

Jimenez v Nostrand Commons, LLC

2025 NY Slip Op 34972(U)

December 17, 2025

Supreme Court, Kings County

Docket Number: Index No. 532128/2022

Judge: Ingrid Joseph

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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 17th day of December, 2025.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X

RAPHAEL JIMENEZ,

Plaintiff,

Index No.: 532128/2022

-against-

DECISION & ORDER

NOSTRAND COMMONS, LLC and 3720 NOSTRAND LAUNDROMAT, LLC D/B/A CLEAN RITE CENTER,

Mot. Seq. Nos. 2-4

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Mot. Seq. No. 2

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Defendant Nostrand Commons, LLC (“Nostrand”) moves, pursuant to CPLR 3212, for an order dismissing Plaintiff Raphael Jimenez’s (“Plaintiff”) complaint (Mot. Seq. No. 2). Defendant

3720 Nostrand Laundromat, LLC d/b/a Clean Rite Center (“Clean Rite”) moves, pursuant to CPLR 3212, for an order (a) dismissing all claims against it on the grounds that any defective condition was not the responsibility of Clean Rite, and (b) granting it summary judgment on its cross-claims against Nostrand for indemnity and awarding both past and future defense costs (Mot. Seq. No. 3). Plaintiff opposes both motions and cross-moves for summary judgment on the issue of liability (Mot. Seq. No. 4).

This action arises out of an accident that occurred on March 30, 2021, at approximately 9:15AM, as Plaintiff was walking on the sidewalk abutting a building located at 3720 Nostrand Avenue in Brooklyn, New York (the “Premises”). The Premises was owned by Nostrand and leased to Clean Rite. At his deposition, Plaintiff testified that his right foot hit the elevated sidewalk, causing him to trip and fall.

In its motion, Nostrand asserts that it is entitled to summary judgment because (a) it did not cause or create the alleged condition, (b) it did not have notice of the alleged condition, and (c) Plaintiff cannot establish that the proximate cause of his fall was Nostrand’s negligence. Nostrand asserts that the mere happening of an accident on a defendant’s property does not establish liability. Although Plaintiff testified that he tripped and fell over a raised sidewalk slab, Nostrand points out that he further testified that “he does not know why he is saying that his right foot hit the elevated sidewalk” (NYSCEF Doc No. 24, ¶ 20, citing Plaintiff tr at 26). Thus, even assuming the subject sidewalk flag was negligently maintained, Nostrand maintains that Plaintiff cannot establish that the proximate cause of his fall was an act or failure to act by Nostrand. Since Plaintiff does not know why he fell, Nostrand contends that Plaintiff cannot make a prima facie case of negligence against it. Nostrand further asserts that it did not have notice. In support, Nostrand cites to its property manager Jeffrey Reichman’s deposition in which he testified that prior to March 2021, he was not notified of any defect or tripping hazard condition on the sidewalk. Moreover, Mr. Reichman testified that he did not recall seeing any defective condition. Nostrand further argues that there is no testimony or documentary evidence indicating that a defect was present on the sidewalk; therefore, there is no evidence to permit an inference that Nostrand had constructive notice.

Plaintiff opposes Nostrand’s motion and cross-moves for summary judgment against Nostrand. With respect to Nostrand’s motion, Plaintiff argues that it should be denied because Nostrand did not meet in prima facie burden. According to Plaintiff, Nostrand relies on a

mischaracterization of his deposition testimony. Contrary to Nostrand's contention, Plaintiff maintains that he clearly identified the sidewalk defect and marked the location on Nostrand's own photograph. In addition, Plaintiff contends that Nostrand did have constructive notice. In support, Plaintiff refers to Google Street View images demonstrating that the defect existed for more than a year prior to the accident. Moreover, Plaintiff asserts that Nostrand failed to proffer evidence as to when the subject sidewalk was last inspected prior to the accident.

