| **Barnett v Horsebox Inc.** |
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| 2021 NY Slip Op 32139(U) |
| November 4, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 156138/2019 |
| Judge: Richard G. Latin |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. RICHARD LATIN, *Justice* — **PART** 46V

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DAVID BARNETT,

Plaintiff,

- v -

HORSEBOX INC. AND 218 A LLC,

Defendants.

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**INDEX NO.** 156138/2019

**MOTION DATE** 10/13/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, defendants Horsebox Inc. and 218 A LLC's motion for, inter alia, summary judgment pursuant to CPLR 3212, is determined as follows:

Plaintiff David A. Barnett commenced the instant action to recover for injuries he allegedly sustained, on or about February 12, 2019 at approximately 4:30 p.m., when he slipped and fell on a ramp located outside of the Horsebox, a tavern located at 218 Avenue A in New York, New York.

Defendants now seek summary judgment dismissing plaintiff's complaint and for an order granting summary judgment as they did not assume or owe a duty to plaintiff pursuant to the "storm in progress" defense. Additionally, defendants assert that the wooden ramp present at the entrance to the premises was safe, free from any defects and was not a causal factor in plaintiff's accident.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Chance v Felder,* 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of the motion, defendants submit, inter alia, the deposition testimony of plaintiff, the deposition testimony of Charles Pettebone, former owner of the Horsebox, weather reports, the affidavit of George Wright, certified meteorologist and the affidavit of Jeffrey J. Schwalje, P.E.

*Deposition testimony of plaintiff David A. Barnett*

Plaintiff David A. Barnett testified that prior to the accident he would frequent the Horsebox tavern a couple of times a week. The plaintiff stated that a bartender by the name of Tatjana was working at the tavern on the date of the accident. He explained that the ramp located outside of the bar was wooden and was the width of the door. Prior to February 2019, each time plaintiff visited the tavern, the ramp was present. The plaintiff averred that he left his home at approximately 2:30 p.m. on the date of the accident to go to the tavern, which was a half block from his home. When he arrived at the tavern, he stated that it was lightly snowing. The plaintiff also stated that at that time he utilized the ramp without issue to enter the tavern.

The plaintiff further averred that when he got up to leave the tavern, he walked towards the door, opened it, and then slipped on the ramp and landed on his back. He explained that he braced himself with his left hand, with the brunt of his weight on his left arm. Plaintiff stated that when he left the bar, the light snow had switched to an icy rain. He further testified that he did not see the sign on the window of the tavern which stated, "careful ice." The plaintiff stated that a bar patron and Tatjana witnessed him lying on the ground. At that time, the plaintiff claimed that he broke his wrist and asked for someone to call an ambulance.

Plaintiff was shown a photograph at his deposition of the Horsebox tavern, the ramp, and the front entrance. He testified that the ramp he slipped on was the same ramp depicted in the photograph. Plaintiff was asked if on the date of the accident he saw any anti-slipping salt in front of the bar, and he stated that he did not.

*Deposition testimony of Charles Pettebone*

Charles Pettebone testified that he was the sole owner of the Horsebox on the date of the accident, but now no longer owns the tavern. He explained that on the date of the accident, Tatjana was the only bartender present and part of her responsibilities included maintaining the cleanliness of the room and the front area of the tavern. Pettebone acknowledged that 218 A, LLC was his landlord, and the owner of the premises and their lease agreement was in effect from January 15, 2009 through January 31, 2020. Pettebone was first made aware of plaintiff's accident on the same day when he received a call from Tatjana. He did not advise Tatjana to take any photographs of the premise where plaintiff had fallen.

Pettebone acknowledged that there was a ramp outside of the Horsebox entrance on the date of plaintiff's accident. He averred that the ramp was placed outside of the Horsebox on the first day the tavern opened and has been there every day for the past nine years. Pettebone further stated that his partner Noel Foley constructed the ramp. He testified that they never received a permit to place the ramp outside the entrance. He was unsure as to whether Noel had formal building certificates for constructing ramps. Pettebone explained that there was grip tape on the ramp but did not know if the grip tape was up to New York City code. As to maintenance of the ramp, Pettebone explained that once a year the grip tape was replaced. The last time prior to plaintiff's accident that the grip tape was replaced was September 2018. Aside from replacing the tape, there was no other maintenance to the ramp in September of 2018. Pettebone stated that he never considered putting railings on the ramp. He further averred that no one ever told him

that the ramp was safe. When asked if it was anyone's responsibility to check whether the ramp was slippery, he answered that it was the bartender's responsibility to shovel, make sure the area was salted throughout the day during inclement weather, and make sure that the front area was passable.

