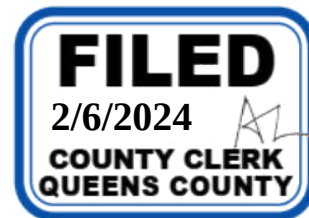


Khan v Rodriguez
2024 NY Slip Op 35561(U)
February 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 715525/2021
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY**

PRESENT: HON. PHILLIP HOM PART 14

Justice

-----X

MOHAMED KHAN,

Plaintiff,

- v -

JORDY RODRIGUEZ,

Defendant.

-----X

INDEX NO. 715525/2021

MOTION DATE 02/16/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that this summary judgment motion by Defendant is determined as follows:

Plaintiff Mohamed Khan ("Plaintiff") commenced this action against Defendant Jordy Rodriguez ("Defendant") to recover for injuries he allegedly sustained on October 28, 2020, when he slipped and fell on the staircase of Defendant's house located at 48-28 196th Place, Fresh Meadows, NY (the "Premises").

Now, Defendant moves for summary judgment based upon, among other things, Defendant's lack of notice of the alleged dangerous condition. Plaintiff opposes.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

In a premises liability case, e.g., slip-and-fall case, the defendant moving for summary judgment has the initial burden of demonstrating that it neither created the allegedly defective or dangerous condition, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Jandly v New Carle Place Farm, Inc.*, 211 AD3d 1018, 1019 [2d Dept 2022]; *Rendendo v Central Ave. Chrystal Jeep, Inc.*, 205 AD3d 1060, 1061 [2d Dept 2022]; *Steele v Samaritan Found., Inc.*, 176 AD3d 998, 999 [2d Dept 2019]; *Zerilli v Western Beef Retail, Inc.*, 72 AD3d 681, 681 [2d Dept 2010]).

“A defendant has constructive notice of a hazardous condition on its property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it” (*Brannon v New York City Hous. Auth.*, 221 AD3d 772, 773 [2d Dept 2023]). “To meet its prima facie burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” (*id.*).

In support, Defendant submits, among other things, Defendant’s affidavit (EF Doc 18), the transcript of the examination before trial (“EBT”) of Plaintiff (EF Doc 19), the EBT transcript of Defendant (EF Doc 20), and photographs (EF Doc 21).

Plaintiff testified he is a licensed HVAC general contractor. Plaintiff said that he first went to the Premises on October 27, 2020, to remove the old HVAC system. He stated that he went back the next day, on October 28, 2020, to install the new HVAC system. Plaintiff testified that he went upstairs to test the airflow of the vents. He attested that he had followed Defendant up the stairs, and that he had no issues going upstairs. Plaintiff stated that there was no debris, garbage, or liquid on the stairs, when he went upstairs with Defendant. Plaintiff was asked what wear and tear he observed on the stairs. He responded that the stairs had some discoloration that he said was because of foot traffic, but it did not affect his ability to use the stairs. Plaintiff testified that he walked on every step going up. He attested that, as he was walking up the stairs, he did not notice any dog urine or feel any wetness on the step where he fell. Plaintiff further testified he did not observe any liquid on the stairs prior to the accident, nor did he observe anything dripping on the steps or any water sources or empty water bottles or drinking vessels on the staircase.

Plaintiff said that between 9:00 a.m. and 9:30 a.m., he walked down the stairs first, and Defendant followed behind him. Plaintiff said that he did not use the handrails as he walked back downstairs. He testified that he slipped in dog urine on first step after the landing and fell down some steps. Plaintiff testified that the puddle of dog urine was circular and about six inches in diameter. He also said that the circular puddle was yellowish. Plaintiff said that he fell and landed on the dog urine puddle, which caused his pants to get wet. Plaintiff reiterated that he did not see the dog urine going upstairs or prior to the accident. After his fall, Plaintiff said that he did not mention the dog urine to Defendant. At the hospital, when asked by doctors, he told them he slipped down some steps, but also did not describe falling on dog urine.

Plaintiff did not know how long the dog urine was on the stairs, but said the urine was wet, sticky, and dry. Plaintiff could not recall whether the dog urine was warm or cold. He said that he did not see the dog while they were upstairs, but he heard the dog in one of the rooms. Plaintiff stated that he never observed the dog go upstairs, and that the dog was upstairs when he got there. Plaintiff testified that he was upstairs with Defendant for twenty (20) minutes, prior to going downstairs and slipping. He further testified that Defendant was with him the entire time they were upstairs.

During his EBT, Defendant testified that, on October 28, 2020, he walked up the stairs in the Premises, as Plaintiff followed. Defendant said that he was upstairs with Plaintiff for approximately fifteen (15) minutes before they went downstairs. He testified that he followed Plaintiff down the stairs, and the latter slipped and fell, as they descended. Defendant attested that

he did not know what Plaintiff slipped on. Defendant was asked the following: “Sir, within the 14 years that you’ve owned Buddy [the dog], has he ever urinated in the house?” Defendant responded: “Not that I recall.”

In his affidavit, Defendant avers that as he went up the stairs, he did not observe any liquid, water, or urine on any of the steps, from bottom of the staircase to the top. He attests that, on the date of the incident, no one, including Plaintiff, complained to him about water, liquid, or urine on the stairs.

The Court finds that Defendant meets his prima facie burden by demonstrating that he did not cause the alleged dangerous condition on his stairs, nor did he have actual or constructive notice of same. As such, it is incumbent upon Plaintiff to raise a triable issue of fact.

In opposition, Plaintiff submits, among other things, Plaintiff’s affidavit (EF Doc 29). In Plaintiff’s affidavit he states that prior to falling, he noticed discoloration and foot tracks on the staircase and that he was not asked to describe the foot tracks during his EBT. He states that the foot tracks were “dry and yellow with streaks of dirt,” and consistent with the color of the substance that caused him to slip. He attests that the foot tracks were not liquid, but rather dried urine with dirt streaks and wet spots. He also states that he did not see or feel liquid on the stairs because he walked up the stairs on the right side, and then he walked down the stairs on the left side. Plaintiff states that, prior to slipping on the step, he did not look at the exact step that he slipped on.

Plaintiff’s new statement that the foot tracks were dried urine with dirt streak and wet spots is an apparent attempt to show that the alleged condition existed for a while prior to his fall. Notably, said details and observations contradict his own EBT testimony. For example, Plaintiff states that, prior to the accident, he noticed foot tracks that were dried urine with dirt streaks and wet spots on the stairs; however, during his EBT, he answered “No.”, when asked the following: “As you proceeded up the stairs, was there anything on the stairs, any sort of debris or garbage or liquid or anything like that?” During Plaintiff’s EBT, he further clarified that he did not observe any liquid of any kind on the staircase prior to his accident. Additionally, Plaintiff answered in the negative when asked whether the discolored foot tracks affected his ability to walk in or upon those stairs in any way, shape, or form. Plaintiff testified that he had not seen the puddle of dog urine at all on his way up the stairs. Furthermore, Plaintiff answered in the negative, when he was asked whether he saw anything like the puddle of yellow dog urine on the step prior to the accident. As such, Plaintiff’s new statements regarding seeing urine and wet spots prior to the accident, constitutes an attempt to create a feigned issue of fact specifically designed to avoid the consequences of his earlier EBT testimony (*see Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308-09 [2d Dept 2011]). Therefore, Plaintiff fails to raise a triable issue of fact.

Moreover, this Court rejects Plaintiff’s argument that this case is like *Quinones v. Starret City, Inc.*, as this case is distinguishable from same (163 AD3d 1020 [2d Dept 2018]). In *Quinones*, the plaintiff was a resident of an apartment building in Brooklyn (the “Building”) owned by the defendants. The plaintiff alleged he slipped on a puddle of what he alleged was urine while descending an interior staircase of the Building. In *Quinones*, the trial court granted the defendants summary judgment, finding that they did not have constructive notice of the alleged dangerous condition. The Appellate Division, Second Department reversed the trial court, holding that

defendants failed to meet their burden on the issue of constructive notice because “[r]eference to general cleaning practices is insufficient to establish lack of constructive in the absence of evidence regarding specific cleaning or inspection of the area in question” (*id.* at 1021-22). Here, unlike *Quinones*, Defendant’s affidavit provides specific evidence that he, in effect, inspected the area about 15 minutes before Plaintiff fell and Defendant “did not observe any liquid, water or urine on any of the steps from the bottom of the staircase all the way to the top” (EF Doc. 18).

In accordance with the foregoing, it is hereby **ORDERED** that Defendant’s motion for summary judgment is granted; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

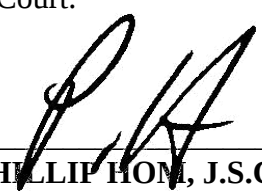
ORDERED that Plaintiff’s Complaint is hereby dismissed; and it is further

ORDERED that Defendant shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Plaintiff, within twenty (20) days of the date of entry; and it is further

ORDERED that this action is hereby disposed.

This constitutes the Decision and Order of this Court.

Dated: February 5, 2024



PHILLIP HOM, J.S.C.

