

**DeGeorge v County of Nassau**

2008 NY Slip Op 30530(U)

January 21, 2008

Supreme Court, Nassau County

Docket Number: 3874-05/

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**MARY K. DEGEORGE**

**TRIAL/IAS, PART 9  
NASSAU COUNTY**

**Plaintiff,**

**MOTION DATE: 10/21/07**

**-against-**

**MOTION SEQ. NO.: 001  
INDEX NO.: 13874/05**

**COUNTY OF NASSAU, INCORPORATED VILLAGE  
OF GARDEN CITY, TOWN OF HEMPSTEAD,  
GARDEN CITY HOTEL AND CENTO PROPERTIES  
COMPANY**

**Defendants.**

**The following papers having been read on the motion (numbered 1-5):**

**Notice of Motion.....1**  
**Affirmation in Opposition.....2**  
**Reply Affirmation.....3**  
**Sur-Reply Affirmation.....4**  
**Sur Sur-Reply Affirmation.....5**

Motion pursuant to CPLR 3212 by defendant Garden City Hotel and Cento Properties Company for summary judgment dismissing the complaint is **granted**.

Plaintiff commenced this action to recover damages for injuries she sustained on June 11, 2004 when she tripped and fell forward as she was ascending steps leading from the front driveway of the Garden City Hotel to the main street level/public sidewalk on Seventh Street. Movants are the sole defendants remaining in the case.

Plaintiff testified at her deposition that she "caught" the toe of her shoe on the edge of the top step of the stairway and fell forward onto the pavement of the Seventh Street sidewalk. When asked if she noticed anything out of the ordinary after her fall she replied:

"Nothing that would have obstructed or caused a fall, no."

At no point in her examination before trial or 50-h Hearing testimony does plaintiff allege that she was caused to fall because of an uneven or unlevel condition on the stairway or the presence of a hidden trap. At her deposition, the comptroller of the defendant Hotel testified that she received no complaints regarding the subject stairway prior to the June 11, 2004 incident nor any notifications from any municipal or governmental entity regarding same.

It is well settled that the owner or possessor of land or a building has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. *Bhandari v Isis*, 45 AD3d 619 [2<sup>nd</sup> Dept. 2007]. To establish a *prima facie* case of liability in a premises liability case, a plaintiff must prove that the defendant had actual or constructive notice of the dangerous condition and sufficient time, within the exercise of reasonable care, to correct it or warn of its existence. *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Lee v Bethel First Pentecostal Church of America, Inc.*, 304 AD2d 798, 799 [2<sup>nd</sup> Dept. 2003]. There is no particular rule that a defect must be of a certain nature or configuration in order to be actionable. A trivial defect, however, which is neither a trap nor nuisance, but of a kind over which one might stumble, stub her toe or trip is not actionable. *Outlaw v Citibank, N.A.*, 35 AD3d 564 [2<sup>nd</sup> Dept. 2006]. Evidence of a building code violation serves as some evidence of negligence. *Hill v Carter*, 258 AD2d 699, 701 [2<sup>nd</sup> Dept. 1999].

In opposition to defendants' motion for summary judgment dismissing the complaint, plaintiff has offered the affidavit of a licensed professional engineer wherein the expert opines that:

“the accident and injuries sustained by plaintiff on June 11, 2004 was [sic] caused by the negligence of the owner \* \* \* for providing and maintaining an exterior stairway that was dangerous and hazardous for the following reasons: the absence of any handrails or guardrails on the subject stairway and the improper step geometry.”

While plaintiff argues that the subject stairway falls within the definition of “Exit” set forth in 9 NYCRR § 606.3(63) [New York State Building Construction Code] that the improper step geometry is violative of the requirements set forth in Table IV of § 765 thereof (Dimension Requirements for Exit Stairs, Handrails, Guardrails); and that the absence of handrails/guardrails is violative of §765.4(a)(11), defendants’ expert counters that the sections of the Building Code on which plaintiff relies are inapplicable to the subject location/feature.

Examination of the photographs and the description of the premises by the parties and their respective experts demonstrates that there is no basis to support plaintiff’s contention that the subject stairway falls within the definition of “exit:” as set forth in § 606.3(61), i.e.,

“[t]hat portion of the way of departure from the interior of a building or structure to the exterior at street, or grade level accessible to a street, consisting of:

- (i) corridors, stairways and lobbies enclosed in construction having a fire-resistance rating, including the door opening thereto from a habitable, assembly or occupied space;
- (ii) an interior stairway;
- (iii) a horizontal exit;
- (iv) a door to the exterior at grade; or
- (v) an exterior stairway or ramp adjoining the building.”

By this definition, the type of “Exit” regulated by § 765 is one from the hotel to its vestibule and service roads found at the base of a stairway, i.e., at grade level. Although plaintiff contends that § 606.3(63)(v) does not require that an exterior stairway must adjoin the building, this court does not agree. Plaintiff has offered no authority to support the proposition that the subsection must be read in the disjunctive (requiring that only the ramp be adjoining the building) and not in the conjunctive. Moreover, as defendants’ expert opines, since the Code defines a stairway in § 606.3(197) as:

“[o]ne or more flights of stairs and the necessary landings and platforms connected therewith to form a continuous passage from one floor to another”

the means of ascent, unconnected to the hotel, to the street from the grade level of the hotel service road cannot be considered either an interior or exterior stairway within the purview of § 765.4 of the Code.

Notwithstanding plaintiff’s assertion to the contrary, the applicability of a Statute, Rule or Ordinance to a particular set of facts is a question of law for the court. *Robbins v County of Broome*, 87 NY2d 831, 834 [1995]; *Mansfield v Dolcemascolo*, 34 AD3d 763, 764 [2<sup>nd</sup> Dept. 2006]; *Gaston v New York City Housing Authority*, 258 AD2d 220, 224 [1<sup>st</sup> Dept. 1999]. In this case the configuration and location of the subject stairway is undisputed.

Where, as here, a defendant moves for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute, thus entitled it to judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. Once the defendant has met its burden, plaintiff must present facts, in admissible form, sufficient to demonstrate the existence of triable issues of fact requiring trial. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Defendants have sustained this burden by submitting competent evidence, including, *inter alia*, plaintiff’s own testimony and their engineer’s report, including photographs of the accident site. To defeat this motion, plaintiff is required to establish the existence of facts and conditions from which the negligence of defendants and the causation of the accident by that negligence, might reasonably be inferred. *DeRosa v City of New York*, 30 AD3d 323, 324 [1<sup>st</sup> Dept. 2006].

Even viewing the evidence in the light most favorable to plaintiff (*Poulakis v Town of Orangetown*, 29 AD3d 882, 883 [2<sup>nd</sup> Dept. 2006]), the complaint must be dismissed. Liability may not be imposed upon defendants on the theory that the stairway in question was affected by a violation of New York State Building Construction Code and was, therefore, defective and hazardous, since the Code sections relied upon by plaintiff are not applicable to the stairway herein. Plaintiff has failed to demonstrate a factual issue as to whether her fall was caused by a

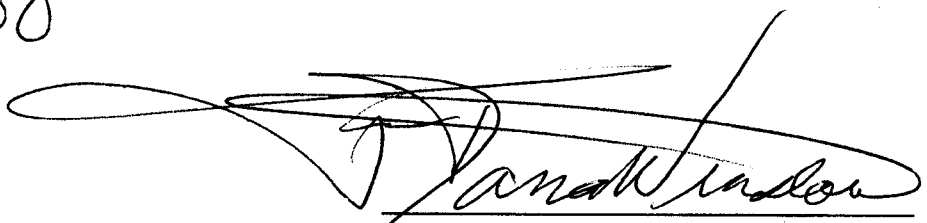
defective/hazardous condition, of which defendants had either actual or constructive notice, or whether a significant structural or design defect, contrary to a specific statutory safety provision, existed *vis a vis* construction of the subject stairway.

Accordingly, defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is **granted**.

This Constitutes the Order of the Court.

Dated: 1/21/08

ENTER:

  
J.S.C

**ENTERED**  
FEB 20 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE