

Velasquez v New York City Tr. Auth.

2024 NY Slip Op 32476(U)

July 18, 2024

Supreme Court, New York County

Docket Number: Index No. 452050/2018

Judge: Richard Tsai

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD TSAI **PART** **21**

Justice

-----X

DANIEL VELASQUEZ,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

-----X

INDEX NO. 452050/2018

MOTION DATE 10/17/2023

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 121-152 were read on this motion to/for JUDGMENT - SUMMARY.

In this action, plaintiff Daniel Velasquez alleges that he lost his balance, slipped, and fell due a worn step on a subway staircase on a rainy day. Defendant New York City Transit Authority now moves for summary judgment dismissing the complaint based on the “storm in progress” doctrine and/or in the alternative that the defendant had no notice of any defect alleged to have caused the plaintiff to fall. Plaintiff opposes this motion.

BACKGROUND

Plaintiff Daniel Velasquez alleges that, on May 7, 2016, at approximately 9:00 AM, he slipped and fell on a worn step while descending staircase P2A located at the north side exit of the 4 and 5 trains at the Bowling Green subway station (Defendant’s Exhibit C [NYSCEF Doc. No. 128], verified complaint ¶¶ 6-7, 9); Defendant’s Exhibit B [NYSCEF Doc. No. 130], verified bill of particulars ¶ 2). Defendant New York City Transit Authority admitted it is “responsible for the maintenance, management and upkeep” of the subway station (see Defendant’s Exhibit D [NYSCEF Doc No. 129], verified answer ¶ 2).

At his statutory hearing, plaintiff stated the following: the incident occurred around 9:30 AM on May 7, 2016 (Defendant’s Exhibit G [NYSCEF Doc. No. 132] [statutory hearing tr] at 18, lines 14-21). Around the time of the accident, “[i]t had been raining a lot, but the moment when I was going to the station, it had stopped raining, but it was still wet on the floor” (*id.* at 20, lines 23-25 through 21, lines 1-3). As he “was going down the stairs and the step right before the last one, I slipped, I lost my balance, and I fell” because “it was wet” (*id.* at 25, lines 1-7). He knew it was the P2A staircase because “after I fell, I looked at the stairs and the number was there” (*id.* at 25, lines 19-24). He saw that the step was wet before he slipped and that a lot of the steps were wet because “people are going down, down the steps with their umbrellas, so the steps were wet” (*id.* at 28, lines 24-25 through 29, lines 1-7).

At his deposition, plaintiff testified as follows: he left the Staten Island Ferry Terminal at “quarter after nine” to make the “ten minutes” walk to the Bowling Green station, and that it was raining during these ten minutes (Defendant’s Exhibit H [NYSCEF Doc. No. 133] [Velasquez

EBT] at 32, lines 18-25, through 33, lines 2-6). He used staircase “AP2” to enter the station (*id.* at 33, lines 15-18). The staircase was “slippery and wet” and he noticed that “it looked like it was not being clean and it was wet, so anybody could fall there” (*id.* at 34, lines 6-14). The staircase was wet on the day of the accident because of rain (*id.* at 34, lines 17-23). The steps on the staircase are “[c]oncrete, it’s concrete, but at the end of the last step, it’s made of metal where you can easily slip on that. At the very end of the last step, there is metal edge. Yeah, there is the cement and the metal part of it, where you can easily slip” (*id.* at 36, lines 3-11).

Plaintiff further testified that he was caused to slip and lose his balance on the second step from the bottom because “[i]t was wet” due to “the rain that was occurring at the time” (*id.* at 39, lines 2-9). He had walked down “approximately twelve” steps before he slipped and fell (*id.* at 41, lines 7-23). That “[y]ou check every single step, otherwise you will fall down (*id.* at 42, line 25, through 43, lines 2-7). He looked at the surface of each step as he descended the stairway and “[e]very single step was wet” (*id.* at 43, lines 12-25, through 44, lines 2-5). He put his right foot on the second step from the bottom before he slipped, and he looked at the surface of the step before he put his foot on it (*id.* at 46, lines 16-23). When asked if he had reported the incident to defendant’s personnel, he claimed “[w]hen I try to do that with the girl that was at the station she took off her badges and closed the window and I couldn’t do it” (Defendant’s Exhibit G [NYSCEF Doc. No. 134] [Velasquez’s continued EBT] at 74, lines 13-25, through 75, lines 1-6).