Pettebone attested that prior to the accident, he asked Tatjana to salt the outside of the bar and confirmed that she had done so. He also stated that the corporation does not have set policies and procedures. He did not specify how often the bartenders were to salt the front of the tavern. He alleged that the building owner did not instruct him to place the ramp, nor to remove it. Pettebone also averred that the front entrance, where the ramp was placed, was the only way to access the Horsebox. He further stated that they never documented nor received any complaints about the ramp or anyone slipping on the ramp. Pettebone confirmed that no incident report exists for the date of plaintiff's accident. During Horsebox's tenancy at 218 Avenue A, there was no work done to the front entrance where the ramp was situated. Pettebone testified that after the plaintiff's accident, he "removed the ramp that day and never put it out again." He further testified that after the accident he purchased a temporary ramp to accommodate a disabled patron.

*Affidavit of Jeffrey J. Schwalje, P.E.*

Schwalje, defendants' consulting engineer, stated in his affidavit that he has extensive experience in conducting safety analysis relating to engineering, construction and accident cause and construction. He averred that on December 8, 2020, he visited the premises where the accident occurred, inspected the public sidewalk abutting the entrance to the premises as well as the portable wooden ramp. Schwalje testified that he took photographs and measurements of the wooden ramp at issue.

Schwalje stated that "the front entrance from the sidewalk along the east side of Avenue A to the premises is from a single 35.5-inch-wide door." The front door is equipped with a single standard hydraulic door closer. A metal door saddle was secured onto the doorway threshold. He stated that, "it is understood that the entrance, front door, saddle, threshold and door closer were not altered, repaired or changed between the date of the accident and the date of my inspection." Schwalje further testified that there is a 9.75-inch-high riser at the door threshold to the public sidewalk resulting in a 9.75-inch height differential between the threshold and the sidewalk. At the time of the accident, a portable wooden ramp was installed against the riser at the threshold. Schwalje explained that when he conducted his inspection, "the ramp extended past the right side of the door as viewed entering the tavern to provide sufficient space for persons to safely place their foot onto the ramp."

He averred that the wooden ramp installed against the riser at the threshold, as it was at the time of the subject accident, a 3.5-inch-high riser exists from the door threshold to the top surface of the ramp resulting in a 3.5-inch height differential between the door threshold and ramp. He further opined that the ramp measures 33.375 inches wide and 29.75 inches in length, front to back. The ramp is sloped 23.3% and has vertical open sides. The ramp surface consists of six, 5.5 inch wide by 1-inch-thick wooden boards nailed into a wooden base. He noted remnants of black abrasive strips were observed on each wooden plank. The strips measured approximately 3 inches wide by 28 inches in length. He opined that the abrasive strips exhibited

signs of wear, however, the strips still contained abrasive material. Schwalje stated, "[i]t is understood that the wooden ramp and abrasive strips were not altered, repaired or changed between the date of the accident and my inspection."

Schwalje conducted slip resistance testing of the wooden ramp surface to determine the coefficient of friction of the ramp's surface. The coefficient of friction was determined to be 0.55 on the abrasive tape and 0.52 on the bare wood. He opined that a coefficient of 0.50 or greater defines a "slip-resistant walking surface pursuant to industry standards." After inspection, Schwalje concluded the following: "the wooden ramp is stable and structurally sound . . .the ramp surface is a slip-resistant walking surface . . . the plaintiff would have stepped onto the abrasive tape when he slipped and fell . . . the wooden ramp was safe for its intended use, which was to reduce the height differential between the door threshold and the sidewalk and create a safe transition to the sidewalk." He opined that, "[a]fter review of the New York City Building Code, I determine that there are no code violation applicable to the use of this portable wooden ramp at the entrance to the premises . . . [and]the use of this wooden ramp is not in violation of any building code or provision."

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 880 [2d Dept 2012]). Here, Pettebone testified that he never received a permit to place the ramp outside of the tavern entrance, was unsure if the grip tape was up to New York City code, and any maintenance to the ramp was limited to replacing the grip tape once a year, arguably creating a hazardous condition. Moreover, the ramp was placed outside of the Horsebox on the first day the tavern opened and has been there every day for the past nine years. Here, affording the plaintiff the benefit of every reasonable inference that can be drawn from the testimony, defendants failed to establish, prima facie, that they did not have construction notice of the allegedly hazardous condition of the ramp irrespective of the weather conditions at the time of the accident.

