

Batista v Langsam Prop. Servs. Corp.

2024 NY Slip Op 34960(U)

September 3, 2024

Supreme Court, Bronx County

Docket Number: Index No. 30042/2020E

Judge: Elizabeth A. Taylor

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X
ARIEL BATISTA,

Plaintiff,

-against-

LANGSAM PROPERTY SERVICES CORP. and
McKINLEY SQUARE L.P.,

Defendants.
-----X

Index No. 30042/2020E


Hon. Elizabeth A. Taylor,
Justice Supreme Court

The following papers numbered ___ to ___ were read on this motion (NYSCEF Seq. No. 1) for noticed on _____ and duly submitted as Nos. on the Motion Calendar of _____

Sequence	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	16-29
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	30-35
Reply Affidavit	36-38

Upon the foregoing papers, the defendants’ motion for summary judgment is decided in accordance with the annexed decision and order.

Dated: SEP 03 2024

Hon. 
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X
ARIEL BATISTA,

Plaintiff,

DECISION and ORDER
Index No. 30042/2020E

-against-

LANGSAM PROPERTY SERVICES CORP. and
McKINLEY SQUARE L.P.,

Defendants.
-----X

Elizabeth A. Taylor, J.

Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

FACTS AND ARGUMENT

Plaintiff, a resident of defendant’s building located at 1227 Boston Road in Bronx County, was allegedly injured on Saturday, July 18, 2020, when he ascended the concrete exterior steps of the premises. Plaintiff testified at his examination before trial that he fell on the left-hand side of the stairway as he ascended the stairs, tripping on the second step from the top when his left foot came into contact with a “hole” on one of the stairway treads. Plaintiff described the hole that caused his accident as two inches wide and one inch deep, located in the center of the second step from the top of the staircase.

Each side of the staircase was equipped with a handrail. At the time of his accident, plaintiff was holding the handrail. He testified initially that he was holding the handrail with his right hand, but later testified that he was holding it with his left hand. When plaintiff tripped, he lost his grip on the handrail. The corner of the step came into contact with plaintiff’s ankle, causing him to sustain a comminuted oblique posteriorly angulated displaced fracture of the distal fibula of the

left ankle.

The defendants submit the report of their expert engineer who examined the second step from the top and located only a *de minimis* defect. In this regard, the defendant's expert report states as follows:

“Specific attention was directed to a minor chip located within the nosing of the second tread down from the upper landing (Photos 19-22). The minor chip measured 3-1/2 inches in length and tapered to a maximum width of 1/2 inch and an immeasurably small depth. As such, even with the insignificant minor chip, a tread depth 10-1/2 inches was available to pedestrians. Consequently, the tread depth functionality, structural integrity and safety was unaffected by the minor chip....The minor chip located within the second tread down from the upper landing did not compromise the functionality of the tread or create an unsafe condition. Specifically in this regard, the area and depth of the tread remained sufficient for persons to properly place their foot on the tread and traverse in a safe manner and the presence of the minor chip would not affect persons ascending/descending the stairway.”

Defendants argue that although plaintiff testified that the hole that caused his accident was two inches wide and one inch deep, the photographs produced by both parties establish that no such hole existed, and that only non-actionable chip was present.

In opposition, plaintiff argues that he tripped on the righthand side of the staircase, as initially stated in his deposition testimony, and that he was holding the railing with his right hand, as further clarified in a deposition errata sheet which plaintiff attaches to his opposition papers. In his errata sheet, plaintiff “corrects” his subsequent testimony to corroborate his *initial* EBT testimony that he was ascending the righthand side of the staircase. (Plaintiff's counsel contends that the deposition transcript changes are timely as defendant did not serve plaintiff's deposition transcript with Demand for Execution and Errata until a copy was requested on November 23, 2022, at which time it was emailed to counsel.) Plaintiff explains that he became confused at his virtual deposition and asserts that he was responding to questions based on a different photograph from that to which defense counsel was referring.

Based on these clarifications, and specifically plaintiff's identification of the defect's location as the righthand side of the staircase (and not the center), Vincent Pici, plaintiff's professional engineer, conducted an inspection of the subject staircase. His report notes a hole on the nosing of the riser of the second step from the top on the exterior staircase at the location where plaintiff now testifies that he fell. The hole measures nine inches wide by approximately one inch deep and extended up to 1 1/2 inches from the face of the riser from the tread.

In reply, defendants argue that plaintiff was served with a demand for execution of the deposition transcript with an errata sheet on November 30, 2021, three weeks after his deposition was held. The request made by plaintiff's counsel for a copy was the second time plaintiff received the transcript. CPLR 3116 (a) provides that when a witness fails to sign and return the deposition within sixty days after service of a copy, no changes to the transcript may be made by the witness. Defendants maintain that the errata sheet here is untimely. They assert that despite the fact that plaintiff was timely served with a demand to execute the deposition transcript and make any changes on an errata sheet, plaintiff failed to do so within the 60-day window. It was not until 358 days after being served that plaintiff improperly submitted changes.

In addition, defendants argue that plaintiff's affidavit appears to be "tailored to dovetail" with the expert's affidavit, and that plaintiff's clarifications are "feigned" to create an issue of fact in order to defeat summary judgment. Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, defendants argue, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment.

DISCUSSION

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." (*Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

A defect alleged to have caused injury may be trivial as a matter of law. (*Trincere v County*

of Suffolk, 90 NY2d 976 [1997].) Physically small defects may be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards, or difficult to traverse safely on foot. Attention to the specific circumstances is required, and undue or exclusive attention should not be focused on whether a defect is a "trap" or "snare." (Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66, 79 [2015].) "[F]actors that may render a physically small defect actionable, [include] a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; or a location—such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet." (Hutchinson v. Sheridan Hill House Corp., supra at 78 [internal citations omitted]. See also, Herrera v. City of New York, 262 AD2d 120 [1st Dept. 1999] [triable issue of fact where photographic record showed the possibility that there was not only an elevation differential of three-quarters to one inch, but also a gap of up to one and a half inches in width].)

If plaintiff's errata sheet is untimely, and submitted after a summary judgment motion has been made, it may not be considered without demonstrating good cause for the delay (see Zamir v Hilton Hotels Corp., 304 AD2d 493, 758 NYS2d 645 [1st Dept 2003]). Plaintiff does not advance any reason for the delay, as defendants observe. However, it is clear from plaintiff's argument that plaintiff believed that the service of the errata sheet was timely. While defendants dispute this, it is not clear on the papers submitted whether the original email was properly served, and if so, received. Plaintiff may yet establish good cause.

Assuming, without deciding, that the errata sheet is untimely and may not be considered as part of the deposition, plaintiff has nevertheless submitted his deposition in which he explains his confusion and repeats his contentions. Plaintiff may submit his factual contentions in opposition to summary judgment despite the failure to amend the deposition. (Parra v Cardenas,

183 A.D.3d 462, 124 N.Y.S.3d 343 [1st Dept. 2020].) In this regard, the factual contentions in plaintiff's affidavit, combined with the plaintiff's expert report, raise issues of fact as to the existence of a substantial defect. Plaintiff now states clearly that he was caused to trip and fall because of a hole on the edge of the step near the righthand side of the stairway. The expert identifies the "hole" located there as a significant defect. This suffices to raise an issue of fact as to defendant's negligence.


"Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (see *Telfeyan v City of NY*, 40 AD3d 372, 373, 836 N.Y.S.2d 71 [1st Dept 2007] [internal quotation marks omitted]). However, here, the evidence does not suggest that the plaintiff's testimony was feigned. Plaintiff has always maintained that he fell on a significant "hole" on the second step from the top of the staircase. His confusion as to which side of the stairway he was on, or which handrail he was holding, does not alter his fundamental contention that a hole on the second step caused him to fall. Moreover, plaintiff was clearly confused at the deposition, as he testified inconsistently as to which side of the staircase he was on when he fell. The inconsistency is not so pronounced and unexplained as to preclude plaintiff from clarifying his claims.

Based upon the foregoing, it is hereby

ORDERED that the defendants' motion is denied.

Dated: SEP 03 2024

ENTER:



Hon. Elizabeth A. Taylor, J.S.C.