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SHORT FORM ORDER

INDEX No. 21467-1999

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001 &002-MD
R/D: 070102
S/D 110602

ELAINE SWERDLOW

Plaintiff,

- against -

WSK PROPERTIES CORP. and BENEFICIAL FINANCE COMPANY

Defendants.

PLTF'S/PET'S ATTY:
SALTZMAN, CHETKOF & ROSENBERG, LLP
300 Garden City Plaza
Garden City, New York 11530

DEFT'S/RESP'S ATTY:
KUSHEL & HORVAT, ESQS. (WSK)
128 East Main Street
Riverhead, New York 11901

PETER J. CREEDON & ASSOCIATES (Beneficial)
3 Huntington Quadrangle
Melville, New York 11747

Upon the following papers numbered 1 to 18 read on this motion and cross motion for an order pursuant to CPLR §3212

Notice of Motion/Order to Show Cause and supporting papers 1-5 ; Notice of Cross Motion and supporting papers 6-7
Answering Affidavits and supporting papers 8-11; 12-16 Replying Affidavits and supporting papers 17-18
Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant WSK PROPERTIES CORP. ("WSK") and the cross motion by defendant EIENEFICIAL FINANCE COMPANY ("BFC") each seeking an order pursuant to CPLR $3212 granting *summary* judgment dismissing plaintiffs complaint are determined as follows:

On October 22, 1997 plaintiff ELAINE SWERDLOW ("SWERDLOW') fell while walking down a stairway on premises owned by defendant "WSK' and leased by defendant "BFC". Plaintiffs complaint claims that the defendants negligently maintained the area where "SWERDLOW' fell.

Defendants motions each seek an order granting summary judgment dismissing plaintiffs complaint claiming that no legal basis exists upon which "WSK' and "BFC" can be found liable for "SWERDLOW's" injuries. In support of both applications, defendants submit attorney affirmations and claim that there is no evidence to prove that the stairway was defective or to show that if it was in a defective condition that defendants had prior notice of the defect. Movants claim that plaintiffs deposition testimony reveals only that "SWERDLOW' does not remember why she fell and no other proof exists to establish the presence of a defective condition. It is defendants position that absent expert testimony establishing that a defective condition existed on the premises causing "SWERDLOW' to fall, summary judgment must be granted dismissing plaintiffs complaint.

In opposition plaintiff submits two affidavits and two attorney affidavits and claims that evidentiary proof exists to support "SWERDLOW's" claim that: 1) a defective condition existed; 2) the defect caused plaintiffs injuries and 3) defendants had notice of the defect. Plaintiff contends that "SWERDLOW's" deposition testimony raises significant factual issues concerning whether adequate lighting was present illuminating the stairway; whether handrails should have been provided; and whether the unequal height and the minimal width of the stairway steps violated the New York State Uniform Fire Prevention and Building Code and constituted a defective condition which proximately caused plaintiffs injuries. Plaintiff claims that defendant "WSK's" representative testified that there was insufficient space to install a handrail on the stairway. It is plaintiff's position that this admission shows that defendants were aware of the defective condition and is sufficient evidence to prove that defendants failed to maintain the premises in a reasonably safe condition. Plaintiff argues that under these circumstances substantial questions of fact exist sufficient to require a plenary triad.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (PALKA v. EDELMAN, 40 NY2d 781, 390 (NYS2d 393 (1976); PALSGRAF v. LIRR CO., 248 NY 339 (1928); Prosser, "Torts" 4 Edition §30, 41-42 and 53)). He must further demonstrate that defendants' acts or omissions which constituted such breach were a proximate cause of plaintiffs injuries (SHEEHAN v. CITY OF NEW YORK, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (BARSO v. MILLER, 40 NY2d 233, 241, 386 NYS 2d 564 (1976); SMITH v. TAYLOR, 279 AD 2d 566, 719 NYS 2d 686 (2d Dept., 2001:)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (MARTINEZ v. SANTORO, 273 AD 2d 448, 710 NYS 374 (2d Dept., 2000); SADLER v. TOWN OF HURLEY, 280 AD 2d 805, 720 NYS 2d 613 (3rd Dept., 2001).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property (BALSAM v. DELMA ENGINEERING CORP., 139 AD 2d 292, 296-297 (1st Dept., 1988) leave to appeal denied, 73 NY2d 783 (1989); PAPPALARDO v. NY HEALTH & RACKET CLUB, 279 AD 2d 134, 718 NYS 2d 287 (1st Dept., 2000).

In a slip and fall case a plaintiff may only recover when she is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (ANDERSON v. KLEIN'S FOODS, 139 AD2d 904 (4* Dept., 1988), aff d 73 NY2d 835 (1989); MOSS v. JNK CAPITAL, 211 AD2d 769, 621 NYS2d 679 (2d Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (GORDON v. AMERICAN MUSEUM OF NATURAL HISTORY, 67 NY2d 836 (1986); FASOLINO v. FASHION BUG, 77 NY2d 847, 567 NYS2d 640 (1991)).

Based upon the submission of evidence by the parties, significant issues of fact exist concerning defendants negligence sufficient to defeat defendants motions for summary judgment. Accordingly, it is

ORDERED that defendant "WSK's" motion and defendant "BFC's" cross motion each seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs complaint are denied.

Dated: January 8, 2003

J.S.C.

NON-FINAL DISPOSITION