Inasmuch as defendants failed to meet their prima facie burden, it is unnecessary to examine the plaintiff's opposition (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Wallace v Adam Rental Transp. Inc.*, 68 AD3d 856, 857 [2d Dept 2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2d Dept 2009]). Nevertheless, in opposition to the motion, plaintiff submits, inter alia, photographs of the Horsebox entrance, the affidavit of Robert Fuchs, consulting engineer, and the deposition testimony of non-party witness, Tatjana Gellert.

*Affidavit of Robert Fuchs, P.E.*

Robert Fuchs testified that he has been a licensed professional engineer in the State of New York since 2017. He opined within a reasonable degree of engineering and safety certainty, that the ramp on which plaintiff fell contained multiple defects that created a dangerous condition which was a substantial factor in causing plaintiff's fall on February 12, 2019. Fuchs' report notes that the relevant defects include: "(a) the absence of a top landing on the exterior side of the doorway; (b) the excessive ramp slope in the direction of travel; and (c) the absence of an appropriate non-slip ramp surface." Additionally, Fuchs stated that, "the hazardous ramp violated

numerous provisions of the New York City Industrial Code and other industry standards."

He conducted an inspection of the subject ramp on December 8, 2020. He determined that the subject ramp is of wooden construction and has nominal dimensions of 29 ¾ inches long. The top of the ramp is finished with 1x6 wooden boards. Strips of adhesive-backed grit traction tape had been applied onto the boards. Fuchs opined that the tape was worn, deteriorated, and missing in areas. He determined that the exterior door at the entrance has nominal dimensions of 36 inches wide by 7 feet high and swings outward over the ramp. The door threshold is raised 9 ¼ inches above the subjacent sidewalk, thereby creating a single riser step. The top, inboard side of the ramp measured 4 ¼ inches below the door threshold. Fuchs testified that, "[t]he overall defective arrangement of the ramp posed an inherent danger to pedestrians, especially when exiting the bar."

Fuchs further stated that the absence of a top landing violates specific building code requirements and generally accepted industry standards, specifically:

a. §27-377(c)(3) of the 1968 New York City Building Code provides that:

> "Level platforms or landings, at least as wide as the ramp, shall be provided at the bottom, at the intermediate levels where required, and at the top of all ramps. Level platforms shall be provided on each side of door openings into or from ramps."

b. §27-377(c)(4) of the 1968 New York City Building Code provides that:

> "No door shall swing over the sloping portion of a ramp."

c. §4.8.4 of ANSI A117.1-1986 provides that:

> "Ramps shall have level landings at the bottom and the top of each run."

d. §1010.5.3 of the 2008 New York City Building Code provides that:

> "No door shall swing over the sloping portion of a ramp…"

e. §1010.6 of the 2008 New York City Building Code provides that:

> "Ramps shall have landings at the bottom and top of each ramp, points of turning, entrance, exits and at doors."

Fuchs explained that "the absence of a top landing provides a sudden change in elevation (i.e. drop off) that promotes a fall on the sloped ramp surface." Essentially, a pedestrian experiences a sudden drop-off on the exterior side of the doorway, thereby increasing a risk for a fall on the sloped ramp surface.

As to the ramps slope, it is excessively steep and violates other building code requirements, such as:

a. §27-377(c)(4) of the 1968 New York City Building Code provides that:

   "No door shall swing over the sloping portion of a ramp."

b. §4.8.4 of ANSI A117.1-1986 provides that:

   "Ramps shall have level landings at the bottom and top of each run."

c. §1010.5.3 of the 2008 New York City Building Code provides that:

   "No door shall swing over the sloping portion of a ramp…"

d. §1010.6 of the 2008 New York City Building Code provides that:

   "Ramps shall have landings at the bottom and top of each ramp, points of turning, entrance, exists and at doors."

