SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MIRIAM HAUPTMAN and JACK HAUPTMAN,

Plaintiffs,

-against-

CHELSEA PIERS L.P. and CHELSEA PIERS MANAGEMENT, INC.,

Defendants.

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DECISION/ORDER

Index No.: 152949/2014

Mot. Seq. 002

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendants, Chelsea Piers L.P. and Chelsea Piers Management, Inc. ("Defendants") now move pursuant to CPLR 3212 to dismiss the amended complaint ("Complaint") of plaintiffs, Miriam Hauptman ("Miriam") and Jack Hauptman (collectively "Plaintiffs").

Factual Background

The parties do not dispute that on April 3, 2011, Miriam was at Defendants' facility, the Sky Rink at Chelsea Piers, for a social event. While at the event, Miriam entered a hallway to use the restroom. The hallway includes a single step descending to another area where the restroom is located. A black handrail is affixed to the ground adjacent to the step, and parallel to a white wall. The hallway, including the step and the area under the step, is covered with the same blue/grey carpeting. At the time of Miriam's accident, a door in the area under the step was opened outward toward the step. Miriam fell as she approached the single step, causing her body to come into contact with the opened door.

The Complaint alleges, *inter alia*, that Defendants' negligent ownership, operation, management, supervision, maintenance and control created the condition that caused Miriam's injury (Compl. ¶¶18-19). Moreover, Plaintiffs' Bill of Particulars alleges, *inter alia*, that Defendants were negligent in the ownership, operation, control, repair and/or maintenance of the premises, in having an unsafe stairway, in failing to warn about the alleged defective condition, in failing to provide proper lighting in the area where Miriam's accident occurred, and in failing to have proper handrails accompanying the subject step (Grover Aff., Ex. C, Plaintiffs' Verified Bill of Particulars).

Defendants' Motion

In support of their motion for summary dismissal of the Complaint, Defendants argue that the depositions of Miriam and Neal Walsh, the Director of Operations and Maintenance of the Sky Rink at Chelsea Piers, the affidavit of Mr. Walsh, and photographic evidence demonstrate that the condition that caused her to trip was open and obvious and not inherently dangerous. Specifically, Miriam tripped on a single step adjacent to a handrail, in an area with average lighting. And, the cause of Miriam's accident was her own inattentiveness, since immediately prior to her accident Miriam was looking straight ahead, and not at the step or handrail.

Plaintiffs' Opposition

In opposition, Plaintiffs argue that Miriam's alleged inattentiveness was not a factor in causing her accident; rather Miriam could not see the step because the conditions created an optical confusion. Specifically, the same dark-colored carpet covered the hallway above the step where Miriam fell, the step itself, and the hallway immediately below the step. Moreover, there were no markings or warnings identifying the top of the step from the floor below it. Further,

Defendants' argument that Miriam's accident was caused by her "inattentiveness" is unfounded. Moreover, the condition that caused Miriam's accident was not open and obvious, but even if it were, that issue goes to comparative negligence. Further, the presence of the handrail is not dispositive of whether Miriam was warned of the presence of the step. Moreover, the case law cited by Defendants are factually distinguishable. Finally, expert testimony is not necessary to determine whether the step was a hazardous condition.[1]

Defendants' Reply

In reply, Defendants argue that the case law cited by Plaintiffs is distinguishable, since unlike the cited cases, here there is the presence of a black handrail, average lighting, and no prior complaints of the condition where Miriam's accident occurred.

Discussion

Standard for Summary Judgment

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 [1st Dept 2012]; *see also Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). "Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v. Rodriguez*, 72 A.D.3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept

[1] Defendants do not argue that Plaintiffs' lack of expert testimony is a basis for dismissal, and therefore it is not addressed in this Decision.

2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances (*Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.2d 564 [1976]; *Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 141-142, 718 N.Y.2d 287 [2000]; *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 375 [2d Dept 2010]). Moreover, a defendant moving for summary judgment in a slip and fall action has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition (*Rodriguez v. 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 A.D.3d 518, 913 N.Y.S.2d 189 [2010]).

Open and Obvious and not Inherently Dangerous

While "a landowner has no duty to warn of an open and obvious danger [,] . . . a *latent* hazard may give rise to a duty to protect entrants from that danger" (*Piluso v. Bell Atlantic Corp.*, 305 A.D.2d 68, 759 N.Y.S.2d 58 [lst Dept 2003] [emphasis added], citing *Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Whether a hazard is latent, or open and obvious, is generally a question of fact for the trier of fact and should only be resolved as a matter of law when the facts compel such a conclusion (*Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 71, 773 N.Y.S.2d 38 [1st Dept 2004], citing *Tagle, 97 N.Y.2d 165*).

It has been held that "[a] condition that is visible to one 'reasonably using his or her senses' is not inherently dangerous. However, a step may be dangerous where the conditions create 'optical confusion' - the illusion of a flat surface, visually obscuring the step" (*Langer v. 116 Lexington Ave., Inc.*, 92 A.D.3d 597, 599, 939 N.Y.S.2d 370, 372 [1st Dept 2012] [citations

omitted]; *Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89, 924 N.Y.S.2d 32, n 1 [1st Dept 2011]).

In cases where an alleged dangerous condition is a single step or other height differential, a defendant seeking summary dismissal must demonstrate, as a matter of law, that the alleged condition was both open and obvious and not unreasonably dangerous (*see Langer*, 92 A.D.3d 597).

In such cases, "findings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Langer*, 92 A.D.3d 599, citing *Schreiber v. Philip & Morris Rest. Corp.*, 25 A.D.2d 262, 268 N.Y.S.2d 510 [1st Dept 1966], *affd*, 19 N.Y.2d 786, 279 N.Y.S.2d 730 [1967]).

Since the parties are not in dispute of the underlying facts, the only question for the Court to determine is whether the condition that caused Miriam's accident was open and obvious and not inherently dangerous. Here, Defendants have made a *prima facie* showing of its entitlement to summary judgment. The testimony and affidavit of Mr. Walsh established that the configuration of the single step and black handrail was in place from 1998 through the date of Miriam's accident (Grover Aff., Ex. H, Neal Walsh Trans. at 26:25-27:14; Walsh Aff. ¶3). Specifically, the hallway above the step, the step itself, and the hallway below the step has "always been covered by carpeting" (Walsh Aff., at ¶3). He further established that the black metal handrail was adjacent to the single step. Additionally, he affirmed that the area where Miriam's accident occurred "has always been fully and adequately illuminated by lighting fixtures during operating hours" (¶5). Mr. Walsh further affirmed that the condition of the area

where the accident occurred was not the subject of complaints by Defendants' employees or any other persons visiting the premises (¶¶6, 9). Moreover, the single step had been used without incident from 1998 to the date of the accident (¶¶7-8) (*Burke v. Canyon Rd. Rest.*, 60 A.D.3d 558, 559, 876 N.Y.S.2d 25, 26 [1st Dept 2009] (defendant established *prima facia* entitlement to summary judgment where deposition testimony established, *inter alia*, that area where plaintiff fell was illuminated and that defendant did not receive any complaints about the subject area); *Remes v. 513 W. 26th Realty, LLC*, 73 A.D.3d 665, 666, 903 N.Y.S.2d 8, 9 [1st Dept 2010]).

Miriam testified also that the lighting in the subject area was average (Grover Aff., Ex. D, Miriam Hauptman Trans. at 12:7-8). She further testified that she was looking straight ahead immediately before her accident (22:15-19), and did not see the step or handrail immediately prior to her accident (23:8-18), suggesting that her inattentiveness was the cause of her accident (*see Franchini v. Am. Legion Post*, 107 A.D.3d 432, 432, 967 N.Y.S.2d 48, 48 [1st Dept 2013]; *Philips v. Paco Lafayette LLC*, 106 A.D.3d 631, 632, 966 N.Y.S.2d 400, 401 [1st Dept 2013]; *cf. Saretsky*, 85 A.D.3d 89).

Moreover, the photographic evidence depicts the black handrail adjacent to the subject step, and beside a white wall (Grover Aff., Exs. E, F, G). Specifically, photographs evidence the downward sloping handrail held in place by two balusters, one on the subject step and the other on the floor under the step, demonstrating that the subject step was distinguished from the floor under it (*see Auliano v. 145 E. 15th St. Tenants Corp.*, 129 A.D.3d 469, 470, 11 N.Y.S.3d 50, 51 [1st Dept 2015] (noting that the presence of "handrails or guardrails, . . . may have alerted plaintiff to a potentially dangerous condition"); *Saretsky*, 85 A.D.3d 93 [suggesting that the presence of a handrail indicating a change in elevation would have adequately warned plaintiff of

the height differential from a transitional step to the sidewalk]). Moreover, the photographs show black molding bordering the bottom of the white walls below the subject step, visible even if the door was open, which further emphasize the height differential between the hallway above the step and the area below the step (Grover Aff., Exs. E, F).

Taken together, the testimony and affidavit of Mr. Walsh, testimony of Miriam, and the photographic evidence demonstrate that a person reasonably using their senses would have seen the single step that Miriam tripped over (*see Langer*, 92 A.D.3d 599).

In response, Plaintiffs do not raise an issue of triable fact as to whether the area in which Miriam's accident occurred was open and obvious and not inherently dangerous. Plaintiffs' reliance on *Saretsky* (85 A.D.3d 89) and *Chafoulias v. 240 E. 55th St. Tenants Corp.* (141 A.D.2d 207, 533 N.Y.S.2d 440 [1st Dept 1988]) is misplaced. Unlike in those cases, where the courts specifically noted that defendant property owners failed to provide visual cues alerting to the presence of steps, including handrails, whereas here, the presence of the black handrail adjacent to the subject step is a visual cue to alert of the forthcoming step. The placement of the handrail demarcated the subject step from the floor below (*see Langer*, 92 A.D.3d 599). Thus, that the carpet covering the hallway above the step where Miriam fell was the same dark color of the carpet in the hallway immediately below the step, is sufficient, in and of itself, to defeat the showing that the step was open and obvious (*see Langer*, 92 A.D.3d 599; *see e.g. Barakos v. Old Heidelberg Corp.*, 145 A.D.3d 562, 43 N.Y.S.3d 324 [1st Dept 2016]).

CONCLUSION

Accordingly, it is hereby

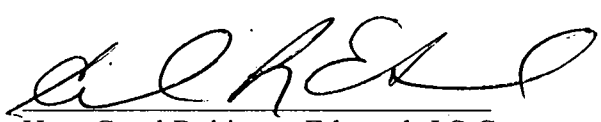
ORDERED that the branch of defendants, Chelsea Piers L.P. and ChelseaPiers Management, Inc.'s motion to dismiss plaintiffs, Miriam Hauptman and Jack Hauptman's amended complaint pursuant to CPLR 3212 (mot. seq. 002), is granted, and the complaint is hereby dismissed. It is further

ORDERED that defendants, Chelsea Piers L.P. and Chelsea Piers Management, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry. It is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 13, 2017



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.