ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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NORMA CHAPARRO,

Plaintiff,

-against-

HEALEY BROTHERS, INC. and W.S. HEALEY CHEVROLET-BUICK, INC.,

Defendants.

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To commence the statutory time period 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.

Index No. 1009/2013

Motion Date: August 28, 2015

The following papers numbered 1 to 5 were read on Defendants' motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Affirmation in Opposition / Exhibits - Affidavit 4-5

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is a personal injury action arising from Plaintiff's fall on November 3, 2012 on the premises of Defendants' automobile dealership in New Hampton, New York. Plaintiff alleges that she tripped and fell on a step within the automobile service area, near the glass entranceway to the service and parts office. There were two single-step risers, each four inches in height, the edges of which were painted in yellow with black stripes to distinguish them from the garage floor and the landing between the steps. On the left side of the first step was a handrail.

Plaintiff testified at her deposition that she needed to use the bathroom, was proceeding to the office looking "towards the door" and tripped because she did not see any step and hence did not raise her foot.

"A property owner has a duty to maintain [its] property in a reasonably safe condition" (*Katz v. Westchester County Healthcare Corp.*, 82 AD3d 712, 713...). "However, a property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous" (*id.; see* [cit.om.]; *Cupo v. Karfunkel,* 1 AD3d 48, 51...). "[W]hether a dangerous or defective condition exists on the property of another so as to create potential liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Trincere v. County of Suffolk,* 90 NY2d 976, 977...[cit.om.]." *Surujnaraine v. Valley Stream Central High School District,* 88 AD3d 866, 866-867 (2d Dept. 2011).

Accordingly, to establish their *prima facie* entitlement to summary judgment, Defendants must establish that the single-step riser in Defendants' automobile service area was (1) open and obvious, and (2) not inherently dangerous. *See, Surujnaraine, supra,* 88 AD3d at 867; *Pirie v. Krasinksi,* 18 AD3d 848, 849 (2d Dept. 2005); *Broodie v. Gibco Enterprises, Ltd.*, 67 AD3d 418 (1st Dept. 2009); *Grazidei v. Mezeny Inc.*, 26 Misc.3d 1221(A), 2010 WL 447057 at *5 (Sup. Ct. Kings Co. 2010). In *Langer v. 116 Lexington Avenue, Inc.*, 92 AD3d 597 (1st Dept. 2012), the First Department wrote:

> A condition that is visible to one "reasonably using his or her senses" is not inherently dangerous (*Tagle* [*v.Jakob,* 97 NY2d 165], at 170...). However, a step may be dangerous where the conditions create "optical confusion" – the illusion of a flat surface, visually obscuring the step (*Brooks v. Bergdorf-Goodman Co.*, 5 AD2d 162, 163...). "[F]indings 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 dangerous condition" (*Scheiber v. Philip & Morris Rest. Corp.*, 25 AD2d 262, 263..., *affd.*, 19 NY2d 786...[1967]).

Langer, 92 AD3d at 599.

In "single riser" cases where special demarcation of the step itself in conjunction with other factors obviated the risk of optical confusion, summary judgment of dismissal is typically granted. *See, e.g., Varon v. NYC Department of Education,* 123 AD3d 810, 810-811 (2d Dept. 2014) (top of riser painted red, contrasting with rest of bathroom floor; warning sign outside bathroom door); *Weiss v. Half Hollow Hills Central School District,* 70 AD3d 932, 933 (2d Dept. 2010) (riser painted yellow; plaintiff had recently traversed without incident); *Bretts v. Lincoln Plaza Associates, Inc.*, 67 AD3d 943, 944 (2d Dept. 2009) (gold-color nosing on step; contrasting patterns of tile above and below step; warning sign adjacent to step); *Broodie v. Gibco Enterprises, Ltd.*, 67 AD3d 418 (1st Dept. 2009) (step painted black and white; yellow warning signs posted in the vicinity); *Groon v. Herricks Union Free School District,* 42 AD3d 431, 432 (2d Dept. 2007) (yellow line painted across top of step; short ramp allowed passersby to circumvent step altogether).

Defendants established *prima facie* the absence of a tripping hazard via the affidavit of their engineering expert, who averred that the steps were clear and visible; that the edges of the steps were painted in yellow and black stripes to distinguish them from the floor and the landing between the steps; that the area appeared to be well lit by natural and artificial lighting; that there were railings on one side of each step; and that the situs of the accident met the requirements of Chapter 10 (Means of Egress) of the New York State Building Code as well as ASTM Standard F 1637-13.

In opposition, Plaintiff tendered the affidavit of her engineering expert. Based on observations made during a visit to Defendants' premises, Plaintiff's expert noted that as he looked toward the sliding glass doors separating the automobile service area from the service and parts reception and waiting areas, "my eyes were immediately drawn to the movement of persons on the other side of the picture window/glass wall and as such I was unaware at that time of the single step transitions." He opined that "there existed an optical illusion in that there no doubt was a change in height owing to the vertical rise at the single step transition, however, when viewed from my vantage point and looking at the distracting and eye catching movement behind the glass, the flooring appeared to be at a uniform elevation." Plaintiff's expert also referenced Section 1003, Subsection 1003.2.7 of the New York State Building Code ("Where changes in elevation of less than 12 inches exist in the means of egress, sloped surfaces shall be used."), and opined that "the code mandates that a sloped surface or ramp be provided for the transition from the service bay floor level to the entry door level, thus the abrupt vertical rise in the form of a single step transition at the accident site was inappropriate."

Defendants did not reply to either of these contentions.

Under the circumstances, Plaintiff's expert affidavit gives rise to triable issues of fact whether the single-step riser in Defendants' automobile service area was open and obvious, whether conditions on the premises created optical confusion generated by the potential distraction of persons approaching the glass doors to the service and parts office, and whether there existed a dangerous or defective condition by virtue of the alleged optical confusion and/or the alleged Building Code violation. Furthermore, given Plaintiff's testimony that she was proceeding to the service and parts office looking "towards the door" and tripped because she did

not see any step and hence did not raise her foot, there is a triable issue of fact whether the alleged dangerous or defective conditions proximately caused Plaintiff's injury.

Finally, the contention of Defendants' engineer, who is also a biomechanical expert, that the nature of Plaintiff's injury is such that she could not have sustained it by falling forward onto the step, as she testified in her deposition, is contradicted by the opinions of the orthopaedic experts for both Plaintiff and Defendants, each of whom has opined that Plaintiff's injury is causally related to the accident at issue here.

In view of the foregoing, the motion for summary judgment must be denied. CPLR §3212(b). *See, Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985).

It is therefore

ORDERED, that Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

Dated: October 14, 2015 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE