

**Dinatale v Mahoney**

2008 NY Slip Op 33424(U)

December 10, 2008

Supreme Court, Richmond County

Docket Number: 103522/2006

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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FRANK DINATALE,

DCM PART 5

Plaintiff(s),

Present:

-against-

HON. JUDITH N. MCMAHON

DECISION AND ORDER

EDWARD MAHONEY, TARA ANN MAHONEY,  
CONSTRUCTION BY DONALD ROWE, JR., INC.,  
ANTHONY J. GUIDA AND POWERHOUSE ELECTRICAL  
CONTRACTORS, INC.,

Index No. 103522/2006  
Motion Nos. 004, 005, 006

Defendant(s).

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The following papers numbered 1 to 13 were used on this motion this 18th day of November, 2008:

|   |    |
|---|----|
| Notice of Motion (004) [Defendant Anthony Guida](Affirmation in Support) .....    | 1  |
| Notice of Motion (005) [Defendants Powerhouse Elec.](Affirmation in Support)..... | 2  |
| Notice of Motion (006) [Defendant Mahoney’s](Affirmation in Support) .....        | 3  |
| Affirmation in Opposition to Guida [Plaintiff] .....                              | 4  |
| Affirmation in Opposition to Powerhouse [Plaintiff] .....                         | 5  |
| Affirmation in Opposition to Defendant Mahoneys [Plaintiff] .....                 | 6  |
| Affirmation in Opposition to Guida and Powerhouse [Mahoney] .....                 | 7  |
| Affirmation in Opposition/Support [Powerhouse] .....                              | 8  |
| Affirmation in Opposition to Mahoneys/Support [Powerhouse] .....                  | 9  |
| Reply Affirmation Defendant Guida .....   | 10 |
| Reply Affirmation Defendant Powerhouse. ....                                      | 11 |
| Reply Affirmation Defendant Mahoneys to Plaintiff’s Opposition.....               | 12 |
| Reply Affirmation Defendant .....   | 13 |

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On February 16, 2006, the plaintiff allegedly sustained injuries when he fell through an opening in the attic of the residence of defendant’s Edward and Tara Ann Mahoney [hereinafter “Mahoneys”] located at 323 Retford Avenue, Staten Island, New York. The defendant Mahoneys were having renovations performed on their residence and plaintiff was working as an air conditioning technician when the accident occurred. The plaintiff fell through the attic onto an old roof that had been renovated by defendants Construction by

Donald Rowe Jr., Inc.<sup>1</sup>, and Anthony J. Guida [hereinafter “Guida”] in 2005. The plaintiff commenced this action on or about November 7, 2006, against defendant Guida as the contractor hired to do the second story renovation in 2005, and defendant Powerhouse Electrical Contractors, Inc., [hereinafter “Powerhouse”] as the company hired to perform the electrical during the 2005 renovations. Plaintiff also commenced the action against Edward and Tara Mahoney as the homeowners. Presently, discovery has been completed and defendants Guida, Powerhouse and the Mahoney’s are all separately moving for summary judgment on the ground that they did not create, nor possess actual or constructive notice of the alleged condition that caused plaintiff’s injuries and/or the condition was sufficiently open and obvious as to warrant summary judgment.

It is well settled that a “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks

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<sup>1</sup>Defendant Construction by Donald Rowe Jr., Inc., had a default judgment granted against him on February 26, 2008. At the time of trial an inquest will be held.

omitted)).

**I. Defendant Anthony Guida’s Motion for Summary Judgment (Motion 004)**

“The imposition of liability in a slip-and-fall case requires evidence that the defendants created the dangerous condition which caused the accident, or that they had actual or constructive notice of that condition and failed to remedy it within a reasonable time” (Perlongo v. Park City 3 & 4 Apts., Inc., 31 AD3d 409, 410 [2d Dept., 2006]). Constructive notice requires that the condition is “visible and apparent and existed for a sufficient length of time before the accident such that it could have been discovered and corrected” (*id.*). However, landowners owe no duty to warn of an open and obvious condition (Cupo v. Karfunkel, 1 AD3d 48, 51-52 [2d Dept., 2003]).

Here, the defendant Guida has submitted evidence in admissible form that it did not create nor possess actual or constructive notice of the opening, nor did it have sufficient time to remedy the condition (*see* Maguire v. Beyer, 31 AD3d 621, 622-623 [2d Dept 2006]). Specifically, the defendant Guida established that they did not do any construction in the area of the accident and that the “cliff” that the plaintiff fell from was open and obvious. In opposition, the plaintiff contends that all the construction related to the new second floor and reconstructing of the attic stairs and plywood layout was performed by defendant Guida. Further, proof that the “cliff” which the plaintiff fell through in this case was open and obvious is relevant to the issue of plaintiff’s comparative negligence (Cupo v. Karfunkel, 1 AD3d 48, 51-52 [2d Dept., 2003])[finding that “proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff’s comparative

negligence”]; Mooney v. Petro Inc., 51 AD3d 746, 747 [2d Dept., 2008]; Barbario v. Agramunt, 45 AD3d 514, 515 [2d Dept., 2007]). Therefore, in this case, the plaintiff has raised triable issues of fact regarding whether the defendant Guida actually created the alleged condition and as such the open and obviousness of the defect will be weighed against the plaintiff’s comparative negligence. Summary judgment is therefore inappropriate (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

## II. Powerhouse’s Motion for Summary Judgment (Motion 005)

Plaintiff alleges that defendant Powerhouse failed to properly install adequate lighting in the area of the accident during the construction Powerhouse performed in the subject premises in December 2005. Here, the defendant Powerhouse has established its entitlement to summary judgment as a matter of law by submitting evidence that they did not create or have notice of the alleged condition (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Further, Powerhouse submitted additional evidence that it completed all electrical work requested in the premises in accordance with the New York City Electrical Code and such work was approved by the city inspector.

In opposition, the plaintiff submitted the expert affidavit of Robert L. Schwartzberg, P.E., who opined that the electrical work performed in attic of the subject premises was “insufficient and resulted in an unsafe lighting condition” which was a contributing factor to plaintiff’s accident. As a result, the plaintiff has successfully raised triable issues of fact

regarding whether the electrical/lighting work performed by the defendant Powerhouse was sufficient (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Therefore, summary judgment is inappropriate.

### III. Edward and Tara Mahoney's Motion for Summary Judgment (Motion 006)

As previously stated, “[t]he imposition of liability in a slip-and-fall case requires evidence that the defendants created the dangerous condition which caused the accident, or that they had actual or constructive notice of that condition and failed to remedy it within a reasonable time” (Perlongo v. Park City 3 & 4 Apts., Inc., 31 AD3d 409, 410 [2d Dept., 2006]). Constructive notice requires that the condition is “visible and apparent and existed for a sufficient length of time before the accident such that it could have been discovered and corrected” (id.). However, landowners owe no duty to warn of an open and obvious condition (Cupo v. Karfunkel, 1 AD3d 48, 51-52 [2d Dept., 2003]).

Here, defendant Mahoneys have established their entitlement to summary judgment by establishing evidence that they had no involvement/supervision with the construction being performed in their home (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Further, the defendant Mahoney's contend that the condition was open and obvious. In opposition, the plaintiff has successfully established that questions of fact exist regarding the nondelegable duty of the landowner Mahoney's to maintain the premises in a reasonably safe condition. Specifically, whether the Mahoney's were negligent in not inspecting the work performed in their attic and remedying the alleged “open and obvious” condition of the opening in the attic (Mooney v. Petro Inc., 51

AD3d 746, 747 [2d Dept., 2008]; Barbario v. Agramunt, 45 AD3d 514, 515 [2d Dept., 2007]).

As a result, summary judgment is inappropriate (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, it is

**ORDERED** that the defendant Anthony J. Guida's motion for summary judgment is hereby denied in its entirety and it is further,

**ORDERED** that the defendant Powerhouse Electrical Contractors, Inc.'s, motion for summary judgment is hereby denied in its entirety, and it is further

**ORDERED** that the defendant Edward and Tara Ann Mahoney's motion for summary judgment is hereby denied in its entirety, and it is further

**ORDERED** that the Clerk enter judgment accordingly.

**THIS IS THE DECISION AND ORDER OF THE COURT.**

**Dated: December 10, 2008**

**E N T E R,**

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**Hon. Judith N. McMahon**  
**Justice of the Supreme Court**