

Bracho v La-Ge Corp.
2023 NY Slip Op 35217(U)
April 11, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27332/2018
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 27332/2018

CATHERINE BRACHO,

Plaintiff,

-against-

LA-GE CORP. and WHITE CASTLE,

Defendants.

DECISION/ORDER**Present:****Hon. Laura G. Douglas****J. S. C.****Part 6**

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 3):

PapersNumbered

Defendants Notice of Motion, Statement of Material Facts by David M. Goldman, Esq. dated October 20, 2022, Affirmation of David M. Goldman, Esq. dated October 20, 2022 in Support of Motion, and Exhibits (“A” through “H”).....	1
Affirmation of Beth S. Gereg, Esq. dated December 14, 2022 in Opposition to Motion, Exhibits (“1” and “2”), and Response to Statement of Material Facts by Beth S. Gereg, Esq. dated December 14, 2022.....	2
Memorandum of Law by Beth S. Gereg, Esq. dated December 14, 2022 in Opposition to Motion.....	3
Reply Affirmation of David M. Goldman, Esq. dated January 11, 2023.....	4

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendants (collectively, “White Castle”) seek summary judgment pursuant to CPLR § 3212 dismissing the plaintiff’s complaint in its entirety. The motion is denied.

The plaintiff (“Bracho”) seeks monetary damages for personal injuries allegedly sustained on August 21, 2017 when she tripped and fell while exiting a White Castle restaurant in Bronx County. White Castle does not deny that it was responsible for the condition of the area where Bracho fell. However, it contends that Bracho fell simply because she misstepped and that she has been unable to

identify any defect at the location that might have proximately caused her injuries. In addition, White Castle argues that the evidence in this case, including the testimony of its expert witness, reveals that there was no defective condition in the area where Bracho fell.

In support of its motion, White Castle submits Bracho's own deposition testimony. In pertinent part, Bracho testified that she was inside the White Castle restaurant at approximately 3:00 p.m., having made a food purchase which she carried in a bag in her right hand. She also had a shoulder bag over her right shoulder draped across her body. While she had entered the restaurant through its side door, she exited through the front door onto Webster Avenue. After she took a step or two while exiting, she fell to the ground. Bracho stated that she fell where there was a step, but did not recall if she had stepped off of that step. She did not remember where she was looking at the time of the accident or if she had looked at the ground prior to falling. She did not recall anyone walking in front of her at the time of the accident. Bracho testified that she did not remember seeing any steps at that location. She did not notice if there were any defects at the location and was not aware of any prior complaints or accidents concerning this location.

When asked why she fell, whether due to a misstep or if she slipped on something, Bracho answered, "I don't remember, I just know I fell, that's all I know." (*see* Bracho deposition transcript, p. 22, ll. 22-23, p. 23., ll. 1-2). Asked if she fell off of the step or stepped off of the step or something else, Bracho stated, "I don't remember, I just remember falling, I just remember falling." (*see* Bracho deposition transcript, p. 24, ll. 2-6). When asked again why she fell, Bracho answered, "There was a step there" (*see* Bracho deposition transcript, p. 23, ll. 11-12). In answering whether there was one or more steps at the location, Bracho replied, "I don't remember seeing any steps." (*see* Bracho deposition transcript, p. 25, ll. 1-3).

White Castle also relies on the deposition testimony of Julian Alvarez ("Alvarez"), its Assistant General Manager at this restaurant on the date of this accident. His duties include inspecting the premises by walking around the inside and outside of the restaurant to ensure that the store was presentable for customers. Alvarez was at the restaurant on the date of the accident. He first learned of Bracho's accident when someone, possibly a male customer accompanying Bracho, told him that a woman had tripped. Alvarez claims to have then spoken to Bracho, who told him that she had tripped, but did not know how. In his investigative report, Alvarez stated that "no physical conditions . . . could have contributed to this incident."

Finally, White Castle offers an affidavit dated October 12, 2022 from Andrew Yarmus (“Yarmus”), an engineer retained by White Castle to inspect the subject egress door area and walkway. Yarmus concluded that there was no way that Bracho should have tripped and fallen off of the edge of the walkway had she been paying attention to where she was walking. In support of his opinion, Yarmus notes that the subject walkway is significantly wider than the doorway which Bracho had used to exit the restaurant, that the doorway does not open beyond the edge of the walkway, and that there is a railing to the right of the doorway as one is exiting. In addition, Yarmus notes the difference in coloration of the adjacent travel path to the right of the walkway as one is exiting, the curb height, and the length of the ramped walkway leading from the door’s left as other factors that lead him to conclude that Bracho would not have fallen had she been paying attention.

In opposition, Bracho argues that she was caused to fall because the walkway and steps created optical confusion. Bracho made this claim in her verified bill of particulars dated September 18, 2018, specifically alleging that the subject walkway blended into the adjacent public sidewalk and that there was no appropriate handrail present. The single step was not discernable because the concrete landing edge blends in and merges with the concrete sidewalk surface, creating the appearance that the landing and sidewalk are level. She alleges that both the landing and the sidewalk are constructed of poured concrete with similar color, hue, and texture.

Bracho submits an affidavit from Robert T. Fuchs (“Fuchs”), an engineer that she retained to determine the extent to which the condition or arrangement of the front exit at the White Castle might have contributed to her fall. Fuchs personally inspected the exit way and also reviewed three color photographs of the location furnished by Bracho’s attorney. In pertinent part, Fuchs concluded that the difference in elevation between the landing curb and the adjacent sidewalk is not perceptible because the landing edge blends in with the concrete sidewalk. This gives the mistaken appearance that the landing and the sidewalk are on the same level plane. Fuchs avers that both the landing and the sidewalk are constructed of the same material – poured concrete – and have similar color, hue, and texture. In Fuchs’ estimation, this adds up to an optical confusion that poses a safety hazard. He also notes the absence of a handrail on the open side of the exit way, parallel to and adjacent to the exit door (as shown in the photographs, the only railing at this location is on the far end of the landing and is obstructed when the exit door is opened to the outside). While Fuchs acknowledges the presence of a handrail on the extreme end of the landing, he notes, and the photographs confirm, that there is no railing along the length of the

landing ramp to the left of the doorway. This allows a customer to step straight down onto the sidewalk. Fuchs opines that these conditions violate the National Bureau of Standards guidelines for stair safety. Finally, Fuchs concludes that these conditions were a proximate cause of Bracho's accident.

In order to obtain summary judgment, White Castle must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, Bracho must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). In this case, White Castle must demonstrate that it did not create or have actual or constructive notice of a hazardous condition (*see Rodriguez v. 705-7 E. 179th St. Housing Development Fund Corp.*, 79 AD3d 518 [1st Dept 2012]).

Here, a material issue of fact remains whether the exit way created an optical confusion that caused Bracho's injuries. While White Castle insists that Bracho was unable to identify a step or a defective condition, her apparent inability to state how many steps existed at this location is consistent with her claim that the exit way created an optical illusion. If her allegations are correct, then she would have had difficulty making out the step and would be at a loss to quickly identify why she fell. That an exiting pedestrian would have difficulty discerning the presence of step(s) is the essence of Bracho's theory of liability and rebuts the argument that the condition was "open and obvious".

In this sense, optical confusion occurs when conditions create the illusion of a flat walking surface, obscuring the presence of an elevation differential managed by a step (*see Buonchristiano v. Fordham University*, 146 AD3d 711 [1st Dept 2017]). Factors contributing to a finding of liability for such a condition include whether there was inadequate warning of the descent, poor lighting, and inadequate demarcation between the higher and lower areas (*see Schreiber v. Phillip & Morris Restaurant Corp.*, 25 AD2d 262 [1st Dept 1966], *aff'd*, 19 NY2d 786 [Ct App 1967]). A well-lit area containing multiple reflective strips on a step and a sign with a downward pointing arrow reading "Step Down" was found not to create optical confusion (*see Langer v. 116 Lexington Avenue, Inc.*, 92 AD3d 597 [1st Dept 2012]). Similarly, optical confusion is belied by the presence of a metal threshold and step that are shiny and of contrasting or lighter in color from the adjacent floor (*see Denstman v. Manhattan Eye, Ear & Throat Hospital*, 200 AD3d 409 [1st Dept 2021] and *Namm v. Levy*, 172 AD3d

507 [1st Dept 2019)). Arguably, none of these measures were present at this exit way.

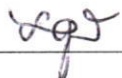
When asked what caused her accident, the plaintiff in *Saretsky v. 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011]) also answered that she “just fell” and that there was a step in the middle of the sidewalk which she did not see. The court in *Saretsky* found that the plaintiff’s testimony could be reasonably interpreted to mean that the step could not be discerned due to optical confusion. Here, a similar conclusion can be reached as to Bracho’s testimony, supported by Fuchs’ observation that the concrete on the sidewalk and the concrete on the step was similar shades of gray and that there was no bright line demarcating the edge of the step. In addition, the photographs submitted by Bracho can be reasonably interpreted to support a finding that the manner in which this exit way was arranged and constructed concealed the drop in elevation from a customer exiting the restaurant. Finally, Bracho’s testimony as to the suddenness of her fall also supports her optical confusion theory.

In light of Fuchs’ contrary opinion, Yarmus’ ability to discern between the landing and the adjacent sidewalk by looking at the surroundings simply presents a question of fact and credibility to be adjudicated by a jury. A conflict among expert witnesses regarding the hazardous nature of a condition that is alleged to have caused personal injuries raises issues of fact and credibility that cannot be resolved on a summary judgment motion (*see Carter v. HP Lafayette Boynton Housing Development Fund Company, Inc.*, 210 AD3d 580 [1st Dept 2022]). Similarly, whether the existing handrail alone was sufficient warning of a change in elevation is a question for the trier of fact. A departing customer, such as Bracho, could have expected an easily accessible handrail to indicate and support her need to step down or a level pathway leading away from the doorway, without need to turn left, since there was no barrier preventing her from continuing to walk straight.

Viewing these circumstances in the light most favorable to Bracho, a jury could reasonably conclude that she was injured because she was not able to perceive the drop in elevation due to White Castle’s failure to distinguish the landing from the sidewalk in color, hue, and/or material. Since these evidentiary facts plausibly support a finding that White Castle negligently created or maintained this optical illusion, summary judgment dismissing the plaintiff’s complaint is denied.

The foregoing constitutes the Decision/Order of this Court.

DATED: April 11, 2023
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.