Razo v 2931 Fulton Group Inc.
2024 NY Slip Op 34050(U)
November 14, 2024
Supreme Court, Kings County
Docket Number: Index No. 513875/2018
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November, 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

----------X

WANDEMBERG RAZO,

Plaintiff,

-against-

2931 FULTON GROUP INC.,

Defendants.

----------X

Index No.: 513875/2018

DECISION AND ORDER

Motion Seq. 4

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	124-137
Opposing Affidavits (Affirmations)	143-155
Reply Affidavits (Affirmations)	157-158
Other papers	

Upon the forgoing papers, defendant 2931 Fulton Group Inc. ("defendant") moves for an order pursuant to CPLR § 3212, granting summary judgment to dismiss plaintiff's complaint, or in the alternative, granting partial summary judgment to dismiss all claims of injury related to plaintiff's left shoulder and left knee (Motion Seq. 4).

BACKGROUND AND PROCEDURAL HISTORY

On September 1, 2017, plaintiff was allegedly walking on the sidewalk, in front of a beauty salon ("salon") owned by defendant located at 2931 Fulton Street, Brooklyn, New

York when he fell through a half-opened cellar door (also referred to as "basement door"). On July 6, 2018, plaintiff commenced this action to recover damages for injuries he allegedly sustained as a result of the fall, by filing a summons and complaint. By stipulation dated September 14, 2018, defendant's time to answer was extended to October 10, 2018. On October 2, 2018, defendant filed its answer. Subsequently, by notice of motion filed on March 19, 2024, defendant filed the instant motion for summary judgment. Plaintiff opposes the motion.

The Parties' Contentions

Defendant's Motion for Summary Judgment

Defendant argues the sidewalk cellar door was open and obvious, plaintiff cannot show a biomechanical relationship between his version of the accident and the claimed injuries, and therefore, the claim is not actionable as a matter of law. In support of its argument, defendant submits, *inter alia*, plaintiff's July 24, 2019 deposition transcript, non-party witness Carlos Gerena's ("Gerena") January 29, 2020 deposition transcript, as well as biomechanical expert Jacqueline M. Lewis Devine's ("Ms. Devine") January 25, 2024 report and March 14, 2024 affidavit.

Plaintiff testified that on the day of the accident he tripped on a basement door in front of the subject location, as one of the doors was open. He ended up hanging from the open door with the rest of his body in the air. He denied seeing the open basement door, orange cones or warning signs around the basement doors at the time of the accident. He also testified the accident did not involve tripping on anything and that he fell. Plaintiff, who lived around the corner from the accident location, explained he always passes through

the subject location but had not passed through it earlier that day. When asked how he was able to get up, he testified Mr. Gerena detached him and sat him on the sidewalk until the ambulance and police came.

Mr. Gerena testified that at the time of the accident he was on the stairs leading from the sidewalk to the basement, opening the cellar gate doors, when plaintiff's leg came down and hit his shoulder. Only one of plaintiff's legs was within the gate opening. When asked if he helped plaintiff get his leg out of the gate opening, Mr. Gerena further denied it, and testified plaintiff did it on his own. Mr. Gerena further testified the plaintiff had moved first and then he (Mr. Gerena) came up the stairs to the sidewalk level and sat the plaintiff down. He observed plaintiff was having trouble breathing, and later walked into the subject salon without trouble. Thereafter, plaintiff came back and told him to call an ambulance.

In the report and affidavit, Ms. Devine opines that plaintiff's claimed mechanism of injury to the left shoulder and left knee are both biomechanically inconsistent with the forces necessary to cause them from the accident as described. She argues that plaintiff's position – hanging from the door by his armpits – would not exert the necessary forces to cause rotator cuff and labral tears in his shoulder. She explains, *inter alia*, there must be a force applied through the arm into the shoulder or a pulling of the shoulder out of the socket and tearing for a rotator cuff tear. She further explains plaintiff's left knee was not exposed to forces and pressures that could cause a meniscus to tear, as the fall and plaintiff's leg dangling did not expose nor place force on it; and the necessary twisting and compression to cause a meniscal tear was absent. Therefore, she opined, a causal relationship between the subject accident and the claimed injuries cannot be made.

Plaintiff's Opposition

In opposition, plaintiff argues the claimed injuries to the left shoulder and left knee are causally related to the subject accident, and the open cellar door was not open and obvious to warrant dismissal of the complaint. Plaintiff contends defendant's open and obvious argument falls short, as it did not include "inherently dangerous" in its papers. He asserts Ms. Devine's analysis is limited and flawed, as she failed to identify or consider, *inter alia,* the biomechanical properties of plaintiff, the distance he fell and the upward forces applied to his shoulders, as he struck and secured himself on the door by his armpits.

In support of the opposition, plaintiff submits, *inter alia*, biomechanical expert James Pugh's ("Pugh") August 21, 2024 report and orthopedic surgeon Barry Katzman's ("Dr. Katzman") medical reports for December 18, 2017 to May 14, 2018. According to the Pugh report, he concluded, *inter alia*, plaintiff sustained trauma in his left shoulder and left knee from the subject accident. Mr. Pugh's calculation of plaintiff's fall and the impact of his body with the open door produced upward forces into his armpits such that it resulted in rotator cuff injuries to plaintiff's left shoulder. Mr. Pugh further explained plaintiff's left knee was traumatized because the dangling and twisting of his left leg was enough to render his left knee symptomatic and was likely caused by a forceful contact against the step under the cellar door.

According to Dr. Katzman's medical reports, plaintiff's initial visit was on December 18, 2017. Dr. Katzman notes plaintiff tripped over basement doors, did not lose consciousness, and injured his left shoulder and left knee. The subsequent visits with Dr.

Katzman showed plaintiff was diagnosed, *inter alia*, with a left shoulder strain and tear and left knee strain and cartilage defect.

Defendant's Reply

In reply, defendant reiterates plaintiff's description of the accident is biomechanically incompatible with the claimed injuries. Defendant argues Mr. Pugh's opinions are speculative and conclusory, as he did not cite to any accepted standards in support of his findings, did not address the forces exerted on plaintiff's left shoulder but his armpit, and did not address Ms. Devine's conclusions. Moreover, defendant argue Mr. Pugh's calculation is irrelevant, as forces were exerted on portions of plaintiff's body that were not alleged to have sustained any injury. Additionally, defendant argues Mr. Pugh's assertion about plaintiff's left knee having contact with the step under the cellar door contradicts plaintiff's testimony denying that his foot or leg ever struck anything below the cellar door. Defendant also reiterates the cellar door was open and obvious, as plaintiff could have seen it prior to walking into it as there was nothing obstructing his view.

In support of the reply, defendant submits Ms. Devine's September 9, 2024 affidavit, which argues Mr. Pugh's opinions should not be considered, as they are inapplicable and irrelevant to the subject accident. She counters Mr. Pugh's assertion regarding forces to the shoulder. She explained the rotator cuff is made of three muscle-tendon complexes, and the armpit is formed by muscles. Therefore, the armpit muscles would have been injured rather than the rotator cuff. Ms. Devine argues Mr. Pugh's assertion regarding plaintiff's left knee is without merit and without basis in the field of

biomechanics, as the forces on the armpits have no relevancy to any forces applied to the plaintiff's knee.

DISCUSSION

> "A property owner has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous. However, [w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted. Therefore, "[w]hether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury" (*Evans v Fields*, 217 AD3d 656, 656–657 [2d Dep't 2023][internal quotation marks and citations omitted]).

The defendant's submission including, *inter alia*, the deposition transcripts of the plaintiff and Mr. Gerena, when read together, demonstrate the existence of triable issues of fact (*Blackwood v E.S.F. Transport, Inc.*, 2024 WL 4498292, *2 [2d Dep't 2024]). Notably, there is a question of fact as to exactly how the accident happened, whether plaintiff's body was hanging in the air or just one leg went into the opening, and whether the plaintiff detached himself from the cellar door or was assisted by Mr. Gerena. While the plaintiff's deposition transcript demonstrates his familiarity with the subject location, and he testified to having previously traversed the subject accident location before to the date of accident, he claims he was not aware of the open cellar door condition prior to his fall (*Beier v Giglio*, 230 AD3d 733, 734 [2d Dep't 2024]). "A triable issue of fact remains as to whether the alleged defect was open and obvious inasmuch as [t]he nature or location of some hazards, while they are technically visible, make them likely to be overlooked" (*Johnson v 1451*

Associates, L.P., 225 AD3d 752, 753–754 [2d Dep't 2024][internal quotation marks and citations omitted]). Thus, the defendant failed to establish, prima facie, that the condition of the cellar door that caused the plaintiff to fall was open and obvious and not inherently dangerous (*S. S. v Village of Sleepy Hollow*, 228 AD3d 891, 893 [2d Dep't 2024]).

Additionally, the expert report and affidavit of defendant's expert (Ms. Devine) conflicts with the expert report of plaintiff's expert (Mr. Pugh) as to how the movement of plaintiff's body impacts the alleged injuries. Specifically, defendant's expert averred that there is no causal relationship between the subject incident and the claimed injuries premised on plaintiff's description of his position on the cellar door. However, plaintiff's expert opined plaintiff suffered his injuries from the subject accident, providing a different causal basis. The conflicting opinions raise triable issues of fact warranting jury determination *(Tamburo v Long Island University*, 229 AD3d 828, 829–830 [2d Dep't 2024]).

The parties' remaining contentions, to the extent not expressly set forth herein, have been considered and are denied.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment (Motion Seq. 4) is denied in its entirety.

This constitutes the decision and order of the court.

ENTER

J.S.C.
Hon. Wavny Toussaint
J.S.C.

7