicable.

The court finds that following rules and regulations may apply and whether they are charged as some evidence of negligence will be up the trial justice assigned based on the record:

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Based on the foregoing, it is

ORDERED, that the defendant's motion (MS#2) is GRANTED ONLY TO THE EXTENT that the following rules and regulations may not be used to show any evidence of negligence at trial: NYC DOT Standard Details of Construction, §19-112, Curbs on ramps; §19-129 Board or plank walks; § 19-152 (general obligations of owners); §27-37 (doors); §27-376 Exterior stairs; §27-109 Building matters covered; §27-110 Matters not provided for; §27-1021 Protection of sidewalks (construction); §27-1051 Ramps and runways (construction); §27-2005 Duties of owner (housing); §27-301.1 (general obligations of owners); FC §1027.3.3 Maintenance of means of egress; §27-2027 Drainage of roofs and courtyards; NYC Charter §2904 (general duty to repair), RCNY §2-05 (construction activity), RCNY §2-05(f)(1) (general duty), NYC Building Code §1010.7.2 (means of egress); NYC Fire Code §1027.3.3 (cumulation of snow and ice); HMC 27-2005, 27-2027; NYC Administrative Code 7-210 (general obligations of owner) and DENIED regarding dismissing the complaint; and it is further

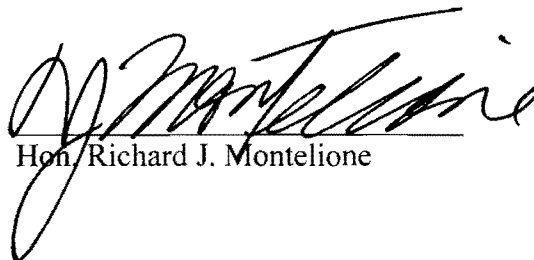
ORDERED that the court has searched the record and finds that New York City, N.Y., Rules, Tit. 34, § 2-09, New York City, N.Y., Rules, Tit. 34, § 2-09(x), (xi) and (xii), applies and the jury shall be instructed that they may consider the violations as some evidence of negligence, along with the other evidence in the case, provided that such violations were a substantial factor in bringing about the injury; and it is further

ORDERED that the applicability of any other Administrative Rules and Regulations not addressed will be determined by the assigned trial Justice based on the record at trial; and it is further

ORDERED, that the plaintiff's motion to amend the complaint is DENIED; and it is further

ORDERED, that any other application for relief not specifically addressed is DENIED.

This constitutes the decision and order of the Court.



Hon. Richard J. Montelione

KINGS COUNTY CLERK
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