During discovery, defendant produced a Service Call Report for the period May 7, 2014, to May 7, 2016 (Plaintiff’s Exhibit B [NYSCEF Doc. No. 146] service call reports) and a Production by Station and Date Report for the period May 7, 2014, to May 7, 2016 (Plaintiff’s Exhibit C [NYSCEF Doc. No. 147] production by station date report].

Frank Blandina, a structure maintainer employed by defendant, testified that he is a record searcher for their legal department (Defendant’s Exhibit K [NYSCEF Doc. No. 136] [Blandina EBT] at 8, lines 4-12; at 9, lines 16-25).

Blandina testified as follows: the content of the Service Call Report is one that is “strictly called in by a station supervisor and/or any employee of the station with a complaint for a potential tripping hazard to the general public” (Blandina EBT at 13, lines 22-25, through 14, lines 2-22). The Production by Station and Date Report “contains everything that’s in a service call report except some minor things on the report maybe inspections and goals that won’t make it” (*id.* at 17, lines 22-25, through 18, lines 2-14).

Regarding the P2A staircase, the Service Call Report included one entry on July 19, 2014 (service call report at 5; *see also* production by station date report at 3). This entry states “[c]logged floor drains in front s/w P2A & P2B), and it states this matter was resolved on August 6, 2014 (*id.*). This was the only reference to the P2A staircase in both reports.

DISCUSSION

“On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the moving party produces the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019] [internal

citations and quotation marks omitted]).

On a motion for summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

To be entitled to summary judgment in a slip and fall case, defendant has the burden of making a prima facie showing “that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence” (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]).

I. Whether defendant affirmatively created the hazardous condition

Here, to the extent that plaintiff claims that he slipped due to a wet step, defendant established that it did not cause or create that allegedly hazardous condition. Plaintiff testified at his statutory hearing that a lot of the steps were wet because “people are going down, down the steps with their umbrellas, so the steps were wet” (statutory hearing tr at 28, lines 24-25 through 29, lines 1-7).

II. Whether defendant had actual or constructive notice

“Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident. In order to constitute constructive notice, a defect must be visible and apparent for a sufficient length of time to permit the defendant’s employees to discover and remedy it” (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011] [internal citation omitted]).

Defendant argues that no evidence has been introduced into the record that it had actual or constructive notice of the alleged hazardous condition (NYSCEF Doc. No. 124 [affirmation in support of motion] ¶ 20). Defendant relies upon the Service Call Report, the Production by Station Date report, and Blandina’s deposition testimony. Defendant argues that “[u]pon review of the reports there were no service call reports or complaints made prior to the accident involving a wet and/or slippery condition on the subject staircase” (affirmation of defendant’s counsel ¶ 13).

To the extent that defendant is arguing that plaintiff had the burden of introducing evidence of actual or constructive notice on this motion, that is not the law. Rather, because this is defendant’s motion for summary judgment, defendant, as the movant, has the “prima facie burden of showing lack of notice” (*Davis v Brookfield Props. Mgt., LLC*, 220 AD3d 527 [1st Dept 2023]). “Merely pointing to gaps in an opponent’s evidence is insufficient to satisfy the movant’s burden” (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018]).

Nevertheless, defendant established lack of actual notice. The Service Call report does not include entries relating to either wet and/or slippery steps on the subject staircase. Nor is there any entry in respect of a worn step on the subject staircase.

However, defendant did not establish that it lacked constructive notice. “A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area

was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Here, defendant did not submit any evidence of a recent inspection of staircase P2A prior to the incident.

Thus, defendant is not entitled to summary judgment dismissing the complaint on the ground that it lacked notice of the allegedly wet step or worn step.

III. The “storm in progress” doctrine

Defendant further argues that the “storm in progress” doctrine provides a defense in this matter, rendering them free from any liability arising from the alleged accident (affirmation of defendant’s counsel ¶¶ 16-17). In support, defendant states that “[i]t is undisputed that it rained all day on the date of the subject accident and that there was rain fall at the time of the alleged accident” (*id.* ¶ 12). Defendant relies on plaintiff’s testimony and certified climatological records from the National Climatic Data Center for New York (Defendant’s Exhibit J [NYSCEF Doc. No. 135], local climatological data).

In opposition, plaintiff does not contradict their deposition testimony, stating, “Admittedly, it was raining on the day of my accident, but I never said during my deposition that rain was the exclusive and only cause for my fall” (Plaintiff’s Exhibit E [NYSCEF Doc. No. 149], Velasquez Affidavit ¶ 4).

However, defendant’s own submissions raise a material issue of fact as to whether it was raining on May 7, 2016. Although plaintiff testified that the date of the incident was May 7, 2016 (statutory hearing tr at 18, lines 14-21), and that it was raining that day (*id.* at 20, lines 23-25 through 21, lines 1-3; Velasquez EBT at 32, lines 18-25, through 33 lines 2-6), the climatological records that defendant submitted show otherwise.

Contrary to defendant’s assertion, the climatological records show no precipitation on the entire day of May 7, 2016 accident (*see* Defendant’s Exhibit J [climatological records] [NYSCEF Doc. No. 135] [emphasis added]):

Department of Commerce National Oceanic & Atmospheric Administration National Environmental Satellite, Data, and Information Service					Local Climatological Data Hourly Observations May 2016 Generated on 03/27/2023																			National Centers for Environmental Information 151 Patton Avenue Asheville, North Carolina 28801	
Date	Time (LST)	Station Type	Sky Conditions	Visibility	Weather Type (see documentation)			Dry Bulb Temp		Wet Bulb Temp		Dew Point Temp		Rel Hum %	Wind Speed (MPH)	Wind Dir (Deg)	Wind Gusts (MPH)	Station Press (inHg)	Press Tend	Net 3-Hr Change (inHg)	Sea Level Press (inHg)	Report Type	Precip Total (in)	Alti-meter Setting (inHg)	
					AU	AW	MW	(F)	(C)	(F)	(C)	(F)	(C)												
1	2	3	4	5	6			7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	
07	0451	7	OVC:08 2	5.00	BR:1			48	8.9	47	8.3	46	7.8	93	9	070	17	29.65			29.80	FM-15	0.00	29.82	
07	0551	7	OVC:08 4	6.00				49	9.4	48	8.9	46	7.8	90	8	070	16	29.65			29.80	FM-15	0.00	29.82	
07	0651	7	OVC:08 4	6.00				49	9.4	48	8.9	47	8.3	95	8	080		29.66	1	-0.01	29.80	FM-15	0.00	29.83	
07	0703	7	OVC:08 5	6.00	BR:1			50	10.0	48	8.9	47	8.3	89	8	070		29.66				FM-16		29.83	
07	0716	7	OVC:08 4	5.00	BR:1			50	10.0	48	8.9	47	8.3	89	8	VRB	17	29.66				FM-16		29.83	
07	0751	7	OVC:08 5	6.00	BR:1			50	10.0	48	8.9	47	8.3	89	6	VRB		29.65				FM-15	0.00	29.82	
07	0851	7	OVC:08 6	10.00				51	10.6	49	9.4	47	8.3	88	0	000		29.66				FM-16	0.00	29.83	
07	0851	7	OVC:08 6	10.00				52	11.1	49	9.4	46	7.8	80	6	120		29.65	6	+0.01	29.80	FM-16	0.00	29.82	
07	1030	7	OVC:08 10	10.00				53	11.7	50	10.0	47	8.3	80	8	080		29.65				FM-16		29.82	