Plaintiff acknowledges that his cross-motion is untimely; however, he requests that the Court consider the motion since his motion and Nostrand's motion arise from the same record and present the same questions of liability. Plaintiff argues that he is entitled to summary judgment because Nostrand violated New York City Administrative Code § 7-210 by failing to maintain its property in a reasonably safe condition. On the issue of constructive notice, Plaintiff asserts that the Google Street View images from October 2019 reflect that the sidewalk was misleveled and had existed for some time. Plaintiff also submits an affidavit of his expert, Scott Silberman, a professional engineer, who opined that Nostrand failed to properly inspect, maintain, or repair the sidewalk, which had a vertical grade differential of over 1 ¼ inches, and that the defect was a substantial cause of Plaintiff's fall.

In reply to its motion and in opposition to Plaintiff's cross-motion, Nostrand asserts that the untimely cross-motion cannot be considered since the motions ask for different relief. In addition, Nostrand asserts that Plaintiff has not proffered an excuse for the late filing of his motion. With respect to its motion, Nostrand maintains that the proximate cause of Plaintiff's fall was his own inattention and negligence. Turning to Mr. Silberman's report, Nostrand argues that his findings are erroneous since Plaintiff testified that he does not know why he is saying his foot hit the elevated sidewalk. Moreover, Nostrand notes that Mr. Silberman's report was never exchanged during discovery and only submitted in opposition to its motion; thus, Nostrand argues that it should be rejected.

In reply to his cross-motion, Plaintiff asserts that the Court may consider his motion, even if untimely, because it was made on nearly identical grounds to Nostrand's timely motion. Plaintiff also maintains that he has sufficiently identified the cause of his fall—the raised sidewalk flag. According to Plaintiff, any uncertainty in his testimony goes to weight and credibility, not the sufficiency of proof at summary judgment. With respect to his expert, Plaintiff assert that late expert disclosure does not automatically bar the court's consideration of expert affidavits submitted

in connection with summary judgment motion, if there is no prejudice. Even though Mr. Silberman's affidavit was first served in connection with the cross-motion, Plaintiff argues that Nostrand had an opportunity to address it in reply.

In Clean Rite's motion, it argues that Plaintiff's claims as against it must be dismissed because it was merely a tenant in the building Plaintiff was walking past when he fell, and it had no contractual obligation to maintain the sidewalk. Clean Rite further argues that it is entitled to contractual indemnification because the Article 10 of the lease¹ requires Nostrand to reimburse it for all reasonable attorney's fees expended defending this action. Clean Rite also asserts that under the lease, Nostrand was responsible for the common areas including the sidewalk. In support, Clean Rite cites to the lease and deposition testimonies of Mr. Reichman and William Green, the Vice President of Clean Rite.

In his opposition, Plaintiff asserts that the lease provisions alone are insufficient to warrant judgment as a matter of law. Instead, Plaintiff avers that Clean Rite must make a prima facie showing that it neither created the defect nor had a role in the occurrence. Plaintiff argues that Clean Rite has not proffered evidence showing it (a) never performed repairs, (b) never altered the surface, (c) never contributed to the condition that caused Plaintiff's fall, and (d) did not derive a special use from the subject sidewalk. Plaintiff asserts that the sidewalk directly abuts the laundromat's entrance and is the only pedestrian access point for customers. Plaintiff states that the actual defect is adjacent to a tree pit in the path leading up to the Premises. This, according to Plaintiff, creates a question of fact as to whether the sidewalk was specially used or benefited Clean Rite's business. In support, Plaintiff submits a report from his expert Scott Silberman who states that the tree pit narrows the sidewalk and makes coming into contact with the defect more likely. Mr. Silberman also asserts that depending on the time of day, shadows on the walking surface can further camouflage the defect's presence.

Nostrand partially opposes Clean Rite's motion on the grounds that there is no "ironclad" evidence that there was an occurrence on the Premises. In support, Nostrand again notes that Plaintiff testified that he did not know why he was saying his right foot hit the elevated slab. At

¹ A lease dated February 5, 2014, was entered into between Isidore Margel Trust, as landlord, and 3720 Nostrand Laundromat, LLC, as tenant (NYSCEF Doc No. 44). The lease was then assigned to Nostrand Commons, LLC, as landlord, on June 27, 2021 (NYSCEF Doc No. 45).

minimum, Nostrand argues that there is an issue of fact as to whether there was an occurrence of any type on the subject sidewalk.

In reply, Clean Rite maintains that, as a commercial tenant, it has established it had no responsibility for the maintenance of the subject sidewalk. In addition, since the subject sidewalk is meant for the general public, Clean Rite asserts that it cannot be said it made a special use of it by its customers using that to enter and exit its business. Clean Rite further argues that whether or not Plaintiff's accident actually happened is irrelevant, since a mere allegation that it happened is sufficient to trigger the indemnification provision.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact’” (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). “The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The Court will first address Nostrand's and Plaintiff's motions for summary judgment. When the defendant is moving for summary judgment, it must establish that it “maintained the subject property in a reasonably safe condition and that it neither created the alleged dangerous condition nor had actual or constructive notice thereof” (*McGee v New York City Hous. Auth.*, 122 AD3d 695, 696 [2d Dept 2014] [internal citation omitted]). “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 v Is. Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept 2019]).

“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]). At his deposition, Plaintiff answered how the accident happened (“I tripped and fell”) and that his right foot hit the elevated sidewalk (Pl tr at 25, lines 11-23). When asked “What makes you say that your right foot hit the

elevated sidewalk,” Plaintiff testified, “I don’t know what – maybe – I don’t – I don’t know” (Pl tr at 26, lines 11-14, 18-19). In its motion, Nostrand uses this latter testimony to assert that Plaintiff does not know the reason why he fell.

However, “the plaintiff’s deposition testimony did not demonstrate that [h]e was unable to identify the cause of the accident, or that [h]e engaged in mere speculation as to the cause of the accident” (*Zorin v City of NY*, 137 AD3d 1116, 1117 [2d Dept 2016]). At his deposition, Plaintiff was shown a photograph that he asserted showed where he tripped and fell (Pl tr at 31, lines 13-16). Plaintiff also circled the photograph where the elevation was located (Pl tr at 34, lines 2-11). Thus, Nostrand’s motion is denied to the extent it is based on the issue of proximate cause.

The Court will address Nostrand’s remaining arguments regarding notice.² Nostrand’s witness Jeffrey Reichman testified that he did not receive any complaints about the subject sidewalk (*see Rosa v Food Dynasty*, 307 AD2d 1031, 1031 [2d Dept 2003]; *Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). Thus, Nostrand has established that it did not have actual notice. Mr. Reichman further testified that A-1, a company hired by Nostrand, inspected the sidewalk once a week (Reichman tr at 84, line 20-25). However, Nostrand did not submit evidence indicating when the sidewalk was last inspected prior to Plaintiff’s accident. 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]). Thus, Nostrand failed to meet their prima facie burden establishing that it did not have constructive notice (*Kontorinakis v 27-10 30th Realty, LLC*, 172 AD3d 835, 836-837 [2d Dept 2019]). Therefore, Nostrand’s motion is denied. Since Nostrand failed to meet its initial burden, it is not necessary to consider the sufficiency of Plaintiff’s opposition (*see Winegrad*, 64 NY2d at 853 [1985]).

As a preliminary matter, the Court will first address the timeliness of Plaintiff’s cross-motion. It is undisputed that Plaintiff’s cross-motion is untimely, and Plaintiff has not proffered any excuse for the late filing. Nonetheless, “an untimely motion or cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds” (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). While Plaintiff argues that his cross-motion is made on identical grounds as Nostrand’s, Nostrand asserts that they are not identical since they seek different relief. The Court finds Nostrand’s

² Nostrand’s arguments concerning whether it caused or created the condition were limited to Plaintiff’s alleged inability to identify the cause of his fall (*see* NYSCEF Doc No. 24, ¶¶ 19-24).

contention unavailing. The Second Department has determined that an untimely cross-motion seeking summary judgment on the issue of liability was properly considered where a timely motion to dismiss was made by the defendant (*Braunstein v Half Hollow Hills Cent. Sch. Dist.*, 104 AD3d 893, 894 [2d Dept 2013]). Accordingly, the Court will consider Plaintiff's cross-motion.

Generally, in a personal injury action alleging a dangerous or defective property condition, liability for such condition is predicated upon "evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated" (*Ruggiero v City Sch. Dist. of New Rochelle*, 109 AD3d 894, 895 [2d Dept 2013]). Administrative Code § 7-210 "imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property" (*Zorin*, 137 AD3d at 1117). This section "does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable" (*Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2d Dept 2018]). Thus, [t]o prevail on a motion for summary judgment on the issue of liability, a plaintiff must demonstrate, prima facie, that the property owner created the defect or had actual or constructive notice of it" (*Cooper v First In Queens, Inc.*, 229 AD3d 761, 762 [2d Dept 2024]).

In his cross-motion, Plaintiff does not argue that Nostrand caused/created or had actual notice of the alleged sidewalk condition. Instead, Plaintiff asserts that Nostrand, who undisputably owned the Premises, had constructive notice. In support, Plaintiff relies on a Google Street View image from October 2019, which allegedly shows the subject defect, and his expert Mr. Silberman's opinion³ that the image demonstrates the defect was not suddenly created and Nostrand had time to discover and correct it. The Court finds that Plaintiff met his prima facie burden of demonstrating that Nostrand had constructive notice of the defect and failed to maintain the sidewalk in a reasonably safe condition in violation of Administrative Code § 7-210, and that Nostrand's negligence was a proximate cause of his accident. In opposition, Nostrand failed to raise an issue of fact. Its argument that Plaintiff's testimony establishes that he does not know the

³ Nostrand avers that this Court should not consider Mr. Silberman's findings since they were not exchanged during discovery or prior to the filing of the Note of Issue. Nonetheless, mere noncompliance with CPLR 3101 (d) (1) (i), which governs expert disclosure, does not "mandate that a party be precluded from proffering expert testimony . . . unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Burbige v Siben & Ferber*, 115 AD3d 632, 633 [2d Dept 2014]). Here, Nostrand has not shown that Plaintiff's late disclosure was intentional or willful or that it has been prejudiced.

reason why he fell is disingenuous. Therefore, Plaintiff's cross-motion seeking summary judgment on liability against Nostrand is granted.

The Court lastly addresses Clean Rite's motion seeking to dismiss all claims against it and awarding summary judgment on its cross-claims against Nostrand. As the Second Department stated,

[A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty (*Martin v Rizzatti*, 142 AD3d 591, 592-593 [2d Dept 2016]).

While it is uncontested that Clean Rite did not bear any responsibility for maintaining the sidewalk pursuant to the terms of the lease, Clean Rite did not proffer evidence that it did not create the defective condition or make special use of the sidewalk (*cf. Maltese v Metro. Transp. Auth.*, 179 AD3d 780, 784 [2d Dept 2020]; *Zorin*, 137 AD3d at 1117). Thus, Clean Rite did not meet its prima facie burden. Since the lease's indemnification provision contains an exception "for loss or damage resulting from the negligence" of Clean Rite, at this stage, the portion of the motion seeking indemnification and attorney's fees is denied. Therefore, Clean Rite's motion is denied in its entirety.

Accordingly, it is hereby

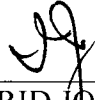
ORDERED, that Defendant Nostrand Commons, LLC's motion (Mot. Seq. No. 2) seeking summary judgment dismissing Plaintiff's complaint is denied; and it is hereby

ORDERED, that the portion of Defendant 3720 Nostrand Laundromat, LLC d/b/a Clean Rite Center's motion (Mot. Seq. No. 3) for summary judgment dismissing all claims against and granting entitlement to indemnification from Nostrand is denied; and it is further

ORDERED, that Plaintiff's cross-motion (Mot. Seq. No. 4) for summary judgment on liability against Defendant Nostrand Commons, LLC is granted.

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