

Montesinos v Daly

2009 NY Slip Op 30782(U)

April 2, 2009

Supreme Court, New York County

Docket Number: 105868/2007

Judge: Shirley Werner Kornreich

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SCANNED ON 4/8/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice
Index Number : 105868/2007
MONTESINOS, LUZ MARINA
vs
DALY, WILLIAM J.
Sequence Number : 003
DISMISS

INDEX NO. 105868/07
MOTION DATE 12/18/08
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers are filed in support of a motion to/for SS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1, 2
FILED
APR 08 2009

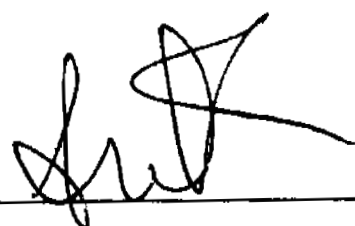
Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 4/2/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
LUZ MARINA MONTESINOS and ARTURO
MONTESINOS,

Index No. 105868/2007

Plaintiffs,

- against -

DECISION and ORDER

WILLIAM J. DALY, TRUSTEE OF ST.
PATRICK'S CATHEDRAL IN THE CITY OF
NEW YORK, TRUSTEES OF ST. PATRICK'S
CATHEDRAL IN THE CITY OF NEW YORK,
ST. PATRICK'S CATHEDRAL, and THE
ARCHDIOCESE OF NEW YORK,

Defendants.
-----X

FILED

APR 08 2009

COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

In this negligence action, plaintiff Luz Marina Montesinos is an elderly parishioner who fell and injured herself walking up the exterior steps of St. Patrick's Cathedral in Manhattan on February 11, 2007. Defendants St. Patrick's Cathedral, its Trustees and the Archdiocese of New York (collectively "St. Patrick's"), deny the allegations of negligence and now move for summary judgment and dismissal of the Complaint. Their motion is supported by the pleadings, an affirmation of counsel, EBT transcript excerpts, other documentary and photographic exhibits, and a memo of law. Plaintiff opposes, supported by an affirmation of counsel, affidavits of plaintiff and engineer Harlan W. Fair, EBT transcript excerpts, other documentary and photographic exhibits, and a memo of law.

I. Factual Summary

Plaintiff was invited by the Archdiocese to celebrate World Marriage Day 2007 by attending a special mass at St. Patrick's on February 11, 2007. She was 91 years old at the time.

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The mass was organized to celebrate marriages lasting over 65 years. It is undisputed that at the appointed time and place, plaintiff, her husband and daughter were dropped off and began to walk up the exterior steps of St. Patrick's leading to the southwest entrance on East 50th Street. Plaintiff alleges defendants' negligence caused her to fall and injure herself. She claims defendants were negligent in constructing and maintaining steps that were uneven in height, in failing to install handrails, in failing to properly advise her where to enter St. Patrick's and in not having a "greeting committee" to meet her. Plaintiff also claims liability premised on violations of the New York City Building Code of 1968 and 1938, and the Life Safety Code, also known as NFPA 101. She allegedly broke both wrists, sustained a trauma to the head and numerous other injuries.¹

The un-rebutted evidence submitted by defendants establishes the following facts. St. Patrick's, which was built between 1858 and 1879, is a designated New York City historic landmark. The bottom riser near the location of plaintiff's fall is shorter than the second riser. The bottom riser adjoins a sloping public way with that riser starting at grade, approximately 60 feet from the fall site, and increasing in height as it gets closer to the stone wall on 50th Street. This architectural feature appears in a number of public buildings in New York. Exhs. F, G, Drotzer Affirm. There is no handrail right where plaintiff fell, but there are seven sets of handrails outside of St. Patrick's, with one being 60 feet West of the fall site, on the corner of 50th Street and 5th Avenue. There is also a handicap ramp on 51st Street. Exhs. D, F, J, K.

