Colon v Acosta Grocery Store, Corp.
2025 NY Slip Op 34326(U)
November 12, 2025
Supreme Court, Kings County
Docket Number: Index No. 523011/2020
Judge: Ingrid Joseph

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of November, 2025.

PRESENT:

HON. INGRID JOSEPH,
Justice.

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VICTOR COLON,

Plaintiff,

Index No.: 523011/2020

-against-

DECISION & ORDER

ACOSTA GROCERY STORE, CORP. and 313 WILSON AVE LLC,

Mot. Seq. Nos. 3-4

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Mot. Seq. No. 3	
Notice of Motion/Affirmation/Memorandum of Law/Exhibits…	47 – 62
Affirmation in Opposition/Exhibits……	65 – 69
Reply Affirmation……	72
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Mot. Seq. No. 4	
Notice of Cross-Motion/Affirmation……	74 – 75
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Affirmations in Reply……	90 – 91

Defendant 313 Wilson Ave LLC ("313 Wilson") moves, pursuant to CPLR 3212, for an order dismissing Plaintiff Victor Colon's ("Plaintiff") complaint against 313 Wilson on the grounds that (i) Plaintiff failed to identify a proximate cause of his accident; (ii) 313 Wilson did not create or have notice of a dangerous condition; and, alternatively, (iii) the alleged condition

was trivial (Mot. Seq. No. 3)[1]. Defendant Acosta Grocery Store, Corp. ("Acosta") cross-moves, pursuant to CPLR 3212, for an order dismissing Plaintiff's complaint as to Acosta since Plaintiff speculates as to the proximate cause of his accident and Acosta did not cause, create or have notice of any dangerous condition (Mot. Seq. No. 4). Plaintiff opposes both motions. 313 Wilson and Acosta (collectively, "Defendants") filed partial oppositions to each other's motions.[2]

This action arises out of an accident that occurred on June 25, 2020, as Plaintiff was entering the premises located at 313 Wilson Avenue in Brooklyn, New York (the "Premises"). The Premises is owned by 313 Wilson and leased to Acosta. At the time of the accident, Plaintiff was making a delivery of soda to the cellar of the Premises. According to Plaintiff, the accident occurred on his first trip down to the cellar when he took a step onto the first step with his left foot and felt his left knee buckle. Plaintiff asserts that the steps were defective and as a result, he sustained serious injuries.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (*Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2d Dept 2015]). The defendant meets its burden by "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ Med Center*, 64 NY2d 851 [1985]). When evaluating a motion for summary judgment, "facts must be viewed 'in the light most favorable to the nonmoving party'" (*Vega v Restani Const Corp*, 18 NY3d 499, 503 [2012], citing *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011]).

The Court will first address the portion of Defendants' motions seeking summary judgment on the basis that Plaintiff cannot identify the proximate cause of his accident. "There can be more than one proximate cause of an accident, and a defendant moving for summary judgment must show that it is free from fault" (*Fiorentino v Uncle Giuseppe's of Port Washington, Inc.*, 208 AD3d 757, 758 [2d Dept 2022]). In its motion, 313 Wilson cite to Plaintiff's deposition testimony and his medical records to argue that Plaintiff's accident was due to his left knee giving out and was

[1] 313 Wilson also moved for summary judgment granting its cross-claims for contractual indemnification and breach of contract against Acosta. Pursuant to a stipulation dated May 21, 2025, and filed on July 11, 2025, 313 Wilson and Acosta agreed to withdraw their cross-claims against each other without prejudice (*see* NSYCEF Doc No. 95). Accordingly, the portions of 313 Wilson's motion seeking summary judgment on its cross-claims are moot and will not be addressed herein.

[2] To the extent the partial oppositions concerned cross-claims, those portions are moot and will not be discussed.

not a result of any alleged condition at the Premises.[3] 313 Wilson avers that Plaintiff does not make any allegation that the cause of his accident was related to any alleged defect at the Premises. Since Plaintiff failed to identify a proximate cause, 313 Wilson argues that the complaint must be dismissed. In its cross-motion, Acosta adopts 313 Wilson's argument with respect to causation.

In opposition, Plaintiff relies on the affidavit of its engineer Adam C. Cassel, who opined that the defective cellar steps caused Plaintiff's knee injury. According to Mr. Cassel, his inspection of the steps' tread width and riser height revealed that they did not conform to long-standing and fundamental principles of stair design and construction. Mr. Cassel also found issues with the cellar hatch. Mr. Cassel concluded that "defective step geometry poses a hazard to stair users that was a proximate cause for the reported accident circumstances" (NYSCEF Doc No. 69, ¶ 10 [a]). Plaintiff also cites to his deposition testimony, in which he stated that "the steps were kind of uneven," "the steps were a little steep," the first step was "not very wide" or "wide enough" for his shoe (NYSCEF Doc No. 65, ¶ 19). In his affidavit of merit, Plaintiff further stated that his "heel was on the very back of the step and a good portion of [his] foot was sticking over the step" (NYSCEF Doc No. 67, ¶ 5). Thus, Plaintiff argues that his accident was caused by the defective steps, which were a hazard to anyone using them and were a result of Defendants' negligence in failing to maintain the Premises in a safe condition.

In reply, 313 Wilson maintains that Plaintiff has failed to identify a proximate cause of the accident. Though Plaintiff testified that the steps were uneven or steep, 313 Wilson argues that Plaintiff never testified that these alleged defects caused his accident. Instead, 313 Wilson asserts that the accident was caused by Plaintiff's knee buckling, which is allegedly a prior physical issue Plaintiff suffered from. Moreover, 313 Wilson notes that Plaintiff continued to use the steps without issue after the alleged accident. In its reply, Acosta also maintains that Plaintiff has failed to point to any dangerous condition on the step that caused his accident. According to Acosta, at his deposition, Plaintiff denied that his left foot slipped at all prior to his knee giving out. Though he reported the accident to his supervisor, Acosta argues that Plaintiff only reported a "dangerous situation on the steps," without pointing to any specific condition. In addition, while Plaintiff

[3] While 313 Wilson cites to and references Plaintiff's medical records as "Exhibit N," the Court notes that counsel failed to electronically file the exhibit. After a conference held on April 23, 2025, with the parties to address this issue, the Court declines the Defendants' request to allow the late filing of the exhibit.

testified to general defects of the steps, Acosta asserts that Plaintiff never stated that these defects caused his knee to buckle.

"Generally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2d Dept 2011]). Although Defendants argue that Plaintiff had a prior medical condition that caused his knee to buckle, the failure to attach the pertinent records renders any such claim unsupported and conclusory. Accordingly, Defendants failed to eliminate all issues of fact as to whether or not the accident was caused by a defect in the stairs or Plaintiff's prior medical condition. Thus, Defendants' motions are denied to the extent they are based on the issue of proximate cause.

The Court next turns to the portion of Defendants' motions seeking dismissal of Plaintiff's complaint on the grounds that they did not cause, create or have notice of the alleged dangerous condition. "In a premises liability case, a defendant real property owner or a party in possession or control of real property that moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence" (*Williams v Is. Trees Union Free Sch. Dist.*, 177 AD3d 936, 937 [2d Dept 2019]). A defendant has constructive notice if the defect (1) is visible and apparent and (2) existed for a sufficient length of time before the accident to allow the defendant to discover and remedy it (*see Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Williams*, 177 AD3d at 938). Mere testimony of general practices is insufficient to establish lack of constructive notice (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Goodyear v Putnam/N. Westchester Bd. of Co-op. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]).

In its motion, 313 Wilson argues that Plaintiff has not shown that it violated any applicable New York City Building Codes. Moreover, since there have been no prior accidents or complaints made about the stairs, 313 Wilson contends that it did not have actual or constructive notice.

In opposition, Plaintiff asserts that 313 Wilson, as the owner of the Premises, is negligent. Since Acosta's witness testified that the stairs had not been repaired since the time its lease began, Plaintiff argues that 313 Wilson leased the building to Acosta "with dangerous steps and did nothing to remediate the condition" (NYSCEF Doc No. 65, ¶¶ 21-22). Plaintiff further cites to its

expert Mr. Cassel's findings that the stairs' geometry violated various New York City Building Codes. Further, Plaintiff maintains that landlords have a general duty to maintain their property in a reasonably safe condition, and failure to provide a safe means of ingress and egress can impose liability.

