Maio v Vero
2010 NY Slip Op 33173(U)
November 8, 2010
Supreme Court, Suffolk County
Docket Number: 08-25859
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 08-25859
CAL. No. 10-00365-OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 4-9-10 (#002)
MOTION DATE 4-14-10 (#003)
MOTION DATE 7-16-10 (#004)
MOTION DATE 7-30-10 (#005)
ADJ. DATE 9-3-10
Mot. Seq. # 002 - MotD
003 - XMD
004 - MotD
005 - MG

---X
VINCENT MAIO and MELISSA MAIO,

Plaintiffs,

- against -

FRANK VERO, ARLENE VERO and
PRINCETON PROPERTIES d/b/a CENTURY 21,

Defendants.
---X

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Upon the following papers numbered 1 to 60 read on this motion and cross-motions to vacate the Note of Issue, discovery, and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 11 ; Notice of Cross Motion and supporting papers (003) 12-19; (004) 20-31; (005) 32-45 ; Answering Affidavits and supporting papers 46-48; 49-50; 55-60 ; Replying Affidavits and supporting papers 51-54 ; Other_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant, Crisel Realty Corp. d/b/a Century 21/Princeton Properties s/h/a Princeton Properties d/b/a Century 21, for an order pursuant to CPLR 3212 extending the time to move for summary judgment has been rendered academic by the defendant's cross-motion (004) for summary judgment and is denied; pursuant to CPLR to vacate the Note of Issue and Certificate of Readiness is denied; and pursuant to CPLR 3124 and 3126 directing the plaintiff to provide HIPPA compliant authorizations to the moving party is granted to the extent that the plaintiff is directed to provide additional duly executed current HIPPA compliant authorizations for the employment records and Federal and State Income tax records for Vincent Maio within twenty days of the date of this order; and it is further

ORDERED that this motion (003) by the defendants, Frank Vero and Arlene Vero, for an order pursuant to CPLR 3402 and NYCRR section 202.21(e) striking the Note of Issue and Certificate of Readiness; pursuant to CPLR 3212 extending the time to move for summary judgment; and pursuant to CPLR 3124 for an order compelling the plaintiff to serve duly executed and notarized authorizations and IRS forms has been rendered

academic by motion (005) and is denied as moot as summary judgment has been granted to the Vero defendants; and it is further

ORDERED that cross-motion (004) by the defendant, Crisel Realty Corp. d/b/a Century 21/Princeton Properties s/h/a Princeton Properties d/b/a Century 21 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any and all cross-claims asserted against it on the issue that they bear no liability for the occurrence of the accident is denied without prejudice to renewal upon submission of proper papers within thirty days of the date of this order; and it is further

ORDERED that this motion (005) by the defendants, Frank Vero and Arlene Vero, pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims asserted by the co-defendant Crisel Realty Corp. d/b/a Century 21/Princeton Properties is granted.

This is an action sounding in premises liability wherein it is claimed that on November 3, 2007, Helen C. DiLorenzo, a real estate agent working with Crisel Realty Corp./Century 21/Princeton Properties (Crisel), brought the plaintiffs, Vincent Maio and Melissa Maio, to the premises located at 19 Magnolia Street, Centereach, N.Y., owned by the defendants Frank Vero and Arlene Vero, and when viewing the premises, the attic door fell on Vincent Maio's hand causing him to sustain personal injury. It is claimed that the Vero defendants negligently maintained the premises and that all the defendants had actual and constructive notice of the dangerous condition and failed to remedy the same and to warn the plaintiffs of the dangerous condition. A derivative claim has been asserted by Melissa Maio.

VACATE NOTE OF ISSUE and CPLR 3124 and 3126

Pursuant to 22 NYCRR §202.21(e) a motion to vacate the note of issue for lack of readiness must be filed within twenty days of the note being filed (***Schroeder v IESI NY Corporation,*** 24 AD3d 180 [1st Dept 2005]). When a party moves to vacate the note of issue within twenty days following service of the same, 22 NYCRR § 202.21(e) provides that the court may grant vacatur upon a showing that the case is not ready for trial and a material fact in the certificate of readiness is incorrect (***Weiss et al v Finkelstein, M.D. et al,*** 2006 NY Slip Op 51502U, 12 Misc 3d 1189A, 2006 NY Misc Lexis 2085 [Supreme Court of New York, Nassau County]). Pursuant to the court's computer record, the Note of Issue and Certificate of Readiness was filed on March 9, 2010. Accordingly, defendant Crisel's motion to vacate the Note of Issue is timely in that it has been brought within twenty days of the filing of the Note of Issue.

Crisel seeks an order vacating the Note of Issue and Certificate of Readiness on the basis that the case is not ready for trial. It is undisputed that on August 31, 2009, the plaintiff provided a duly executed authorization permitting the moving defendant to obtain a copy of the plaintiff's employment records from Unique Woodworking, and further authorization for plaintiff's Federal and State Income Tax Returns. Crisel claims that on October 14, 2009, the authorizations to obtain Vincent Maio's employment records from Unique Woodworking was returned with the envelope stamped "Return to Sender/No Mail Receptacle/Unable to Forward." Counsel claims that to date his office has been unable to ascertain an alternative or proper address for this business. On or about January 4, 2010, the authorization to obtain the plaintiff's Federal and State Income Tax Returns was returned by the IRS with a note indicating they were unable to provide the records requested because the disclosure laws would not permit them to do so.

It is determined that Crisel has not demonstrated entitlement to an order vacating the Note of Issue and Certificate of Readiness. Crisel has not provided copies of the Note of Issue and Certificate of Readiness which it seeks to vacate, nor has it provided a copy of the Compliance Conference Order with signatures for this court's review. The plaintiffs complied with the discovery order and did not fail to timely provide the requested

authorizations provided August 31, 2009. Defendants have not demonstrated that they notified the plaintiff of any difficulty obtaining the discovery prior to this application. Instead, the defendant has demonstrated a lack of diligence in pursuing the discovery prior to the filing of the Note of Issue and Certificate of Readiness and has not demonstrated that it did not consent to the Compliance Conference Order or make any contingencies for the authorizations which it now seeks. There was sufficient time to complete disclosure concerning the subject authorizations prior to the filing of the Note of Issue and Certificate of Readiness. A lack of diligence in seeking discovery does not warrant post-note of issue disclosure (***Genova v Weinberg et al,*** 184 AD2d 617, 587 NYS2d 172 [2nd Dept 1992]). However, in that the demand was made during discovery and prior to the Note of Issue being filed, the plaintiffs are directed to reserve the authorizations although they have not failed to comply with disclosure pursuant to CPLR 3124 and 3126.

Accordingly, that part of motion (002) which seeks an order vacating the Note of Issue and Certificate of Readiness is denied; and that part of the motion which seeks HIPPA compliant authorizations for Vincent Maio's employment records and his Federal State Internal Revenue Services, pursuant to the defendants' prior demand, is granted to the extent that the plaintiff is directed to reissue current authorizations within twenty days of the date of this order.

SUMMARY JUDGMENT

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

In motion (004), the defendant, Crisel seeks summary judgment on the issue of liability dismissing the complaint and any and all cross-claims asserted against it. In support of the application, the defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, its answer, plaintiff's verified bill of particulars; and copies of the transcripts of the examinations before trial of Vincent Maio dated June 11. 2009, Melissa Maio dated June 11, 2009, Helen DiLorenzo dated January 28, 2010 on behalf of Princeton Properties/Century 21, and Frank Vero and Arlene Vero dated October 20, 2009. However, Crisel has not submitted a copy of the answer served by the Vero defendants that it seeks to have the cross-claims dismissed. It is further noted that the transcript of Helene DiLorenzo submitted on its behalf is not signed. Therefore, the motion fails to comport with the requirements of CPLR 3212 in that a complete copy of the pleadings have not been provided, nor has an affidavit or deposition transcript in admissible form by a person with knowledge been submitted.

Accordingly, motion (004) is denied without prejudice to renewal within thirty days of the date of this order upon the submission of proper papers.

In motion (005) the Vero defendants seek summary judgment dismissing the complaint and all cross-claims against it served by the co-defendant Crisel. In support of the application, the moving defendant has submitted, inter alia, an attorney's affirmation; defendants' answers; plaintiffs' verified bills of particulars; copy of the transcripts of the examinations before trial of Vincent Maio and Melissa Maio each dated June 11, 2009, Frank Vero and Arlene Vero dated October 20, 2009, and Helen DiLorenzo dated January 28, 2010; and real estate listing and various photographs.

Vincent Maio testified at his examination before trial to the extent that on November 3, 2007, at about 12:00 noon, he and his wife went to look at a home on 19 Magnolia Street in Centereach with the real estate agent, Helen DiLorenzo whom he believed was associated with Century 21. He had signed paperwork and looked at other houses previously that day with her. When they entered the house with Ms. DiLorenzo, no one was home and the house was vacant, completely empty. Because the house had two dormers in the listing picture and he saw them from outside the house, he wanted to go into the attic to see if it was possible to make a bedroom up there and he wanted to see if the dormers were real. Ms. DiLorenzo told him there was no stairway and went to her car and obtained a flashlight for him to use. While she was gone, he pulled himself up into the attic through an opening in the ceiling, after jumping up to the opening about seven or eight feet up. The opening was covered with a door about 2 x 2 feet which he pushed up with some sort of a wooden stick laying around and the door pivoted up. The door stayed up when he lifted it. Ms. DiLorenzo handed him the flashlight which he used to look around, but he did not walk around as he was on 2 x 6's. To exit the attic, he started lowering himself when the plywood door came down and pinned his hands against the 2 x 6, leaving him just hanging there. He was able to pull his left hand out and was left hanging by three fingers on his right hand. Someone was able to get a stool and he banged the door with his head to free his hand, and was able to come down.

Helen DiLorenzo testified at her examination before trial to the effect that she is employed with Century 21/Princeton Properties as a sales agent and also works for herself. The plaintiffs were her previous customers when she worked for Hamlet Realty and then continued with her to Century 21/Princeton Properties. The listing agent for the seller was Ulrich Property and Development. The broker's listing sheet was generated from MLS Stratus which is what agents use to look up information on listings. She was aware the Maio's were looking for a three-bedroom home and there came a time she took them to 19 Magnolia Street, Centereach on November 3, 2007. At the house, she recalled Mr. Maio wanting to see the attic space to see if the roof was high enough for a room. From the outside of the house, they thought there were dormers in the attic, but she had not been up there. She obtained a flashlight from her car and gave it to Mr. Maio who was already in the attic, having gone through the opening covered with a piece of wood which he pushed up to gain access to the attic. On his way down, his hand got stuck and he could not free it on his own. She did not advise him that he should not use the pole to open the cover for the attic or that he should not go up. She stated she did not have an expectation when she went to get the flashlight that he would go into the attic, and that he was already up when she returned. She testified that attics were typical places a person would want to view in a home. She had never gotten any instructions from the Veros that no one was to go into the attic when the house was being shown.

Frank Vero testified at his examination before trial that he was in construction, and in 2007 owned three rental properties, one of which was 19 Magnolia Street, Centereach, which he purchased twenty years ago with his wife, but never resided in it. In November 2007, no one was residing in the house. He was responsible for upkeep and maintenance. He described the house as a small cape with two bedrooms on the main floor and one bedroom in the basement. He stated the attic was never liveable space. There were no dormers on the roof but

there were windows sticking out of the roof which were considered doghouses-just a bump to give a little of effect on the roof with a window. In July 2007, he listed the house for sale with Ulrich Realty who placed the house on multiple listing, which meant that other real estate agents from other companies would be able to show the home to their perspective purchasers. He never had a contract with Century 21 or Princeton Properties. To gain access to the attic at the house, a six foot ladder was needed. There was a plywood covered opening which would have to be picked up and put to the side to gain entry into the attic. The plywood was not affixed with any type of hinging device. No previous tenants had complained about the access to the attic. He was unaware of injuries to anyone else in accessing the attic. He had never instructed the real estate agent to show the attic as useable living space. There were no ladders or devices in the house which would allow for access to the attic.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.... The existence of one or more of these elements is sufficient to give rise to a duty of care" (***Bruhns et al v Antonelli et al,*** 255 AD2d 478 [2nd Dept 1998]; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619 [2005]). Here it is determined that the Vero defendants owners owed a duty to the plaintiff who entered onto the property to view it with the real estate agent. It has been established that the plaintiff sustained injury. Therefore, it must be determined if the defendants breached their duty, proximately causing the plaintiff's injury.

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (***Singh v United Cerebral Palsy of New York City, Inc. et al,*** 72 AD3d 272 [1st Dept 2010]). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (*see*, ***Placquadio v Recine Realty Corp.***, 84 NY2d 967 [1994]; ***Murphy v Conner***, 84 NY2d 969 [1994]). To constitute constructive notice, a condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it (***Granillo v Toys "R" us, Inc et al,*** 72 AD3d 1024 [2nd Dept 2010]; ***Pelow v Tri-Main Development et al,*** 303 AD2d 940 [4th Dept 2002]). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (***Baumgartner v Prudential Ins. Co. of Am.***, 251 AD2d 358 [2nd Dept 1998]).

"The issue whether a condition was readily observable impacts on a plaintiff's comparative negligence and does not negate a defendant's duty to keep the premises reasonably safe. An open and obvious condition merely negates the duty to warn. Likewise, the issue of whether the hazard was 'trivial" is also one of fact, dependent on the peculiar facts and circumstances of the case" (***Pelow v Tria-Main Development et al,*** supra). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see*, ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005 [3rd Dept 2005]).

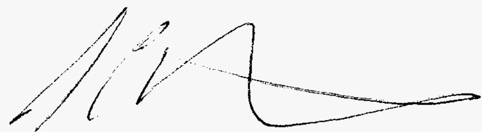
It is determined that the Vero defendants have demonstrated prima facie entitlement to summary judgment dismissing the complaint and cross-claims asserted against them.

"Landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries. Encompassed within this duty is the duty to warn of potential dangerous conditions existing thereon, whether they are natural or artificial. This duty extends, however, only to those conditions not readily observable. The landowners owe no duty to

warn of conditions that are in plain view and easily discoverable by those employing the reasonable use of their senses" (***Meyer et al v Tyner et al,*** 272 AD2d 364 [2nd Dept 2000]). In ***Meyer,*** the appellants, while looking at a house for sale by the respondent owners, went up to a dimly lit attic, stepped off a plywood landing, and fell through the insulation, sustaining injury. The appellants claimed that the respondent owners had a duty to warn them of the unfinished attic floor. Summary judgment was granted by the trial court dismissing the complaint and on appeal, the court affirmed, holding that the respondent owners had a general duty to maintain their property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries, but they owed no duty to warn of conditions that were in plain view, and easily discoverable by those employing the reasonable use of their senses. The court held that the unfinished floor was readily observable and in plain view.

Likewise, in the instant action, the attic door was readily apparent and in plain view. It was observed by the plaintiff who pushed it up with a stick to gain access to the attic, then raised himself up into the attic opening. The owner established that during the years the house was rented, no one ever complained about the attic opening or door. He knew of no one sustaining injury from the attic door. No evidence has been submitted by the plaintiff to raise a factual issue to demonstrate that the attic opening cover, or door, presented a potentially dangerous condition which the landowner should have warned of. Except for conclusory assertions, no evidence has been submitted to raise a factual issue that the Vero defendants did not maintain their property in a reasonably safe condition. Thus, plaintiffs have failed to raise a triable issue of fact to preclude summary judgment being granted to the Vero defendants.

Accordingly, motion (005) by the defendants, Frank Vero and Arlene Vero for summary judgment dismissing the complaint and all cross-claims asserted by the co-defendant Crisel Realty Corp. d/b/a Century 21/Princeton Properties is granted.



Dated: November 8, 2010

HON. JOSEPH C. PASTORESSA

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION