

**Roth v Sandifer**

2007 NY Slip Op 31101(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0104837/2005

Judge: Sherry Klein Heitler

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Sherry Klein Heitler*

PART 30

Index Number : 104837/2005

ROTH, ETELKA

INDEX NO. 104837/05

vs

SANDIFER, JANET

MOTION DATE \_\_\_\_\_

Sequence Number : 003

MOTION SEQ. NO. (003)

STRIKE

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and matter are decided as per the decision of 5-1-07.*

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5-1-07

*Sherry Klein Heitler*  
**HON. SHERRY KLEIN HEITLER**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 30**

-----X  
ETEKA ROTH and  
LESLIE ROTH,

Plaintiffs,

-against-

JANET SANDIFER and  
ANURHADAPPURA CORP.,

Defendants.

-----X  
**SHERRY KLEIN HEITLER, J.:**

Index No. 104837/05

**DECISION AND ORDER**

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence Nos. 003, 004, and 005 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendant Anurhadappura Corp. moves to strike this action from the trial calendar on the ground that there are outstanding discovery requests due from plaintiff, and seeks summary judgment dismissing the claims and cross claims asserted against it. Defendant Janet Sandifer also moves for summary judgment dismissing the claims and cross claims asserted against her.

Plaintiff Etelka Roth seeks recovery for injuries she suffered on February 15, 2005, at 12:30 p.m., when she fell out the window of the second floor apartment at 399 Washington Street, New York, New York (the Premises). Defendant Janet Sandifer owns the Premises. Defendant Anurhadappura Corp. owns, operates, and maintains the building at 399 Washington Street.

Plaintiff was working as a house cleaner for defendant Sandifer, cleaning the Premises once a week since the summer of 2004 (Deposition of Etelka Roth, dated May 1, 2006, at 21-22, 24). At the time of the accident, plaintiff was attempting to clean the outside of the apartment windows. She stepped on a wood ledge, which she claims ran along the length of the building, to clean the windows

when the wood gave way and broke. She fell down to the ground, suffering two broken legs and a broken hip for which she was hospitalized for over two months, and required surgery. She seeks recovery from these defendants on theories of common law negligence, as well as Labor Law §§ 200, 202, 240 (1), and 241 (6). Plaintiff Leslie Roth is her husband, and is seeking loss of consortium damages.

Defendants seek dismissal of the action on several grounds. They assert that the Labor Law provisions under which plaintiff Etelka Roth seeks recovery do not apply to this five story building. They also urge that the common law negligence claim fails as a matter of law. They argue that they had no duty to plaintiff, that it was unforeseeable that plaintiff would use the wood ledge to stand on, that the danger was open and obvious, and that there was no notice to them of a defective condition. Defendant Sandifer also contends that plaintiff Etelka's actions were the sole proximate cause of the accident.

In response, plaintiffs concede that they do not have claims under the Labor Law, but they dispute that the negligence claims can be dismissed as a matter of law. They argue that the issues of foreseeability and comparative negligence are triable issues. They maintain that the burden of removing the risk, the wood ledge, was very low while the risk of serious injury significantly outweighed the effort required to remove it. They further argue that the doctrine regarding an open and obvious danger does not protect defendants in this action.

### DISCUSSION

The motions for summary judgment are granted only to the extent of dismissing the claims under Labor Law §§ 200, 202, 240 (1) and 241 (6), set forth in the first cause of action, and is otherwise denied. The motion seeking additional discovery, and requesting that the note of issue be

stricken from the trial calendar is granted only to the extent that plaintiffs are directed to serve a Supplemental Bill of Particulars regarding their special damages, including past, present and future medical expenses and wages, and to serve a response to defendants' Demand for Collateral Sources, and is otherwise denied.

To the extent that the complaint seeks recovery under the Labor Law, plaintiffs have conceded that this statute does not apply to this action. The Labor Law sections 202, 240 (1), and 241 (6), referenced by plaintiffs, apply to buildings six stories and higher, and it is undisputed that the Premises here was only five stories (see Labor Law § 202 [requiring that building be six stories or more] and 12 NYCRR 21.1 and 21.2 [requiring that regulations apply only to buildings meeting requirements for Labor Law § 202]). In addition, it has been held that Labor Law § 240 (1) does not apply to this routine household window cleaning (Brown v Christopher St. Owners Corp., 87 NY2d 938 [1996]). While Labor Law § 200 is a codification of the common law duty to maintain a safe place to work, plaintiffs concede that they do not have a Labor Law claim, and, instead, seek recovery under the defendants' duties as landowners of the Premises. Therefore, the part of the first cause of action in the amended complaint based on violations of the Labor Law is dismissed.

