SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 48

MARIAN GILMORE,

Plaintiff,

-against-

PHYLLIS I. MALLALIEU and JOHN MALLALIEU THE TOWN OF HEMPSTEAD and MELPA CONSTRUCTION, INC.,

Defendants.

INDEX NO.:20696/05

MOTION DATE:11-19--07
SUBMIT DATE:12-17-07
SEQ. NUMBER - 002

MOTION DATE: 12-17-07
SUBMIT DATE: 12-17-07
SEQ. NUMBER - 003

The following papers have been read on this motion:

Notice of Motion, dated 10-29-07..... 1
Affirmation in Opposition, dated 11-15-07.....2
Notice of Cross Motion, dated 11-7-07.....3
Affirmation in Opposition, dated 11-23-07.....4
Affirmation in Opposition, dated 12-7-07.....5
Reply Affirmation, dated 12-14-07.....6

Motion and cross motion by defendants, Melpa Construction, Inc. and The Town of Hempstead, respectively, each for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the plaintiff, Marian Gilmore, and all cross claims asserted against them, are granted. The complaint and all cross claims insofar as is asserted against these defendants are dismissed.

This is an action in negligence by plaintiff Marian Gilmore, a 71 year old woman, to recover for personal injuries allegedly sustained on May 30, 2005 at approximately 4:00 p.m., when she tripped and fell on the stairs on the porch of the home owned by defendant, Phyllis I. Mallalieu located at 871 Chestnut Street, Franklin Square, New York. Defendant, John Mallalieu, is Phyllis's husband and he is deceased (*Phyllis Tr.*, p.8). As a result of the trip and fall, the plaintiff sustained a fractured wrist which necessitated several surgeries.

Prior to the accident, in 2004, the homeowner defendant, Phyllis Mallalieu, had her front porch and step area completely rebuilt. The renovated porch was made up of a landing and one step leading up to the landing from a ground level walkway. A railing was situated on one side of the porch (on the landing) and was located on the left side of the porch as one looks out at the premises from the street. It is undisputed that there was no handrail on the step leading from the landing to the front walkway on the day of the accident. It is also undisputed that the renovated front porch area consisted of two risers - one situated between the landing and the step; and the other situated between the step and the ground level walkway.

Defendant, Melpa Construction, Inc. ("Melpa"), was the contractor who performed the renovation under the supervision of the Town of Hempstead ("Town"). This oversight was part of a program under which home improvement funds were loaned by the Town to certain of its residents. A Town employee who had been present throughout the work testified that he had approved of the finished project.

Plaintiff claims that she was caused to trip and fall as a result of the non-uniformity of the risers on the steps (*Gilmore 50-H Tr.*, pp. 21-22); the lack of a handrail (*Id*; *Bill of Particulars*, ¶6); and the placement of the numerous flower pots on the porch of the

Mallalieu home (*Gilmore EBT Tr.*, pp. 33, 104).

Melpa and the Town move for summary judgment dismissing plaintiff's complaint as to each.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]. Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995].

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Ayotte v Gervasio*, 81 NY2d 1062 [1993]. If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers. *Id.*; *Alvarez v. Prospect Hosp., supra.*

However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve *Id.* Mere conclusions and unsubstantiated allegations or assertions are insufficient *(Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert. *Alvarez v Prospect Hospital*, supra; *Aghabi v. Sebro*, 256 AD2d 287 [2d Dept. 1998].

The moving defendants' submissions satisfy their initial burden on their motions. By presentation of deposition transcripts and other proof, each has demonstrated that under the facts of this case that it had no duty of care to the plaintiff upon which liability for this

accident might be fastened.

With regard to Melpa, it is well settled that a contractor can be held liable in tort to a person who is not a party to the contract for an alleged breach of contractual obligation only in very limited circumstances. *Church v. Callanan Indus.*, 99 NY2d 104 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]. As stated by the Court of Appeals in *Church,* a contractor may only be found to have a duty of care to noncontracting third-parties arising out of its contractual obligations in three limited circumstances: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk"; (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuous performance of a contractual obligation"; and (3) "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" *Church v. Callanan Indus., supra* at 111-112.

It is apparent that here plaintiff can recover against Melpa only under the first of these three possibilities, the second and third clearly having no applicability here. Melpa has made a *prima facie* showing that it did not create an "unreasonable risk of harm" or increased a previously existing risk to persons in plaintiff's position.

