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ORIGINAL

To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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NICHOLAS RODANO,

Plaintiff,

-against-

RICHARD O'LEARY and JOAN O'LEARY,

Defendants.

----------X

DECISION AND ORDER

INDEX NO.: 6693/2012
Motion Date: 2/18/15
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 11 were considered in connection with the application of defendants for summary judgment for an order dismissing plaintiff's Complaint:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Stiefeld)/Exhibits A-E/ Exhibit F (Affidavit of Sadegh)	1 - 8
Affirmation in Opposition (Shuttleworth)/Affidavit & Report of Bremer	9 - 10
Reply Affirmation	11

Background and Procedural History

This is an action for personal injuries arising out of an incident alleged to have occurred on the exterior stairs leading to plaintiff's apartment at 8 Mount William Street, Port Jervis, New York on March 16, 2012 at approximately 6:30 p.m. The premises consisted of a two-family home owned and rented to tenants by defendants.

On that evening, plaintiff slipped and fell while ascending the covered staircase used for ingress and egress to his second-floor apartment. Plaintiff commenced this action by the filing of

a Summons and Complaint (Exhibit A), served on defendants on or about August 24, 2012.[1] Issue was joined by service of a Verified Answer on or about August 27, 2012. Plaintiff served a Verified Bill of Particulars in September 2012 and a Supplemental Verified Bill of Particulars in December 2013. (Exhibit B)

Plaintiff was deposed on September 6, 2013 (Exhibit D) and defendant Richard O'Leary was deposed on September 11, 2013. Plaintiff filed a Note of Issue on or about September 8, 2014.

On November 20, 2014, defendants filed the instant motion for summary judgment, on the grounds that defendants did not create or have notice of any dangerous or defective condition. The motion was originally returnable December 15, 2014 and was adjourned by the parties to February 18, 2015.

The Parties' Testimony

The facts of the matter are not significantly disputed: On the date of the accident, plaintiff arrived home from work, walked up the stairs and entered his apartment, in Port Jervis, New York. (Exhibit D at page 73) He went back downstairs with his children, and remained downstairs until about 6:00 p.m. (Exhibit D at page 79) He began walking up the stairs at his normal pace, until he stepped on a place about halfway up the stairs, "where there should be a step but there isn't"; he fell, causing him injuries. (Exhibit D at pp. 84-86) Plaintiff described the area where he fell as a "landing" in the middle of the staircase. (Exhibit D at page 87) He had his left foot on the landing and was going to step up to the next step with his right foot, but hit the step with his right foot and fell. (Exhibit D at page 88)

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[1]An Affidavit of Service is appended as Exhibit A, but reflects a different lawsuit. Nevertheless, there does not appear to be a dispute regarding service of process.

Prior to the accident, plaintiff had used the staircase more than twice each day. (Exhibit D at page 63) There was no liquid or debris on the stairs, and nothing he had to step over. (Exhibit D at pp. 78-79) Nor was lighting an issue. (Exhibit D at page 86) He had never had a problem with the stairs before, and had never made a complaint about their condition. (Exhibit D at pp. 63, 89) He never saw work being performed on the staircase. (Exhibit D at page 64)

Defendant Richard O'Leary testified that he and his wife purchased the property in 1992. (Exhibit E at page 13) The premises were a legal two-family house, and they had a certificate of occupancy. (Exhibit E at page 15)

After purchasing the house, defendants had a roof constructed over the exterior stairway at issue, in order to keep it sheltered from ice and snow. (Exhibit E at page 20) The covered exterior stairway was the only way to get in and out of the second-floor apartment. (Exhibit E at page 23)

In addition to placing a roof on the exterior stairway, defendants also added an outside stringer to reinforce the steps, as well as a guardrail and handrail. (Exhibit E at pp. 24-25) All of the risers and top boards of the stairs were also replaced. (Exhibit E at page 25) When the top boards were replaced, defendants kept the original two board depth of the tread, including the "landing." (Exhibit E at page 31)

From the time the steps were replaced in or around 1997, defendants never received a violation regarding the steps. They never received any complaints regarding the condition of the steps. (Exhibit E at page 51)

Experts

1. Defendants' Expert:

Defendants append to their motion the Affidavit of Ali M. Sadegh, Ph.D., P.E. (It should

be noted that plaintiff's opposing papers focus on the argument that the affidavit of Sadegh was unsworn, and should thus be disregarded. However, while the Court infers that plaintiff was served with an unsigned copy, the affidavit appended to the Court's copy of the motion contained a proper notarization. The argument has therefore been disregarded.)

Dr. Sadegh's affidavit avers his reliance upon the Bill of Particulars, deposition transcripts, photographs, medical records, a site inspection, and a review of the report of plaintiff's expert. (Exhibit F at ¶3) He states that the photographs and his site inspection reveal that there were 19 steps; the treads were uniform and measured 10 inches wide and the risers were 7 to 8 inches high. The dimensions of the steps and railing comply with the 1968 New York City Building Code §27-375. (Exhibit F at ¶5) Mid-way up the stairs was a double wide tread of 19 inches; however, that tread did not constitute a landing, as defined by the building code. (Exhibit F at ¶¶ 4, 6)

The expert opined that, because defendants purchased the building prior to the enactment of the 1995 New York State Uniform Fire Prevention and Building Code, that code was not applicable to the subject stairs. (Exhibit F at ¶8)

Dr. Sadegh further claimed that if plaintiff had been ascending the stairs at a normal gait, his left knee would have been flexed due to body weight, and he would have come down on the surface of the extended 10th tread, while his right hand would have gripped the railing, preventing the fall. The fractures that plaintiff suffered must have been caused by an impact of high velocity. Therefore, he believed, with a reasonable degree of biomechanical and engineering certainty, that the accident happened because of plaintiff's inattentiveness and his moving fast or running up the stairs, not because of any dangerous condition of the staircase. (Exhibit F at ¶¶ 8-12)

2. Plaintiff's Expert:

Appended to the opposing papers is the affidavit and report of their expert, Frederick G. Bremer, A.I.A. In making his report, Mr. Bremer also reviewed photographs, property maps and deeds, building permits, certificates of compliance, violation notices and inspection letters. He also made a personal examination of the premises. (Affidavit at ¶2, Report at ¶3)

His site inspection revealed 19 treads, with depths varying from approximately 9-1/4 inches to 10-3/4 inches. The tenth tread had a depth of 19-1/2 inches. The heights of the risers varied from 6-1/2 to 8 inches. Guardrails were formed by 4 equally spaced 2x4s on the right side (in ascent). There was no graspable handrail attached to the guardrail and no handrail at all on the left side. (Affidavit at ¶2; Report at ¶4)

Mr. Bremer noted that the New York State Building Code, as well as nationally-recognized industry standards, require that treads and risers not vary by more than 1/8 inch in any run, because the geometry of the stairs controls body movement. Inconsistent riser heights or tread depths create unexpected changes in the stair geometry, and contribute to falls. (Affidavit at ¶3) The depth of the tenth step was 95% greater than the depth of the previous nine risers. Moreover, the top 2x4 guardrail does not meet the requirements for a handrail, as its perimeter dimension of 10 inches is 60% greater than the 6.25 inch maximum permitted by the Building Code. (Affidavit at ¶3)

Mr. Bremer's report is critical of defendants' expert's report in several ways: primarily, he found Dr. Sadegh's measurements of the subject treads and risers to be incomplete and inaccurate. Secondly, Dr. Sadegh's citation to the 1968 New York City Building Code is irrelevant to an accident which took place in Port Jervis, New York. Finally, he opined that Dr. Sadegh's assertions regarding plaintiff's rate of ascent and the amount of force required to cause the fracture were

conclusory and unsupported by any reasonable degree of biomechanical or mechanical engineering certainty. (Affidavit at ¶4)

In his report, Mr. Bremer attributed the causes of the accident to include: (1) the failure to construct a stairway which complied with the New York State Uniform Fire Prevention and Building Code and the Fire Code of New York State; (2) failure to maintain a safe premises as required by the New York State Property Maintenance Code; (3) failure to provide uniform tread depths, a safe walking surface, rounded stair nosings and a graspable handrail; (4) failure to properly inspect; and (5) failure to eliminate a dangerous condition. (Report at ¶¶ 2, 6)

Argument

Defendants assert that there is no evidence that defendants created a hazardous condition or had actual notice of it. Without a showing that constructive notice can be inferred as to the amount of time the dangerous condition existed, the complaint must be dismissed. (Stiefeld Affirmation at ¶19) Inasmuch as plaintiff failed to set forth any evidence that anyone, including defendants, was aware of the alleged condition, or complained about it, defendants did not and could not have had actual or constructive notice of it, and could not have been negligent as a matter of law. (Stiefeld Affirmation at ¶20)

Plaintiff asserts that defendants' motion is insufficient to warrant summary judgment, as the facts and circumstances establish plaintiff's cause or action, or at a minimum, the existence of sufficient questions of fact to preclude that relief. (Shuttleworth Affirmation at ¶¶ 2, 12)

Although defendants acquired the property in 1992, thereafter, they constructed a roof, and replaced various parts of the wooden stairway. They added parts, including an outside stringer to reinforce the steps, a guardrail and a handrail. (Shuttleworth Affirmation at ¶5)

Plaintiff submits that Dr. Sadegh, defendants' expert, lacks qualifications to render opinions on biomechanical or medical claims[2]; thus rendering his opinion "fatally defective." (Shuttleworth Affirmation at ¶7) Hence, defendants have failed to meet their burden to establish a lack of notice, nor have they documented any regular inspections. (Shuttleworth Affirmation at ¶14)

Regardless, Bremer's (plaintiff's expert) affidavit and report points to various deficiencies in the Sadegh report, as described hereinabove, including the accuracy of measurements, the inapplicability of the Code cited by Dr. Sadegh, the applicability of New York State Fire Prevention Building Codes, and the speculative nature of Sadegh's opinions. (Shuttleworth Affirmation at ¶11)

Viewing the evidence in the light most favorable to the non-moving party, unless a negligence verdict is insupportable as a matter of law, the matter must go to a jury. (Shuttleworth Affirmation at ¶14) Since defendants have failed to establish a lack of notice, as a matter of law, summary judgment is unavailable. (Shuttleworth Affirmation at ¶17)

In reply, defendants point out that this matter does not turn on a periodic inspection, or a condition that occurred over a period of time. Rather, the structure had not been changed since defendants purchased the property. (Reply Affirmation at ¶7) Defendants also submit that the cases submitted by plaintiff regarding the lack of a handrail are factually inapposite, as a handrail did exist on this staircase. (Reply Affirmation at ¶8)

The Court has fully considered the submissions of the parties.

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[2]This claim is refuted by defendants in their Reply Affirmation, where it is asserted that Dr. Sadegh's curriculum vita was provided in their Expert Disclosure. It has not been provided to the Court.

Discussion

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact." *Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 (2nd Dept 2011), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). On a summary judgment motion, defendant must show that "'it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it'." *Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-75 (2nd Dept 2012) (citing *Cummins v New York Methodist Hosp.*, 85 AD3d 1082, 1083 (2nd Dept 2011), quoting *Molloy v Waldbaum, Inc.*, 72 AD3d 659, 659-660 (2nd Dept 2010); *Milano v Staten Is. Univ. Hosp.*, 73 AD3d 1141 (2nd Dept 2010)); *Gomez v. David Minkin Residence Housing Development Fund Co. Inc.*, 85 AD3d 1112 (2nd Dep't 2011)

The function of the Court on such a motion is issue finding, and not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957) and the Court is obliged to draw all reasonable inferences in favor of the non-moving party. *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2nd Dep't 1995) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. *Anyanwu v. Johnson*, 276 AD2d 572 (2nd Dep't 2000)

The issue of whether a dangerous condition exists on real property "is generally a question of fact for the jury," depending as it does on the "peculiar facts and circumstances." *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 446, 799 NYS2d 827 (2nd Dept 2005)

However, in the instant matter, the Court finds that defendants have failed to meet their burden to establish a lack of negligence as a matter of law. Defendants' expert asserts that the tread

and riser uniformity and the handrail were consistent with the provisions of the 1968 New York City Building Code. (There is no explanation for the reliance on New York City Codes in this Port Jervis matter.) Although defendants acknowledge adding a roof, outside stringer, handrails and guardrails to the staircase, Dr. Sadegh asserts, without explanation, that the 1995 New York State Fire Prevention and Building Code provisions are not applicable to this matter. While acknowledging that the nineteen-inch tenth step was not a landing in accordance with Code provisions, the report does not assert that it was safe, or attempt to explain the discrepancy between it and the other stair treads. The report asserts that plaintiff should have grabbed the handrail, but does not assert that the handrail was graspable, within the meaning of the Code.

Simply on the basis of those deficiencies, when combined with the opinion of the expert regarding biomechanics (unsupported by any assertion in his affidavit of his qualification to make such a conclusion), the Court finds that, as a whole, defendants have failed to establish their entitlement to summary judgment. Given such a finding, the Court need not have even considered the sufficiency of plaintiff's submissions. *Sainte-Aime v. Ho*, 274 AD2d 569 (2nd Dep't 2000)

But, even if the Court had not made such a finding, the conflicting affidavits of the parties' experts as to the discrepancy of the measurements, the existence of dangerous conditions, and the cause(s) of the accident create triable issues of fact. It is within the province of the jury to determine the weight to be accorded to the conflicting testimony of experts. *See Gleeson-Casey v Otis Elevator Company*, 268 AD2d 406, 407 (2nd Dep't 2000). *See also, Jones v Shamrock of Ithaca, Inc.*, 78 AD3d 1299, 1300 (3rd Dep't 2010)

In light of the insufficiency of defendants' submissions, the triable issues of fact raised by plaintiff in his opposition and the conflicting testimony of the parties' expert witnesses, the motion for summary judgment is denied.

This matter is scheduled for pre-trial conference on July 15, 2015 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 22, 2015
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: Finkelstein & Partners
1279 Route 300, PO Box 1111
Newburgh, NY 12551

Burke, Gordon, Conway & Loccisano
10 Bank Street–Suite 790
White Plains, NY 10606