

Weinberg v Weinberg
2008 NY Slip Op 30017(U)
January 3, 2008
Supreme Court, Nassau County
Docket Number: 6692-06/
Judge: Roy S. Mahon
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SCAD

SHORT FORM ORDER

MD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

MARTIN WEINBERG,

TRIAL/IAS PART 11

INDEX NO. 6692/06

Plaintiff(s),

MOTION SEQUENCE
NO. 1

- against -

MOTION SUBMISSION
DATE: October 12, 2007

IAN WEINBERG and STEPHANIE WEINBERG,

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by defendants for an Order granting summary judgment in favor of the defendants dismissing plaintiff's complaint, on the basis that plaintiff has failed to establish a prima facie cause of negligence as and against said defendants, is determined as hereinafter provided:

This personal injury action arises out of a slip and fall accident on a stairs that occurred on January 1, 2006 at approximately 5:30 pm at the defendant's home located at 3 Saratoga Avenue, Jericho, New York. The plaintiff is the father of the defendant Ian Weinberg and on the date of the incident the plaintiff was watching the defendants' children.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607,

467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The defendants contend that the sole proximate cause of the plaintiff's alleged accident was that the handrail on the stairs in issue ended prior to the stairs where the fall occurred. In this regard, the defendants refer to the deposition transcript of the plaintiff which sets forth:

"Q. When you began walking down the stairs, were you walking on the carpet area of the stairs or the wooden area of the steps?

A. I don't know.

Q. Did you slip on anything on the staircase?

A. No.

Q. Did you trip on anything on the staircase?

A. No.

Q. When you began to fall, did you begin to fall forward or back?

A. Forward.

Q. Prior to falling forward did you feel any part of the carpet shift under your feet?

A. No.

Q. Did you feel any part of the floor or the wooden part of the steps give way at all?

A. No.

Q. As we sit here today, do you know why you began to fall?

A. There was no more railing. I had nothing to hold onto as I was approaching the bottom steps. My hand was ahead of me and it slid right off the railing.

Q. Were you griping the railing?

A. In walking down, yes.

Q. At some point did you feel there was no railing to grip onto?

A. That must have been when I fell.

Q. Do you remember if that was before you fell or after you fell that you realized there was no railing?

A. I don't know.

Q. Prior to this accident had you ever experienced any difficulty either walking up or down steps?

A. No."

The plaintiff in the plaintiff's Verified Bill of Particulars states:

"6. The defective, dangerous and hazardous conditions on the steps and or stairway consisted of treads that are not level and true, risers heights that vary, tread widths that are less than the minimum mandated by the building code, an inappropriately located handrail and inadequate lighting.

The specific dangerous and defective conditions, as enunciated by plaintiffs professional engineer Robert Schwartzberg, P.E. are as follows: It is Mr.

Schwartzberg's professional opinion that hazardous conditions were created and allowed to remain in place. He observed that hazardous conditions were created and allowed to remain in place. He observed that the subject stairway did not conform to the requirements of the New York State Building Code. He noted that the treads were not level and true, riser heights vary by more than that permitted by the building code, tread widths are less than the minimum mandated by the building code, tread widths are less than the minimum mandated by the building code, the handrail is inappropriately located and illuminated at the subject stairway is less than that needed for safe travel. Ms. Schwartzberg concluded that there was negligence on the part of the building owners, the building management and those

Section 713.1 Stairs. Paragraph (a) General Requirements. states: "Stairs, both interior and exterior, shall be so arranged and constructed to provide safe ascent and descent. A fixed stair shall be provided where travel is required between two stories each of which contains a habitable space or a recreation room, and between first story and basement or cellar." It is Mr. Schwartzberg's professional opinion that the subject stairway was not arranged for safe ascent and descent. During the inspection of the subject stairway he noted the following violations of the Building Code:

Section 713.1 Stairs., paragraph (b) Treads. subparagraph (1) states that "Minimum widths of treads shall be nine inches plus 1 1/8 inches nosing for closed riser, type, or nine inches for open riser type..." The subject stairway was measured and found to be uniform in width at 10 inches including the nosings. The stairway is a closed type and as such, the stair treads do not meet the requirements in terms of tread widths, a condition which causes the actual area upon which a person can stand/walk to be narrow and of less than adequate footing.

Section 713.1 Stairs., paragraph (b) Treads. subparagraph (4) states that "Treads shall be level and all other than winder treads shall be uniform in width, with no variation exceeding one-eighth inch in any one run of stairs." At the time Mr. Schwartzberg's inspection he noted that the reads were not set level and true. He observed, and verified through use of a torpedo level, that the steps sloped forward in the direction of descent, a condition which would cause a pedestrian to be off balance while on the subject stairway. Clearly, the treads at the subject stairway do not meet the code requirements as regards being level and true.

Section 713.1 Stairs., paragraph © Risers., Subparagraph (2) states "There shall be no variation exceeding one-eighth inch in any one run of stairs." Mr. Schwartzberg's measurements of the riser heights indicated that the risers varied from 6 3/4 inches at a minimum to more than 7 1/2 inches at a maximum. The differential between these riser heights is six (6) times the code allowable variance, clearly a violation of the Building Code and a hazardous condition for pedestrians. In addition to the above, he noted that the runner atop the treads at the subject stairway created a condition wherein the top of the runner projected a full half inch higher in elevation than the wood base at the stairway treads. This finding is clearly a violation of the code and

has created an obvious unsafe condition as person on the stairway is liable to step edge of the carpet and turn an ankle or otherwise be thrown off balance.

Part 713, Section 713.1 Stairs., paragraph (f) Handrails and railings., subparagraph (5) states: "Clearance between handrail and supporting wall shall be not less that 1½ inches." The measurement clearance between the handrail and the wall was 1 1/8 inches. This is less than the mandated minimum dimension and will result in difficulty, if not making it impossible, to grasp the handrail.

Part 713, Section 713.1 Stairs., paragraph (h) Light. states that "Treads of stairs shall be lighted by either natural or artificial light of sufficient intensity to allow safe ascent and descent." At the time of Mr. Schwartzberg's inspection he noted that there were no light fixtures over the stairway or in the immediate vicinity of the stairway. The closest light fixture was noted to be at the ceiling of the room at the top of the stairway, remote to the stairway and behind persons descending the stairway thus creating shadows and dark areas in front of the person descending the stairway and leaving the area in darkness. Clearly, owing to the poor and remote location of the light fixture a person at the stairway would block the rays from the light with his/her body thus causing shadows and dark areas at the stairs further diminishing the available lighting.

7. Actual notice is claimed in that the defendants, themselves or employees, agents and/or servants of the defendants IAN WEINBERG and STEPHANIE WEINBERG, including but not limited to members of their maintenance staff were aware of the dangerous and defective conditions, claimed prior to the accident occurring.

8. Constructive notice is claimed in that the defendants IAN WEINBERG and STEPHANIE WEINBERG, themselves should have been aware through reasonable inspections and normal maintenance of the defective and hazardous conditions claimed. To be supplemented, if necessary, after discovery is completed."

The Court observes that the plaintiff, amongst other things, testified as to the lighting conditions on the stairs at the plaintiff's deposition (see Martin Weinberg deposition transcript at pg. 26).

In examining the issue of a slip and fall accident, the Court in **Kotsakos v Tsirigotis**, 28 AD3d 426, 813 NYS2d 169 (Second Dept., 2006) stated:

"A plaintiff in a slip-and-fall case must demonstrate the existence of a dangerous condition and that the defendant created the condition or had actual or constructive notice of it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838, 501 NYS2d 646, 492 NE2d 774; *Gonzalez v Jenel Mgt. Corp.*, 11 AD3d 656, 784 NYS2d 135; *Brown-Phifer v Cross County Mall Multiplex*, 282 AD2d 564, 723 NYS2d 393; *Prisco v Long Is. Univ*, 258 AD2d 451, 451-452, 684 NYS2d 604). Here, the evidence presented by

the plaintiff was insufficient to establish a prima facie case of negligence against the defendants (see *Pennie v McGillivray*, 15 AD3d 639, 640, 790 NYS2d 692). The plaintiff failed to present evidence to support a common-law negligence claim that a dangerous condition existed on the subject stairway (see *Vachon v State of New York*, 286 AD2d 528, 531, 729 NYS2d 212). Further, she did not establish that the handrail on the subject stairway violated any applicable provision of the Building Code of the City of New York (see *Mokszki v Pratt*, 13 AD3d 709, 710 786 NYS2d 222; *Hyman v Queens County Bancorp.*, 307 AD2d 984, 986-987, 763 NYS2d 669, *affd.* 3 NY3d 743, 787 NYS2d 215, 820 NE2d 859; *Daria v Beacon Capital Co.*, 299 AD2d 312, 313, 749 NYS2d 79; *cf. Peters v 1625 E. 13th St. Owners, Inc.*, 18 AD3d 456, 794 NYS2d 446)."

Koydakos v Tsirigotis, supra at 426-427

In opposition to the requested relief, the plaintiff submits the affidavit of Robert L. Schwartzberg, PE to substantiate those contentions set forth in the plaintiff's Verified Bill of Particulars as to the alleged violations of the New York State Uniform Fire Prevention and Building Code. The defendant offers no submission related to the plaintiff's contentions regarding the alleged violations. As such, the defendant's application for an Order granting summary judgment in favor of the defendant dismissing plaintiff's complaint, on the basis that plaintiff has failed to establish a prima facie cause of negligence as and against said defendant, is denied.

SO ORDERED.

DATED:

1/3/2008

Ray S. Malin
.....
J.S.C.

ENTERED

JAN 09 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**