

Tamburo v Long Is. Univ.
2023 NY Slip Op 35262(U)
January 11, 2023
Supreme Court, Nassau County
Docket Number: Index No. 611006/2020
Judge: Felice J. Muraca
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU: IAS PART 41

P R E S E N T:

HON. FELICE J. MURACA, A.J.S.C.

ANGELO TAMBURO,

Plaintiff,

-against-

LONG ISLAND UNIVERSITY,

Defendant.

DECISION & ORDER

INDEX NO. 611006/2020

Motion Seq.#: C-002

The Court has considered e-filed documents 43 through 72 (excluding document 65) in preparing this Decision and Order.

Defendant moves this Court for an order pursuant to CPLR § 3212, granting it summary judgment. Plaintiff has submitted opposition.

This action arises out of an incident that occurred on September 30, 2019, when Plaintiff, while working at his place of employment, Long Island University (Defendant), as a custodian, tripped and fell on the upper landing of a staircase inside the Fine Arts Building (Subject Staircase). At the time of the fall, Plaintiff was attempting to descend from the first floor to the basement level. Plaintiff alleges he fell backwards on the landing thereby sustaining physical injuries. In his pleadings, Plaintiff alleges the Defendant was negligent in maintaining Subject Staircase, specifically, "in failing to make the proper repairs; in failing to allow for continuous and unobstructed path of vertical and horizontal egress; in allowing steps to be uneven and/or not level; and in failing to use anti-slip treads."

It is well settled that in a motion for summary judgment, the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (see also *Andre v. Pomeroy*, 35 N2d 361 [1974]).

Premises liability will attach where (1) the plaintiff was injured by a defective condition on defendant's premises, (2) the defendant either created the alleged condition or the defendant had actual or constructive notice of the condition, and (3) the defective condition was the proximate cause of the plaintiff's injury. (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1983]).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability " 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury." (*Guerrieri v. Summa*, 193 A.D.2d 647 [citations omitted])." (*Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 977 [1997]). "However, '[a] plaintiff's inability to identify what had caused him or her to fall is fatal to his or her case, and a defendant moving for summary judgment dismissing the complaint can meet its initial burden as the movant simply by demonstrating that the plaintiff did not know what had caused him or her to fall' (*Kudrina v. 82-04 Lefferts Tenants Corp.*, 110 AD3d 963, 964; see *Mitgang v. PJ Venture HG, LLC*, 126 AD3d 863, 863-864; *Calciano v. Tarragon Corp.*, 125 AD3d 709, 710; *Rodriguez v. 1790 Broadway Assoc., LLC*, 122 AD3d 604, 605)." (*Giannotti v. Hudson Valley Fed. Credit Union*, 133 A.D.3d 711, 712 [2d Dept 2015]; see also *Antelope v. Saint Aidan's Church, Inc.*, 110 A.D.3d 1020 [2d Dept 2010] [finding no evidence to connect the alleged dangerous condition to the plaintiff's fall]; *Winder v. Executive Cleaning Services, LLC*, 91 A.D.3d 865 [2d Dept 2012] [plaintiff's deposition testimony revealed that she did not know what caused her to trip]).

Moreover, “the doctrine that a defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a holding of triviality to be based on all the specific facts and circumstances of the case, not size alone.” (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]). Accordingly, “[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” *Id.* at 79.

There is no minimum dimension or height required to render an alleged defect actionable. Rather, “a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it ‘unreasonably imperil[s] the safety of’ a pedestrian.” (*Hutchinson*, 26 NY3d at 77 [citations omitted]). An examination of all the facts presented can, and should include, consideration of the “width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury.” (*Fasone v. Northside Properties Management Corp.*, 149 AD3d 905, 906 [2d Dept 2017] [quoting *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 978 [1997]]; see also *Melia v. 50 Court Street Assocs.*, 153 AD3d 703 [2d Dept 2017]; *Kavanagh v. Archdiocese of City of New York*, 152 AD3d 654 [2d Dept 2017]).

Based upon Defendant’s Affirmation and exhibits, including deposition testimony and an Expert Report of Professional Engineer, Mr. Kelly D. Scott (Scott Report), Defendant has established a *prima facie* showing of entitlement to summary judgment as a matter of law. Defendant supports its argument that Plaintiff has only speculated as to how the fall occurred, based on certain inconsistencies between Plaintiff and his own expert. The Scott Report contains sufficient evidence to demonstrate the absence of a material issue of fact. The Scott Report states Subject Staircase complied with the New York State building code and was overall in a “safe condition.” Also, the Scott Report included measurements and assessments of the overall condition of Subject Staircase. Defendant has demonstrated Plaintiff does not know what caused him to fall. The burden now shifts to the Plaintiff to establish a material issue of fact requiring a trial of the action.

Plaintiff claims that summary judgment must be denied since Defendant failed to address whether it had actual or constructive notice of the alleged defect. Plaintiff also claims dismissal is inappropriate based on the opinions of his Professional Engineer, Harold Krongelb, who found a "slope" that contradicted Defendant's Expert Report. Lastly, Plaintiff attempts to raise an issue of fact by using the deposition of a non-party witness who testified to alleged "waxing" of the Subject Staircase.

Plaintiff's arguments are wholly unsupported by sufficient facts and evidence. Plaintiff has worked at the location for twenty-five years and has been designated to clean Defendant's buildings based on assignment, including Subject Staircase. On the date of the incident, Plaintiff was on a routine cleaning despite covering the building for a colleague. Plaintiff states there was no substance observed on Subject Staircase. Plaintiff's deposition testimony is clear that at the time of the fall, he did not know the cause of his fall. After returning to Subject Staircase several hours later, Plaintiff noticed what he described as a "slope." Plaintiff could not describe the "slope" in any greater detail other than the "whole platform was ...sloping" and it was the cause of his fall.

Prior to the incident, Plaintiff had never noticed any "sloping on the [Subject Staircase]" or any staircase at LIU. During Plaintiff's deposition, when he was shown a photograph of the Subject Staircase, specifically the landing, Plaintiff did not identify the slope but instead indicated there was no gripping on the landing. Plaintiff clearly circled the middle portion of the landing as the only cause of his fall.

Plaintiff's expert, Mr. Krongelb, conducted measurements of Subject Staircase and included a diagram in his Report. In Krongelb's Report the "slope" is one and a half (1 ½) inches wide out of the total 49-inches of the width of the landing, and "slopes" one-quarter (¼) of an inch downward. It is clear in Krongelb's Report that the "slope" is on the outer most portion of the landing that abuts the railing and/or the wall. There is no "slope" indicated in the middle of the landing where Plaintiff circled as the defect and cause of his fall.

These contradictory statements raised a feigned factual issue designed to avoid the consequences of Plaintiff's earlier admission. (*See Nieves v. Iss Cleaning Services Group, Inc.*, 248 AD2d 441 [2d Dept 2001]). Plaintiff's deposition testimony of the "slope" is drastically exaggerated from what his own expert reports. Additionally, Krongelb's Report indicates that the only alleged defect that existed was not in the location where Plaintiff stated he fell. Most notably,

Mr. Krogelb's Report is completely devoid of any reference to anti-slip tread being required on the landing, another contradiction of Plaintiff's claim. Plaintiff has not submitted a subsequent affidavit in Opposition to correct or modify any of these inconsistencies.

Plaintiff's argument only raises a question as to the location of the defect and the fall, which is insufficient to satisfy Plaintiff's burden. Plaintiff has not established an issue of fact regarding whether Defendant created a defect or dangerous condition through an affirmative act of negligence. It's Plaintiff's burden to establish that the area of occurrence that caused the injury was in a defective or dangerous condition. However, Plaintiff failed to do so as he is unable to demonstrate what caused him to fall. It should also be noted, that Plaintiff as part of his job was to report any alleged defects, that would cause injury. Plaintiff is in fact the person who inspects and cleans these locations. So, while this incident remained unreported Plaintiff also did not notify his employers of any potential defects that would cause injury to other patrons and students.

Notwithstanding that Mr. Krogelb's alleged defect is in a different location from where Plaintiff testified he fell, "[c]onsidering the evidence presented, particularly the photograph... and the [P]laintiff's description of the time, place, and circumstance of the injury," and both expert reports, this Court finds that the Defendant established, prima facie, that the alleged defect was trivial as a matter of law and, therefore, not actionable. *Sullivan v Colonial Woods Condominiums*, 162 AD3d 704, 705 [2d Dept 2018]. Scott's Report is sufficient to support Defendant's argument that the risk of the alleged "slope" is insignificant.

The burden shifts to the Plaintiff to raise a triable issue of material fact that the defect is not trivial. Plaintiff's only supporting evidence is contained in Mr. Krogelb's Report. Mr. Krogelb opines that the one-quarter inch ($\frac{1}{4}$) "slope" on the one and a half ($1\frac{1}{2}$) inch of the landing is not trivial and is in violation of general building codes. However, Mr. Krogelb and Plaintiff are incapable of establishing a nexus between the alleged code violations, and the alleged trip and fall of Plaintiff. Mr. Krogelb's opinions are mere conclusions. Therefore, Plaintiff failed to meet its burden of establishing that any alleged defect is more than trivial. (*Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 1225 [3d Dept 2016])). Property owners are not held liable for trivial defects. *id.* The Plaintiff failed to provide any facts and conditions from which negligence could reasonably be inferred.

Lastly, Plaintiff's attempt to now allege through a non-party EBT of Mr. Kenneth Yoli, that the floors were waxed and slippery is a hearsay statement that is not sufficient to bar summary judgment as the only evidence submitted. *Stock v Otis El. Co.*, 52 AD3d 816, 817 [2d Dept 2008]. Mr. Yoli had no personal knowledge of the Subject Staircase landing being waxed and testified to the general preferences and past conversations with his superior. Mr. Yoli's testimony about Subject Staircase is Impermissibly speculative and lacking probative value." *Stock* at 817. Plaintiff never plead, or stated during his deposition, nor did he file an affidavit with his Opposition, contending that the floors were waxed or slippery and as a result caused the fall.

In conclusion, the Plaintiff has failed to demonstrate what caused him to fall. This Court finds the alleged defect described by Krogelb was trivial and was not connected to any evidence as the proximate cause of Plaintiff's fall and injury. On this record, the Defendant has established their entitlement to summary judgment as a matter of law. Plaintiff has failed to offer any non-speculative or non-conclusory evidence to raise a material issue of fact in opposition.

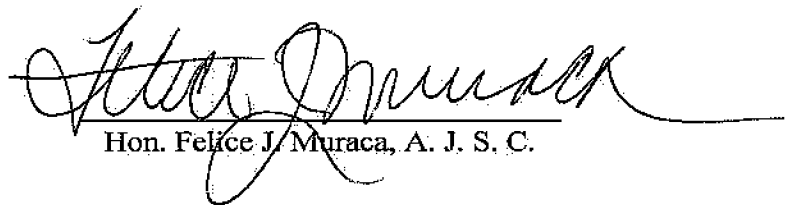
Accordingly, it is hereby

ORDERED, that the Defendant's motion for summary judgment is GRANTED.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this Court.

Dated: January 11, 2023
Mineola, NY



Hon. Felice J. Muraca, A. J. S. C.

ENTERED

Jan 17 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE