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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 100328/2011
CERON, JORGE
VS.
YESHIVA UNIVERSITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
SEP 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/27/13

_____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 2

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JORGE CERON,

Plaintiff,

- against - Index No.: 100328/2011

YESHIVA UNIVERSITY

Defendant.

----------X

YORK, J.:

In this negligence action to recover for personal injuries, defendant moves for summary judgment and dismissal, pursuant to CPLR 3212. In support of this motion, defendants have submitted the deposition of plaintiff, the deposition of Amit Selimoski, an employee of defendant, an affidavit of its expert engineer, James J. Bernitt, and photographs of the ramp.

In opposition, plaintiff has submitted an affidavit of his expert engineer, Scott Silberman, and photographs of the ramp.

BACKGROUND

On the morning of March 1, 2010, plaintiff slipped, fell, and was purportedly injured on a ramp made wet by rain at defendant's premises. Plaintiff's fall occurred while delivering soda to defendant in the course of his employment with a Coca-Cola distributor. Plaintiff alleges that, as a result of this fall, he suffered serious and permanent injuries, claiming that he has chronic pain, can no longer run, jump, climb stairs or carry heavy objects.

At deposition, plaintiff testified that he and his coworker Leroy arrived at defendant's premises, located at 245 Lexington Avenue, New York, NY, and proceeded to load their hand trucks with boxes of soda. Each box of soda was two feet by two feet and weighed 20 pounds. Plaintiff loaded eight boxes, for a total of 160 pounds. Plaintiff stated that it had been raining on and off throughout the morning, and that it had not rained for 10 minutes before he arrived at

defendant's building. Plaintiff attempted to pull the hand truck up the ramp, took one step back with his right foot, and slipped and fell when he took a step back with his left foot. He stated that his left foot slipped on the wet metal surface at the bottom of the ramp. He fell on his buttocks, and the fully loaded hand truck fell onto his knees. Plaintiff did not see any substance or debris on the ramp before attempting to pull the hand truck up it. After plaintiff fell, he noticed that the very bottom of the ramp did not have a strip of traction tape, which had applied in 7 inch intervals, starting 7 inches above the very bottom of the ramp.

After falling, plaintiff remained sitting on the ramp for 45 seconds to one minute before his coworker Leroy arrived to help him get up. Leroy asked plaintiff if he would like to go to the hospital. Plaintiff took a few steps and determined that he would be able to work for the rest of the day. Plaintiff purchased and ingested Tylenol for the pain and rested for a few minutes, before heading to the next delivery destination. Plaintiff completed the assigned route for the day, though Leroy did the majority of the work for the remaining deliveries. Upon his arrival at the Coca-Cola distributor at the end of the day, plaintiff informed a supervisor of his fall, and was instructed to contact the workers compensation department. Plaintiff duly contacted the workers compensation department. Employment records show that plaintiff took one day off the week after the accident, and worked a full schedule until June of 2010, when he took off two weeks for vacation. After his vacation, plaintiff continued to work a full schedule, and treated his pain with over the counter pain relievers.

On October 29, 2010, plaintiff was in downtown Manhattan preparing to make the first delivery of the day, when he experienced severe back pain while standing outside. The pain was so intense that he took a taxi to the emergency room at Saint Lukes Hospital, where he was given painkillers and discharged with a note instructing him not to work for two or three days. Plaintiff brought the note to a supervisor and returned to his home, where he remained for the prescribed period. Plaintiff then returned to a full-time work schedule. This was the first time plaintiff received professional medical treatment for back pain since his fall.

Though he was able to work, plaintiff continued to suffer back pain, and a friend recommended that he see Dr. John Vlattas. On November 17, 2010, plaintiff had an appointment with Dr. Vlattas, who prescribed 800 mg of Ibuprofen, and physical therapy to help alleviate plaintiff's back pain. He also sent plaintiff for x rays and an MRI. Plaintiff testified that he received physical therapy two or three times a week until some time in December 2011, when the workers compensation office discontinued paying for it.

Plaintiff continued to work a full schedule until January 26, 2011, when he suffered severe pain in his knees, back and shoulder while pushing a pallet of soda in Penn Station. The pain was unbearable, and plaintiff visited Dr. Vlattas; this was the first time plaintiff sought medical treatment for knee pain. Though he did not specify by which doctor, plaintiff testified that he was directed not to work as a result of the Penn Station incident. Plaintiff subsequently went to Dr. Charles DeMarco for his knee pain, and had knee surgery performed by Dr. Touliopoulos on June 20, 2011. On March 12, 2012, plaintiff was able to return to work with reduced duties.

Even with his reduced duties, plaintiff continued to suffer back pain, and Dr. Vlattas referred him to a spine specialist, Dr. Jeffery Klein. Additional MRIs were ordered, and it was determined that plaintiff had three herniations. On May 15, 2012, Dr. Klein performed back surgery, and as of plaintiff's deposition taken on June 20, 2012, he had not returned to work.

DISCUSSION

Defendant argues that it is entitled to summary judgment and dismissal on the grounds that there was no dangerous condition, and that slipping and falling on the ramp was not the proximate cause of plaintiff's injuries.

Plaintiff argues that there are issues of fact precluding summary judgment, that defendant had actual and constructive notice that the ramp constituted a hazardous condition, and that defendant was negligent because the ramp violated the New York City Building Code and engineering standards.

As a preliminary matter, the court must determine whether plaintiff may properly raise a new theory of liability in opposition to a motion for summary judgment. Nowhere in plaintiff's complaint, verified bill of particulars or supplemental verified bill of particulars, is the allegation that defendant was negligent by violating the New York City Building code or accepted engineering standards. The complaint merely recites slip-and-fall boilerplate language regarding notice, hazardous conditions, slippery and debris-strewn conditions, snares, traps, etcetera. In his verified bill of particulars, plaintiff again recites the aforementioned boilerplate language and includes an additional allegation that the ramp was in violation of the New York State Industrial code.[1] The supplemental verified bill of particulars merely added detail to the nature of plaintiff's injuries and treatments.

"A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012] [internal quotation marks and citations omitted], *see also People v Grasso*, 58 AD3d 180, 212-213 [1st Dept 2008] ["'plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability . . . for the first time in opposition to the motion'"] (internal citation omitted); *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007] [plaintiff's expert "improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability . . . that had not been set forth in the complaint or bills of particulars"]).

The court finds that plaintiff may not raise new theories of liability in opposition to the instant motion; this is especially so when the plaintiff has filed the note of issue, served a bill of particulars and a supplemental bill of particulars. The court takes note that plaintiff has not cross-moved or otherwise applied for leave to supplement or amend his pleadings, nor has plaintiff served another supplemental or amended bill of particulars of his own accord.

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[1]Plaintiff does not oppose defendant's contention that the New York State Industrial code does not apply to the ramp.

When moving for summary judgment and dismissal, the burden is on the defendant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Liability in a slip and fall case requires proof of a dangerous condition and the defendant's actual or constructive knowledge of that condition prior to the fall" (*Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002]). In order to prevail on its motion, defendant must make a showing that there was no dangerous condition, or that if there was a dangerous condition, it had no actual or constructive notice of it.

Defendant advances the argument that a ramp which has become wet from rain, without any other alleged defects, is not a dangerous condition as a matter of law, and thus, the complaint must be dismissed. "The mere fact that the ramp became wet from the rain [is] insufficient to establish the existence of a dangerous condition" (*Medina v Sears, Roebuck & Co.*, 41 AD3d 798, 799 [2d Dept 2007]). This rule is not limited to ramps; it is a well-settled principle that, without more, the simple fact that a surface has become wet from rain is insufficient to establish the existence of a dangerous condition. (*McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010] ["The complaint properly was dismissed because, as a matter of law, mere wetness on walking surfaces due to rain does not constitute a dangerous condition"]; (Gomez v David Minkin Residence Hous. Dev. Fund Co., Inc., 85 AD3d 1112, 1113 [2d Dept 2011] ["[T]he mere fact that the exposed staircase was wet from the rain is insufficient to establish a dangerous condition"], *see also Joseph v New York City Tr. Auth.*, 66 AD3d 842, 843 [2d Dept 2009]; (*Sadowsky v 2175 Wantagh Ave. Corp.*, 281 AD2d 407, 407 [2d Dept 2001] ["The mere fact that the outdoor deck was wet from the rain is insufficient to establish the existence of a dangerous condition"]).

Here, plaintiff merely testified that he slipped on the wet metal surface of the ramp approximately 10 minutes after it ceased to rain. Plaintiff did not see debris, substances or any other defects on the ramp prior to his attempted ascent (*see* exhibit D, at 50-51, Coleman

affirmation in support). While plaintiff's verified bill of particulars alleged that the ramp was in violation of the New York State Industrial Code, plaintiff has conceded that the Industrial code does not apply to the ramp. No other defects have been properly alleged. Plaintiff did notice that there was no traction tape where he slipped after he fell, however, the fact that defendant placed traction tape on the ramp does not transform the bare metal portion of the ramp into a dangerous condition. Building owners should not be punished for going above the absolute minimum duty to maintain their premises in a reasonably safe condition.

The court finds that defendant has established entitlement to judgment as a matter of law, by demonstrating that there was no dangerous condition in existence when plaintiff slipped and fell. Accordingly, the burden shifts to the plaintiff, who must demonstrate the existence of a material issue of fact in order to defeat the instant motion.

> "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The report of plaintiff's expert does not introduce any evidence which demonstrates an issue of material fact regarding the existence of a dangerous condition. Plaintiffs expert merely describes the area where plaintiff slipped as "metal with a diamond plate pattern. The surfacing of this pattern was worn, smooth and polished" (*see* exhibit B, at 2, Domini affirmation in opposition). This description alone, unsupported by any empirical data obtained by scientific analysis, fails to demonstrate evidence of a dangerous condition. "The plaintiff's contention that the steps were worn and smooth is merely conclusory and was insufficient to raise a triable issue of fact . . ." (*Joseph v New York City Tr. Auth.*, at 843).

In his report, plaintiff's expert states that plaintiff tried to grab hold of a handrail while falling (*see* exhibit B, at 2, Domini affirmation in opposition). However, nowhere at deposition

did plaintiff state this, nor did his expert indicate how he obtained the knowledge that plaintiff purportedly reached for a handrail. At deposition, plaintiff said he did not know if the presence of handrails on the ramp would have assisted him in any manner (*see* Coleman's affirmation in support, exhibit D, pg 101). Even if plaintiff did convey to his expert that he reached for a handrail, it would not raise a material issue of fact,

> "While plaintiff's expert asserts that the ramp was also too steep, did not have adequate handrails, and did not have a non-slip surface, . . . neither plaintiff's deposition testimony nor her affidavit, both to the effect that she slipped immediately upon stepping out of the building and onto the ramp, tends to show that any of the foregoing contributed to her fall"

(*Clouse v Columbia Presbyt. Hosp.*, 35 AD3d 209, 210 [1st Dept 2006]).

In essence, plaintiff's claim is that he fell because the ramp had a smooth surface and was made slippery by rain; under these circumstances a dangerous condition does not exist as a matter of law, and defendant cannot be held liable. No issue of material fact was raised to preclude the granting of summary judgment.

Accordingly, it is,

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/27/13

ENTER:

FILED

SEP 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.