Fuchs opined that the absence of a landing at the top of the ramp and on the exterior side of the doorway violates all the above requirements and presents a foreseeable hazard to pedestrians, such as the plaintiff in this case. Additionally, Fuchs stated that the subject ramp is also hazardous due to its excessive slope which renders the ramp excessively steep and violates other building code requirements and generally accepted industry standards, specifically:

a. §27-377(b) of the 1968 New York City Building Code which provides that:

"Ramps shall not have a slope steeper than 1 in 8" (i.e., 12.5%)

b. §4.8.2 of ANSI A117.1-1986 provides that:

"The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be 1:12 (i.e., 8.3%)"

c. §1010.2 of the 2008 New York City Building Code provides that:

"Ramps used as part of a means of egress or part of an accessible route shall have a running slope not steeper than one unit vertical in 12 units horizontal (8.3%). The slope of other pedestrian ramps shall not be steeper than one unit vertical in eight units horizontal (12.5%)."

Based on his inspection, the running slope was measured to be 23% in the direction of travel, which is nearly one inch of vertical rise per every four inches of horizontal run. Fuchs determined that the subject ramp is severely steeper than what was permissible under the above-described building code and industry requirements. He opined that such excessive slope reduces the ability of a person to maintain balance when exiting the bar and stepping down on the steep ramp surface. Furthermore, he explained that the excessive slope of the ramp demands an even higher coefficient of friction to provide for safe walking and increases the likelihood of a slip event, especially in wet conditions.

With respect to the absence of an appropriate non-slip ramp surface, Fuchs opined that the ramp fails to provide an adequate slip-resistant surface under normal use and service conditions. Pursuant to the pertinent parts of the New York City Building Code:

a. §C27-377(c)(6) of the 1968 New York City Building Code provides that:

"All exterior ramps shall be provided with nonslip surfaces."

b. §1010.7.1 of the 2008 New York City Building Code provides that:

"The surface of ramps shall be of slip-resistant materials that are securely attached."

Fuchs acknowledged that strips of traction tape had been applied to the ramp, however, the tape is worn, deteriorated, and missing is certain areas. Fuchs remarked that the surveillance

video recording produced by defendants, which was taken on the date of the accident, depict similar wear. He explained that "the tape cannot be relied upon as a substitute for an adequate slip-resistant surface due to normal wear and tear affecting the tape from erosion of the grit surface, exposure to weather and foot traffic, and a loss of adhesion to the ramp surface." Fuchs opined, "the absence of an appropriate and adequate slip-resistant ramp surface, regardless of dry or wet weather conditions, was a defect that contributed to the subject incident." He also reviewed the climatological records for the date of the accident and concluded that the ramp which lacks a non-slip surface would have been wet, slick, and potentially icy from exposure to the precipitation and subfreezing air temperatures, thereby further reducing the surface friction and promoting a slip and fall event.

With respect to the ramp's placement, Fuchs stated that the ramp is too narrow, too short, not anchored to the building or sidewalk, and has no handrails.

Pursuant to §27-377(c)(5) of the 1968 New York City Building Code:

> "Guards and railings of ramps shall comply with the applicable requirements…except that only ramps having a slope steeper than one in twelve need to comply with the requirements for handrails and intermediate handrails shall not be required."

Fuchs averred that the subject ramp has a slope of 23%, which is steeper than one in twelve (i.e., 8.3%). Moreover, he testified that "[t]he makeshift construction and arrangement of the ramp would not conform to any building code or industry standard."

With respect to defendants' expert engineer, Fuchs testified that Schwalje failed to include critical information concerning the slip meter testing he performed to determine the coefficient of friction on the ramp surface. Specifically, he stated that Schwalje's affidavit did not specify the direction of the tests, whether or not they were performed under dry or wet conditions and provided no evidence that the tape present at the time of the inspection on December 8, 2020 was the same tape present at the time of the incident. Fuchs also mentioned that Schwalje did not discuss the weather conditions at the time of the accident, which would have reduced the slip resistance of the ramp surface due to the wet weather conditions. In response to Schwalje's statement that there are no code violations applicable to the use of the portable ramp, Fuchs asserts that this statement is unsupported and misleading in that the defective arrangement of the ramp, excessive slope, non-slip resistant surface and lack of handrails all violate the Building Codes and industry standards. He explained that whether or not the ramp was portable does not eliminate the need for a code-complaint egress component at the exit. He concluded that, "defendants failure to recognize and correct the dangerous condition created by the ramp was…a substantial factor in causing plaintiff's accident…"

