

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable MARTIN J. SCHULMAN IAS PART 7  
Justice

APRIL BROGDAN,

Index No.: 1324/01

Plaintiff,

Motion Date: 6/15/04

-against-

Motion Cal.: 3

SHERIDAN AVENUE. LLC and VISION  
ENTERPRISES MANAGEMENT CORP.,

Defendants.

The following papers numbered 1 to 7 read on this motion by the defendants for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint

	PAPERS <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits-Memo of Law..	1-3
Answering Affidavits-Exhibits.....	4-5
Reply.....	6-7

Upon the foregoing papers, it is hereby ordered that this motion by the defendants for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint against them is denied, as follows:

This action arises from an incident which occurred on December 16, 1999, when the plaintiff allegedly slipped and fell on a ramp in the basement in the apartment building where she lived.

It is well settled that a defendant will not be liable for a dangerous or defective condition on its property unless it created the condition, or had actual or constructive notice of its existence and failed to remedy it within a reasonable time. See, *Gordon v American Museum of Natural History*, 67 NY2d 836; *Goldin v Riker*, 273 Ad2d 197. To establish constructive notice, a plaintiff must provide evidence that the condition was visible

and apparent, and that it existed for a sufficient period of time to permit a defendant to discover and remedy it. See, *Gordon, supra; Negri v Stop & Shop*, 65 NY2d 625; *Lewis v Metropolitan Trans. Auth.*, 64 NY2d 670.

The defendants have established their prima facie entitlement to judgment as a matter of law by demonstrating that they neither created the condition that allegedly caused the plaintiff to fall, nor had actual or constructive notice of the alleged dangerous condition. See, e.g., *Gillian v White Castle*, 2004 N.Y. App. Div. LEXIS 8400 (2<sup>nd</sup> Dept.; June 14, 2000); *Galietta v New York Sports Club*, 4 AD3d 449.

The plaintiff testified at her deposition that she slipped and fell on the floor in the basement. Counsel asked her whether there was any substance on the floor when she slipped, and she responded no. She also testified that she resided in the building for approximately twenty three years, that she never complained to anyone in the building about the condition of the ramp, and that she was unaware if any other tenants complained about the ramp. Peter Michaels, the managing agent for the building testified that he never received any complaints from anyone regarding the condition of the ramp.

In opposition, however, the plaintiff has raised a triable issue of fact as to whether the defendants created the allegedly dangerous condition. Plaintiff has submitted an affidavit in which she states that "I fell because the basement ramp was too steep and was not built with a slip proof floor surface. I was also unable to catch myself after I slipped because the ramp did not have hand rails." Although plaintiff did not testify as to these details at her deposition, defense counsel failed to question her in any manner about the ramp except to ask the sole question as to whether there was any foreign substance present.

However, in her verified Bill of Particulars dated September 5, 2002, plaintiff did specifically claim that she fell because the ramp had a dangerous and unsafe incline; that the ramp did not have a slip-proof floor surface or handrails, and that ramp was constructed in violation of the Mount Vernon Building Code and the New York State Uniform Fire Prevention Code.

Furthermore, the expert affidavit submitted by Frank

Raimondi, A.I.A., is sufficient to raise a triable issue of fact. It is well settled that an expert's opinion must be based on facts in the record or personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusion. See, *Cassano v Hagstrom*, 5 NY2d 643; *Fields v S & W Realty Assocs.*, 301 AD2d 625; *Mendez v City of New York*, 295 AD2d 87; *Erbstein v Savasatit*, 274 AD2d 445; *Tucker v Elimelech*, 184 AD2d 636. The expert's opinion taken as a whole must reflect an acceptable level of certainty in order to be admissible. See, *Matot v Ward*, 48 NY2d 445; *Erbstein, supra*; *Gross v Friedman*, 138 AD2d 571.

Mr. Raimondi states that at the time of the accident the Mount Vernon Building Code and the Fire Prevention and Building Code had specific requirements for interior ramps such as the one on which plaintiff fell and which he claims in detail that the defendants violated. He further opines "Had the ramp been constructed with a proper slope and a non-slip surface, her foot would not have slid out from underneath her and she would not have slipped and fallen". The court finds that this expert affidavit is neither so speculative or conclusory nor without basis in the record as to render it inadmissible. See, *Erbstein, supra*.

The court notes that although defense counsel argues in his Reply that these Building Codes are inapplicable to the subject building, there is no expert affidavit attached to support these allegations.

Accordingly, the motion by the defendants for summary judgment dismissing the complaint against them is denied.

Dated: July 23, 2004

---

J.S.C