Plaintiff's daughter Luz Marina Montesinos-Lalli (Lalli) testified that she learned about World Marriage Day and wrote a letter to the contact person Noreen McCormick because her

¹The extent of plaintiff's injuries are not at issue in this motion.

parents were going to be married for 72 years. Lalli's parents were invited to the special mass at St. Patrick's and the reception following it. Lalli discussed the events with McCormick or a Ms. Rizzi. She also discussed parking, her parents' good health and how they lived alone. She did not discuss where her parents should be dropped off or where they should enter St. Patrick's, and she did not ask about special assistance or handicapped access because her parents are "not handicapped" and could walk "by themselves." Exh. I, pg. 30.

Nancy Rizzi, the Marriage Enrichment Coordinator for the Archdiocese, testified that she sent a letter to all participants of World Marriage Day with certain information, including that, "[y]ou and your family members can enter through the handicap entrance on 51st. Between Madison Ave. and Fifth Avenue, or the main entrance on Fifth Avenue between 50th and 51st streets." Exh. M. Rizzi testified that she sent one of these letters to all the participants, and that the person designated as the contact for the participants was told they could use the handicap entrance if needed. The average age of the participants is between 95 and 100 years old. Exhs. L, M1 (Rizzi Affid.).

On the day of the event, plaintiff drove with her family to St. Patrick's. The car stopped on 50th Street in front of the lateral entrance of St. Patrick's. A sign on a nearby stone wall shows the universal sign for handicapped access and reads "ramp on 51st Street." Exh. D. Mr. Montesinos started up the stairs without his wife because "she didn't want to be helped. She wanted to do it by herself." Exh. H, pg. 133. He leaned on the wall most of the way up. Lalli walked up behind her father with her mother behind. There was no liquid, debris or any other obstruction on the steps. Plaintiff did not ask for help or seek out a handrail. Plaintiff fell when she went to the second step. Nobody saw her fall and plaintiff could not say why she fell, only

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recalling there was “something different on the floor” and “something on ...[her] shoe,” and then she fell. Exh. H, pg. 51. She was wearing sunglasses and did not recall seeing a wall.

II. *Discussion and Rulings*

Principals of Summary Judgment

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law based on undisputed material facts, in directing judgment in its favor. CPLR 3212(b); *see Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285 (1st Dept. 2008) (summary judgment denied for plaintiff on Labor Law § 240(1) claim, and granted for defendant on negligence claim). A movant must support its cause with evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. *Id.* at 560; CPLR. 3212(b). *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967-968 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit).

“We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord v Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282; *Fried v Bower & Gardner*, 46 NY2d 765, 767; *Platzman v American*

Totalisator Co., 45 NY2d 910, 912; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290)." *Zuckerman v. New York*, 49 N.Y.2d 557, 562 (1980). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 515 (2d Dept. 1989).

Negligent Construction/Maintenance

A landowner "must act as a reasonable [person] in maintaining his 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 N.Y.2d 233, 241 (1976). See *Peralta v. Henriquez*, 100 N.Y.2d 139, 144 (2003); *Jang Hee Lee v. Sung Whun Oh*, 3 A.D.3d 473 (2d Dept. 2004). The scope of the duty varies with the foreseeability of the potential harm. See *Tagle v Jakob*, 97 N.Y.2d 165, 168 (2001).

There is no factual dispute as to the height of the step risers where plaintiff fell, or that there was no handrail located exactly where plaintiff chose to ascend the steps. The first step where plaintiff was located is four inches in height and the second and remaining steps are 6 ½ inches in height. Defendants argue that the lack of a handrail and the step height differential were open and obvious and did not pose an undue risk of harm, which would entitle them to summary judgment as a matter of New York law. "[A] court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion." *Tagle v. Jakob*, 97 N.Y.2d 165, 169 (2001). Sufficient undisputed proof of an open and obvious hazard relieves landowners of the duty to warn [*Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 (1st

Dept. 2004)], since there is no duty to warn of conditions that are easily observable with the normal use of one's senses. *De Rossi v. Golub Corp.*, 209 A.D.2d 911, 912 (3d Dept.), *appeal denied by* 85 N.Y.2d 804 (1995). The court finds that defendants have met their burden, to show with undisputed evidence, that the conditions alleged by plaintiff were open and obvious. *See Vinci v. Vasaturo*, 8 A.3d 262, 263 (2d Dept. 2004) (court found open and obvious height differential in stair risers negated duty to warn).

It is undisputed that the height differential here is due to the steps' location adjacent to a sloping public way, an architectural feature existing in other public buildings in New York City, as evidenced in photographs submitted by defendant. Exh. G. The bottom riser starts at grade, then increases in height as it gets nearer to the wall on 50th Street. Exh. F. It is obvious, as the photographs show, that the bottom step is much lower than the ones above it, and that it changes in height as the slope of the sidewalk changes. There are no allegations of poor lighting, disrepair or the presence of liquid or debris.

The court's inquiry does not, however, end with a finding that the condition was open and obvious. Although the finding relieves a property owner of the duty to warn, "it does not relieve a property owner of the obligation to maintain the property in a reasonably safe condition." *Cupo v. Karfunkel*, 1 A.D.3d 48, 52 (2d Dept. 2003). Where it can reasonably be argued that a landowner was under a duty to remedy a dangerous condition existing on the property, the open and obvious nature of the condition becomes relevant to the issue of comparative negligence. *Id.* But a court is not prevented from granting summary judgment to a defendant where the condition at issue is not unduly hazardous. *Schulman v. Old Navy/Gap, Inc.*, 45 A.D.3d 475, 476 (1st Dept. 2007) (summary judgment granted where clothing bracket not inherently dangerous).

The court cannot say as a matter of law that a height differential of two and one-half inches between steps is not inherently dangerous. *See, e.g., Trincere v County of Suffolk*, 90 N.Y.2d 976, 977 (1997) (finding "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable"). *See also Durante v. Kenmore-Tonawanda Union Free Sch. Dist.*, 2 A.D.3d 1441 (4th Dept. 2003) (finding height differential of 2 1/4 inches between steps to be jury issue). This does not, however, preclude granting summary judgment to defendants under the circumstances of this case.

The court must determine whether the circumstances support finding defendants in breach of a duty to plaintiff. In doing so, the court must consider a variety of factors:

Judicial recognition of the existence of a duty of care is dependent on principles of sound public policy, and involves a consideration of numerous relevant factors. The courts resolve questions of legal duty by resort to common concepts of morality and logic, and consideration of the social consequences of imposing such duty. Thus, the issue involves moral considerations arising from the view of society toward the relationship of the parties, the degree to which the court should be involved in the regulation of that relationship, and the social utility of the activity out of which the alleged injury arises. An essential question is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.

79 NY Jur Negligence § 17. First, St. Patrick's Cathedral is a landmark, a monumental structure originally built in the 19th Century. St. Patrick's was approved as a landmark building in 1966 and any repair or reconstruction work requires approval from the New York City Landmark Preservation Commission (LPC).² Exhs. N-Q. On the 50th Street side there is a wall where the

² The parties discuss at length the LPC's 1988 approval of the resetting and recaulking of the Fifth Avenue steps and the addition of two new bronze handrails. Exhs. O-Q. There is no evidence of work being approved for the steps on the 50th Street side of St. Patrick's, so evidence of this work is unrelated to the issues now before the court. Therefore, the court does not need to determine the extent to which the work had to comply with the Code and whether it so complied.

steps end on the right facing St. Patrick's. There is also a handrail farther down the block around 60 feet from the wall. Plaintiff's husband testified at his EBT that he walked up ahead of his wife and leaned on the wall. On that same wall defendants have affixed a sign indicating the presence and availability of a handicap ramp. They have also shown that plaintiff was notified of the various entrances and the location of the handicap entrance. The court finds that defendants acted reasonably under these circumstances and did not breach a duty to plaintiff.

Even assuming that defendants breached a duty to plaintiff, which the court does not find occurred here, defendants have cast serious doubt on whether such a breach proximately caused plaintiff's injuries. Proximate cause cannot, however, be based on speculation. *Oettinger v. Amerada Hess Corp.* 15 A.D.3d 638, 639 (2d Dept., 2005). As is the case here, the *Oettinger* court held that "[s]ince it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation". *Id.*; *See Jefferson v. Temco Servs. Indus.*, 272 A.D.2d 196 (1st Dept. 2000) (plaintiff offered no nonspeculative support for theory that he would have recovered footing if handrail had projected an additional quarter inch from wall).

Plaintiff did not ask her husband or her daughter to help her up the steps, both of whom characterized plaintiff as stubbornly self-sufficient and physically capable. Although plaintiff testified that her "shoe and foot hit the second step going up and there was no handrail to hold on to," (Exh. H, pg. 51), there is no evidence that a second handrail's presence on the 50th Street side of St. Patrick's would have prevented the accident. Indeed, a handrail was present, but plaintiff did not ascend the steps near it. A handrail, thus, would have had to be present right near

where plaintiff chose to climb the steps, and even then the evidence is insufficient to show that plaintiff would have used it or have been able to grab it when she fell. See *Hyman v. Queens County Bancorp, Inc.*, 307 A.D.2d 984, 987 (2d Dept.), 3 N.Y.3d 743 (2004). The court in *Hyman*, granting summary judgment, stated, “[u]nder these circumstances, it would be sheer speculation for a jury to find that the presence of a second handrail would have prevented the injured plaintiff from falling.” *Id.* Here, plaintiff was also wearing dark glasses, which could have obscured her vision, and she was extremely elderly. The accident was unfortunate and it appears that plaintiff was seriously injured, but defendants have shown they exercised reasonable care as a matter of law.

Code Violations

Plaintiff has cited to a plethora of Code sections that she claims defendants violated. Defendants have established that none of the codes generally, or code sections specifically, are controlling. St. Patrick’s Cathedral was built well before the New York City Building Code came into effect, and therefore is not subject to its provisions under the grandfathering clause of Administrative Code § 27-111. *Isaacs v. West 34th Apts. Corp.*, 36 A.D.3d 414 (1st Dept.), *appeal denied* 8 N.Y.3d 810 (2007) (court found Building Code not apply where building constructed prior to effective date); *Jones v. Presbyterian Hosp.*, 3 A.D.3d 225 (1st Dept. 2004) (court found auditorium built in 1961 not subject to building code). Nor do any of the exceptions to § 27-111 apply because, as is undisputed, “[i]n no 12-month period did the building ever undergo alterations that cost 30% or more of the building’s value.” *Isaacs v. West 34th Apts. Corp.*, *supra*, 36 A.D.3d at 416.

Defendants have also shown that the Life Safety Code (LSC), cited by plaintiff, does not

apply. Also known as NFPA 101, the LSC is an American consensus standard and not a legal code. Originally enacted in 1927 (after St. Patrick's was built), and revised repeatedly since, the LSC is available for adoption. There is no evidence that New York City has adopted the LSC in the industry at issue here—the construction and maintenance of churches. Exh. B, Defendants' Memo.

This case is similar in this respect to the case of *Sokol v. Kirsch*, 25 A.D.3d 523 (1st Dept. 2006). In *Sokol*, plaintiff fell down the stairs in a mansion on the Hudson constructed more than 100 years earlier and prior to the adoption of building codes. The court, in granting summary judgment to the defendant, found that "the affidavit of plaintiff's engineering expert was insufficient to defeat defendants' motion for summary judgment inasmuch as it failed to set forth a violation of any specific safety guidelines in effect at the time of the mansion's construction." *Id.* Similarly, plaintiff here would have to show that the construction of the steps in question violated the code provisions existing at the time of the original construction, which plaintiff has not done.

Instead, plaintiff submits an affidavit of an engineer opining that the height differential and lack of a railing constitute dangerous conditions that violate various provisions of the building code. For the following reasons, the affidavit is excluded. The engineer affiant devotes much of his affirmation to the interpretation and application of the Building Code and interpretive case law, which are questions of law for the court to determine. *Buchholz v. Trump, 767 Fifth Ave., LLC*, 4 A.D.3d 178 (1st Dept.), *aff'd* 5 N.Y.3d 1 (2005) (Administrative Code provision relied on by plaintiff not apply as matter of law). See *Franco v. Jay Cee of N.Y. Corp.*, 36 A.D.3d 445 (1st Dept.) *lv. denied* 2007 N.Y. App. Div. LEXIS 6472 (2007). Plaintiff's expert

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also misstates the record and includes general, non-specific conclusions. *See Oestreich v. Present, et al.*, 50 A.D.3d 522 (1st Dept. 2008). For example, he opines to “a reasonable degree of engineering certainty” that defendants were negligent and failed to comport with “good and accepted safety engineering practices.” Fair. Affirm. Yet he bases that opinion mostly on his conclusion that the Building and Life Safety Codes apply, that certain New York cases were decided wrongly and that defendants violated the applicable codes. This is improper and the affidavit is excluded.³

Even if the Building and Life safety Codes were found to apply, and the expert’s affidavit were included, they would be insufficient to raise a triable issue of fact. Defendants have shown they were not in violation of the cited provisions. LSC §§ 7.2.2.3.6.3 states:

Where the bottom riser adjoins a sloping public way, walk, or driveway having an established grade and serving as a landing, the bottom riser shall be permitted to have a variation in height of not more than 1 in. In every 12 in. (25 mm in every 300 mm) of stairway width.

The bottom riser of the steps here adjoin a sloping public way, which is undisputed. The LSC does not control and would not have been violated even if it did control.

Plaintiff has also mis-cited Building Code provisions. These are exterior stairs, not interior stairs or even exterior stairs “used as exits in lieu of interior stairs.” Accordingly, the 1968 Building Code, Administrative Code §§ 27-375 and 376, and the 1938 Building Code §§ 6.4.1.4 and 6.4.1.12, do not apply. *See Savarese v. Sacred Hearts & St. Stephen’s Church*, 309

³Plaintiff’s expert also cites to numerous provisions from various Codes, including the New York State Code (1984), the BOCA Basic Building Code-1081, the Building Code of New York State-2000, the Life Safety Code, additional sections of the New York Building Code, and “Article 27-539 Open exterior spaces for NYC public assembly.” These Code sections do not apply to St. Patrick’s, which was constructed before their effective dates. (*See discussion ante.*)

A.D.2d 848 (2d Dept. 2003) (summary judgment granted where plaintiff fell down exterior steps of church). See also *Gaston v. New York City Housing Authority*, 258 A.D.2d 220 (1st Dept. 1999). Nor do Administrative Code §§ 27-127 (general requirement to maintain buildings in safe condition) and 128 (owner responsibility for safe maintenance of building) apply; the basis for plaintiff's claim is the riser height differential and lack of handrail, not a lack of or negligent repair and maintenance.

Sanctions

St. Patrick's has requested sanctions against Plaintiff's counsel pursuant to 22 NYCRR 130-1.1(c) for a plethora of actions. The court declines to sanction counsel, but cautions her that her conduct borders on the frivolous. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the case against them is dismissed; and it is further

ORDERED that the Clerk shall enter Judgment accordingly.

Date: April 2, 2009
New York, N. Y.

ENTER:



J.S.C.

FILED
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