

Apolito v Artisan House
2015 NY Slip Op 30456(U)
March 27, 2015
Supreme Court, Suffolk County
Docket Number: 11-16758
Judge: Daniel Martin
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ORDERED that the motion by the defendant Peter Kokell doing business as Pete's Complete Plumbing & Heating, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by the defendants Artisan House, Frank Cavagnaro and Joseph Cavagnaro for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment as to the liability of the defendants Artisan House, Frank Cavagnaro and Joseph Cavagnaro is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment as to the liability of the defendant Peter Kokell doing business as Pete's Complete Plumbing & Heating, Inc. is denied.

This action arises out of a personal injury claim by the plaintiff for injuries she allegedly sustained on February 23, 2011 when she fell into an open trap door in the floor of a jewelry store located at 72 Main Street, Northport, New York (the premises). It is undisputed that the owners of the premises, the defendants Frank Cavagnaro and Joseph Cavagnaro (the Owners), hired the defendant Peter Kokell doing business as Pete's Complete Plumbing & Heating, Inc. (collectively Kokell) to perform certain work at the premises which required access to the crawl space under the premises through a trap door located within the store operated by the defendant Artisan House (Artisan or the store). The plaintiff was a close friend of the proprietor of Artisan, Kathie Kitts (Kitts), and was at the store socializing with Kitts and being helpful.

It is also undisputed that Artisan occupied one of two stores located in the building at the premises pursuant to a lease with the Owners, and that the Owners were responsible for all structural repairs to the premises under said lease. On the day of this incident, Kokell opened or removed the trap door to access the crawl space beneath the premises to conduct its work, the trap door was left open or removed the entire day while work was performed, and the plaintiff fell into the opening when she walked behind the jewelry counter where the trap door was located to help one of Artisan's customers.

In her complaint, the plaintiff alleges, among other things, that the defendants failed to properly operate, manage, maintain and control the premises, and that they had knowledge and notice of the dangerous and defective condition which resulted in her injuries. The plaintiff further alleges that Kokell left the unsafe condition unattended, unguarded and without warnings or notices.

Kokell now moves for summary judgment dismissing the complaint on the grounds that there is no duty to warn a customer of a hazard of which they are already aware, and that the subject opening was open and obvious and not inherently dangerous. In support of its motion, Kokell submits, among other things, the depositions of the parties and a non-party witness. At her deposition, the plaintiff testified that she was close friends with Kitts, that she went to Artisan often to socialize or help her friend with work, and she learned the day before her accident that a plumber would be working there. She stated

that, because Kitts was not feeling well, she went to the store the day before the accident to move a table and stereo from in front of the subject counter to the rear of the store. She indicated that she arrived at the store at approximately 10:00 a.m. the next day, that she saw a plumber working in the corner behind the counter, and that she could not see what he was working on. The plaintiff further testified that she was at the store for four or five hours before her fall. She stated that, before her fall, the plumber had not been in the store for 45 minutes to one hour so she believed that he had completed his work, that Kitts was on the phone with a customer, and that she went behind that counter to show a piece of jewelry to another customer when she fell. She indicated that there was no caution tape or orange cones to warn that the hole or opening was present, that there were no drop cloths or markings around the opening, and that she was not aware of the opening before her fall.

At her deposition, Kitts testified that she is the owner of Artisan, and that, prior to occupying the store the defendant Frank Cavagnaro (Cavagnaro) told her that there could be no fixtures over the trap door. She expressed that Cavagnaro came into the store every Wednesday after she took possession of the store, and that he told her, at some point before the work commenced, that the plumber would need access to the crawl space. She stated that the day before this incident, the plaintiff volunteered to help her by moving a table and stereo from behind the counter to allow access to the trap door, but then stated that she believed that the items were in front of the counter not behind it, and that she was uncertain if she mentioned the trap door to the plaintiff. She indicated that the plaintiff arrived at the store at approximately 11:15 a.m. on the day of this incident, and that she showed the plaintiff that work was going on and drop cloths had been laid down. Kitts further testified that a person could not see what work was actually going on from the position where she and the plaintiff spoke, that she did not remember if she mentioned to the plaintiff that the trap door had been opened, and that this accident occurred at approximately 4:00 p.m. She stated that, just before this accident, she was on the telephone with a customer, that she nodded assent to the plaintiff who had indicated that she would help another customer view some merchandise, and that the plaintiff had her permission to help customers despite the fact that she did not work at the store. She indicated that she watched as the plaintiff went behind the subject counter and disappeared, that the opening or hole was approximately 2 feet by 2 feet, and that, at the plaintiff's request for delay, the plaintiff was in the hole for ten to fifteen minutes before she called 911. Kitts further testified that Kokell and his helper had been in and out of the trap door 60 times during the course of the day, that the accident happened at the very end of Kokell's work day, and that Kokell did not return to the store until after the plaintiff was taken away in an ambulance.

Kokell was deposed on July 26, 2012, and testified that he was hired by Cavagnaro to work at the premises, and that he told Kitts that he would be there working and that no one would be able to get behind the subject counter while he was there. He stated that, on the day of this accident, he removed the trap door and leaned it against the wall, that the trap door remained open the entire day, and that the longest period he was out of the store was 30 minutes. He indicated that he laid down blue or tan drop cloths, that tools were on the floor near the opening, and that he did not place any cones or caution tape near the opening. Kokell further testified that he and his helper were out of the store for approximately 30 minutes at the time of the plaintiff's accident, that the hole created by the opening of the trap door was approximately four to five-and-a-half feet deep, and that orange extension cords were run into the opening while they were working. He stated that he continued working for a few hours after the plaintiff's accident.

Non-party Patrick H. Primrose (Primrose) was deposed on March 11, 2013. He testified he worked with Kokell on the day of this incident, that they opened the trap door and placed one drop cloth outside the opening, and that they set up lights in the crawl space below the premises. He stated that the trap door remained open all day, that no tools were left outside the crawl space, and that an orange extension cord was run into the opening for the lights. He indicated that he and Kokell spoke to each other all day, that they were in and out of the trap door approximately 45 times during the day, and that they took a 45 minute lunch between noon and 1:00 p.m. Primrose further testified that this accident happened at the end of the work day, that he and Kokell were at Kokell's shop down the street at the time, and that they walked back to the store when they saw an ambulance and police cars at the store. He stated that the trap door opening was not visible when someone entered the store, that one could first see the opening when he or she steps behind the counter, and that Kokell told Kitts and the plaintiff that they were working in the opening and to be careful.

Kokell has failed to establish its prima facie entitlement to summary judgment on the ground that it had no duty to warn the plaintiff of a hazard of which she was already aware. It has been held that there is no need to warn a consumer already aware of a specific hazard of a product (*Schiller v National Presto Indus.*, 225 AD2d 1053, 639 NYS2d 217 [4th Dept 1996]; *Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 427 NYS2d 1009 [4th Dept 1980]). In its submission, Kokell contends that it is undisputed that the plaintiff was expressly warned and personally observed the work being performed, and it relies on the cited authority to support its contention that it is entitled to summary judgment herein. Accepting for the purposes of this motion only that the cited authority, which involves actions for products liability, is applicable herein, it has been held that it is a question for the trier of fact whether a consumer has been made fully aware of the specific hazard of a product (*Lichtenstein v Fantastic Mdse. Corp.*, 46 AD3d 762, 850 NYS2d 462 [2d Dept 2007]). The adduced evidence reveals that there are issues of fact whether the plaintiff was expressly warned about the trap door or otherwise became aware of the subject opening in the floor behind the subject counter.

Kokell has also failed to establish its prima facie entitlement to summary judgment on the ground that the subject opening was open and obvious and not inherently dangerous. As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (see *Figueroa-Corser v Town of Cortlandt*, 107 AD3d 755, 967 NYS2d 744 [2d Dept 2013]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 865 NYS2d 667 [2d Dept 2008]). Where these elements are not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*Ruffino v New York City Tr. Auth.*, *id.*; *Noia v Maselli*, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]). Here, Kokell failed to submit any evidence that it did not control the area of the premises where it was conducting its work, and there is an issue of fact if it did so control that portion of the premises.

Regardless of whether Kokell exercised any control over the premises, there is an question whether Kokell's contractual obligation, standing alone, gave rise to tort liability in favor of the plaintiff (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). That is, there is an issue of fact whether Kokell negligently created a dangerous condition – thereby “launch[ing] a force or instrument of harm” – when it opened the trap door and left it open the entire day (see *George v Marshalls of MA*,

Inc., 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]; *Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652, 848 NYS2d 230 [2d Dept 2007]).

In addition, Kokell failed to establish, prima facie, that the trap door opening that caused the plaintiff to fall was open and obvious and not inherently dangerous (*see Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 917 NYS2d 896 [2d Dept 2011]). Generally, whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of the individual case and is properly a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]). Here, there are issues of fact precluding the grant of summary judgment including, but not limited to, whether there were drop cloths or other visible signs that the opening was present on the day of this incident or at the time of this incident, and whether the plaintiff was expressly warned or became aware of the presence of said opening by the events of the day. In addition, a condition that is generally apparent “to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1009, 864 NYS2d 554 [2d Dept 2008]; *see Clark v AMF Bowling Centers, Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]). Moreover, a determination that the trap door opening was open and obvious would not entitle Kokell to summary judgment as it would not foreclose the plaintiff’s negligence claim, but is relevant only to a determination of the plaintiff’s comparative fault herein (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 924 NYS2d 32 [1st Dept 2011]; *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 896 NYS2d 85 [2d Dept 2010]).

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 demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing 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*). Accordingly, Kokell’s motion for summary judgment dismissing the complaint is denied.

The Owners and Artisan now move for summary judgment dismissing the complaint on the grounds that they did not create or have notice of the allegedly dangerous condition, that they had no duty to warn the plaintiff of a hazard of which she was already aware, and that the subject opening was open and obvious and not inherently dangerous. For the reasons set forth above, the Owners and Artisan have failed to establish their prima facie entitlement to summary judgment herein regarding the latter two grounds set forth in their motion. In addition, they have failed to do so in relation to their first ground for relief.

Generally, owners, possessors or persons in control of property 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 Flores v BAJ Holding Corp.*, 94 AD3d 945, 942 NYS2d 202 [2d Dept 2012]; *Sowa v SJNH Realty Corp.*, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]). 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]).

Here, the adduced evidence indicates that Artisan had actual and constructive notice of the allegedly defective condition on the premises. However, there is an issue of fact whether it performed its duty to warn the plaintiff of the opening prior to this accident (*see Kaufmann v Lerner New York, Inc.*, 41 AD3d 660, 838 NYS2d 181 [2d Dept 2007]). There is an issue of fact whether the Owners had actual or constructive notice of the allegedly dangerous condition due to Cavagnaro’s hiring of Kokell or otherwise, and the Owners have failed to submit any evidence to establish that they did not have such notice.

Inasmuch as the moving defendants did not meet their initial burden in establishing their entitlement to summary judgment, the sufficiency of the plaintiff’s opposition papers need not be considered (*see Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892, 893, 917 NYS2d 886 [2d Dept 2011]). Accordingly, the motion by the Owners and Artisan for summary judgment dismissing the complaint is denied.

The plaintiff now cross moves for summary judgment as to the liability of the Owners and Artisan on the ground that they had actual notice of the allegedly dangerous condition and they did nothing to remedy the condition or warn patrons of the store about the opening. In support of her motion the plaintiff submits the depositions previously summarized herein, and the deposition of Cavagnaro. At his deposition, Cavagnaro testified that he hired Kokell to work at the premises, that he made Kokell aware of the existence of the trap door prior to the day of this incident, and that he did not recall when he informed Kitts/Artisan that the work would be performed. He stated that he was next door when this incident occurred, that he entered Artisan after the plaintiff left in an ambulance, and that he observed blue drop cloths, or something blue, near the trap door opening. He indicated that he did not supervise Kokell’s work, and that he did not observe the work being performed.

The plaintiff has failed to establish her entitlement to summary judgment as to the liability of the Owners. There is an issue of fact whether the Owners had actual or constructive notice that the trap door was, or would be, left open all day, and that, allegedly, no warnings or barriers were placed to prevent an individual from falling into the opening. In addition, the plaintiff failed to submit any evidence that the Owners had an obligation to supervise the subject work, or that they had a nondelegable duty to keep the work site safe for the public.

In addition, the plaintiff has failed to establish her entitlement to summary judgment as to the liability of Artisan. While it appears that Kitts had actual notice of the work being performed and the fact that the trap door had been removed, there are issues of fact whether she had any ability to supervise the work being performed, and whether she expressly warned the plaintiff, or was aware that Kokell

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expressly warned the plaintiff, of the existence of the opening that day. Accordingly, the plaintiff's motion for partial summary judgment as to the Owners' and Artisan's liability is denied.

The plaintiff now cross moves for summary judgment as to the liability of Kokell on the grounds that Kokell created the allegedly dangerous condition and failed to maintain a safe work site. In support of her cross motion, the plaintiff submits essentially the same evidence as in her previous cross motion. While it is undisputed that Kokell removed the trap door and left it open prior to this incident, there are issues of fact whether Kokell acted unreasonably, or failed to maintain a safe work site, considering the conflicting testimony herein. There is conflicting testimony regarding the presence of drop cloths, tools and extension cords placed near the opening, as well as the efforts to make the plaintiff aware of the work being performed.

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (*Andre v Pomeroy*, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; *Elzer v Nassau County*, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (*Chilberg v Chilberg*, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; *Barclay v Denckla*, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; *Cohen v Herbal Concepts, Inc.*, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *aff'd* 63 NY2d 379, 482 NYS2d 457 [1984]). Accordingly, the plaintiff's motion for partial summary judgment as to Kokell's liability is denied.

Dated: MARCH 27, 2015


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION