SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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PHYLLIS SPIEGELMAN,

Plaintiff,

-against-

DOROTHY WELTSEK,

Defendant.

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TRIAL/IAS PART 21

INDEX # 22887/09

Motion Seq. 1
Motion Date 8.5.11
Submit Date 9-9-11
XXX

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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Defendant moves by notice of motion for the following relief: an order pursuant to CPLR 3212 granting summary judgment to the defendant.

The action arises from an alleged incident that occurred at a dwelling located at 30 Admiral Lane, Hicksville, New York, on November 15, 2008. The premises was owned by defendant and the first floor of the premises was rented to plaintiff and her husband in April, 2008. Plaintiff alleges she fell due and sustained serious personal injuries due to protruding screw on the wooden lip between the dining room and living room. Defendant now moves for summary judgment on the basis that there was no proof that the defendant had any notice of the alleged defective condition, and as a result, she cannot be held liable for the occurrence. Therefore, the action must be dismissed.

In support of the application, defendant relies on the deposition testimony of the parties, the verified bill of particulars and the pleadings herein.

Defendant contends that at her deposition on December 7, 2010, plaintiff failed to testify to any facts that would show that the defendant caused the alleged defective condition or had any notice of any alleged defective condition.

In pertinent part, plaintiff testified as follows: She was involved in an accident that occurred on the first floor of a two family house which first floor she was renting; she started paying rent in April 2008, but as of the date of the accident, she had not moved in yet; they were fixing the apartment themselves in anticipation of moving in; between the time that the prior tenants moved out and the date of plaintiff's accident, the defendant did not perform any repairs or alterations to the premises; on the date of the accident, plaintiff was cleaning and dusting; the accident occurred as she was going from the dining room to the living room; there was one step down from the dining room to the living room; the dining room floor was wood; there was a raised lip as you stepped from the dining room to the living room; while plaintiff was stepping down, she fell; she did not feel her feet catch on anything; after she fell, she did not look at the floor around the area where she fell; her husband looked and saw that the wooden lip was loose and a screw was sticking up; prior to the accident, plaintiff never saw that the lip was loose or that a screw was sticking up; she did not know anyone who saw that the lip was loose or that the screw was sticking up prior to the accident; plaintiff made no complaints to the defendant at any time prior to the accident; she never told defendant that she fell; plaintiff never officially moved into the premises and advised defendant of same after the accident occurred.

At her deposition on December 7, 2010, defendant testified in pertinent part as follows: On November 15, 2008, she owned a mother/daughter house with two apartments which became the scene of the accident; she rented the first floor of the house to plaintiff and her husband in April, 2008; upon plaintiff's request, defendant painted, added a light to the storage room, added two ceiling fans, added wall plates for outlets and switches; there was wood flooring on the first floor; there is a step down from the dining room to the living room; the floor was installed in 2001; there is a bullnose piece of wood that goes across the top of the step; about two weeks after the accident, plaintiff's husband told defendant that plaintiff slipped going from the dining room to the living room and never mentioned a nail; in the six months prior to the accident, no one complained to her about a problem with the lip of the flooring or the step between the dining room and the living room; in the year prior to the accident, no work was performed on the lip or step between the dining room and the living room; between April and November 2008, defendant had been in the apartment approximately eight times; during the six months that plaintiff rented the apartment, defendant did not receive any complaints about the flooring or the step.

In opposition, plaintiff annexes an affidavit of her son, John Spiegelman. In his affidavit, John states that he was present at the location on the date of the incident and witnessed his mother's accident. He states that he made various complaints to the defendant for repairs since his parents rented the apartment in April, 2008. One of the complaints he made to defendant within several weeks after renting the apartment, was regarding the raised lip and screw that attached the top edge of a step that extended from the dining room floor to the sunken living room. He stated to her that the raised lip on the top of the step did not appear to be secure

enough and that there was a raised screw with loose molding at the edge of the raised lip. This repair was never made. He additionally states that he observed his mother proceed to trip and fall on the protruding screw at the raised lip of the step; observed her right foot getting caught on the raised screw that was attached to the raised lip on the edge of the step on the dining room floor. After she had fallen, he observed that the raised lip was still loose, and that the screw was still sticking up at the edge of the step.

In reply, defendant argues that the affidavit of John Spiegelman should be disregarded because he was never listed as a witness in the discovery responses. Furthermore, at her deposition, plaintiff testified that she did not know anyone who saw that the lip was loose or that the screw was sticking up prior to the accident; she made no complaints to the defendant any time prior to her accident; and she never told the defendant that she fell.

Based on the foregoing, the decision of the court is as follows:

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact (see, *Andre v. Pomeroy*, 35 N.Y.2d 361). The goal of summary judgment is to issue find, rather than to issue determine (see, *Hantz v. Fleischman*, 155 A.D.2d 415). To make out a prima facie case of negligence, the plaintiff has the obligation to demonstrate that the defendant created the condition or had actual or constructive notice of the defective condition and failed to remedy it (see, *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836; *Stumacher v. Waldbaum*, 274 A.D.2d 572; *Bonilla v. Starrett City*, 270 A.D.2d 377). In order for a plaintiff to prove constructive notice they must show that "the defect was visible and apparent and that it existed for a sufficient amount of time prior to the accident for it to be noticed." *(Gordon*, supra at 837.)

The defendant claims that the plaintiff has failed to establish that the defendant had notice of the alleged dangerous condition which proximately caused her accident and plaintiff has failed to establish that the defendant caused or created any alleged defective condition. The court agrees.

According to plaintiff's own deposition testimony, defendant did not have any notice of the alleged defective condition; nor is there any testimony that defendant caused or created the alleged defective condition. Plaintiff's attempt to submit an affidavit of her son, John Spiegelman, in an attempt to defeat the instant motion, is unavailing. Plaintiff failed to identify her son as a witness during pre-note discovery in violation of CPLR 3101 (see, *Thomas v Kendall*, 261 AD2d 964; *Carache v New York City Transit Authority*, 175 AD2d 41). Furthermore, the affidavit contradicts plaintiff's testimony that her son, John, never told her that he saw that the wooden lip was loose or that a screw was sticking up. Plaintiff may not submit an affidavit that contradicts her prior deposition testimony in an effort to create an issue of fact. (see, *Israel v Fairharbor Owenrs, Inc.*, 20 AD 3d 392; *Tejada v Jonas*, 17 AD3d 448; *Branham v Loews Orpheum Cinemas*, 8 N.Y.3d 931).

The court finds that the affidavit submitted in opposition to the motion was tailored to raise a triable issue of fact and merely raised a feigned factual issue designed to avoid the consequences of plaintiff's earlier admissions (see, *Israel v Fairharbor Owners, Inc.*, supra).

Accordingly, it is

ORDERED, that the application for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant, is **GRANTED**. The complaint against defendant is hereby dismissed with prejudice.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 14, 2011

ENTER:

HON. JEFFREY S. BROWN, JSC
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ENTERED
SEP 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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