The first issue to be addressed is the defendants' duty to plaintiff Etelka. In order to find negligence, there must be a breach of a duty (Darby v Compagnie Natl. Air France, 96 NY2d 343, 347 [2001]). While a jury determines whether and to what extent a duty was breached, the court must first determine if a duty exists (id.). Plaintiffs seek recovery from both defendants under their duty as landowners— defendant Sandifer as the owner of the apartment itself, and defendant Anurhadappura Corp. as the owner of the building. The Court of Appeals in Tagle v Jakob (97 NY2d 165, 168 [2001]) recently articulated the scope of the landowner's duty. It started with the

rule set forth in Basso v Miller (40 NY2d 233 [1976]) that “landowners owe people on their property a duty of reasonable care to maintain their property in a safe condition” (Tagle v Jakob, 97 NY2d at 168). In determining whether a duty exists, the court must consider the reasonable expectations of the parties and of society (id.). The scope of the duty is governed by the foreseeability of the possible harm (id.).

If the court determines that a duty of care exists, it remains for trial whether the premises was in a reasonably safe condition, whether defendant was negligent in not keeping it in a reasonably safe condition, whether the defendant’s negligence was a substantial factor in causing the injuries, whether the plaintiff’s presence was foreseeable, and whether plaintiff was comparatively negligent (see MacDonald v City of Schenectady, 308 AD2d 125 [3d Dept 2003]). The Court in Tagle v Jakob then went on to analyze two distinct duties, the duty to maintain and the duty to warn (97 NY2d at 168-70). It applied the defense that the danger was open and obvious, relied upon by defendants in the instant case, only to the duty to warn (id. at 169; see Mizell v Bright Servs., Inc., \_\_ AD3d \_\_, 2007 WL 685965 [1<sup>st</sup> Dept 2007] [readily observable nature of condition is just a factor to be considered by jury in deciding comparative fault; it does not abate duty to maintain premises in reasonably safe condition]; Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69 [1<sup>st</sup> Dept 2004][duty to warn may be negated by obvious nature, but duty to maintain in reasonably safe condition is not negated, factual issue raised]; Cohen v Shopwell, Inc., 309 AD2d 560, 561-62 [1<sup>st</sup> Dept 2003] [duty to maintain is analytically distinct from duty to warn, and open and obvious defense may negate duty to warn, but not duty to maintain]; MacDonald v City of Schenectady, 308 AD2d at 129 [same]; Orellana v Merola Assocs., Inc., 287 AD2d 412, 413 [1<sup>st</sup> Dept 2001] [same]; Tuttle v Anne LeConey, Inc., 258 AD2d 334 [1<sup>st</sup> Dept 1999] [open and obvious defense does not

negate duty to plaintiff, but simply raises triable issues about plaintiff's comparative negligence]; Morgan v Genrich, 239 AD2d 919 [4<sup>th</sup> Dept 1997] [readily observable dangerous condition is relevant to issue of plaintiff's comparative fault, but does not negate duty to keep premises reasonably safe]).

In this action, plaintiffs are not simply asserting that defendants had a duty to warn of the dangers of stepping on the wood plank or ledge. Instead, they also seek recovery for defendants' broader duty to maintain the Premises in a reasonably safe condition for any person whose presence is reasonably foreseeable. They contend that defendants created or permitted a dangerous condition, by attaching, or leaving attached, a wood ledge or plank to the outside of the building, directly outside the window, and, according to plaintiff Etelka's testimony, which ran the length of the building (Deposition of Etelka Roth, dated May 1, 2006, at 42, 44), with a metal track and several metal bars supporting it (Deposition of Mr. Chouraki, at 16-17; see also Exhibit A to Affirmation of Patrick Daniel Gatti in Opposition [photos]). It was used to hold things such as plants, flower pots, and watering cans (Etelka Roth Dep. at 44-45; Jacobs Dep. at 14). Plaintiffs present proof, including the testimony of defendant Anurhadappura's principal, Gloria Jacobs, that the ledge or plank had been there for approximately four years, placed there by the previous apartment owner, and that defendant Anurhadappura was aware of it (Deposition of Gloria Jacobs, dated July 10, 2006, at 14, 17-18). They further present proof that defendant Sandifer was also aware it was there, and of its condition (Sandifer Dep. at 23-26). This proof raises an issue of fact as whether, and to what extent, defendants' duty to maintain their property in a reasonably safe condition was breached. Whether this wood ledge was a dangerous condition, really turns on the foreseeability of a risk of harm. Whether it was foreseeable that plaintiff, cleaning defendant Sandifer's apartment, and asked,

according to plaintiff Etelka, to clean the windows (Etelka Roth Dep. at 38-39), which she asserts she cleaned in the same manner the previous May (by standing on the wood ledge)(Etelka Roth Dep. at 37), would clean the outside of the windows by standing on the wood ledge is an issue for trial (see Kriz v. Schum, 75 NY2d 25, 34 [1989] [foreseeability is subject to varying inferences, like the question of negligence itself, and is generally for the fact finder]; Li v Midland Assocs., LLC, 26 AD3d 473, 474 [2d Dept 2006]).

If the defendants had not created the dangerous condition of this wood ledge, plaintiffs urge that, at the least, they had notice of the dangerous condition of such ledge (see Jacobs Dep. at 17-18 [stating that they were aware that the wood was there for four years, and that it looked extremely thin and “worn”]; Chouraki Dep. at 16-18 [wood was plywood with thin metal bars underneath, and it was rotting]; Sandifer Dep. at 23-26 [plywood, laying on metal rods between the building and the building adjacent to it, wood was “old” and “worn”]). Again, this proof raises triable issues as to both defendants’ notice of the condition. Should the trier of fact conclude that an unreasonably dangerous condition existed, and that defendants had either actual or constructive notice of it, whether the condition of the wood was readily observable, and whether it was observed by plaintiff who nonetheless stepped on the wood ledge, are factors to be considered by the jury in determining the issue of comparative fault (see e.g. Mizell v Bright Servs., Inc., 2007 WL 685965, *supra*; Cohen v Shopwell, Inc., 309 AD2d at 561; Tuttle v Anne LeConey, Inc., 258 AD2d 334, *supra*).

To the extent that defendant Sandifer argues that plaintiff Etelka was not asked to clean the windows, pointing to the deposition testimony of Mr. Chouraki (Chouraki Dep., at 11-12), that also is a triable issue. As mentioned above, plaintiff Etelka testified that she was asked to “take care of the windows” by Mr. Chouraki (Etelka Roth Dep., at 38-39), that he was paying her additional

mony to do so (*id.* at 39), and that she had done them the previous May for defendant Sandifer (*id.* at 36-37). This proof demonstrates that the issue is in dispute.

It is noted that, in view of all the circumstances, the burden of avoiding the risk, by removal of the wood ledge outside the windows, which either served no purpose or was there to hold some plant pots, is significantly less than the likelihood of injury from the old, worn and rotten wood placed on some metal supports outside, but attached to, the building. Accordingly, summary judgment dismissal of the common law negligence claim against either defendant is inappropriate on this record.

The branch of the defendant Anurhadappura Corp.'s motion for discovery is granted to the extent that plaintiffs are directed to respond to defendant's Demand for Collateral Sources, and to serve a Supplemental Bill of Particulars, within ten days after service of this order with a copy of the notice of entry. Defendant Anurhadappura Corp. has demonstrated that the Demand was served on plaintiffs, and that plaintiffs have failed to respond. In addition, defendant also has demonstrated that plaintiffs failed to respond to the bill of particulars requests with regard to special damages, including present and future medical expenses and lost wages. Thus, plaintiffs are directed to serve a Supplemental Bill of Particulars with regard to special damages. The branch of the motion to strike the Note of Issue is denied, the case will remain on the trial calendar. Accordingly, it is

ORDERED that motion sequence number 003 by defendant Anurhadappura Corp. to strike the action from the trial calendar and for discovery is granted only to the extent that plaintiffs are directed to serve a response to the Demand for Collateral Sources, and to serve a Supplemental Bill of Particulars with regard to special damages, including past, present and future medical expenses and lost wages, within ten days after service of this order with notice of entry; and it is further

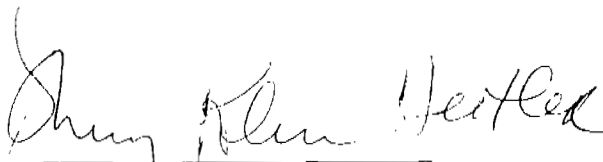
ORDERED that motion sequence number 004 by defendant Anurhadappura Corp. for summary judgment is granted only to the extent that the Labor Law §§ 200, 202, 240 (1), and 241(6) claims in the first cause of action are dismissed, and is otherwise denied; and it is further

ORDERED that motion sequence number 005 by defendant Sandifer for summary judgment is granted only to the extent that the Labor Law §§ 200, 202, 240 (1), and 241 (6) claims in the first cause of action are dismissed, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue. However, please note that as of this date this case has been transferred to another IAS Part.

This shall constitute the decision and order of the court.

DATED: MAY 1, 2006

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE