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| <b>Sanchez v 263443 Atl. Ave. LLC</b>  |
| 2021 NY Slip Op 30052(U)   |
| January 7, 2021  |
| Supreme Court, Kings County  |
| Docket Number: 503067/2019   |
| Judge: Peter P. Sweeney  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 503067/2019  
Motion Date: 12-14-20  
Mot. Seq. No.: 2

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VICTOR DEJESUS SANCHEZ,

Plaintiff,

-against-

**DECISION/ORDER**

263443 ATLANTIC AVENUE LLC and ELECTRICO  
AUTO REPAIR, INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF as item numbers 36-52, 55-56 were read on this motion:

The defendants, 263443ATLANTIC AVENUE LLC ("ATLANTIC") and ELECTRICO AUTO REPAIR, INC. ("ELECTRICO") move for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint.

The plaintiff, VICTOR DEJESUS SANCHEZ, commenced this action claiming that on August 27, 2018, at approximately 12:45 p.m., he was caused to trip and fall as a result of defective sidewalk vault doors adjacent to defendants' premises at 3443 Avenue, Brooklyn, New York. In support of the motion, the defendants submitted, among other things, plaintiff's deposition testimony. Plaintiff's testimony as to how the accident occurred is far from clear. Plaintiff was asked what caused him to fall and he responded, "the door was bad." (Sanchez Dep. 51:3-4). He further testified that after stepping on the two doors together with his right foot, he just fell forward. (Id. 51:5-11; 52:25-53:2; 54:9-14) and that "at the moment that I stepped on it that it went down. That's when I fell." (Id. 66:5-14). This testimony suggests that the plaintiff fell when one or more of the vault doors deflected when he walked over them and that such caused him to fall.

Plaintiff also gave testimony indicating that he tripped over a differential in the height of the two doors. On Page 52 line 11 to page 53, he gave the following testimony:

- Q. Explain to me how the door caused you to fall?
- A. It was like fake. (Indicating).

Q. Are you able to explain in words?

A. The door was bad.

Q. Describe the door for me. I know you said it was metal. Was it two doors that meet in the middle, one door, something else?

A. I hit the two of them together, yes.

Q. So it's two –

A. That's what I'm saying (indicating). I hit the –

INTERPRETER: He's doing this (indicating).

MR. POMERANTZ: Indicating with his hands, one hand is higher than the other.

Defendants also submitted the affidavit of Jonathan Valdez, the Manager of ELECTRICO, who stated that he has worked at the auto repair shop located at 3443 Atlantic Avenue, Brooklyn, New York for fifteen (15) years and that for that entire time period, he never became aware of any problems the sidewalk vault doors. He averred that “I have occasion to observe the cellar vault doors nearly every day and I have never noticed any problems with the doors and have never observed either of two doors move when I step on them.”

Finally, defendants submitted an affidavit from Douglas Peden, a Registered Architect, who personally inspected the vault doors on or about October 22, 2020, over two years after the accident. He opined that the vault doors did not deflect by more than ½ inch when weight was placed upon them and as such, they are well within the permissible parameters set forth in New York City's and New York City's Department of Transportation's Highway Rules as they pertain to the duties and obligations of property owners with respect to sidewalks. He further stated that vault doors had the appropriate tread and skid-resistance pursuant to the Sidewalk Rules and industry standards. He concluded by stating that both sidewalk vault doors were maintained in reasonably safe condition and were not in violation of the applicable codes.

In opposition to the motion, the plaintiff submitted photographs of the two vault doors that was shown to the plaintiff at his deposition. Plaintiff testified that the photograph that was marked as Exhibit A showed where he fell (page 75 line 2) and he placed an X on the photograph in the area where the two vault door meet as showing the place where his accident

occurred (Page 77). Plaintiff also submitted a copy of a close-up photograph that was marked as Exhibit B which apparently shows where the two vault doors meet. Plaintiff's testimony, however, did not provide a proper evidentiary foundation for the admission of this photograph. This photograph shows a differential between the two vault doors but since the height of the differential was not measured, the Court cannot determine whether the differential was trivial in nature and defendants contend. Notably, defendants submissions do not address Exhibit B. Plaintiff points out that the depositions of the defendants remain outstanding. For this reason, plaintiff did not have the opportunity to elicit testimony from the defendants as to whether the conditions shown in this photograph existed at the time of the accident and to explore whether the height differential between the two vault doors was trivial or not.

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 A.D.3d 769, 770, 899 N.Y.S.2d 645; see CPLR 3212[f]; *Jones v. American Commerce Ins. Co.*, 92 A.D.3d 844, 845, 939 N.Y.S.2d 115). This is especially so where the motion for summary judgment was made prior to the parties conducting depositions (see *Wesolowski v. St. Francis Hosp.*, 108 A.D.3d 525, 526, 968 N.Y.S.2d 181; *Bond v. DeMasco*, 84 A.D.3d 1292, 1293, 923 N.Y.S.2d 902; *Cardone v. Poidamani*, 73 A.D.3d 828, 828, 902 N.Y.S.2d 121; *Valdivia v. Consolidated Resistance Co. of Am., Inc.*, 54 A.D.3d 753, 755, 863 N.Y.S.2d 720).

Here, an award of summary judgment would be premature at this stage of the action. The plaintiff should be afforded the opportunity to conduct defendants' depositions (see *Wesolowski v. St. Francis Hosp.*, 108 A.D.3d at 526, 968 N.Y.S.2d 181; *Jones v. American Commerce Ins. Co.*, 92 A.D.3d at 845, 939 N.Y.S.2d 115; *Gardner v. Cason, Inc.*, 82 A.D.3d 930, 931, 918 N.Y.S.2d 769).

Accordingly, it is hereby

**ORDRED** that defendants' motion is **DENIED**, without prejudice, to renewal upon the completion of discovery (*Schlichting v. Elliquence Realty, LLC*, 116 A.D.3d 689, 690, 983 N.Y.S.2d 291, 293).

This constitutes the decision and order of the Court.

Dated: January 7, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020