

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

LEONOR VASQUEZ,

Plaintiff,

-against-

THE COLLEGE OF NEW ROCHELLE and ALUMNAE/I ASSOCIATION OF THE COLLEGE OF NEW ROCHELLE INC.,

Defendants.

Index No. 303386/2007
DECISION AND ORDER

HON. SHARON A.M. AARONS. J.S.C.:

Defendants THE COLLEGE OF NEW ROCHELLE and ALUMNAE/I ASSOCIATION OF THE COLLEGE OF NEW ROCHELLE INC. (hereinafter, collectively, College) move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff submits written opposition. The motion is granted.

On May 16, 2006, plaintiff was allegedly injured when he slipped and fell on an interior stairway on premises owned by defendant College and located at 332 East 149th Street, in Bronx County. As she descended the stairway from the fourth to the third floor, "... I felt my feet got caught to something and then from there I tripped down the steps." The plaintiff described the step as "broken," but did not identify or describe the nature of the defect. She "had no idea" what caused her foot to stick to the step, but she identified the location of her fall from a photograph. Photographs of the accident location indicate that the plaintiff fell at a place where there was a rusted, darkened spot in the middle of the step, between the back of the step and a wide tread applied to the outer edge of the step.

In support of the motion, defendant College submits the pleadings; the verified bill of particulars;

the uncertified, unsworn deposition testimony of the plaintiff; [1] and the certified, unsworn deposition testimony of Walter Barnes, defendant's building superintendent. The superintendent testified that this particular step was granite, and had been removed and "turned over" (i.e., replaced face-down), because the edge had become worn. He identified the black mark in the photograph as a water-stain; the step was "completely smooth" on the day of the accident. There was no depression in the area which the plaintiff testified was "broken."

In opposition, plaintiff submits the affidavit and curriculum vitae of Robert Schwartzberg, a professional engineer. The engineer asserts that based on the plaintiff's testimony and his review of the photograph, the dark spot on the step is a depression or low spot. He opines that the defendant breached its statutory duty to maintain the stairway in a safe condition.

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994]. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d

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[1]An unsworn, uncertified deposition transcript may be considered where it is not challenged as inaccurate, and no party has raised the lack of a certification. *Rosenblatt v. St. George Health and Racquetball*, 984 N.Y.S.2d 401 (2d Dept. 2014).

573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *(Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

Defendant College established prima facie their entitlement to judgment by submitting evidence, including plaintiff's deposition testimony, demonstrating that plaintiff was unable to identify the cause of her fall. (*Scott v Rochdale Vil., Inc.*, 65 AD3d 621, 883 NYS2d 726 [2d Dept. 2009] [plaintiff was unable to identify the cause of her accident without engaging in speculation]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 818 NYS2d 58 [1st Dept. 2006] [no reasonable inferences existed as to causation based upon plaintiff's expert's opinion that the staircase violated several provisions of the New York City Administrative Code, in the absence of any evidence connecting the alleged violations to plaintiff's fall], *lv denied* 8 NY3d 801, 861 NE2d 108, 828 NYS2d 292 [2007]).

A fair reading of plaintiff's testimony indicates that while she claimed the step was broken, she failed to identify any defect whatsoever. She never testified that there was a depression or low spot. She never identified any defect other than to state that her foot became stuck, caught, or grabbed.[2]

The mere fact that a plaintiff does not know the cause of a fall is not always fatal to plaintiff's claim. For example, in *Rodriguez v. Leggett Holdings, LLC* (96 A.D.3d 555, 947 N.Y.S.2d 429 [1st Dept.

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[2]*Collazo v. Concourse One Co.*, 6 A.D.3d 320, 775 N.Y.S.2d 142 (1st Dept. 2004), which is cited by the plaintiff, does not state that merely stating that a step is broken raises issues of fact. Rather, in that case, the plaintiff described the step as "broken or rotted" with a "hole" "on the top" or "edge" about three inches in height.

2012]), plaintiff, who slipped and fell as he ascended the interior stairs of defendants' building, raised triable issues of fact by the submission of the affidavit of an expert engineer ,who inspected the subject stairs and found a variety of defects and building code violations at the location of the spot where he allegedly slipped. (See also, *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 906 N.Y.S.2d 528 [1st Dept. 2010] [the injured plaintiff's testimony that she slipped on the top step of the subject stairway, coupled with her expert's testimony of the slippery condition of such steps due to worn-off treads, provided sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition]).

In the present case, however, the expert's affidavit does not raise any issue of fact as to the existence of a defect. The expert never examined the step itself, and only surmises that the photograph depicts a depression, as opposed to merely a dark spot on the granite step. Indeed, the steps have a number of similar discolorations across the entire length, which do not appear to be depressions. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Buchholz v. Trump 767 Fifth Ave.*, LLC, 5 N.Y.3d 1, 831 N.E.2d 960, 798 N.Y.S.2d 715 [2005].)

Accordingly, the motion is granted. It is accordingly,

ORDERED that the complaint is dismissed in its entirety as against defendants THE COLLEGE OF NEW ROCHELLE and ALUMNAE/I ASSOCIATION OF THE COLLEGE OF NEW ROCHELLE INC, and it is

ORDERED that said defendants shall serve a copy of this order with notice of entry on the plaintiff.

Dated: December 4 , 2014

SHARON A.M. AARONS. J.S.C.