

Lorenzo v McCarthy

2013 NY Slip Op 31766(U)

July 26, 2013

Supreme Court, Suffolk County

Docket Number: 11-17301

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 12-27-12
ADJ. DATE 7-16-13
Mot. Seq. # 002 - MD

-----X		
ALLISON LORENZO,	-----X	BUTTAFUOCO & ASSOCIATES, PLLC
Plaintiff,		Attorney for Plaintiff
- against -		144 Woodbury Road
ELAINE C. MCCARTHY,		Woodbury, New York 11797
Defendant.		CURTIS, VASILE, P.C.
-----X		Attorney for Defendant
		2174 Hewlett Avenue, P.O. Box 801
		Merrick, New York 11566

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 15; Replying Affidavits and supporting papers 16 - 18; Other memorandum of law, 9; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action arises out of a personal injury claim by the plaintiff for injuries she allegedly sustained on June 1, 2011 as a result of a trip and fall accident that occurred at a single-family residence she was renting located at 33 Bowman Lane, Kings Park, New York (the premises). In her complaint, the plaintiff alleges, among other things, that the defendant failed to maintain a staircase inside the premises, and permitted a dangerous and defective condition to exist, resulting in her injuries.

The defendant now moves for summary judgment dismissing the complaint on the ground that she did not owe the plaintiff a duty, and that the plaintiff is unable to show that the defendant created the alleged condition, or had actual or constructive notice of its existence. In support of her motion, the defendant submits copies of the pleadings, the deposition transcripts of the parties, and a copy of the subject lease agreement. The deposition of the plaintiff is certified but unsigned, and the defendant has failed to submit proof that the transcript was forwarded to the plaintiff for her review (*see* CPLR 3116 [a]). However, the Court may consider the plaintiff's unsigned deposition transcript submitted in support of the motion as the plaintiff has not raised any challenges to its accuracy (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also Bennet*

(PR)

v *Berger*, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At her deposition, the plaintiff testified that she visited the premises only one time before deciding to rent it, that she was able to use the staircase down to the basement, and that she observed that the landing at the top of that staircase was unsafe. She signed a lease and moved in with her family on or about January 15, 2011. She did not observe anything unsafe about the landing at that time. After signing the lease, but before she moved into the premises, she hired someone to paint some of the rooms in the house. The painter informed her that there were a couple of issues that she might want to address with the owner, including a "dip" in the landing at the top of the staircase. The painter showed her the dip, she put her foot on the spot and felt "a soft spot ... an indent." She stated that, because the area was carpeted, a person could not see the dip, and would not appreciate its dimensions, without stepping on it. The plaintiff further testified that she informed the owner of the issues raised by the painter, and that she merely mentioned the dip because the defendant had indicated that she was going to tile the area that includes the landing at the time the lease was signed. She stated that, while she was living at the premises, she used the staircase down to the basement two to four times a day because the laundry room and her bedroom were downstairs. Prior to her accident on June 1, 2011, she had stepped in the dip, but had not lost her balance. On the day of her accident, at approximately 8:30 a.m., she stepped down onto the landing from the kitchen, went to step again with her left foot, which "sunk in and I lost my balance." She indicated that she had previously taken the same path as she did that morning, and that she had never lost her balance. The plaintiff further testified that she was aware of the dip, that the majority of the time she tried to be careful on the landing, and that it was hard to always remember to be careful because the dip was carpeted. She states that, on that day "[i]t just happened that I lost my balance," and that she fell down the stairs injuring herself.

The defendant was deposed on February 23, 2012. She testified that she is the owner of the premises, that she obtained title from her mother in 2005, and that her parents lived in the premises for 25 years before she took title. The premises were rented to another family between 2009 and 2010. During this period, a pipe burst on the main floor, flooding the basement. When that family moved out in August 2010, she did a visual inspection of the premises, and did not note a dip in the subject landing. She visited the premises a number of times between August 2010 and January 1, 2011 and did not notice any dip or depression in the landing. The defendant further testified that the foyer area of the premises, including the landing area, was carpeted, that it had the same carpeting for at least 25 years, and that the contractor who repaired the damage after the pipe burst did not lift or remove any of that carpeting. She stated that the prior tenants did not complain about a dip in the landing, and that she believes that she met the plaintiff and her husband when

they signed the lease to rent the premises. She indicated that keys were given to the plaintiff on January 1, 2011, that the plaintiff took possession of the premises on January 15, 2011, and that the plaintiff never told her that a painter had said that there was a dip in the landing. The defendant further swears that she never had a conversation with the plaintiff regarding a dip in the landing prior to the date of this accident, and that she never spoke with the plaintiff's painter. She indicated that she did mention the possibility that she would tile the foyer at the lease negotiations. However, she decided not to do the work. Approximately two or three weeks after the plaintiff's accident, she inspected the premises and did not note a dip or depression in the landing.

Generally, owners have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see Peralta v Henriquez*, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; *Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see Sowa v SJNH Realty Corp.*, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; *Lee v Bethel First Pentecostal Church of Am.* 304 AD2d 798, 762 NYS2d 80 [2d Dept 2003]; *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see Chianese v Meier*, 98 NY2d 270, 746 NYS2d 657 [2002], *citing Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986], *citing Negri v Stop & Shop*, 65 NY2d 625, 491 NYS2d 151 [1985]). The issue of whether a dangerous or defective condition exists on the property of another is generally dependent upon the peculiar circumstances of each case (*see Portanova v Kantlis*, 39 AD3d 731, 732, 833 NYS2d 652 [2d Dept 2007], *citing Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]).

The defendant contends that she does not owe the plaintiff a duty as she is an out of possession landlord, and the plaintiff signed the lease agreeing to take the premises "as is." Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*Lindquist v C & C Landscape Contrs.*, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; *Gibson v Bally Total Fitness Corp.*, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (*Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; *Gelardo v ASTHMA Realty Corp.*, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it. (*see Sowa v SJNH Realty Corp.*, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]; *Curiale v Sharrotts Woods, Inc.* 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). As in the general rule, in order to constitute "constructive notice" to an out-of-possession landlord, a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see Chianese v Meier, supra, citing Gordon v American Museum of Natural History, supra; Negri v Stop & Shop, supra*).

The subject lease provides in pertinent part:

11. CARE OF PREMISES

11.1. The Tenants shall make all interior repairs, cleaning, garbage removal and dumping, repainting as a result of damages caused by the Tenant, their agents, guests and invitees, at their own expense.

* * *

16. BUILDING REPAIRS

The Landlord, or its agents, may perform construction or demolition in or near the building , even if it interferes with the Tenants' ventilation, view or enjoyment of the House ...

* * *

19. "AS IS"

The Tenants have inspected the premises and states that the Premises is in good order and repair and takes the premises "as is", including but not limited to all appliances in the premises

* * *

21. ENTRY BY LANDLORD

21.1 The Landlord or its representative may, at reasonable times, enter the premises examine, make repairs or alterations, and to start showing Premises to possible buyers, brokers, lenders or other Tenant ...

Here, there are issues of fact as to whether the defendant had actual notice of the defective condition, and as to the extent of her responsibility for maintenance and repair as an out-of-possession landlord, precluding summary judgment in her favor (*Zappel v Port Auth. of N.Y. & N.J.*, 285 AD2d 389, 728 NYS2d 32 [1st Dept 2001]; see also *Lawrence v Celtic Holdings, LLC*, 85 AD3d 874, 925 NYS2d 172 [2d Dept 2011]; *Massucci v Amoco Oil Co.*, 292 AD2d 351, 738 NYS2d 386 [2d Dept 2002]; see generally *Sampino v Crescent Assoc., LLC*, 34 AD3d 779, 825 NYS2d 135 [2d Dept 2006]; *Perez v Ward*, 271 AD2d 590, 706 NYS2d 160 [2d Dept 2000]). The lease is ambiguous regarding the scope of the plaintiff/tenant's responsibility for interior repairs. In addition, the lease is ambiguous regarding the defendant/ landlord's responsibility for maintenance and repairs of the premises. The adduced evidence does not resolve those issues of fact which would permit a determination of the defendant's obligations under the lease, and her duty, if any, as an out of possession landlord.

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To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). However, the party moving for summary judgment in a trip and fall action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (*Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]; *Birnbaum v New York Racing Assn.*, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]; *Altieri v Golub Corp.*, 292 AD2d 734, 741 NYS2d 126 [1st Dept 2002]). Thus, the burden is on the defendant to show that she did not create the condition, or have actual or constructive notice of its existence. Here, there is conflicting testimony whether the defendant was informed about the condition of the landing at the top of the staircase. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; *Roth v Barreto, supra*; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]).

In addition, the defendant has failed to submit any apposite authority which establishes as a matter of law that the plaintiff's agreement to take possession of the premises "as is" obviates the duty of an owner/landlord to keep her premises in a reasonably safe condition under the existing circumstances. Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp., supra*; *Winegrad v New York Univ. Med. Ctr., supra*).

In any event, the plaintiff's opposition to the motion establishes that there are issues of fact precluding summary judgment herein. In opposition to the motion, the plaintiff submits, among other things, the affirmation of her painter, Robert Cantatore (Cantatore). In his affirmation, Cantatore swears that he advised the defendant in January 2011 of the dangerous condition of the landing in two telephone conversations. The defendant contends that said affirmation raises a feigned issue of fact which contradicts the plaintiff's testimony. The Court finds that the defendant's contention is without merit, and that the plaintiff did not testify as to the painter's interaction with the defendant. Thus, there is a question of fact, among other things, whether the defendant had actual notice of the allegedly defective condition of the subject landing.

Accordingly, the defendant's motion for summary judgment dismissing the complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: July 26, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION