

Glorioso v 70 E. Sunrise Hwy., LLC
2023 NY Slip Op 35228(U)
September 6, 2023
Supreme Court, Nassau County
Docket Number: Index No. 606856/2020
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARYANN GLORIOSO,

Plaintiff,

- against -

70 EAST SUNRISE HIGHWAY, LLC and
SEROTA PROPERTIES, LLC,

Defendants.

TRIAL/IAS PART 29
NASSAU COUNTY

Index No.: 606856/2020
Motion Seq. No.: 02
Motion Date: 09/28/2022

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits, Statement of Material Facts	<u>1</u>
Affirmation in Opposition and Exhibits, Statement of Material Facts and Counterstatement of Material Facts	<u>2</u>
Affirmation in Reply and Exhibits, Counterstatement of Material Facts	<u>3</u>
Reply Affirmation and Exhibit	<u>4</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion and purportedly cross-moves (albeit without a contemporaneously filed Notice of Cross-Motion), pursuant to CPLR § 3126, for an order striking defendants' Answer for noncompliance with their discovery obligations.

Background and Procedural History

Plaintiff commenced this action for personal injuries sustained as a result of a June 25, 2018 trip and fall that occurred near a surface sidewalk inside the front entrance of a

professional building located at 70 East Sunrise Highway in Valley Stream (the “Building”). At her Examination Before Trial (“EBT”), plaintiff testified that, on the day of the accident, she had a scheduled doctor’s appointment in the Building. She had never been there before. Even though the Building had a garage, upon arrival, plaintiff parked on a side street and entered through the front doors on the Sunrise Highway side. Plaintiff testified that it was light outside, but that it became dim when she walked past the entrance doors. Plaintiff was wearing prescription sunglasses, tinted grey, which dimmed her view, but also made objects appear very clear.

Once through the doors, plaintiff took several steps and then tripped and fell over an approximately six to seven-inch step down onto a two-way roadway for cars that were parking in the Building’s garage. Photos and a surveillance video viewed by plaintiff at her EBT show that the step down was located about four steps (about ten to twelve feet) past the entrance, and that the height of the step, as well as a few inches of the sidewalk just before the step, were painted yellow. Past the roadway, there was a step up, and a few feet later, there were doors leading to the Building’s interior lobby. Several feet past the step down, in the middle of the roadway, there was a yellow sign hanging from the ceiling stating: “Watch Your Step.” At her EBT, plaintiff conceded that the surveillance video showed that she was not looking down in the few seconds between the time that she entered the Building and when she fell.

Plaintiff commenced the instant action on July 8, 2020. Plaintiff’s Bill of Particulars alleges, among other things, that defendants (1) failed to provide a safe means of ingress/egress from the Building, (2) improperly designed and construction the Building, (3) failed to warn visitors about the step down, (4) failed to supply proper lighting, and (5) permitted the sidewalk/walkway to lead to a dangerous unmarked drop-off, allowing it to become a

dangerous trap for the unwary. On May 6, 2022, plaintiff filed a Note of Issue and a Certificate of Readiness for Trial. The Certificate of Readiness listed defendants' deposition as the only outstanding discovery. Defendants' property manager, Daniel Serota ("Serota"), was deposed four (4) weeks later, on June 27, 2022.

Defendants' Summary Judgment Motion

On August 18, 2022, Defendants filed the instant summary judgment motion. In support of same, defendants submit the transcript from plaintiff's EBT testimony, the surveillance video, photographs of the subject location and Serota's affidavit. In his affidavit, Serota states that the video was kept in the ordinary course of defendants' business, that he is unaware of any prior, similar accidents at the location and otherwise makes no substantial factual assertions.

Defendants contend that, as shown in the surveillance video and photographs, the subject step down was open and obvious and not inherently dangerous, and that, therefore, they had no duty to warn visitors. Defendants note that the video demonstrates that the area was well-lit and that the curb and step were highlighted with fluorescent yellow paint. Defendants also point out that plaintiff conceded that she mis-stepped, and that the video demonstrates that plaintiff was looking straight ahead and failed to observe the step. Defendants further contend that they had no notice of any dangerous condition, as Serota states that defendants were unaware of any prior, similar accidents at that location.

Plaintiff's Opposition

On December 23, 2022, plaintiff filed an "Affirmation in Opposition and in Support of Cross-Motion to Strike Defendants' Answer." Plaintiff did not file a Notice of Cross-Motion contemporaneously with the affirmation, but only filed it on February 24, 2023 as an exhibit to her reply.

As to the merits of defendants' motion, plaintiff contends that defendants failed to meet their burden and the motion should be denied without even reviewing plaintiff's opposition. Plaintiff argues that, even if defendants met their burden, there are material factual and credibility issues that preclude summary judgment. In that regard, plaintiff argues that Serota's testimony that the Building was built in 1985 by his family establishes that defendants had actual and constructive notice of the step down. Plaintiff contends that, as opined by her expert, the step down into a roadway with no eye level warning signs was a wholly unexpected, inherently dangerous condition and a trap for the unwary, especially first-time visitors to the Building who believe they are entering a lobby. In addition, in their affidavits, both plaintiff and her expert assert that they have never encountered a building with a similar design where a roadway traverses a building's interior.

With respect to plaintiff's purported cross-motion to strike defendants' Answer, plaintiff contends that this sanction is warranted because defendants failed to adequately respond to plaintiff's January 25, 2021 discovery demands seeking building plans, blueprints, architectural information, contracts, permit information, certificates of occupancy, complaints and similar documents. Plaintiff argues that while defendants stated that they did not have any such materials in their November 18, 2021 discovery response, at his deposition, Serota contradicted defendants' denials, testifying that such documents might exist in the

Building's archive room, but that no one ever requested that he or defendants' representatives search for them. Plaintiff contends that the documents are material and necessary to her case, and that failure to produce them warrants striking defendants' Answer. Alternatively, plaintiff argues that the court should not entertain defendants' summary judgment motion.

Defendants' Reply

In reply, defendants filed an "Affirmation in Opposition to Plaintiff's Cross-Motion and Reply Affirmation in Further Support of Defendants Summary Judgment Motion." With respect to the purported cross-motion, defendants contend that it is procedurally improper because plaintiff did not file it on notice. Defendants also argue that in any event, striking their Answer is not warranted because they responded to plaintiff's demand and plaintiff did not object to the sufficiency of the response until after Serota was deposed and after the Note of Issue was filed. In further support of their motion, defendants contend that plaintiff's expert's affidavit is insufficient to create a factual issue because the expert failed to cite any rule or regulation that was violated with regard to the step's design, and because the expert did not articulate a basis for his conclusion that the step was dangerous.

Plaintiff's Reply

In reply in further support of her purported cross-motion, plaintiff concedes that she inadvertently failed to file a notice of cross-motion, but argues that the court should nevertheless consider it in the interest of judicial economy, since defendants opposed the motion and would not be prejudiced.

Discussion

Defendants' Summary Judgment Motion

It is well settled that a party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *See Sillman v.*

Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v.*

Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020

(2d Dept. 1988). The failure to make this *prima facie* showing requires denial of the motion regardless of the sufficiency of opposing papers. *See Zeitoune v. Cohen*, 66 A.D.3d 889, 887

N.Y.S.2d 253 (2d Dept. 2009); *Cendant Car Rental Group v. Liberty Mut. Ins. Co.*, 48 A.D.3d 397, 852 N.Y.S.2d 190 (2d Dept. 2008); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136

(2d Dept. 2008); *Giammalva v. Winters*, 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009);

Barrera v. MTA Long Island Bus, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v.*

Karnak Corp., 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008). Summary judgment is a

“drastic remedy” that “should not be granted where there is any doubt as to the existence of such issues, or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure.” *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*.

“A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition.” *Wilson v. Rye Family Realty, LLC*,

218 A.D.3d 836, 193 N.Y.S.3d 274 (2d Dept. 2023). *See also Livingston v. Better Med.*

Health, P.C., 149 A.D.3d 1061, 52 N.Y.S.3d 482 (2d Dept. 2017). “To impose liability upon a

defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition

existed, and that the defendant either created the condition or had actual or constructive notice of it.” *Leary v. Leisure Glen Home Owners Assn., Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011). A defendant is deemed to have constructive notice of a defect when it is visible, apparent, and has existed long enough prior to the accident that it could have been discovered and remedied. *See Leary v. Leisure Glen Home Owners Assn., Inc., supra* at 1170.

“A property owner has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous.” *Evans v. Fields*, 217 A.D.3d 656, 190 N.Y.S.3d 154 (2d Dept. 2023); *Brady v. 2247 Utica Ave. Realty Corp.*, 210 A.D.3d 621, 177 N.Y.S.3d 627 (2d Dept. 2022). However, even if a dangerous condition was open and obvious, a property owner may still be found liable for failing to maintain the property in a safe condition. *See Holmes v. Macy’s Retail Holdings, Inc.*, 184 A.D.3d 811, 124 N.Y.S.3d 582 (2d Dept. 2020). Additionally, “[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted.” *Evans v. Fields, supra* at 656; *Brady v. 2247 Utica Ave. Realty Corp., supra* at 622; *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 554 (2d Dept. 2008). “Therefore, [w]hether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury.” *Evans v. Fields, supra* at 656-657; *Brady v. 2247 Utica Ave. Realty Corp., supra* at 622-623. *See also Holmes v. Macy’s Retail Holdings, Inc., supra* at 811. “[A] defendant moving for summary judgment in a slip-and-fall action has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.” *Livingston v. Better Med. Health, P.C., supra* at 1062.

In support of their motion, defendants submitted the transcript from plaintiff's EBT testimony, the photographs, the surveillance video, and Serota's affidavit. Defendants did not submit an affidavit from an expert opining as to the safety of the step's construction or maintenance. Defendants also did not submit Serota's deposition transcript in support of their motion. Defendants' own evidence merely consisted of the photographs of the step and Serota's affidavit, which only served to annex the surveillance video.

Plaintiff's testimony, the photographs, and the surveillance video submitted by defendants demonstrate that the step down was only a short distance past the Building's entrance doors, next to a two-way roadway which need to be traversed in order to enter the Building's lobby. Plaintiff testified that she had never been to the Building before and that the lighting was dimmer past the Building's entrance than it was outside. Further, Plaintiff testified, and the photographs showed, that the warning sign to "Watch Your Step" was hanging from the ceiling, requiring a visitor to look up to observe it. In light of these submissions, defendants failed to meet their burden of establishing, *prima facie*, that the step over which plaintiff tripped was open and obvious and not an inherently dangerous condition. *See Kernell v. Five Dwarfs, Inc.*, 207 A.D.3d 622, 173 N.Y.S.3d 21 (2d Dept, 2022); *Surujnaraine v. Valley Stream Cent. High School Dist.*, 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept. 2011); *Clark v. AMF Bowling Ctrs., Inc.*, 83 A.D.3d 761, 921 N.Y.S.2d 273 (2d Dept. 2011); *Villano v. Strathmore Terrace Homeowners Assn., Inc.*, 76 A.D.3d 1061, 908 N.Y.S.2d 124 (2d Dept. 2010); *Kempter v. Horton*, 33 A.D.3d 868, 824 N.Y.S.2d 308 (2d Dept. 2006). Defendants cannot meet their burden merely by pointing out the gaps in plaintiff's case, such as defendants did in the instant motion. *See Davranov v. 470 Realty Assoc., LLC*, 79 A.D.3d 697, 911 N.Y.S.2d 912 (2d Dept. 2010).

The fact that plaintiff was looking straight ahead instead of glancing down after entering the Building and, thus, did not observe the step does not preclude a finding of liability against defendants for failing to maintain the Building in a safe condition. *See Villano v. Strathmore Terrace Homeowners Assn., Inc., supra* at 1062; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634, 896 N.Y.S.2d 85 (2d Dept. 2010). Rather, such evidence is relevant to the issue of plaintiff's comparative negligence. *See Gradwohl v. Stop & Shop Supermarket Co., LLC, supra* at 636; *Cacciatore v. State*, 13 Misc.3d 1234(A), 831 N.Y.S.2d 352 (Court of Claims of New York 2006).

Accordingly, denial of defendants' motion is appropriate without regard to the sufficiency of plaintiff's opposition. *See Alvarez v. Prospect Hospital, supra* at 324.

