

**Castillo v Cannon Point S., Inc**

2025 NY Slip Op 32464(U)

June 30, 2025

Supreme Court, New York County

Docket Number: Index No. 160080/2020

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC**

**PART 36**

*Justice*

-----X

**INDEX NO. 160080/2020**

VICTOR CASTILLO,  
Plaintiff,

**MOTION SEQ. NO. 002**

- v -

CANNON POINT SOUTH, INC and  
INSIGNIA RESIDENTIAL GROUP,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 75, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 91, 93, 94, 95

were read on this motion to/for

**DISMISS**

In this personal injury matter, plaintiff alleges that he tripped and fell as a result of a defect in a parking lot owned by the defendant, Canon Point South, and leased to a subsidiary of plaintiff's employer, non-party, Little Man Parking (or, "the garage"). Defendants, Cannon Point South, Inc. and Insignia Residential Group (collectively, "the building"), move for summary judgment pursuant to CPLR 3212.

Plaintiff states that on April 16, 2019, while employed as a parking attendant at Little Man Parking, he tripped over an uneven drain grate located at 45 Sutton Place in Manhattan. The garage is open to the public but also serves as parking for tenants of 45 Sutton Place, a residential building. Earlier that day, plaintiff worked from 7:00 A.M. to 11:00 A.M. and did not observe any defects in the subject grate. When he started his second shift at 4:00 P.M., he traversed the grate without incident (NYSCEF Doc. Nos. 59-60, *plaintiff's EBT*). However, at approximately 7:00 P.M., after parking a vehicle near the entrance of the parking garage, plaintiff tripped and fell due to an allegedly mis-leveled drainage grate. Plaintiff testified that the grate was raised but was unable to specify the height differential. Although the incident was captured on surveillance video, the footage only captured the fall itself but not what caused the fall.

Plaintiff's co-worker, Mervin Concepcion, was also working at the time of the accident but did not witness his fall (NYSCEF Doc. No. 63, *Concepcion EBT*). Concepcion also executed an affidavit wherein he affirms that he observed the metal grate both before and after plaintiff's accident and that it was level and in its normal position (NYSCEF Doc No. 68, *Concepcion aff*).

Hamed Siljkovic ("Siljkovic"), the building's maintenance supervisor and handyman, testified that neither the handymen nor porters that he supervises perform any maintenance as it pertains to the garage. However, he and those he supervises are responsible for the plumbing,

standpipe sprinkler lines, telecommunication lines, and any building equipment located in the ceiling of the garage. Siljkovic explained that there are three drains in the garage; one located at the entrance and one at each level as you drive down. Plaintiff fell on one of the grates that was located inside the garage. Siljkovic also explained that the building has a computer system that logs every complaint received or any work performed. Siljkovic reviewed the maintenance log that was later attached as an exhibit to the instant motion. In particular, he was questioned regarding an entry dated April 20, 2018, that states “clean out garage drain basin.” He explained that it referred to the drain at the entrance of the garage and that he personally cleaned it and recalled the complaint that led to the maintenance log entry. He also testified that on the date of the accident, he parked in the garage as he typically does, entering at 6:30 A.M. and leaving at 5:30 P.M., and did not notice any issues with the subject drainage grate while driving or walking over it (NYSCEF Doc. No. 85, *Siljkovic EBT*).

Siljkovic stated in an affidavit that on the date of accident no work was performed in the garage by those employed by the building and in regards to the maintenance log entry dated April 20, 2018, “[o]n April 20, 2018, I cleaned the drain located at the entrance of the garage and not the drain/grate allegedly involved in the Plaintiff’s accident” (Siljkovic aff, NYSCEF Doc. No. 67 ¶¶ 8-9, 19).

It is well-settled that “[t]he 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 eliminate any material issues of fact” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). The court’s function on summary judgment is “issue-finding rather than issue-determination” (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, the court should draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (see *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As a threshold matter, this court must first determine if defendants owed plaintiff a duty of care. “Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists...” (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; see *Basso v Miller*, 40 NY2d 233, 241 [1976]). “As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property” (*Futter v Hewlett Sta. Yogurt, Inc.*, 149 AD3d 912, 913 [2d Dept 2017], quoting *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 620 [2d Dept 2005]). “The landlord’s retained right in a lease to re-enter the leased premises at all times and make repairs would form a sufficient basis to charge it with constructive notice of dangerous conditions in those parts of the building into which the landlord had the authority to enter, inspect and make repairs” (*Manning v New York Tel. Co.*, 157 AD2d 264, 268 [1st Dept 1990]).

However, it is well established that a “landlord’s reservation of the right to enter property to inspect and make repairs does not in itself give rise to a duty to make repairs” (*Keum Ok Han v Kemp, Pin & Ski, LLC*, 36 NYS3d 883, 884 [2d Dept 2016]).

Here, the lease states:

13. Access to Premises:

Owner or Owner’s agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant’s failure to make repairs or perform any work which Tenant is obligated under this lease...

...

46. Repairs and Maintenance.

(a) Tenant shall, at Tenant’s own cost and expense:

(iii) maintain and keep clear at all times all drains and catch basins within the Premises and all runways, ramps, and driveways leading to the Premises. (*Lease*, NYSCEF Doc. No. 69 at 3, 18-19).

When a landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing condition fell within the landlord’s contractual responsibilities (*see McDonnell v Blockbuster Video, Inc.*, 203 AD3d 713, 714- 715 [2d Dept 2022]; *King v Marwest, LLC*, 192 AD3d 874, 877 [2d Dept 2021]). Here, the strict contours of the lease placed the drainage grate in question within the garage’s purview, not the defendants’.

However, Concepcion’s testimony—that he understood the building defendants were responsible for removing the grate to access the drain—and Siljkovic’s prior course of conduct—wherein he took it upon himself to clean a drain that he knew was the garage’s responsibility—raise genuine issues of fact. When considered alongside the post-accident repairs to the grate, which were deemed “necessary to upgrade the plumbing in the building” (NYSCEF Doc No. 71, ¶ 23), this evidence is sufficient to support a finding that the building defendants exercised the degree of control necessary to impose a duty of care to the plaintiff.

Having established that defendants owed plaintiff a duty of care, the court now turns to question of whether that duty was breached.

In premises liability actions, a defendant moving for summary judgement 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” for a sufficient length of time to discover and remedy it (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). “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 NY2d 836, 838 [1986] [citations omitted]). When a defendant seeks summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, it must produce “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]). Notice may be imputed where a hazard or defect is created by the act of the owner or occupant, their servants or agents, or others for whom the owner or occupant is responsible (*Lederer v Samuel Broadway Food Corp.*, 33 AD2d 553, 553 [1st Dept 1969]).

In support of its motion, defendants produced deposition testimony of plaintiff’s co-worker, Concepcion, who was present at the accident and stated that there were no issues with the area immediately before or after plaintiff fell; Siljkovic, who testified that the grate was level at 5:30 P.M.; affidavits from both Siljkovic and Concepcion; and the maintenance log from the building defendants that show no complaints regarding the subject grate or the garage in the months prior to the accident.

Here, notwithstanding defendants’ proof, this court finds that defendants fail to resolve all issues of fact sufficient to establish entitlement to summary judgment. In its decision and order dated September 6, 2024 (NYSCEF Doc. No. 90), this court granted plaintiff entitlement to an adverse inference instruction at the time of trial based on spoliation, given that plaintiff was not allowed the opportunity to inspect the ramp and drainage grate before it was refinished. Although defendants submit evidence in support of its contention that there was neither active notice, in the form of complaints received, nor constructive notice of a hazard sufficiently visible as to permit discovery and remedy by defendants, “[u]nder the circumstances of this case, an issue of fact exists as to whether spoliation of relevant evidence occurred, which issue should be determined by the trier of fact” (*May v American Multi-Cinema, Inc.*, 191 AD3d 657, 659 [2nd Dept 2021]). As such, this court finds that defendants are unable to satisfy their *prima facie* burden of proof in demonstrating that the dangerous condition did not exist and that they lacked actual/constructive notice of same. Therefore, the motion is denied. It is hereby

**ORDERED** the defendants’ motion, pursuant to CPLR 3212, is denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

This constitutes the decision and order of this court.

June 30, 2025

HON. VERA L. SAUNDERS, JSC

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|-----------------------|---|--|---|------------------------------------|
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER     |
|                       | <input type="checkbox"/> GRANTED                    |  | <input type="checkbox"/> GRANTED IN PART                  |                                    |
| 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 |