Persaud v New York City Tr. Auth.
2026 NY Slip Op 31478(U)
April 9, 2026
Supreme Court, New York County
Docket Number: Index No. 153580/2017
Judge: Richard Tsai
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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ZARFANA PERSAUD,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY and KONE INC.,

Defendants.

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INDEX NO. 153580/2017

MOTION DATE 1/02/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 46-68 were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, plaintiff Zarfana Persaud alleges that, on November 15, 2016 at approximately 7:55 a.m., she fell at the top of a staircase, inside the No. 6 Train Station on 51st Street and Lexington Avenue in Manhattan, suffering a fracture of her right tibia and fibula (exhibit G in support of motion [NYSCEF Doc. No. 54], bill of particulars ¶¶ 4-5, 11). During her statutory hearing and deposition testimony, plaintiff claimed that, although she could not say what initially caused her to lose balance, her right foot got caught in a hole in an adjacent construction wall as she grabbed the railing (exhibit I in support of motion [NYSCEF Doc. No. 56], statutory hearing at 30, lines 11-18; at 40, line 21, through 41, line 3; exhibit J in support of motion [NYSCEF Doc. No. 57], plaintiff's deposition at 28, lines 1-8).

On this motion, defendants New York City Transit Authority (NYCTA) and Kone Inc. move for summary judgment, dismissing the complaint, arguing that plaintiff is unable to identify what caused her to fall. Defendants further argue that even if the hole in the construction wall that plaintiff claims she caught her foot in was a proximate cause of her injuries, the premises were reasonably safe as a matter of law. Plaintiff opposes the motion.

BACKGROUND

At plaintiff's deposition, plaintiff testified that as she approached the subject staircase, and was about a "foot away" from "the edge of the first step", "I felt like I was falling, I was going to fall, so I grabbed onto the rail on the right side, but I still fell" (plaintiff's deposition at 16, line 9 through 17, line 7; *see also* statutory hearing at 38, lines 9-10 [describing moment she began to fall]). Plaintiff testified that she is not sure what initially caused her to lose her balance, but as she grabbed the railing, "my foot got stuck somewhere, because it was right at the beginning of the rail and the wall -- like right in the corner of the stairs" (statutory hearing at 40, line 21, through 41, line 3).

Plaintiff testified that, in that moment, her foot had gotten caught in a hole at the bottom of construction wall next to the railing that she grabbed (plaintiff's deposition at 30, lines 11-18).

During plaintiff's statutory hearing, plaintiff was presented with the following photograph of the construction wall, which she took following her accident (plaintiff's statutory hearing at 11, lines 5-25):

(exhibit L in support of motion [NYSCEF Doc. No. 59], photos at 8). During the statutory hearing, at defendants' request, plaintiff circled the area where she fell and placed her

signature and the date next to the area she circled (plaintiff's statutory hearing at 11, lines 5-25 [emphasis of red arrow added]).

At plaintiff's deposition, when asked when she first noticed "the hole in the base of the fence", plaintiff testified "[a]fter I saw my shoe in there" (plaintiff's deposition at 34, line 24 through 3, line 3). However, plaintiff testified that someone brought her shoe to her after she fell, that she did not see her shoe in the hole, that she neither saw nor felt her shoe come off in the hole, and that she did not know whether "the catching of the foot in the hole had anything to do with [her] shoe coming off" (id. at 35, lines 4-10)

When asked how she knew that her foot had gotten caught in the hole, plaintiff testified that she knew because her right foot "had like a line across, like, and was swollen" (*id*. at 40, lines 2-16).

During plaintiff's deposition, when asked, "As you sit here today, do you know what caused you to trip?", plaintiff stated no, "No" (plaintiff's deposition at 27 at 8-10). Defendants' counsel then followed up by asking why plaintiff had brought this action, and plaintiff stated, "I don't understand why they put a hole right by the steps where I got my foot stuck" (*id*. at 27, lines 11-22). Defendants' counsel followed up stating plaintiff had just testified that she did not know what caused her to fall, and asking if she was saying that she knew the wall caused her to fall (*id*. at 27, lines 23-25). In response, plaintiff clarified that getting her foot stuck in the hole was "part of what caused me to fall" and that "I don't know what set me the [sic] motion to fall forward, but then I got my foot stuck" after she "started to fall" (*id*. at 28, lines 1-8).

While plaintiff testified that she did not "even know when it broke", she believed that her right leg broke "because it hit the stairs" (*id*. at 33, line 23 through 34, line 7).

DISCUSSION

> "To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party" (*Nellenback v Madison County*, 44 NY3d 329, 334 [2025] [internal citations omitted]).

I. Whether the complaint should be dismissed on the grounds that plaintiff has not sufficiently identified the defect that caused her accident

"It is true that ordinarily a plaintiff's failure to identify what it was that caused her to fall invites dismissal of the underlying cause of action because the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007] [internal quotation marks

omitted]). However, "a plaintiff is not required to recall the exact manner in which the incident occurred, but must identify the defect enough for a trier of fact to find, based on logical inferences, that the defect proximately caused the accident" (*Ovalles-Sosa v Khoudari*, 217 AD3d 530, 531 [1st Dept 2023] [internal citations omitted]).

Here, while plaintiff admitted that she does not know what initially caused her to lose her balance, she testified that her right foot getting caught in the hole in the blue construction wall was "part of what caused me to fall" (plaintiff's deposition at 28, lines 1-8). Based on this, along with her testimony that she knew her foot had gotten caught in the hole because her right foot "had like a line across, like, and was swollen" (*id*. at 40, lines 2-16), plaintiff is entitled to "a reasonable inference that the gap caught h[er] foot and caused h[er] to fall" (*Cuevas v City of New York*, 32 AD3d 372, 372-73 [1st Dept 2006] [internal citations omitted]). Likewise, even though plaintiff testified that she believed her right leg broke when it struck the stairs, given that plaintiff also testified that she was grabbing the railing right as her foot got caught in the hole, plaintiff is entitled to the reasonable inference that she might not have fallen, or, at least, that her injuries might not have been as severe were it not for her foot getting caught in the hole (*id*.; *see also Adzei v Edward Builders, Inc.*, 221 AD3d 639, 641 [2d Dept 2023] ["there can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause"] [internal emendation and quotation marks omitted]).

Therefore, on this motion for summary judgment, "viewing the evidence in the light most favorable to the plaintiff, the defendants failed to establish, prima facie, that the plaintiff cannot identify what caused [her] to fall" (*Davidoff v First Dev. Corp.*, 148 AD3d 773, 774-75 [2d Dept 2017]). Indeed, there is "competent evidence which, if believed, would support a reasonable juror's conclusion" that the hole in the blue construction wall was a proximate cause of plaintiff's injuries (*Cherry*, 41 AD3d at 131; *see also Rotz v City of New York*, 143 AD2d 301, 304 [1st Dept 1988] ["Issues of negligence, foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finders of fact to resolve even where the facts are essentially undisputed"]).

To the extent that there may be inconsistencies in plaintiff's statutory hearing and deposition testimony about how her fall transpired, such potential inconsistencies "raise issues of credibility that should also be left for trial" (*Francis v New York City Tr. Auth.*, 295 AD2d 164, 165 [1st Dept 2002]).

II. Whether the complaint should be dismissed on the grounds that premises were reasonably safe as a matter of law

Defendants argue that, even if plaintiff's injury was proximately caused by her foot getting caught in the hole in the blue construction wall, it is still entitled to summary judgment because "the premises was in a reasonably safe condition given the circumstance" (affirmation in support of motion [NYSCEF Doc. No. 47] ¶ 34). In support of this argument defendants submit the affirmation of Shawn Rothstein, "a professional

Engineer with over 30 years of experience and expertise in structural engineering, and in construction and construction safety including extensive experience in the New York City Building Code" (exhibit K in support of motion [NYSCEF Doc. No. 58], Rothstein affirmation ¶ 1).

Rothstein avers that "it is my opinion that, to a reasonable degree of engineering certainty, the hole at issue did not constitute a condition that was dangerous to users of the stairs including plaintiff" (*id*. ¶ 15). In rendering this opinion, Rothstein first asserts that, based on "plaintiff's own estimates and my own measurements", the hole where plaintiff allegedly caught her foot was in compliance with the "2014 New York City Building Code (the version current an the time of Plaintiff's accident), sections 1013.3, [which] requires that such an opening at the sides of a stair, formed by the riser, stair and bottom rail 'shall not allow passage of a sphere 6 inches in diameter'" (*id*. ¶¶ 6-7, quoiting 2014 Bldg Code of City of NY (Administrative Code of City of NY) § 1013.3, exception 2, available at https://www.nyc.gov/assets/buildings/apps/pdf_viewer/viewer.html?file=2014CC_BC_Chapte_10_Means_of_Egress.pdf&section=conscode_2014 [last accessed April 7, 2026]).

Preliminarily, regardless of whether this section of the NYC Building Code is relevant to this particular accident, Rothstein fails to explain the basis for his determination that "[t]he base of the right triangle created by the rise, stair and barricade is approximately 11.5 inches" (*id*. ¶ 8).[1] Given that his calculations appear to be based on this base of the right triangle, the court cannot further credit his subsequent calculations that the hole would not "allow passage of a sphere 6 inches in diameter" (2014 Bldg Code of City of NY § 1013.3, exception 2).

In any event, even if Rothstein's calculations were credited, defendants' "compliance with applicable building codes and rules is not dispositive of whether [it] breached [its] duty of care under the common law" (*Rondon v 328 W. 44 St. LLC*, 243 AD3d 493, 494 [1st Dept 2025]; *see also* affirmation in support of motion ¶ 33 [acknowledging that that mere compliance with the Building Code is insufficient to establish that the premises were reasonably safe]).

Nonetheless, Rothstein appears to suggest that "the hole at issue was not a condition that impacted on the safety of pedestrians using the stairs, including Ms. Persaud" because "the base of the construction wall/barricade was well separated from where a pedestrian would place their feet going up or down the stairs" (Rothstein affirmation ¶¶ 10, 12). This "conclusory assertion" is "insufficient to eliminate triable issues of fact" as to whether the subject premises were reasonably safe as a matter of law (*Prunty v Mehta*, 223 AD3d 760, 762 [2d Dept 2024])

[1] Notably, Rothstein appears to suggest that he never visited the site and took direct measurements, this number appears to be based on his review of "among other things, the 50-h transcript and deposition transcript of plaintiff Zarfana Persaud, her Bill of Particulars, and photographs of the accident scene" (Rothstein affirmation ¶ 2).

Given that defendants fail to meet its prima facie burden of establishing that the premises were reasonably safe as a matter of law, there is no need for the court to consider plaintiff's opposing affirmation of Nicholas Bellizzi, "a Registered and Licensed Professional Engineer in New York" (exhibit 2 in opposition to motion [NYSCEF Doc. No. 63], Bellizzi affirmation ¶ 1).

CONCLUSION

Accordingly, it is hereby **ORDERED** that the motion by defendants New York City Transit Authority and Kone Inc. for summary judgment, dismissing the complaint, is **DENIED**.

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4/9/2026
DATE

RICHARD TSAI, J.S.C.

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