

Inoa v 79 Ave A Realty LLC

2024 NY Slip Op 32755(U)

August 7, 2024

Supreme Court, New York County

Docket Number: Index No. 152559/2021

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

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DIGNA INOA,

Plaintiff,

- v -

79 AVE A REALTY LLC,

Defendant.

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INDEX NO. 152559/2021

MOTION DATE 02/27/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this trip and fall action, defendant 79 Ave A Realty LLC moves for summary judgment dismissing plaintiff’s complaint.

BACKGROUND

On April 11, 2019, plaintiff was walking along the sidewalk on Avenue A to bring her grandson to school (NYSCEF Doc No 70, 26:8-25, 41:6-18). It was a sunny morning, with clear conditions and no rain, and plaintiff was looking straight ahead (*id.*, 29:7-31:19). Plaintiff and her grandson approached a deli on their left-hand side, which had closed cellar doors embedded in the sidewalk in front of it (*id.*, 44:9-25, 45:13-16, 50:5-10; NYSCEF Doc No 73). Plaintiff tripped on the cellar doors but provides two conflicting accounts of the condition that caused her fall. At her deposition on October 27, 2022, she testified that she tripped over the right-side¹ cellar door because it protruded slightly over the left-side door when closed (*id.*, 50:23-52:7), i.e., she tripped due to mis-leveling where the doors met in the middle. In an errata sheet dated

¹ Taken from the perspective of the street, facing the deli façade.

December 20, 2022, however, plaintiff indicated that she tripped over “the outside edge of the [left] basement door [which] was higher than the sidewalk” (NYSCEF Doc No 77) and thus fell forward, landing “onto the middle of the cellar doors” (NYSCEF Doc No 78 ¶ 5). By decision and order dated August 8, 2023, the errata sheet was stricken pursuant to CPLR § 3116 because “plaintiff failed to provide a timely and specific explanation for the changes to her testimony, which materially conflicted with her prior deposition testimony regarding the [] cause of her accident” (NYSCEF Doc No 82).

On January 24, 2024, James W. Fordham, P.E., inspected the cellar doors on which plaintiff tripped (NYSCEF Doc No 72). Fordham focused his inspection on “the junction between the two sides of the cellar doors” and found that they were “generally flush,” with a “minor/trivial” elevation differential of approximately a quarter inch (*id.*). He opined “that the cellar doors are code compliant and [do not] constitute[] a tripping/slipping hazard” (*id.*).

Defendant now moves for summary judgment on the basis that the condition plaintiff alleged caused her accident in her deposition—the mis-leveling between the two cellar doors—was minimal and does not constitute a tripping hazard or defect for which defendant can be held liable (NYSCEF Doc No 66). Plaintiff opposes, arguing that Fordham evaluated the wrong aspect of the cellar doors (noting that defendant was “on notice” that she alleged she tripped on the left outer edge, as indicated by the errata sheet) and that in any event, the defect he observed cannot be deemed trivial as a matter of law (NYSCEF Doc No 79).

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion 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.’” (*Pullman v Silverman*, 28 NY3d 1060,

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action.” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility.” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

As an initial matter, even though plaintiff’s errata sheet was served before the instant motion was filed, it is inadmissible in support of her opposition (*Cataudella v 17 John St. Assocs., LLC*, 2015 N.Y. Misc. LEXIS 11853, *12 [Sup Ct NY Co 2015]), as it was stricken from the record because it “materially conflicted with her prior deposition testimony” and she “failed to provide a timely and specific explanation for the changes to her testimony” (NYSCEF Doc No 82). Nor can plaintiff rely on her affidavit in opposition to defendant’s motion (NYSCEF Doc No 78), as it similarly “contradict[s] her deposition testimony [] and thus created

only a feigned issue of fact” (*Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1st Dept 2009] [plaintiff’s testimony described slipping on a narrow patch of ice on a path, while her affidavit claimed the ice was unavoidable because it covered the entire path]). Therefore, for the purposes of this motion, the mis-leveled center of the cellar doors as described in plaintiff’s deposition testimony will be deemed the alleged cause of her fall.

“[T]here is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable” (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Rather, a court must consider “all the facts and circumstances presented, including . . . the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury” (*id.*, quoting *Caldwell v Island Park*, 304 NY 268, 277 [1952]). Thus, “[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” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). “[E]xamples of factors that may render a physically small defect actionable[] includ[e] a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; poor lighting; [and whether the location is one where] pedestrians are naturally distracted from looking down at their feet” (*id.* at 78 [citations omitted]).

Defendant argues that because “the elevation difference of the cellar doors is less than one-quarter of an inch[,] to the extent that such a minor differential can even be considered a defect, it is trivial and not actionable” (NYSCEF Doc No 66). Plaintiff argues that defendant failed to meet its prima facie burden because “apart from robotically measuring the mis-elevation

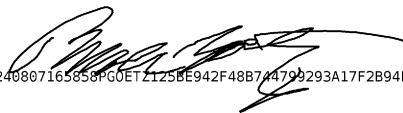
of the gap between the cellar doors[,] Fordham does not address any of the *Hutchinson* factors” such that the defect can be deemed unactionable as a matter of law (NYSCEF Doc No 79).

Here, the quarter-inch elevation differential between the right and left cellar doors constitutes a physically small defect, however, defendant has not established that “the characteristics of the defect or the surrounding circumstances do not increase the risks it poses” (*Hutchinson*, 26 NY3d at 79). Defendant relies on Fordham’s expert report, which focuses almost exclusively on the elevation of the doors, noting only one other characteristic or circumstance: that “[t]here was little to no deflection of the doors when walking on them” (NYSCEF Doc No 72 ¶ 6). This information is insufficient to establish that the hazard was trivial as a matter of law. Moreover, contrary to defendant’s argument that it “established that the cellar doors were in a reasonably safe condition *at the time of the alleged accident*” (NYSCEF Doc No 80 [emphasis added]), the inspection was made nearly five years after the accident took place and defendant did not establish that the same conditions were replicated. Accordingly, defendant’s motion for summary judgment dismissing the complaint will be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant’s motion is denied.


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<u>8/7/2024</u> DATE					<hr/> PAUL A. GOETZ, J.S.C.
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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE