SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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ROBERT McCOY,

Plaintiff,

-against-

R&S FOODS, INC. and
WENDCENTRAL, CORP.,

Defendants.

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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.

Index No. EF005399 - 2016
Motion Date: August 27, 2018

The following papers numbered 1 to 7 were read on the motion of Defendant Wendcentral, Corp. for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit - Expert Affidavit / Exhibit 1-4

Affirmation in Opposition / Exhibits - Affidavit 5-6

Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

The Pleadings

In September of 2016, Plaintiff Robert McCoy commenced this action to recover for personal injuries allegedly sustained in a fall on the premises of the Wendy's restaurant in Middletown, New York on May 5, 2015.

The Complaint alleges that the parking lot at the front of the restaurant was the situs of the accident. The Complaint further alleges that Defendants were negligent "in, among other

things, allowing, causing and/or permitting dangerous, hazardous, slippery and/or unsafe conditions to exist on the aforesaid premises."

The Verified Bill of Particulars further alleges that Defendants were negligent *inter alia*:

-- in creating a hole;

-- in causing a hole;

-- in failing to fix the hole;

-- in failing to warn;

-- in failing to use proper caution tape or orange cones to warn of tripping hazards;

-- in failing to provide adequate lighting.

Plaintiff on June 5, 2017 swore in an affidavit that he was "caused to trip and fall violently to the ground due to the hole in the parking lot."

However, Plaintiff's accident had nothing whatsoever to do with any hole. Wendy's surveillance video demonstrates that the Plaintiff in fact fell as he was exiting from the restaurant and stepping from the level of the sidewalk over the curb down to the level of the parking lot, and Plaintiff so testified at his deposition on November 1, 2017. Nevertheless, on April 12, 2018, Plaintiff filed a Note of Issue and Certificate of Readiness without ever amending his Bill of Particulars.

What the Bill of Particulars does <u>not</u> allege – so far as concerns the present motion – is either (1) that the sidewalk, the curb or the exit from the restaurant were in any way dangerous or defective, or (2) that Plaintiff's fall occurred due to optical confusion.

The Motion For Summary Judgment

A. The Legal Standards Governing Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings." *Foster v. Herbert Slepoy Corp.,* 76 AD3d 210, 214 (2d Dept. 2010) (citing *Alvarez v. Prospect Hospital,* 68 NY2d 320, 325, and *Winegrad v. New York University Medical Center, supra*).

If the movant establishes *prima facie* entitlement to summary judgment, the opponent, to defeat the motion, "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980). "[A] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting, for the first time in opposition to the motion, a new theory of liability that was not pleaded in the complaint or bill of particulars (*see Michel v. Long Is. Jewish Med. Ctr.,* 125 AD3d 945, 946...; *Metzger v. Wyndham Homes, Inc.,* 81 AD3d 795, 796...; *Dolan v. Halpern,* 73 AD3d 1117, 1119...; *Golubov v. Wolfson,* 22 AD3d 635, 636...)." *Troia v. City of New York,* 162 AD3d 1089, 1092 (2d Dept. 2018). *See also, Mazurek v. Schoppmann,* 159 AD3d 814, 815 (2d Dept. 2018); *Harrington v. City of New York,* 6 AD3d 662, 663 (2d Dept. 2004); *Araujo v. Brooklyn Martial Arts Academy,* 304 AD2d 779, 780 (2d Dept. 2003).

B. Defendant Established *Prima Facie* Entitlement To Summary Judgment

Defendant established via expert affidavit, via the deposition testimony of the Building Inspector of the Town of Wallkill, and via the deposition testimony of its own representative that the curb was not defective, hazardous or dangerous; that the situs of the accident was in compliance with the New York State Building Code and the Department of Transportation Code; that there was no tripping hazard that could have contributed to Plaintiff's accident; and that Defendant had no notice of any defective condition. Since "the prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*Foster v. Herbert Slepoy Corp., supra,* 76 AD3d at 214), Defendant was not required in the first instance to address any other matter to establish its *prima facie* entitlement to judgment as a matter of law.

C. Plaintiff In Opposition Failed To Demonstrate The Existence Of Any Material Issue Of Fact

Plaintiff, in opposition to the motion, failed to adduce any proof via expert affidavit or otherwise to controvert Defendant's demonstration of *prima facie* entitlement to summary judgment.

Instead, Plaintiff improperly claimed for the first time in opposition to Defendant's motion that his fall was the product of optical confusion. Consistent with the legal principles set forth hereinabove, courts have explicitly held that a theory of optical confusion which is not alleged in the complaint or bill of particulars may not be raised for the first time in opposition to a motion for summary judgment. *See, Siegfried v. West 63 Empire Associates, LLC,* 145 AD3d 456, 457 (1st Dept. 2016); *Pinkham v. West Elm,* 142 AD3d 477, 478 (1st Dept. 2016).

Even if this Court were to reach the issue, Plaintiff's evidence is palpably insufficient to raise any genuine triable issue of fact. First, Plaintiff submits no expert affidavit but only the incompetent opinion of his attorney. Second, the photographs proffered by Plaintiff plainly show a contrast in color between the concrete sidewalk and the blacktop parking lot. Third, Plaintiff was well aware of the existence of the elevation differential, having within minutes before the fall traversed the curb without incident on his way into the restaurant. Fourth, Plaintiff's averment in his summary judgment affidavit that darkness contributed to his accident flies in the face of his deposition testimony that he had no difficulty seeing as he walked from the parking lot into the restaurant. Fifth, there is no indication in Plaintiff's deposition testimony that his fall was the product of optical confusion. He knew the curb was there and attributed his accident to "a mistake."

Plaintiff's summary judgment affidavit, wherein the theory of optical confusion was belatedly raised for the first time, was patently crafted to avoid the effect of his deposition testimony. To consider that affidavit, when Defendant had no notice either from the pleadings or from Plaintiff's deposition testimony of the need to adduce evidence relative to optical confusion, would gravely prejudice the defense. The Court notes, in any event, that summary judgment of dismissal has been granted in single-step riser cases akin to the case at bar where the circumstances – e.g., contrasting surfaces, compliance with code requirements, prior familiarity with the premises and/or a previous traversal of the step in question – compelled the conclusion that the step was not inherently dangerous and the plaintiff was or should have been aware of the elevation differential. *See, e.g., Fishelson v. Kramer Properties, LLC,* 133 AD3d 706, 706-708

(2d Dept. 2015); *Nelson v. 40-01 Northern Boulevard Corp.*, 95 AD3d 851, 852 (2d Dept. 2012); *Tyz v. First Street Holding Company, Inc.*, 78 AD3d 818, 819 (2d Dept. 2010).

It is therefore

ORDERED, that the motion of Defendant Wendcentral, Corp. for summary judgment is granted, and the Complaint is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: November 13, 2018 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE