Norena v M&G 60th St. LLC
2025 NY Slip Op 32157(U)
June 13, 2025
Supreme Court, New York County
Docket Number: Index No. 151426/2023
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

----------X

DIEGO NORENA,

Plaintiff,

- v -

M&G 60TH STREET LLC,BABIANE KHADIM,

Defendant.

----------X

INDEX NO. 151426/2023

MOTION DATE 01/10/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, this motion is decided as follows. In the complaint, plaintiff Diego Norena ("Norena") asserts a cause of action alleging negligence by the defendants M&G 60TH STREET LLC d/b/a PICCOLO CUCINA UPTOWN ("M&G") and BABIANE KHADIM ("M&G", "Khadim", or "defendants") for an accident that occurred when a sidewalk cellar door was opened from the inside, striking Norena's leg and causing personal injury to plaintiff. Norena now moves for summary judgment against defendants on the issue of liability. Defendants oppose and argue that there exists a triable issue of facts as to whether the cellar door was an open and obvious condition that did not require warning. For the reasons that follow, summary judgment is granted on the issue of liability.

Facts

M&G is a limited liability company that leased a premises at 106 East 60th Street, New York, NY ("Subject Premises"). M&G operated a restaurant named Piccolo Cucina at the Subject Premises. At the time of the incident, Khadim was employed by M&G and worked at Piccolo Cucina.

On November 5, 2022, at approximately 12:26 am, Norena was walking on the sidewalk in front of the Subject Premises with Apple Airpods in his ears. As Norena was walking, Khadim opened the sidewalk cellar door from the inside. The cellar entry has two doors that open outward. As Norena was approaching the eastern cellar door, Khadim begins to open the western cellar door. Norena's left foot then slips into the open cellar door and his right leg hits the western cellar door, causing him to fall and sustain personal injury. There were no warnings, such as cones, that would indicate the door was about to be opened.

Norena has provided a copy of his deposition where he was questioned about the accident. Norena was able to recall that the incident happened around midnight on a Friday night, but he was unable to remember where in Manhattan the accident occurred. Norena was able to remember that the accident occurred outside of a restaurant but was unable to remember the name of the restaurant. When asked how he fell, Norena responded "I don't remember at this moment" but did remember that the metal cellar door was closed as he was walking towards it and that he fell into a hole created by the opening.

Plaintiff has also provided the deposition of Khadim. Khadim testified that at the time of the accident he had been working for Piccolo Cucina for a year and a half. During that time, no one had ever given him safety instructions on how to open the door. Khadim did not remember the specifics of the accident but remembers opening the cellar door and seeing someone fall onto the sidewalk and saying "sorry, sorry" afterwards. During the deposition, Khadim was shown a video depicting the fall and identified himself in it and that the person shown laying on the floor was the individual he had apologized to after opening the cellar door. Khadim testified that this was the first time he had ever opened the cellar door.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Evidence should be viewed in the light most favorable to the non-moving party, and the non-moving party should be given the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]); *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010]; *see also Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019]).

Norena argues that he has demonstrated a *prima facie* case of negligence on a theory that defendants failed to maintain the premises in a reasonably safe condition as evidenced by a surveillance video that captured the accident and the testimony of Norena and Khadim.

The applicable standard of care for landowners in a premises liability action is that "[a] landowner must act as a reasonable [person] in maintaining [the] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injuries to others, the seriousness of the injury and the burden of avoiding risk" (*Basso v Miller*, 40 NY2d 233, 241

[1976]). In order to prove a *prima facie* case, plaintiff must show "the owner either created the alleged defect or had actual or constructive notice of it" (*Doherty v 730 Fifth Upper, LLC*, 227 AD3d 606, 607 [1st Dept 2024] quoting *Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 275 [1st Dept 2010]).

Plaintiff has provided a surveillance video from a street camera that captured the incident via thumb drive. Evidence submitted in support of summary judgment must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). A video "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d 80, 84 [1999]). Here, neither Norena nor defendants provided an affidavit testifying that the videotape was an accurate representation of the subject matter depicted, and therefore the video is not in admissible form and cannot be considered for the purposes of summary judgment.

While both Norena and Khadim were unable to remember certain details of the accident, when taken together the testimony establishes that Khadim created the dangerous condition that caused Norena to sustain injury by walking into the open cellar door. The Court finds that Norena has met his *prima facie* burden of establishing his entitlement to summary judgment as a matter of law on the issue of liability against defendants through the testimony provided, which demonstrates that Khadim was negligent in opening the cellar door without providing any warning and that defendants failed to establish any safety procedures related to the operation of the doors (*see Wajner-Tobias v Delizia Rest. Corp*, 2013 NY Slip Op 31096[U], *3-4 [Sup Ct, NY County 2013]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 518 [1st Dept 2008]).

Once plaintiff has established their *prima facie* case, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003] citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants do not argue that Norena failed to establish his *prima facie* case, but rather that there was nothing wrong with the cellar doors themselves, and that there was only a defect in failure to warn of an open and obvious condition (*see Martinez v Contreras*, 216 AD3d 532, 533 [1st Dept 2023] [finding that an open and obvious condition relieves a property owner of its duty to warn, but not the duty to ensure that the premises is maintained in a reasonably safe condition]). Defendants further argue that a jury could conclude that the cellar doors constituted an open and obvious condition.

When the dangerous condition is open and obvious, the courts have long held that the landowner has no duty to warn (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). A condition is open and obvious when "[a]ny observer reasonably using his or her senses would" see the dangerous condition (*id.* at 167). "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" (*id.* [internal citations omitted]; *see also Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]).

Here, the defendants have failed to produce any evidence that creates a triable issue of fact. Defendants rely on the video to argue that the cellar door was open and obvious and not inherently dangerous based on a clanging noise that can be heard in the video and amount of time Norena had to react to the opening door. However, the video is inadmissible and nothing

else on the record creates a triable issue of fact. Based on the foregoing, plaintiff's motion is granted.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgement on the issue of liability is granted.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

6/13/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE