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SHORT FORM ORDER

INDEX No. 08-3966
CAL. No. 09-01819-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-23-09
ADJ. DATE 3-24-10
Mot. Seq. # 001 - MG; CASEDISP

MARIA QUISPE, Plaintiff, - against - CARLOS A. RAMIREZ and MARGARITA RAMIREZ, Defendants.	CAVALIER & ASSOCIATES, PC Attorneys for Plaintiff 144-1 Remington Boulevard Ronkonkoma, New York 11779 ABAMONT & ASSOCIATES Attorneys for Defendants 200 Garden City Plaza, Suite 400, P.O. Box 9250 Garden City, New York 11530-9250

Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 20 ; Replying Affidavits and supporting papers 21 - 23 ; Other sur-reply 24 - 25 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Carlos Ramirez and Margarita Ramirez seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Maria Quispe as a result of a slip and fall at the defendants Carlos Ramirez's and Margarita Ramirez's premises, located at 137 Charter Oaks Avenue, Brentwood, New York, on December 23, 2007. Plaintiff alleges that she was invited to the subject premises for a party by her friend and co-worker Miguel Sulca. Plaintiff also alleges that as she exited the residence she slipped and fell on the front, exterior steps of the subject premises, causing her to sustain severe personal injuries. Plaintiff further alleges that at the time of the accident it was raining and dark outside of the home, and that the steps were slippery. By her bill of particulars, plaintiff asserts that "the dangerous condition was a defective stairway, including, but not limited to improper, un-level and non-uniform stairway treads; improper, un-level and non-uniform stairway rise; inadequate, insufficient, or defective railing."

Defendants now move for summary judgment on the basis that plaintiff has failed to establish

that defendants created or had notice of the alleged defective condition located on the subject premises. In particular, defendants assert that Margarita Ramirez did not own the subject premises and that Carlos Ramirez was an out-of-possession landowner on the day of plaintiff's accident. In support of the motion, defendants submit a copy of the pleadings, a copy of the deposition transcripts of plaintiff and Carlos Ramirez, a copy of the contract for sale of the subject premises, and a copy of the lease agreement between Mr. Ramirez and the buyer, Luis Sulca. Defendants also submit a photograph of the situs of the accident, and the affidavits of Miguel Sulca and Patrick Ragusa, a Spanish Interpreter. Plaintiff opposes the instant motion on the ground that defendants had notice of the alleged defective condition at the subject premises, because Carlos Ramirez created the condition when he refurbished the stairway in 1997. Plaintiff also asserts that defendants violated Section 1009.11 of the New York State Building Code, which requires, in pertinent part, that stairways shall have handrails on each side, by installing only one handrail for the subject stairway. In opposition to the motion, plaintiff submits a photograph of the site of the accident

Plaintiff testified at a deposition before trial that she had been invited to a party at the residence by her co-worker Miguel Sulca, and that it was her first visit to the home. Plaintiff testified that she and Mr. Sulca arrived at the premises between 4:00 p.m and 4:30 p.m. and remained at the home approximately three to four hours. Plaintiff testified that while visiting she drank some juice and beer, and that she left at approximately 8:00 p.m. She testified that as she was leaving the house she slipped and fell down the exterior stairs. She testified that after taking two steps down the front steps, she fell forward and hit the ground, causing her to lose consciousness and cut her neck and forehead. She testified that there were no witnesses to her accident, because Mr. Sulca and his niece were inside of the home when she fell, but that they came outside when they heard her scream. She testified that she does not know what caused her to fall, that the front steps were a "little slippery" from the rain, and that it was dark, because the light outside of the home was off. Plaintiff further testified that she did not notice if there was a light outside of the home or if it had come on prior to her fall.

Defendant Carlos Ramirez testified at a deposition before trial that he and his ex-wife, Margarita, purchased the premises in 1996, and that he remodeled the inside of the home, refurbished the steps, and installed a wooden handrail for the exterior stairway in 1997. Mr. Ramirez testified that he moved to Queens Village in November 2007 and that he sold the subject premises in 2008. Mr. Ramirez testified that the original closing date for the sale of the home was scheduled for November 28, 2007, but that the purchasers were having problems and the closing was rescheduled for February 2008. Mr. Ramirez testified that he and the purchasers of the home signed a lease agreement allowing the purchasers to move into the home around November 2007. He testified that he allowed them to move into the home before the closing date, because they were buying the home. Mr. Ramirez testified that there are lights located on the top of the front door and above the driveway, which were present prior to his departure in November 2007. Mr. Ramirez further testified that he had not experienced any problems or received any complaints regarding the exterior of the home, including the steps.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Tunison v D.J. Stapleton, Inc.***, 43 AD3d 910, 841 NYS2d 615 [2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2005]; ***Scott v***

Long Is. Power Auth., 294 AD2d 348, 741 NYS2d 708 [2002]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]). In considering the motion, the evidence must be construed in the light most favorable to the non-moving party (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Mosheyev v Pilevsky***, 283 AD2d 469, 725 NYS2d 206 [2001]). The motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of parties or witnesses is in question (***Szczerbiak v Pilat***, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Dykeman v Heht***, 52 AD3d 767, 861 NYS2d 732 [2008]; ***Cameron v City of Long Beach***, 297 AD2d 773, 748 NYS2d 26 [2002]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]; ***Celardo v Bell***, 222 AD2d 547, 635 NYS2d 85 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, *supra*; ***Blake v Guardino***, 35 AD2d 1022, 315 NYS2d 973 [1970]).

In general, a property owner is not liable in negligence unless he or she created the allegedly defective condition or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Voss v D&C Parking***, 299 AD2d 346, 749 NYS2d 76 [2002]; ***Whitt v St. John's Episcopal Hosp.***, 258 AD2d 648, 685 NYS2d 789 [1999]). Once possession of a property has been transferred to a tenant, an out-of-possession landlord will not be held liable for injuries that occur or defective conditions in existence on leased premises unless the landlord retains control over the premises, or is contractually bound to repair unsafe conditions (*see* ***Fernandez v Town of Babylon***, __ AD3d __, 897 NYS2d 510 [2010]; ***Lalicata v 39-15 Skillman Realty Co., LLC***, 63 AD3d 889, 882 NYS2d 185 [2009]; ***Dunitz v J.L.M. Consulting Corp.***, 22 AD3d 455, 805 NYS2d 653 [2005]). "Control may be evidenced by a lease provision making the landlord responsible for repairs (*see* ***Putnam v Stout***, 38 NY2d 607, 381 NYS2d 848 [1976]), or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises" (***Taylor v Lastres***, 45 AD3d 835, 835, 847 NYS2d 139 [2007]; ***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2006]; ***Winby v Kustas***, 7 AD3d 615, 775 NYS2d 906 [2004]). However, mere reservation of a right to enter the premises for the purpose of inspection and repair is insufficient to charge the owner with liability for a subsequently arising dangerous condition unless the defect violates a specific statutory provision and there is significant structural or design defects (*see* ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Couluris v Harbor Boat Realty, Inc.***, 31 AD3d 686, 820 NYS2d 282 [2006]; ***Eckers v Suede***, 294 AD2d 533, 743 NYS2d 129 [2002]; ***Stark v Port Auth. of N.Y. and N.J.***, 224 AD2d 681, 639 NYS2d 57 [1996]). In contrast, where an out-of-possession landlord has retained sufficient control over the leased premises, he or she will be held liable for injuries to another if he or

she affirmatively created or has actual or constructive notice of a dangerous condition for such a period of time that, in the exercise of reasonable care, he or she could have corrected it (*see* ***Thompson v Town of Brookhaven***, 34 AD3d 448, 825 NYS2d 83 [2006]; ***Abrams v Berelson***, 283 AD2d 597, 725 NYS2d 81 [2001]).

Based upon the foregoing, defendants have established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not maintain control over the premises at the time of plaintiff's accident, and that they were not contractually obligated to maintain or repair the allegedly defective condition at the subject premises (*see* ***Lalicata v 39-15 Skillman Realty Co., LLC***, *supra*; ***Taylor v Lastres***, *supra*; ***Gavallas v Health Ins. Plan of Greater N.Y.***, 35 AD3d 657, 829 NYS2d 131 [2006]). Defendants have also established that they did not violate any specific statutory provision that would be sufficient to impose liability (*see* ***Sanchez v Barnes & Noble, Inc.***, 59 AD3d 698, 874 NYS2d 528 [2009]). The terms of the rental agreement, which defendants submitted in support of their motion, demonstrate that Mr. Ramirez was an out-of-possession landlord, who had relinquished all control over the subject premises on the day of plaintiff's incident (*see* ***Fernandez v Town of Babylon***, *supra*; ***Eckers v Suede***, *supra*). The rental agreement, dated December 1, 2007, entered into by Mr. Ramirez and Mr. Luis Sulca states, in pertinent part, that "Mr. Ramirez, the owner, allows Mr. Sulca, the purchaser, to move into the [subject premises] on/about 12/1/07 before closing the contract...[and that] Mr. Sulca agree[s] before moving in or taking possession of the premises to receive the property...as is... The rental agreement must commence on or about the starting date of 12/7/07. Mr. Sulca agree[s] with the terms and conditions given by [the owner]. [Mr. Sulca] also agree[s] to take possession of the premises as is and without any exceptions or adjustments at closing..." Thus, under the terms of the rental agreement, Mr. Sulca is responsible for any necessary repairs at the subject premises. Further, the terms of the rental agreement do not give Mr. Ramirez the right to reenter the premises to make repairs.

Moreover, defendants have made an uncontroverted showing that Margarita Ramirez was not a recorded owner and maintained no control over the subject premises when plaintiff was allegedly injured (***Stark v Port Auth. of N.Y. and N.J.***, *supra*). Defendants have submitted a certified copy of the bargain and sale deed, dated December 12, 2005, transferring Margarita Ramirez's interest in said property to Carlos Ramirez. Additionally, Mr. Ramirez testified that Margarita Ramirez is his ex-wife, that she has not lived at the property since 2001, and that her name was removed from the deed approximately in 2001 or 2002. Given that Margarita Ramirez did not have any interest in the subject property, she cannot be held liable for any injuries sustained by plaintiff as a result of her accident or be said to have had notice of any alleged defective condition, since liability is an incident of occupation and control (*see* ***Hinds v Consolidated Rail Corp***, 263 AD2d 590, 693 NYS2d 284 [1999]; ***Davison v Wiggand***, 259 AD2d 799, 686 NYS2d 181 [1999]; ***Kinner v Corning, Inc.***, 190 AD2d 977, 594 NYS2d 75 [1993]).

In addition, defendants have shown that they neither created nor had actual or constructive notice of the allegedly defective condition on the premises (*see* ***Flores v Langsam Prop. Servs. Corp.***, 13 NY3d 811, 890 NYS2d 432 [2009]; ***Mokszki v Pratt***, 13 AD3d 709, 786 NYS2d 222 [2004]; ***Eckers v Suede***, *supra*; *cf.* ***Danielson v Jameco Operating Corp.***, 20 AD3d 446, 800 NYS2d 421 [2005]; ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, *supra*; ***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, *supra*), or that defendants owed her a duty of care. Mr. Ramirez testified that he had never received any complaints about the exterior of the home and that there were lights located above the front door and

driveway. In addition, Miguel Sulca stated in his affidavit that the front entrance and steps to the home were well lit from the exterior lighting, even though it was dark outside. Therefore, the burden shifted to plaintiff to come forth with evidence in admissible form to raise a material issue of fact to warrant a trial on the merits (*see* ***Zuckerman v City of New York***, *supra*).

In opposition to defendants' prima facie showing, plaintiff has failed to raise a triable issue of fact that defendants created or had actual or constructive notice of the allegedly defective condition on the premises (*see* ***Flores v Langsam Prop. Servs. Corp.***, *supra*; ***Branham v Loews Orpheum Cinemas, Inc.***, 8 NY3d 931, 834 NYS2d 503 [2007]; ***Mokszki v Pratt***, *supra*). Although plaintiff asserts that Mr. Ramirez had actual notice of the allegedly defective condition because he personally refurbished the staircase, plaintiff has failed to present any proof that Mr. Ramirez received any complaints about the allegedly defective stairway (*see* ***Kotsakos v Tsirigotis***, 28 AD3d 426, 813 NYS2d 169 [2006]; ***Pennie v McGillivary***, 15 AD3d 639, 702 NYS2d 692 [2005]; ***Gonzalez v Jenel Mgt. Corp.***, 11 AD3d 656, 784 NYS2d 135 [2004]; *see also* ***Pulley v McNeal***, 240 AD2d 913, 658 NYS2d 732 [1997]). Plaintiff also failed to tender evidence showing that she had difficulty negotiating the steps when she arrived at the home earlier that day, or that an "un-level and non-uniform stairway," or defective handrail contributed to her accident (*see* ***Wrubel v Rose Boutique II, Inc.***, 13 AD3d 264, 787 NYS2d 263 [2004]). Instead, plaintiff testified that she did not know what caused her to fall down the stairs and that she believes she fell because it was dark and raining. In addition, plaintiff has failed to submit evidence to demonstrate that the condition of the steps, which she fell down, constituted a significant structural defect that violated a statutory duty to repair (*see* ***Stark v Port Auth. of N.Y. and N.J.***, *supra*; ***Aprea v Carol Mgt. Corp.***, 190 AD2d 838, 594 NYS2d 53 [1993]; ***Lafleur v Power Test Realty Co. Ltd. Partnership***, 159 AD2d 691, 553 NYS2d 50 [1990]). Despite the fact that plaintiff alleges that the failure to install a second handrail violated the New York State Building Code, plaintiff failed to present any evidence to connect the absence of a second handrail to her fall down the stairs (*see* ***Pancella v County of Suffolk***, 16 AD3d 566, 790 NYS2d 876 [2005;] ***Hyman v Queens County Bancorp, Inc.***, 307 AD2d 984, 763 NYS2d [2003], *aff'd* 3 NY3d 743, 787 NYS2d 215 [2004]; ***Bitterman v Grotyohann.***, 295 AD2d 383, 743 NYS2d 167 [2002]; ***Conry v Avellino***, 287 AD2d 478, 731 NYS2d 205 [2001]; ***Jefferson v Temco Servs. Indus.***, 272 AD2d 196, 708 NYS2d 21 [2000]). Accordingly, defendants' motion for summary judgment is granted.

Dated: 28 June 2010

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION