

Bestani v Northwell Health Inc.
2023 NY Slip Op 35332(U)
May 30, 2023
Supreme Court, Orange County
Docket Number: Index No. EF006989-2019
Judge: Maria S. Vazquez-Doles
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This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at the Orange County Court House,
285 Main Street, Goshen, New York 10924 on the 30th day of May 2023.

To commence the statutory time for
appeals as of right (CPLR 5513 [a]), you
are advised to serve a copy of this order,
with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
MICHAEL BESTANI,

Plaintiff,

-against-

DECISION & ORDER

Index No.: EF006989/2019

Motion date: 3/30/2023

Motion Seq. #3

NORTHWELL HEALTH INC., HIP HOSPITAL INC.,
and FOREST HILLS HOSPITAL,

Defendants.

-----X
VAZQUEZ-DOLES, J.S.C.

The following papers were read on the Defendants' motion pursuant to

CPLR 2221 to reargue the Order dated December 30, 2022 ("the Order"):

Notice of Motion/Affirmation/Exhibits A-Z.....1-28
Opposition Affirmation29
Reply Affirmation30

This is an action related to Plaintiff's fall at a loading dock owned and operated by the Defendants. The Court issued the Order denying summary judgment on liability and on damages following Defendants' Motion Seq.#2. Defendants have not established that the Court overlooked any facts or law. Therefore, the motion to reargue is DENIED.

Plaintiff allegedly sustained personal injuries on August 21, 2018 from a fall at a loading dock at Forest Hills Hospital. Plaintiff's Complaint alleges, *inter alia*, that Defendants were negligent in allowing a cracked and depressed area of concrete ("the Hazard") to exist where

invitees like Plaintiff were walking, which caused Plaintiff to fall and sustain injuries.

Defendants moved for summary judgment, arguing that the Hazard was not a dangerous condition and they did not have actual or constructive notice. Defendants also asserted that the Hazard was not the proximate cause of plaintiff's injuries and that Plaintiff had not established his injury was caused by this accident as a matter of law. The Order denied the summary judgment motion.

With regard to a motion for leave to reargue, CPLR 2221(d) requires that the motion be filed within 30 days of the notice of entry of the prior decision from which the movant seeks relief. The instant motion was timely filed. The motion must site a law or fact overlooked by the Court. Defendants assert that the Court overlooked supposed law that i) a photograph alone is not sufficient to establish a dangerous condition at a premises and ii) Plaintiff must prove that Defendants received a complaint of the Hazard before his accident. Defendants also assert that the Court overlooked facts related to where Plaintiff fell and the causal nexus between his alleged fall and his alleged injuries.

If the proponent of a summary judgment motion tenders proof in admissible form eliminating any material issue of fact from the case, the burden shifts to the party opposing the motion to show the existence of material issues of fact by producing evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). A photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photograph. *Bolloli v Waldbaum*, 71 AD3d 618 (2d Dept 2010).

The cases that Defendants rely upon do not hold that a photograph alone is insufficient to raise an issue of fact as to a premises defect. Instead, those cases held only that, *based on their*

specific facts, the photographs at issue did not depict a dangerous condition. *See Langer v. BJ's Wholesale Club*, 39 AD3d 714 (2d Dept. 2007) (photographs did not depict that the pallets on the floor created a dangerous condition); *Masliach v. Schriefer*, 264 AD 786 (2d Dept. 1942) (photograph of door saddle did not show a crack or break so as to cause a person to fall). Here, to the contrary, the photographs show a substantial area of broken concrete with a depression of sufficient size that a person could trip and fall by stepping in the area.

With respect to Defendants' arguments regarding notice, the Court did not overlook any law. Defendants fail to cite a case holding that a third person must provide notice to a defendant of a defect in its premises, where the defect has existed for sufficient time for a defendant to have become aware of that condition. To the contrary, where a condition is visible and apparent, and exists for a sufficient length of time before the accident to permit the defendant to discover and remedy it, then notice is established. *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938 (2d Dept 2017); *Deveau v. CF Galleria at White Plains, LP*, 18 A.D.3d 695 (2d Dept 2005). Here, no issue of fact exists that the Hazard predated this accident for such a length of time that Defendants would have become aware of it, in a highly trafficked area, had they exercised reasonable diligence in the upkeep of their own property.

Defendants do not cite any facts that the Court overlooked as to causation. The parties differ as to the mechanics of how Plaintiff fell. Plaintiff asserts he fell when stepping in the Hazard and Defendants claim that did not occur. Defendants' assertion that the Court should have held as a matter of law that Plaintiff did not fall in the Hazard is based on the testimony of the Defendants' expert about how to exit a truck and where Plaintiff should have stepped. That expert testimony does not eliminate all issues of fact as to what caused Plaintiff to fall. Nor does

the video of Plaintiff at the loading dock eliminate these issues of fact as to precisely where and how he fell, as Defendants assert.

Similarly with respect to the alleged injuries of Plaintiff, more than one doctor opines as to alleged injuries that were caused by this fall. Defendants' reliance on a medical doctor who was not present at the accident, and who has no accident reconstruction expertise, opining as to the supposed impossibility of the causation, was not overlooked and remains unavailing. As is common, the various medical experts disagree on what injuries, if any, were caused by the fall. Plaintiff submitted admissible evidence on the motion for summary judgment that created an issue of fact as to Plaintiff sustaining at least some injury as a result of the fall.

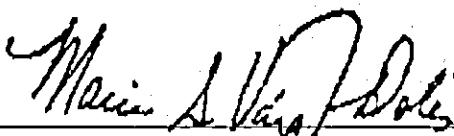
Upon the foregoing, it is hereby

ORDERED that Defendant's motion to reargue is **DENIED**.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 30, 2023
Goshen, New York

ENTER:



HON. MARIA S. VALENZUELA-DOLES, J.S.C.