

**Keceli v AAC Cross County Mall, LLC**

2014 NY Slip Op 32992(U)

June 5, 2014

Supreme Court, Westchester County

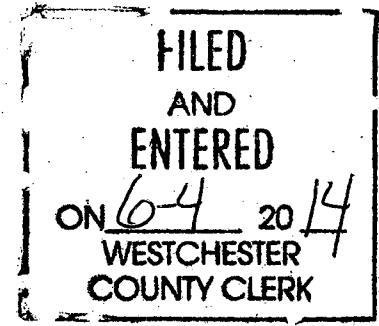
Docket Number: 53745/2012

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
SUZANNE KECELI,

Plaintiff,

-against-

AAC CROSS COUNTY MALL, LLC,

Defendant.

-----X  
HUBERT, A.J.S.C

**DECISION & ORDER**

Index No. 53745/2012  
Motion Seq. 1  
Motion Date: May 29, 2013

The following papers were read on this motion by defendant pursuant to CPLR 3212 to dismiss plaintiff's complaint:

- Notice of Motion
- Affirmation in Support, Exhs. A-D
- Affirmation in Opposition, Aff. of Plaintiff, Aff. of Engineer, Exhs. A-B
- Reply Affirmation in Support
- Affidavits of Service

On the foregoing papers, the motion is determined as follows:

In this personal injury action, plaintiff Suzanne Keceli alleges that, while serving as a security guard at the Cross County Mall in Yonkers, New York, she tripped and fell in a stairwell in a mall parking garage while on patrol on May 29, 2011. The gravamen of plaintiff's action, commenced by summons and complaint dated March 14, 2012, is that plaintiff tripped on a metal lip on the top of a stairway, causing her to fall down the stairs and sustain serious personal injuries. By Notice of Motion dated May 29, 2013, defendant moved pursuant to CPLR 3212 to dismiss plaintiff's complaint on grounds that the lip on which plaintiff tripped was a trivial and

non-actionable defect.

In support of defendant's motion to dismiss, defendant produced photographs of the scene and the affidavit of engineer Timothy Jagonich, attesting that upon inspection of the stairwell, the stair lip on which plaintiff allegedly tripped constituted a 0.5-inch height differential with the landing. Defendant also asserts that plaintiff was, or should have been, familiar with the location inasmuch as she traversed it at work for approximately nine years prior to the alleged incident. On this basis, defendant asserts that any defect was trivial and non-actionable as to plaintiff. In opposition, plaintiff offers the affidavit of engineer Anthony Mellusi, attesting that in addition to one-half inch stairwell lip, there was a 1.5-inch inch forward displacement of the raised tread lip that created a gap on which plaintiff tripped. Mellusi also states that the stairwell, being 48 inches wide, qualified for and should have had installed handrails on both sides of the stairway pursuant to applicable building codes; and that the absence of this second handrail contributed to plaintiff's inability to break her fall, causing her to tumble down the stairs and sustain more serious injuries. Defendant replies that plaintiff's expert affidavit should be rejected on grounds that plaintiff allegedly failed to disclose the expert until after the filing of the Note of Issue. In response, Plaintiff states that she did timely make the CPLR 3101(d) expert statement, and therefore the evidence proffered by plaintiff's expert is properly before the Court.

In the instant posture of defendant's CPLR 3212 motion to dismiss, this Court must accord plaintiff's papers in opposition to dismissal "the benefit of every possible favorable inference" (*511 West 323 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]). If within the four corners of plaintiff's papers there reasonably can be conceived any basis to sustain the action, defendant's motion to dismiss must be denied.

As defendant correctly notes, whether a dangerous defect or condition exists typically is a question of fact (*see e.g. Trincere v County of Suffolk*, 90 NY2d 976 [1997]). As an exception to this general principle, as *Trincere* held, the court itself may find that a defect on which a party stubs a toe is so trivial as to be non-actionable. Where a lip is open and obvious, bearing no indicia of a snare or trap, the defect may be held to be non-actionable (*see e.g. Cruz v Deno's Wonder Wheel Park*, 297 AD2d 653 [2d Dept 2002]). Defendant is correct that courts have held stairway lips of an inch or less to be non-actionable (*see Nathan v City of New Rochelle*, 282 AD2d 585 [2d Dept 2001]); *Morales v Riverbay Corp.*, 226 AD2d 271 [2d Dept 1996]). Plaintiff does not allege or offer record evidence to suggest that the lip on which she allegedly tripped was higher than this threshold amount.

However, plaintiff offers record evidence to suggest—and defendant does not controvert—that also contributing to plaintiff's injury was both a 1.5-inch gap on which plaintiff tripped, and the absence of a handrail that plaintiff might have used to break her fall. This Court rejects defendant's invitation to disregard plaintiff's expert affidavit as to these two additional causes of injury. First, defendant is wrong that plaintiff failed to make a timely CPLR 3101(d) expert disclosure prior to the filing of the Note of Issue. Second, even had plaintiff failed timely to disclose this expert prior to the filing of the Note of Issue, defendant moved to vacate the Note of Issue and this Court (Lefkowitz, J.), by Decision and Order entered on September 17, 2013 (after defendant's instant Notice of Motion), vacated the Note of Issue to allow additional discovery. Accordingly, plaintiff's proffer of expert evidence in opposition to defendant's CPLR 3212 motion is procedurally proper. On the basis of such evidence, this Court concludes that plaintiff has raised a triable issue of material fact as to whether the combination of the lip, the gap and the absence of a handrail created an actionable defect that proximately caused or exacerbated plaintiff's injuries. Accordingly, it is hereby:

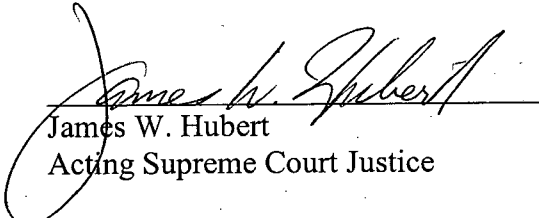
ORDERED that defendant's CPLR 3212 motion to dismiss plaintiff's complaint is denied; and it is further

ORDERED that defendant shall serve on plaintiff this Decision and Order, with Notice of Entry thereof, not later than seven days after the date hereof; and it is further

ORDERED that counsel for all parties will appear in the Settlement Conference Part, Room 1600 of this Courthouse, on August 5, 2014, at 9:30a.m., for further proceedings.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
June 5, 2014

  
James W. Hubert  
Acting Supreme Court Justice

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cc: Settlement Conference Part