

**Zimmermann v St. John's Univ., N.Y.**

2023 NY Slip Op 34961(U)

August 30, 2023

Supreme Court, Queens County

Docket Number: Index No. 721690/19

Judge: Leonard Livote

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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote  
Supreme Court Justice

IAS Part 33

-----X  
MARY ELLEN ZIMMERMANN,  
Plaintiff

Index No.: 721690/19

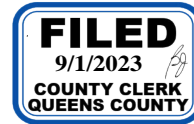
-against-

Motion Date: 06/13/2023

ST. JOHN'S UNIVERSITY, NEW YORK,  
Defendant.

Seq No: 2

-----X  
ST. JOHN'S UNIVERSITY, NEW YORK,  
Third-Party Plaintiff,



-against-

NEW YORK-PRESBYTERIAN/QUEENS,  
Third-Party Defendant

-----X

The following papers below read on this motion by Defendant for an Order pursuant to CPLR §3212, granting summary judgment in favor of SJU, dismissing Plaintiff's Complaint in its entirety.

PAPERS  
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	59-79
Answering Affirmations, Affidavits And Exhibits.....	80-93
Reply Affirmations, Affidavits And Exhibits.....	94-99

Upon the foregoing papers, the motion is denied.

The litigation arises out of personal injuries allegedly sustained by Plaintiff, Mary Ellen Zimmermann, on February 7, 2018, at 7:02 a.m., when she fell due to an allegedly defective condition of the walkway/stairs abutting the premises known as Carnesecca Arena, located on the Queens Campus of St. John's University, New York ("SJU"). Plaintiff, an employee of Third-Party Defendant

New York Presbyterian/Queens (“NYPQ”), was present at SJU that morning, in order to attend an event in the Carnesecca Arena hosted by her employer. SJU commenced a third-party action against NYPQ. Plaintiff claims that Defendant created a defective, hazardous steps as they lacked handrails and an alleged construction issue made the steps appear flush with the landing area. SJU avers that the staircase on which the Plaintiff’s injury occurred was not defective and that any defect would have been open and obvious.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact. *Kolivas v. Kirchoff*, 14 AD3d 493 (2nd Dept 2005). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied." *Celardo v. Bell*, 222 AD2d 547 (2d Dept 1995). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party and may not pass on issues of credibility." *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept 2005).

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact. CPLR Section 3212(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 (2d Dept 2010). However, once the moving party has satisfied this obligation, the burden shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York, supra*).

A defendant in a trip and fall case must establish as a matter of law that the property in question was in a reasonably safe condition or, alternatively, that they neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice of a dangerous condition (*see Mokszycki v. Pratt*, 13 A.D.3d 709, 710).

In support of the motion, defendant SJU submitted an expert affidavit of Stan Pitera, P.E., a licensed professional engineer in New York, New Jersey, and Pennsylvania. Mr. Pitera avers that the staircase was in a reasonably safe condition. Mr. Pitera presented proof that the site in question was well lit between the artificial light lamps and sunrise which had happened two minutes before the accident. Moreover, he asserted that the staircase that was constructed in 2008 followed the 1968 New York City Building Code, that the stairway did not require handrails as per the code.

SJU has also demonstrated that it did not have actual or constructive notice of a defective condition (see *Agman v. American Trails West*, 10 A.D.3d 698 [2004]; see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]). Since its construction in 2008, there had been no reported injuries or complaints on the staircase, accordingly, SJU concluded that it did not have actual or constructive notice (see *Zuppardo v. State*, 186 A.D.2d 561 [2<sup>nd</sup> Dept. 1992]).

In opposition, Plaintiff submits an affidavit from expert Robert Fuchs P.E. who is a licensed professional engineer in New York, Pennsylvania, and Florida and is a Board Certified Safety Professional (CSP). He reported that the steps and landing area blended in with each other due to them being poured of the same material, so the difference in elevation between the walkway and the steps was not readily apparent, creating an optical illusion/confusion. He noted that the concealed condition of the walkway edge was particularly severe, especially considering that it was not light enough outside to illuminate it. He also asserted that the 1968 and 2008 New York Building Code required the installation of handrails for staircases of this sort. Additionally, he asserted that the defendant's classification of the of the stairway as "access" was a false claim to nullify the compliance with the applicable building codes. He stated that the stairs are a required means of egress since they are part of and along the means of egress at the front entrance of the building, therefore, they require handrails. Fuchs avers that the safety hazard posed by the inconspicuous condition of the stairs should have been recognized. He also points to the generally good and accepted industry practice that acknowledges the hazard posed by short stair flights. Mr. Fuchs concludes that the lack of handrails and the lack of contrasting surfaces to make the steps more readily apparent created a dangerous condition.

A defendant's motion for summary judgment should be denied where "there is an issue regarding whether, under the circumstances, a person who was unfamiliar with the premises could reasonably perceive the existence of a change in elevation... and/or whether the subject area created 'optical confusion'" (*Roros v Oliva*, 54 AD3d 398, 400 [2d Dept 2008]). The plaintiff's evidence is sufficient to establish an issue of fact regarding whether the condition of the premises created "optical confusion." Defendant argues that the plaintiff's injuries were caused by her own inattentiveness because the steps were open and obvious. However, an open and obvious condition does not absolve defendants of liability but instead presents an issue of fact as to the plaintiff's comparative fault (*Cupo v. Karfunkel*, 767 N.Y.S.2d 40 [2003]).


The potential defect in the steps may be a violation of the New York Building Code. The experts, Fuchs and Pitera, disagree regarding the step's conformity to the building code. As a general rule, summary judgement should be

denied when experts give conflicting testimonies (see e.g. *Abato v. Millar Elevator Service Co.*, 261 A.D.2d 873, 690 N.Y.S.2d 806 [4th Dept. 1999]; *Lichtenstein v. Baker*, 203 A.D.2d 89, 609 N.Y.S.2d 615 [1st Dept. 1994]).

Accordingly, SJU's motion for summary judgment is denied.

This constitutes the Order of the Court.

Dated: August 30, 2023

  
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Leonard Livote, J.S.C.