Plaintiff's Motion To Strike

While plaintiff's purported cross-motion to strike defendants' Answer fails to comport with CPLR § 2215 because plaintiff failed to contemporaneously serve a Notice of Cross-Motion (*see 30-40 East Main Street Bayshore, Inc. v. Republic Franklin Insurance Co.*, 74 A.D.3d 1330, 904 N.Y.S.2d 740 (2d Dept. 2010); *Guggenheim v. Guggenheim*, 109 A.D.2d 1012, 486 N.Y.S.2d 489 (3d Dept. 1985)), defendants opposed the purported cross-motion and have not otherwise demonstrated that they were prejudiced by this defect. *See Rappel v. Wincoma Homeowners Association*, 125 A.D.3d 833, 4 N.Y.S.3d 276 (2d Dept. 2015). Therefore, in light of plaintiff's argument in support of striking defendants' Answer, in the interest of judicial economy, the Court, in its discretion, will consider the purported cross-motion. *See Rappel v. Wincoma Homeowners Association, supra. See also Speonk Lbr. Corp. v. Ace Bldrs., Inc.*, 190 A.D.3d 775, 135 N.Y.S.3d 855 (2d Dept. 2021); *Nelson v. New York State*

Department of Motor Vehicles, 188 A.D.3d 692, 134 N.Y.S.3d 62 (2d Dept. 2020); *Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 970 N.Y.S.2d 260 (2d Dept. 2013).

Initially, the Court notes that plaintiff has not provided any case law in support of her argument that defendants' Answer should be stricken, nor have defendants cited any legal authority in opposition. The belatedly filed Notice of Cross-Motion states that plaintiff moves for an order pursuant to CPLR § 3126 to strike defendants' Answer. CPLR § 3126(3) permits a court to strike a party's pleading for noncompliance with a court's order for disclosure or when a party fails to disclose information which the court finds should have been disclosed. However, a motion to strike a defendant's Answer pursuant to CPLR § 3126 must be made **prior** to the plaintiff's filing of a Note of Issue and Certificate of Readiness (emphasis added). *See J.H. v. City of New York*, 170 A.D.3d 816, 93 N.Y.S.3d 896 (2d Dept. 2019).

Here, plaintiff filed her purported cross-motion seven months **after** filing the Note of Issue and Certificate of Readiness (emphasis added). Moreover, defendants served their response denying the existence of any documents almost six (6) months prior to plaintiff filing her Note of Issue. Plaintiff has not submitted any evidence that she made any follow up request for the sought after documents, nor sent any good-faith letters to defendants before filing the Note of Issue. The good faith letters submitted by plaintiff were all dated after the Note of Issue was filed. Nor were any discovery motions related to those documents filed prior to filing the Note of Issue. By filing the Note of Issue prior to addressing the alleged failure to produce discovery, plaintiff waived any objection to defendants' alleged failure to meet their discovery obligations. *See J.H. v. City of New York, supra*. *See also Fugazy v. Fugazy*, 210 A.D.3d 653, 176 N.Y.S.3d 728 (2d Dept. 2022); *K-F/X Rentals & Equip., LLC v.*

FC Yonkers Assoc., LLC, 131 A.D.3d 945, 15 N.Y.S.3d 891 (2d Dept. 2015); *Iscowitz v. County of Suffolk*, 54 A.D.3d 725, 864 N.Y.S.2d 78 (2d Dept 2008).

In any event, plaintiff has not made a clear showing of willful or contumacious conduct on defendants' part to warrant the drastic remedy of striking the Answer. *See Guardado v. K.B.G. Commercial, Inc.*, 209 A.D.3d 721, 176 N.Y.S.3d 119 (2d Dept. 2022); *Iscowitz v. County of Suffolk*, *supra* at 725. At his deposition, Serota did not definitively testify that documents responsive to plaintiff's discovery demands existed in the Building's archive room. Serota only testified about where such documents would be located if they did exist.

Finally, the Court notes that pursuant to CPLR § 3101(h), defendants have a continuing obligation to amend or supplement their previously served response if they locate any responsive documents, and the Court, upon motion, may make whatever order may be just if responsive documents exist but have not been turned over. *See CPLR § 3101(h); Pizzo v. Lustig*, 216 A.D.3d 38, 189 N.Y.S.3d 579 (2d Dept. 2023).

Accordingly, the relief requested in plaintiff's purported cross-motion is hereby **DENIED**.

The court has considered the parties' remaining contentions and finds them to be without merit.

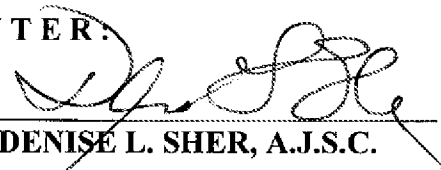
Therefore, based upon the above, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **DENIED**.

All relief not expressly granted herein has been considered and is **DENIED**. And it is further

ORDERED that the parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on **January 16, 2024, at 9:30 a.m.**

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 6, 2023

ENTERED

Sep 11 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE