

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33795
H/ct

_____AD3d_____

Argued - January 12, 2012

ANITA R. FLORIO, J.P.
CHERYL E. CHAMBERS
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2010-10736

DECISION & ORDER

Ralph Trosa, appellant, v Vincent T. Di Cristo, respondent.

(Index No. 9450/09)

Peter M. Zirbes & Associates, P.C., Forest Hills, N.Y., for appellant.

Richard T. Lau & Associates, Jericho, N.Y. (Gene W. Wiggins of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Lane, J.), dated September 7, 2010, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when he fell while ascending a stairway leading to the defendant's home. The defendant moved for summary judgment dismissing the complaint, asserting, inter alia, that the plaintiff failed to identify the cause of his accident. The Supreme Court granted the defendant's motion.

The defendant's submissions included, among other things, the deposition testimony of a witness to the plaintiff's fall, which indicated that as the plaintiff was ascending the stairs, he "was reaching to hold onto something, and nothing was there," and that the plaintiff lost his balance and fell over a retaining wall which abutted the staircase "because he had nothing to hold onto." Viewing the evidence in the light most favorable to the plaintiff, we conclude that the defendant

failed to eliminate all triable issues of fact as to whether the absence of a segment of handrail along the retaining wall was a proximate cause of the plaintiff's accident (*see Antonia v Srouer*, 69 AD3d 666, 666-667; *Palmer v 165 E. 72nd Apt. Corp.*, 32 AD3d 382, 382). Furthermore, the defendant's submissions failed to eliminate all triable issues of fact as to whether handrails were statutorily required at the location where the plaintiff fell (*see Multiple Dwelling Law § 52; cf. Kowalski v Johnson*, 247 AD2d 514). Since the defendant failed to establish his prima facie entitlement to judgment as a matter of law, we need not consider the sufficiency of the opposing papers (*see Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

Accordingly, the Supreme Court erred in granting the defendant's motion for summary judgment dismissing the complaint.

FLORIO, J.P., CHAMBERS, HALL and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court