*Deposition Testimony of Non-Party Witness Tatjana Gellert*

Gellert, a former bartender at the tavern, testified that she did not see plaintiff fall, but heard him fall. She confirmed that on the date of the accident there were no other employees working at the Horsebox other than her. She explained that the weather on the date of the accident

was snowy and rainy and was bad weather all day. Gellert testified that she never received any instructions from Pettebone or anyone else with respect to responding to snow or icy conditions outside the bar. However, she testified that she placed salt outside on the ramp that day at least once. She further testified that she never received a call from Pettebone prior to the accident instructing her to salt the entrance of the tavern. Gellert was unsure how long the ramp was there prior to plaintiff's accident and confirmed that she never saw any changes made to the ramp during her time working at the tavern. Also, she stated that the ramp was placed outside at the beginning of each day and was carried inside each night. She further averred that no one ever complained to her about the ramp prior to the date of the accident. Moreover, she did not know of anyone who fell on the ramp prior to plaintiff's accident, and confirmed that after plaintiff fell, the ramp was removed.

As to removal of the ramp, Gellert averred that after the accident occurred, Pettebone instructed her to call an ambulance and remove the ramp. She did not recall if there was any snow or ice on the ramp when she arrived at 11:30 a.m. on the date of the accident. On March 14, 2019, she gave a written statement to the insurance company which stated that she was constantly going outside to shovel and used a broom to push the accumulation of the sidewalk and ramp. However, at the deposition, she explained that she did salt the area a few times but did not recall shoveling. Gellert testified that between 3:00 and 4:00 p.m., she displayed a sign on the window warning incoming ped of the icy conditions. She confirmed that after plaintiff's accident, there was a wintry mix of ice, rain and snow.

*Signed Statement of Non-Party Witness Tatjana Gellert*

On March 14, 2019, Gellert signed a statement for Horsebox's insurance purposes prior to her deposition, which states in pertinent part, "I did have a conversation with David the business owner only minutes before David Barnett fell about me removing the ramp completely because of the weather conditions. Before I got around to removing the ramp, David Barnett fell." This statement is contrary to Gellert's deposition testimony which states that she spoke with the owner after the accident occurred and was instructed to remove the ramp. Gellert acknowledged that she signed the statement but did not recall anyone instructing her to remove the ramp prior to the accident. It is evident that issues of fact exist as to whether Gellert was instructed to and failed to remove the ramp prior to the accident.

In moving for summary judgment dismissing plaintiff's complaint, the defendants have the burden to show their entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). Here, defendants have not done so. They have not eliminated all issues of fact regarding the applicability of the Building Code provisions cited by plaintiff.

As such, issues of fact exist as to whether the alleged Building Code violations are applicable to the ramp in question, and if so, whether such violations played any role in the plaintiff's accident (*see Seidenberg v Dan's East 23rd Street Parking Corp.,* 268 AD2d 289 [1st Dept 2000]; *Spallina v St. Camillus Church,* 53 AD3d 650, 651 [2d Dept 2008]; *Longo v Woodlawn Veterans Mut. Hous. Co.,* 225 AD2d 458, 459 [1st Dept 1996]).

Moreover, whether a dangerous or defective condition exists on the property so as to create liability is generally a question of fact for the jury, depending on the facts and circumstances of each case (*see Trincere v County of Suffolk,* 90 NY2d 976 [1997]). Both plaintiff and defendants experts clearly disagree as to whether the ramp was properly designed, constructed and maintained, and whether it was a dangerous condition, which precludes summary judgment at this time. Accordingly, defendants' respective motion is denied.

As to defendants' storm in progress defense, which the plaintiff does not dispute, this matter is moot considering that material issues of fact exist as to the condition of the ramp and whether or not it was in compliance on the date of the accident.

Accordingly, it is

ORDERED that, defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that, plaintiff shall serve a copy of this order with notice of entry on the defendants within 30 days of the date that this order is uploaded onto NYSCEF.

This constitutes the decision and order of the court.

| 11/4/2021 | | | | | |
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| **DATE** | | | **RICHARD LATIN, J.S.C.** | | |
| **CHECK ONE:** | [ ] **CASE DISPOSED** | | [X] **NON-FINAL DISPOSITION** | | |
| | [ ] **GRANTED** | [X] **DENIED** | [ ] **GRANTED IN PART** | [ ] **OTHER** | |
| **APPLICATION:** | [ ] **SETTLE ORDER** | | [ ] **SUBMIT ORDER** | | |
| **CHECK IF APPROPRIATE:** | [ ] **INCLUDES TRANSFER/REASSIGN** | | [ ] **FIDUCIARY APPOINTMENT** | [ ] **REFERENCE** | |