

**Byrne v Etos LLC**

2014 NY Slip Op 31713(U)

July 2, 2014

Supreme Court, New York County

Docket Number: 150392-2011

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
MARY BYRNE,

Plaintiff,

Index No. 150392-2011

-against-

**DECISION/ORDER**

ETOS LLC D/B/A ETOS INTERIOR DESIGNER,

Defendant.

-----X

**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits & Exhibits Annexed.....	<u>1, 2</u>
Answering Affirmation, Affidavit(s) & Exhibits.....	<u>3</u>
Replying Affirmation, Affidavit(s) & Exhibits.....	<u>4</u>

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In this action to recover for personal injuries allegedly arising out of a trip and fall, defendant Etos LLC d/b/a Etos Interior Designer (defendant) moves by notice of motion dated February 1, 2013 for order granting it summary judgment pursuant to CPLR § 3212 and dismissing plaintiff Mary Byrnes' (plaintiff) complaint. Plaintiff opposes the motion.

Plaintiff testified at her examination before trial that she entered defendant's furniture store at approximately 3:30 p.m. on January 24, 2011. Plaintiff testified that if one were to enter the store and walk straight to the back of the store, one would not encounter the height differential. However, if one entered the store and walked to the left side the store, the floor on the left side of the store was approximately four inches lower than the other portion of the floor. Plaintiff testified that entire floor was covered by a very dark, possibly black, colored carpet. Plaintiff testified that she saw some items on a table on the left side of the store that she was interested in purchasing. Plaintiff proceeded to the left side of the store to examine the items and as she went from the higher portion of the floor to the lower portion she tripped and fell. Plaintiff testified that she did not notice the elevation differential until after her accident and that there were no warnings, no signs and no barricades to notify a customer of the change in elevation. None of the employee's in the store walked accompanied plaintiff around the store prior to her accident and none of the employees informed plaintiff about te height differential. Plaintiff testified that there was nothing obstructing her view of the floor where the height

differential was located and that the area was not part of aisle but was instead “wide open.” After her accident plaintiff purchased two pre-Columbian bowls from defendant.

Mercedes Desio (Desio) testified that she is co-owner of defendant, along with Alberto Villalobos (Villalobos). Desio estimated that the height differential in the floor was approximately one and a half inches but testified that she never actually measured it. According to Desio, the furniture in the store was arranged in such a manner so as to make the height differential obvious to customers. Desio also testified that she and Villalobos would also instruct customers to watch their step when walking in the store. There were no signs posted warning customers of the height differential and there was no difference in the color of the carpet on the floor so as to differentiate the two levels. Desio described the carpet as being gray in color. Desio also testified that on the date of plaintiff’s alleged accident, no one fell in the store. According to Desio, Villalobos was accompanying plaintiff in the store on the date of the alleged accident. Desio claims that she witnessed plaintiff traverse the height differential in the floor and that plaintiff did not fall while doing so.

Villalobos described the height differential in the floor as being between two and two and a half inches. Like Desio, Villalobos testified that the furniture was arranged in the store in such a way so as to differentiate the height difference in the floor. According to Villalobos, either he or Desio accompanies customers through the store and as they do so they inform the customers that there is a difference in the height of the floor. Villalobos also testified that the carpet was gray. Villalobos testified that he assisted plaintiff on January 24, 2011 and that he warned plaintiff about the height differential. Villalobos did not see plaintiff fall and testified that plaintiff walked out the store in the same manner she walked in. Villalobos never received any written or oral complaints about the floor differential.

Defendant argues that it is entitled to summary judgment because plaintiff cannot establish actual or constructive notice by defendant of the height differential in the floor. Alternatively, defendant contends that the height differential was an open and obvious condition which plaintiff should have seen through the normal use of her senses.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1<sup>st</sup> Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbiner*, 307 AD2d 230 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so.

(*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1<sup>st</sup> Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1<sup>st</sup> Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1<sup>st</sup> Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

To hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition that caused the injury (*Gordon v American Museum of Natural History*, 67 NY2d 836, 492 NE2d 774, 501 NYS2d 646 [1986]; *see also Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 646 NE2d 795, 622 NYS2d 493 [1994]). “Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Espinal v New York City Hous. Auth.*, 215 AD2d 281 [1<sup>st</sup> Dept 1995]). Defendant has failed to establish, *prima facie*, that it lacked notice of the alleged elevation differential between the two levels of the store. In fact, the deposition testimony of defendants’ co-owners establishes that defendant had actual notice of the elevation differential. Both Desio and Villalobos testified that they were aware of the height differential in the floor that was created when the leased space was reconfigured, that they informed customers of the height differential when they accompanied customers through the store, and that they arranged the furniture on display in such a manner so as to call customers’ attention to the height differential. Contrary to defendant’s claim that plaintiff can not establish actual or constructive notice of the defect, Desio’s and Villalobos’ deposition testimony constitutes an admission that defendant had actual notice of the alleged defect. Accordingly, defendant’s motion for summary judgment on the ground that it did not have actual or constructive notice is denied and, upon a search of the record, plaintiff is granted summary judgment on the issue of notice (*Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.* 34 AD3d 244 [1<sup>st</sup> Dept 2006] [It is well settled that, in deciding the propriety of a summary judgment motion, a court may search the record and grant summary judgment to the nonmoving party on any related claim]).

“It is well established that 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, be they natural or artificial. This duty extends, however, only to those conditions that are not readily observable; the landowner owes no duty to warn of

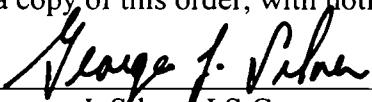
conditions that are in plain view, easily discoverable ‘by those employing the reasonable use of their senses’, for in such instances the condition is a warning in itself” (*Thornhill v Toys “R” Us NYTEX, Inc.* 183 AD2d 1071 [1<sup>st</sup> Dept 1992] [internal citations omitted]). Although landowners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware (*see Basso v Miller*, 40 NY2d 233, 241, 352 NE2d 868, 386 NYS2d 564 [1976]), a court is not “precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous” (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). The question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion (*see Tagle v Jakob*, 97 NY2d 165, 169, 763 NE2d 107, 737 NYS2d 331 [2001]). Moreover, although some hazards may be “technically visible,” if their “nature or location” makes them “likely to be overlooked,” then the facts do not compel the conclusion that such hazards or conditions are open and obvious (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1<sup>st</sup> Dept 2004]). An open and obvious hazard may negate the duty to warn, but it does not negate liability in negligence, because an owner still has a duty to ensure that its premises are maintained in a reasonably safe condition (*Caicedo v Cheven Keeley & Hatzis*, 59 AD3d 363 [1<sup>st</sup> Dept 2009]). While there is conflicting testimony between plaintiff and Desio and Villalobos regarding the color of the carpet, it is undisputed that the entire floor was covered by the same carpet, which was one color. “Findings of liability have typically turned on factors such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar condition” (*Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1<sup>st</sup> Dept 1966]). Therefore, while the height differential of the instant floor may have been technically visible, there is a question of fact as to whether the use of one carpet of the same color across the entire floor created “optical confusion” (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1<sup>st</sup> Dept 2011]).

It goes without saying that the conflicting testimony of plaintiff and Desio and Villalobos regarding whether plaintiff even fell in the store raises questions of credibility that cannot be resolved on a motion for summary judgment. In accordance with the foregoing, it is hereby

ORDERED that defendant’s motion for summary judgment is denied and, upon a search of the record, plaintiff is granted summary judgment on the issue of actual notice; and it is further

ORDERED that the parties are to appear for a pre-trial on August 5, 2014 at 9:30 am in room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendant movant is to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

  
George J. Silver, J.S.C.

Dated: JUL 02 2014

GEORGE J. SILVER