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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Minamchcanx, V.

- v -

160/159 Realty

INDEX NO. 109262/05

MOTION DATE

MOTION SEQ. NO. 04

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
AUG 03 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/28/10

J.S.C.
EMILY JANE GOODMAN

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

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

----------X

VINCENTE MIRAMBEAUX,

Plaintiff,

-against-

Index No. 109262/05

160/159 REALTY, LLC., NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CORPORATION, ET MANAGEMENT & REALTY CORP., and CRESCENT STREET CONSTRUCTION CORP.,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

This is an action for personal injuries sustained by plaintiff VINCENTE MIRAMBEAUX ("plaintiff") when, on April 16, 2005, plaintiff allegedly tripped and fell due to the uneven condition of the floor in plaintiff's apartment, which is located at 560 West 160th Street, Apartment 54, New York, New York 10032.

Defendants 160/159 REALTY, LLC., NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CORPORATION and ET MANAGEMENT & REALTY CORP. (hereinafter collectively referred to as "160/159" or "defendants") move, pursuant to CPLR § 3212, for summary judgment dismissing all claims, cross-claims and counter claims. For the reasons discussed below, the motion is denied.

BACKGROUND

According to plaintiff, on April 16, 2005, during a birthday party for his grand-daughter, plaintiff was walking from the kitchen to the living room in his apartment when his right ankle twisted and he was caused to fall. Plaintiff testified at his deposition that the cause of his fall was due to a height differential between the kitchen floor and the living room floor (the kitchen floor being higher than the living room floor by about four inches) (*Plaintiff Dep.*, 31-34). Plaintiff's right ankle twisted when he exited the kitchen because "when you are walking you think you are going to walk straight" (*Id.* at 35). Plaintiff testified that there was no liquid or alcohol spill on the floor where he fell (*Id.* at 46, 61); and at no time did plaintiff come in contact with the cable wires on the floor in the area of the height differential (*Id.* at 51-52). Plaintiff testified that, in the hour preceding his fall, he had consumed at least one and possibly in excess of three beers (*Id.* at 28-29). As a result of the occurrence complained of herein, plaintiff allegedly sustained: Displaced Weber B fracture of the right ankle; Open reduction internal fixation; Pain in the affected areas; and likelihood of early onset of arthritis in affected areas (*Plaintiff Verified Bill of Particulars*, 4).

Plaintiff commenced this negligence action against defendants. The complaint and bill of particulars allege that the height difference between the kitchen and living room in plaintiff's apartment was a "dangerous, hazardous, unlawful condition" that defendants negligently allowed the condition to remain on premises (*Plaintiff Verified Bill of Particulars*, 1). Plaintiff alleges that defendants' negligence in allowing premises

to remain in this condition, and in failing to warn plaintiff about the dangerous condition, was the proximate cause of plaintiff's injury (*Id.* at 3).

DEFENDANTS' ARGUMENTS

Defendants seek summary judgment on several grounds. Defendants claim that the height differential from plaintiff's kitchen to living room was not a defect or an inherently dangerous condition, but instead a normal feature of plaintiff's apartment. Thus, the defendants claim that as a matter of law they were not negligent because "while a landowner must maintain his premises in a reasonably safe condition, there is no duty to protect or warn against a... condition which is not inherently dangerous." (*Hargas Affirm. in Support of Defendants' Motion*). Defendants also claim the condition was "readily observable by the use of one's senses" and that plaintiff traversed the area regularly and therefore knew about the condition, making it open and obvious so that it does not invoke the landlord's duty to warn. (*Id.*) Defendants cite *Lee v. Oh* (3 A.D.3d 473 [2d Dept 2004]), where the court granted summary judgment as a matter of law to a defendant landowner because an empty, artificial cement pond in the defendant's yard was not an inherently dangerous condition. The court further noted that the plaintiff was aware of the pond's existence because he had traversed the area on many prior occasions before tripping and falling over the pond. (*Id.* at 474.) Defendants also cite *Meagher Cox v. Winarski* (32 A.D.3D 379 [2d Dept 2006]). In that case, the court held that a height differential between a playground and parking lot was not, as a matter of law, inherently dangerous, where a teacher tripped over the height differential, a condition

that she had traversed many times prior to the incident. Thus, defendants contend that because it can be decided as a matter of law that the height differential in plaintiff's apartment was not a defect or an inherently dangerous condition, and that it was open and obvious, no triable issue of fact exists and summary judgment should be granted.

Further, defendants claim that plaintiff's accident was not proximately caused by the height differential between plaintiff's living room and kitchen, but rather by plaintiff's intoxication. (*Hargas Affirm. in Support of Defendants' Motion.*) Defendants point to the paramedics' testimony to support their contention that plaintiff was severely impaired by consumption of alcohol. Defendants cite case law holding that where a plaintiff's own conduct is the cause of his injuries, the defendant is absolved of liability. (*Hargas Affirm. in Support of Defendants' Motion.*) In *Finguerra v. Conn* (280 A.D.2d 420 [1st Dept 2001]), cited by defendants, the court held that a defendant was entitled to summary judgment dismissing the plaintiff's negligence claim where the plaintiff sustained injuries after diving into the shallow end of a swimming pool while intoxicated. The court held that the plaintiff's reckless conduct in consuming alcoholic beverages before diving into the pool was the proximate cause of his injuries, and thus as a matter of law, neither the pool owner nor the manufacturer were liable for the plaintiff's injuries. (*Id.* at 421.)

PLAINTIFF'S ARGUMENTS

Plaintiff argues that defendants owed him a duty to reasonably maintain the premises, even if the dangerous condition was open and obvious. Plaintiff claims that

once evidence of a dangerous condition is presented to the landowner, "the burden shifts to the landowner to demonstrate that he acted with reasonable care to make the property safe based upon the likelihood of injury to other sand the burden of avoiding the risk." (*Affirmation in Opp. To Defendants' Motion for Summary Judgment.*) Plaintiff claims that this duty is not abrogated by the fact that the condition may be open and obvious, and that the open and obvious nature of the condition is only relevant to the issue of comparative negligence. (*See, id.*) Plaintiff cites *Garrido v. City of New York* (9 AD3d 267 [1st Dept 2004]), where a plaintiff tripped over a broken and fallen construction sign on a sidewalk. In that case, the court reversed the trial court's decision to grant summary judgment because although the sign was open and obvious, that fact was only relevant to the issue of the plaintiff's comparative negligence, and not the defendant's overall duty to reasonably maintain the sidewalk.

Plaintiff further argues that all issues raised by defendants are issues of fact that must be left to jury determination. Plaintiff cites *Westbrook v. WR Activities-Cabrera Markets* (5 AD3d 69 [1st Dept 2004]), where the court held that the issue of whether a condition is open and obvious is generally a jury question.

DISCUSSION

The standards for summary judgment are well settled.

> "[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing

> the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

Summary judgment is denied because it cannot be determined as a matter of law that the height differential in plaintiff's apartment is not a defect or inherently dangerous condition. "Whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" *Hargrove v. Baltic Estates* (278 AD2d 278 [2d Dept 2000]), quoting *Trincere v. County of Suffolk* (90 NY2d 976, 977 [1997]). Thus, the fact-specific cases cited by defendants do not provide much guidance here. While the height differentials in the cases cited by defendants were not inherently dangerous, the decision as to whether the differential here is inherently dangerous must be left to the triers of fact. Based on the photographs submitted (Defendant's Exhibit A and Defendant's Exhibit B), this court cannot decide as a matter of law that the height differential is not inherently dangerous, especially because it appears from the photographs that the floor was misleveled. It also appears from the photographs that the condition may be akin to a trap or snare. (*See Bruinsma v. Simon Property Group, Inc.*, 902 N.Y.S.2d 649 [2nd Dept 2010] [where a plaintiff slipped and fell on an irregularity in the floor of a shopping mall, summary judgment was denied because an issue of fact existed as to whether the floor irregularity constituted a trap or snare]). Furthermore, Petros Apsilos, a project manager employed by defendant Crescent Street Construction,

describes the custom and practice of installing transition strips, or "saddles," between rooms when there is a height differential, depending upon the specifications for each job. (See Plaintiff's Exhibit J.) In the photographs of plaintiff's apartment (Defendant's Exhibit A and Defendant's Exhibit B), it appears that no saddle has been laid down to level the junction between the kitchen and living room, and it is for a jury to decide if such a strip should have been installed.

Further, the issue of whether the condition in plaintiff's apartment is open and obvious should be left for the jury (*See Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69 [1st Dept 2004) [the court held that the issue of whether a condition is open and obvious is generally a jury question and should only be resolved as a matter of law when the facts compel such a conclusion]. Even if the height differential in plaintiff's apartment was open and obvious as a matter of law, "that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition." *Id.* at 69. Thus, defendants' argument that the condition is open and obvious does not mean that it was not dangerous, and is not a basis for summary judgment.

Finally, questions of proximate cause are typically best left for the finder of fact. (*See Rotz v. City of New York*, 143 A.D.2d 301 [1st Dept 1988]). The issue of whether plaintiff was intoxicated at the time of his accident, and whether it was his intoxication, and not the height differential, that caused his fall, must be left to the finder of fact because the court cannot ascertain, as a matter of law, whether plaintiff's beer

consumption was of such a degree, as to be the sole cause of his accident. Because defendants have failed to prove a lack of any material questions of fact in this case, summary judgment cannot be granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendants 160/159 REALTY, LLC., NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CORPORATION and ET MANAGEMENT & REALTY CORP. for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: July 28, 2010.

ENTER:

J.S.C.