

Mendelsohn v Young
2007 NY Slip Op 32888(U)
September 10, 2007
Supreme Court, Kings County
Docket Number: 0010195/2004
Judge: Gloria Dabiri
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.

At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of September 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X

ALLAN B. MENDELSON, ESQ. AS TRUSTEE OF THE ESTATE OF JEFFREY BETTAN AND CAROL BETTAN,

Index No. 10195/04

Plaintiffs,

- against -

ANGELO YOUNG,

Defendant.

-----X

The following papers numbered 1 to 7 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross-Motion and
Affidavits (Affirmations) Annexed_____

Papers Numbered

1-3, 4-6

Opposing Affidavits (Affirmations)_____

Reply Affidavits (Affirmations)_____

7

_____ Affidavit (Affirmation)_____

Other Papers_____

Upon the foregoing papers, defendant Angelo Young moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of Allan B. Mendelsohn, Esq. as Trustee of the Estate of Jeffrey Bettan (plaintiff), and Carol Bettan (collectively, plaintiffs). Plaintiffs cross-move for leave to amend their Bill of Particulars.

The instant action arises from a December 4, 2002 trip and fall accident which occurred at 2066 East 28th Street in Kings County (the premises), a two-family home owned by defendant. Plaintiff, who was employed by a mortgage company, was enroute to 2062 28th Street to consult with a client. At approximately 7:30 P.M. plaintiff parked his vehicle in front of 2066 28th Street, mistakenly believing that it was 2062 28th Street. After exiting his vehicle plaintiff began walking along a path leading from the sidewalk to the front door of 2066 28th Street when he tripped and fell on a three-inch step on the walkway. When deposed, plaintiff testified that the walkway was poorly lit. According to plaintiff, there was a 40 or 60 watt lightbulb above the front door and a similar lightbulb in a fixture near a door at the basement apartment,¹ but no street light in the area.

By summons and complaint dated January 9, 2004 plaintiffs commenced the instant action alleging that the defendant was negligent in failing to maintain the walkway and in creating a nuisance or trap-like condition. Plaintiff's wife Carol Bettan asserts a derivative claim. When plaintiff filed a petition in bankruptcy Allen B. Mendelsohn assumed control of the action as trustee. Discovery is now complete and the instant motions are before the court.

In support of summary judgment defendant argues that plaintiffs cannot demonstrate that the walkway was in an unsafe condition. In this regard, defendant maintains that an

¹The lightbulb above the front door was 22 feet from the walkway. The lightbulb near the basement apartment was 18 feet away from the walkway.

owner of private property has no general duty to illuminate the property during hours of darkness. Defendant supplies the affidavit of Robert L. Grunes, a professional engineer, who visited the premises on January 22, 2007 and avers that “notwithstanding the fact that one of the sconces . . . illuminated at the time of the accident was not functioning on the date of the inspection, the walkway was still completely illuminated at the time of the inspection.” Mr. Grunes goes on to state that “the illumination at 2066 East 28th Street meets the recommended maintained illumination levels for residential pedestrian walkways.” Based upon his observations, Mr. Grunes concludes that “no dangerous condition exists on the walkway leading to the front of [the premises] due to the presence of the riser or the level of illumination on the walkway.”

In opposition to the defendant’s motion, plaintiffs argue that the defendant breached his duty to maintain the walkway in a safe condition by failing to warn persons on the walkway of the hazard posed by the riser and by failing to provide adequate illumination. In support of this argument plaintiffs submit the affidavit of Stanley H. Fein, a professional engineer who inspected the premises on January 22, 2007 at approximately 7:00 P.M. Mr. Fein points out that the color of the single step riser and walkway are both dark gray, and that the failure to provide “differentiation” on the riser at this transition between the two levels of the walkway created an “optical illusion” causing the riser to become invisible. Mr. Fein avers that, due to the distance between the lighting fixtures at the building and the riser, the use of even 75 watt bulbs, would still generate light (that calculates to 1.0 foot candles for

both fixtures) well below that needed to allow the riser to be observed.

“A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241 [1976], citing *Smith v Arbaugh’s Rest.*, 469 F2d 97, 100 [C.A.D.C. 1972]). This duty of care does not encompass a general requirement that “landowners . . . illuminate their property during all hours of darkness [since] the financial and environmental costs would surely outweigh any social benefit. Moreover, finding a failure to illuminate alone created a dangerous condition would produce an indeterminate class of plaintiffs without any limitations on liability” (*Peralta v Henriquez*, 100 NY2d 139, 145 [2003]). Consequently, an accident caused by lack of illumination alone will not result in liability for a landowner, particularly where the accident involves an unexpected guest or an area closed to the public. However, a court “would be hard pressed to conclude that a landowner with knowledge of a condition easily alleviated by illumination (such as a curb or a step) is not required to light the area” (100 NY2d at 145). Thus, were an accident is caused by a lack of illumination combined with an additional hazard such as a dark mat on step or an open door leading to a basement stairway, the question of whether the homeowner breached his or her duty of reasonable care should be left to the trier of fact (*Pollack v Klein*, 39 AD3d 730 [2007]; *Miccoli v Kotz*, 278 AD2d 460 [2000]).

Here, the accident was allegedly caused by a lack of illumination combined with a

hazardous condition in the form of a three-inch indistinguishable riser on a walkway. Therefore, it cannot be said, as a matter of law, that the defendant lacked a duty to illuminate the riser on the walkway for the benefit of those using the walkway.

Finally, Mr. Grunes' affidavit is insufficient to establish that the walkway was sufficiently illuminated as a matter of law. This affidavit merely indicates that Mr. Grunes visited the premises and concluded that the walkway was "completely illuminated." It is unclear whether Mr. Grunes took measurements or made calculations supporting his conclusions. Indeed, his affidavit fails to even mention the time of the day his inspection took place. Furthermore, Mr. Grunes' claim that illumination at the premises "meets the recommended maintained illumination levels for residential pedestrian walkways" is meaningless in that he neglects to set forth either the specific levels of illumination found, or what the recommended levels of illumination are for residential pedestrian walkways. Rather, Mr. Grunes' affidavit consists of conclusory claims which are unsupported by scientific data, measurements or analysis. It is well settled that such expert affidavits are of little, if any, probative value on a motion for summary judgment (*McCain v Larosa*, 41 AD3d 792 [2007]; *Khemraj v City of New York*, 37 AD3d 419, 420 [2007]).

Even if Mr. Grunes' affidavit was sufficient to make a *prima facie* showing that the illumination of the walkway was adequate, Mr. Fein's affidavit raises a triable issue of fact regarding the inadequacy of such lighting under the circumstances. Accordingly, defendant's motion for summary judgment is denied.

Plaintiffs cross-move for leave to amend their Bill of Particulars so as to allege a violation of paragraph 6.2.2 of Designation F 1637-95 of the American Society for Testing and Materials (ASTM), which pertains to safe walking surfaces. Specifically, this standard requires that “[i]n situations where a short flight stair or single step transition exists or cannot be avoided, obvious visual cues shall be provided to facilitate improved step identification. Handrails, delineated nosing edges, tactile cues, warning signs, contrast in surface colors, and accent lighting are examples of some appropriate warning cues.” Here, it is undisputed that the single step riser on the walkway lacked any such warning cues. Plaintiffs also maintain that they have a legitimate reason for failing to seek the instant amendment prior to the filing of the Note of Issue. Specifically, plaintiffs point out that there was an outstanding court order requiring that they file the Note of Issue by a date certain and defendant did not allow plaintiffs’ expert to conduct an inspection of the premises until after this date had passed.²

In opposition to plaintiffs’ cross-motion, defendant argues that the court should not allow the instant amendment inasmuch as the matter has already been placed on the trial calendar. In addition, defendant argues that the proposed amendment merely involves a guideline, which is an insufficient basis upon which to premise any liability.

“Leave to amend a Bill of Particulars is freely given absent prejudice or surprise, unless the amendment is sought on the eve of trial” (*Grande v Peteroy*, 39 AD3d 590, 591

² The Bill of Particulars indicates that this inspection had not yet been conducted.

[2007]). When leave to amend is sought after the close of discovery, “judicial discretion should be exercised in a discreet, circumspect, prudent and cautious manner” (*Delahaye v Saint Anns School*, 40 AD3d 679, 684-685 [2007]).

Here, it cannot be said that the proposed amendment will result in any undue surprise or prejudice since the alleged violation of the ASTM standard does not alter plaintiffs’ underlying theories of liability. Furthermore, plaintiffs have established a valid excuse for failing to seek leave to amend prior to the filing of the Note of Issue inasmuch as the inspection of the premises did not take place until after the date set by the court for the filing of the Note of Issue. Moreover, although violations of guidelines such as the instant ASTM standard are “not conclusive evidence that reasonable care was not taken, it is some evidence of negligence” (*Diaz v New York Downtown Hosp.*, 287 AD2d 357, 358 [2001] *affm’d* 99 NY2d 542 [2002]; *Meseck v General Elec. Co.*, 195 AD2d 798, 799 [1993]). Thus, it cannot be said that the proposed amendment is patently lacking in merit. Accordingly, plaintiffs’ cross-motion for leave to amend the Bill of Particulars is granted. Accordingly, it is

ORDERED, that the defendant’s motion for summary judgment is denied; and it is further

ORDERED, that plaintiffs’ cross-motion for leave to amend the Bill of Particulars is granted. and the Amended Bill of Particulars in the form annexed to plaintiffs’ cross-motion is deemed served; and it is further

ORDERED, that the matter is scheduled for a final discovery conference in Part 39
of this Court on September 28, 2008 at 9:30 a.m.

E N T E R,

A handwritten signature in black ink, appearing to be 'Gloria Dabiri', written over a large, loopy flourish that extends to the left and right.

J. S. C.

HON. GLORIA DABIRI