The absence of a handrail, standing alone, cannot be considered sufficient inasmuch as Melpa never was contractually required to install a handrail at the subject premises. Obviously, absent a contractual obligation to perform an act, there can be no breach thereof, and thus there is no basis for liability. *Id.* The testimony of the Town's cost analyst, Sylvester Giaccone, who had overseen and approved the work, confirms that Melpa was instructed by the Town that a handrail was not required by the Town at the subject premises

because the step up from the ground to the landing was only 11 inches in height *(Giaccone Tr.*, pp. 27-28). It also should be noted that the current Residential Code of New York State mandates a handrail only where there are "four or more risers." Residential Code of New York State Ch. 3 R311.5.6. It is undisputed that the porch upon which plaintiff fell had only a single step between the concrete walkway and the porch/landing leading to the front door of the house, *i.e.,* there were two risers.

As to the steps themselves, there is nothing in the record presented tending to demonstrate that Melpa's work created an "unreasonable risk" to persons in plaintiff's position, notwithstanding the fact that a difference in riser heights was cited by the plaintiff as a cause of her fall; the mere fact that the condition may have played a role in the accident is not enough. *Church,* at 112. In that regard, the record does not indicate the landing/porch originally in place was safe and in compliance with applicable building standards, and that this difference in riser height thus rendered unsafe what had been previously safe. *Id.* To the extent that the plaintiff testified, in effect, that she had visited the homeowner defendant prior to the reconstruction of the porch, without incident, this does not mean that the previous incarnation of the porch was safe simply because she had never fallen before. Indeed, Giannone testified, as indicated above, that the drop from the porch to the concrete walkway was approximately eleven inches, where the maximum standard acceptable under the current Code is 8 1/4". Residential Code of New York State Ch 3 R311.5.3.1.

In response, plaintiff submits the affidavit of an expert, William Marletta, who states in pertinent part that under standards in effect at the time a handrail was required where two risers were present and that the risers were not uniform, with a 3/8" difference between the

two. However, this does not overcome the initial showing that Melpa's contract did not call for it to install a handrail, and that its work was deemed acceptable by a Town employee overseeing its work.

Moreover, as noted above current standards do not mandate a handrail unless there are four stairs. Therefore, even if one were to assume that a more heightened standard was in effect and covered this project (and the expert's affidavit does not provide proof that it did), this older standard, standing alone, cannot be seen as creating an issue of fact with regard to Melpa's creating an "unreasonable risk"for failing to install a handrail where there were only two steps. The same is true with regard to the difference in riser heights, as, again, the work was found acceptable to the Town's employee, and current standards permit the 3/8" difference noted by the expert. Residential Code of New York State R311.5.3.1. Accordingly, the Court finds that the plaintiff has been unable to demonstrate that an issue of fact exists with regard to the existence of liability on Melpa's part. *Church v. Callanan Indus.*, *supra.*

Turning to the cross motion, the Town has made out a *prima facie* case that it is entitled to judgment as a matter of law by way of the submissions made by Melpa, which the Town adopts. These submissions indicate that the Town's supervisory role was that of a governmental agency acting under a program intended to benefit its homeowner residents. Thus, even assuming that it improperly supervised the contractor and violated applicable codes or ordinances, it cannot be held liable. It is settled law that a municipality's failure in improperly enforcing its codes, or in issuing an approval of construction work that should not have been approved, is insufficient as a basis for liability "absent a special relationship

creating a municipal duty to exercise care for the benefit of a particular class of individuals..." *Sanchez v Village of Liberty,* 42 NY2d 876 [1977]; *see also, Lubitz v Village of Scarsdale,* 31 AD3d 618 [2d Dept. 2006]; *Perlman v Simons,* 276 AD2d 762 [2d Dept. 2000]; *Metcalf v Town of Islip,* 225 AD2d 744 [2d Dept. 1996].

Here, the papers submitted demonstrate that the program under which the porch was reconstructed was not intended for the benefit of persons in plaintiff's position, and that any ordinance alleged to have been violated by the Town was intended for the benefit of the public at large. In response, the plaintiff has presented no evidence indicating that she had a "special relationship" with the Town such that a duty arose as to her. Accordingly, the Town is entitled to summary judgment.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 11, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Manoussos & Associates, P.C.
Attorney for Plaintiff
400 garden City Plaza
Garden City, NY 11530

Farber Brocks & Zane LLP
By: Christopher P. Cartier
Attorney for Defendant
Melpa Construction, Inc.
1565 Franklin Avenue, Ste. 300
Mineola, NY 11501

Law Office of Breen & Clancy
Attorney for Defendant
Phyllis I. Mallalieu and
John Mallalieu
50 Route 111, Ste. 200
Smithtown, NY 11787

Joseph J. Ra, Town Attorney
Town of Hempstead
Hempstead Town Hall
One Washington Street
Hempstead, NY 11550