In reply, 313 Wilson argues that Mr. Cassel's opinion that it violated Section 28-301.1 of the New York City Administrative Code is unavailing because it is a general safety provision. With respect to Plaintiff's argument about failing to provide a safe means of ingress or egress, 313 Wilson contends that the subject stairway is not an exit as defined by the Administrative Code. Thus, 313 Wilson asserts that Plaintiff has failed to proffer an applicable statute or violation.

In its cross-motion, Acosta claims that it did not cause or create the alleged defect since it had no responsibility to maintain or repair the subject stairs, pursuant to its lease. Acosta asserts that "no evidence has been proffered to show that [it] had actual or constructive notice" (NYSCEF Doc No. 75, ¶ 11). In addition, Acosta argues that since Plaintiff has not articulated any alleged condition that caused his accident, "there can be no notice of a condition that does not exist" (*id.*).

In his opposition, Plaintiff asserts that Acosta failed to maintain the steps in a safe condition and that it made special use of the cellar doors and steps for deliveries. Plaintiff relies on Kings County Supreme Court cases for the proposition that Acosta had notice since the cellar steps were used for deliveries and kept open all day. In partial opposition to Acosta's cross-motion, 313 Wilson asserts that Acosta is the "sole responsibl[e] party to maintain the accident location" under Section 6 of the lease (NYSCEF Doc No. 81, ¶ 11). Though 313 Wilson argues that Acosta failed to establish that it did not cause, create or have notice, it maintains that both motions should be granted because the alleged condition is not inherently dangerous. In support, 313 Wilson referenced a report from its engineering expert Stan A. Pitera (NSYCEF Doc No. 86). However, since the report does not comply with CPLR 2106, it will not be considered.

In reply to Plaintiff's opposition, Acosta maintains that Plaintiff has never identified a specific defective condition and thus, there can be no notice. In reply to 313 Wilson's partial opposition, Acosta argues that even if it was responsible for maintenance, the evidence demonstrates that there was no notice of any condition on the stairs.

Here, 313 Wilson has established that it did not have actual notice. 313 Wilson's witness Duvi Brunner, whose company manages the Premises, testified that he did not receive any complaints about the subject staircase and was unaware of any other prior injuries that occurred

on them (*see Rosa v Food Dynasty*, 307 AD2d 1031, 1031 [2d Dept 2003]; *Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). However, Acosta has failed to establish it had no actual notice.[4] Since both defendants "failed to proffer any evidence to establish when the area in question was last inspected or cleaned relative to the time when the plaintiff fell", they have failed to meet their prima facie burden establishing that they did not have constructive notice (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 975 [2d Dept 2012]).

The Court next considers the remaining portion of 313 Wilsons's motion arguing that the alleged defect is trivial. As the Second Department has stated, "[g]enerally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury" (*Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 983 [2d Dept 2011]). "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. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (*Green v NY City Hous. Auth.*, 137 AD3d 748, 749 [2d Dept 2016]). "In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Snyder v AFCO Avports Mgt., LLC*, 232 AD3d 209, 213 [2d Dept 2024] [internal quotation marks and citations omitted]).

In reviewing the record, the Court finds that 313 Wilson "failed to demonstrate, prima facie, that the alleged defect was physically insignificant, and that the characteristics of the defect and the surrounding circumstances did not increase the risks it posed" (*Karpel v Natl. Grid Generation, LLC*, 174 AD3d 695, 696 [2d Dept 2019]). In looking at the circumstances, including the fact that Plaintiff had a loaded hand truck in front of him, the Court finds that there is an issue of fact (*see Mc Kenzie v Crossroads Arena, LLC*, 291 AD2d 860, 861 [4th Dept 2002]). Thus, 313 Wilson's motion for summary judgment on the grounds that the defect is trivial is denied.

[4] Acosta provided deposition transcripts of the owner Roberto Marte and the owner's uncle Claudio Acosta Hidalgo. Mr. Marte was not asked about prior complaints or injuries involving the stairs. In addition, Mr. Hidalgo was only asked if he ever *saw* anyone get hurt going down the stairs, which he denied (Hidalgo tr at 16, lines 19-25; at 16, line 2).

Accordingly, it is hereby

ORDERED, that the portion of 313 Wilson Ave LLC's motion (Mot. Seq. No. 3) seeking summary judgment dismissing Plaintiff's complaint is denied; and it is hereby

ORDERED, that Acosta Grocery Store, Corp.'s cross-motion (Mot. Seq. No. 4) for summary judgment dismissing Plaintiff's complaint is denied.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice