Acosta v Ortiz
2016 NY Slip Op 31986(U)
October 17, 2016
Supreme Court, Suffolk County
Docket Number: 13-32563
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

PUBLISH

INDEX No. 13-32563
CAL. No. 15-00914OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-9-15
ADJ. DATE 12-3-15
Mot. Seq. # 002 - MG; CASEDISP

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LUZ D. ACOSTA,

Plaintiff,

- against -

JESSE A. ORTIZ and ISABEL ORTIZ,

Defendants.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 12 ; Answering Affidavits and supporting papers 13 - 22 ; Replying Affidavits and supporting papers 23 - 25 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint against her is granted.

This action was commenced by plaintiff Luz Acosta to recover damages for injuries she allegedly sustained on February 22, 2013, as a result of her falling down the interior stairway of the residence owned by defendant Isabel Ortiz and located at 5 Scholar Lane, Commack, New York.

Defendant now moves for summary judgment in her favor on the grounds that she breached no duty to plaintiff, that she was not negligent, that no dangerous condition existed, that plaintiff's own actions were the sole proximate cause of her injuries, and that she had no notice of any defective handrail. Defendant also moves to dismiss the complaint against Jesse A. Ortiz, on the ground that he was deceased at the time of the incident in question. In support of her motion, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, a transcript of the deposition testimony of nonparty Jose B. Acosta, eleven photographs, and a certified copy of Jesse A. Ortiz's death certificate.

As to defendant's initial application, a party "may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate" (***Jordan v City of New York***, 23 AD3d 436, 437, 807 NYS2d 595 [2d Dept 2005]). Plaintiff having failed to name the personal representative of decedent Jesse A. Ortiz's estate, the action against him is a "nullity" (*id.* at 436).

At her deposition, plaintiff testified that although she is a resident of Florida, in February 2013, she and her two daughters were in New York visiting her mother, who lived in the Bronx. Plaintiff explained that she also had planned a surprise visit to the Commack home of her friend of 45 years, defendant Isabel Ortiz. Plaintiff indicated that on the date in question, she and her two daughters drove from the Bronx to the subject premises, arriving at approximately 10:30 p.m., just after Isabel Ortiz was scheduled to return home from work. After a number of hours of conversation, the parties retired to the home's upstairs bedrooms to sleep. Plaintiff testified that although she had been to the subject premises approximately 30 times previously, this was only the second time she had seen the home's second floor, and this particular occasion was the first time she intended to spend the night there.

Plaintiff testified that as she ascended the staircase leading to the second floor, she noted that there was a metal handrail on one side but not the other, and that the staircase was well-lit. She stated that as they reached the top of the stairs, she and her daughter, Anna Maria Castillo, claimed the bedroom to the right, and her other daughter, Gigi Domenech, claimed a separate bedroom. Plaintiff noted that the upstairs areas were well-lit, and that her bedroom had lamps on either side of its bed. Plaintiff stated that she changed into her pajamas, then walked out of her bedroom and into the upstairs bathroom to wash up. She explained that her path to the bathroom was illuminated by light from the lamp in her bedroom and the lights of the upstairs foyer. She testified that when she stepped into the bathroom, she was able to easily locate its light switch and activate it.

Plaintiff testified that after washing in the bathroom, she returned to her bedroom, switched off the lamp that was lit on her side of the bed off, and got into bed. Plaintiff stated that she was unable to sleep and, at some point later in the night, had the need to use the bathroom. Plaintiff indicated that due to her desire to not wake her daughter who was sleeping next to her, she did not turn on the table lamp. Plaintiff testified that by this time in the night, all of the house's lights had been turned off. She stated that she chose not to turn on any lights or put on her eyeglasses and, instead, "stood on my right side of the [upstairs hallway] wall, because I knew the bathroom was there on the right side."

Plaintiff testified that as she was walking the "five or six" steps from her bedroom to the bathroom, she believed she heard Isabel Ortiz crying in her bedroom. Plaintiff stated that, in response to hearing crying sounds, she took "too many" steps to the left and fell down the stairs. Upon questioning regarding her motivation for taking steps to her left, she stated that "I was so close to the bathroom, and I knew from the bathroom, I had to take a few steps to go to Isabel's [bedroom,] [b]ut it was dark, so I didn't realize how many steps I took." Plaintiff further testified that in the midst of her falling down the stairs, when she was approximately halfway down the staircase, she reached out and grabbed hold of the handrail, but it "came loose."

Defendant Isabel Ortiz testified that she had owned the subject premises for 43 years and that she purchased it with her late husband, Jesse A. Ortiz, who died on December 13, 2011. Ms. Ortiz explained that her son Jesse, who was 41 years old, was living at her house following her husband's death. Ms. Ortiz stated that plaintiff had slept overnight at her house approximately 20 times prior to the night she fell, each time sleeping in the same bedroom as the night in question. Ms. Ortiz explained that she left the upstairs foyer light on until her guests went to bed, then switched it off. Ms. Ortiz testified that at approximately 4:30 a.m., she was sleeping, was awoken by the sound of plaintiff saying "help me," turned on the upstairs foyer light, and saw plaintiff laying at the foot of the stairs. With regard to the stairway's handrail, she indicated that it had been there since she bought the house, that it was not "shaky," and that she had never had any problem with it.

Plaintiff's husband, nonparty Jose Acosta, testified that he was not present at the subject premises at the time of plaintiff's fall, but that he flew to New York from Florida the next day. He indicated that he visited the subject premises after he arrived in New York and noticed that the handrail appeared to have "come off the wall," had "new bolts on it," and "metal strapping" had been used to secure one portion. He stated that Ms. Ortiz allowed him to stay at the subject premises for approximately two weeks while his wife was recovering from her fall, and that during such time "there was always enough lighting." When asked whether he had any conversations with Ms. Ortiz's son about the handrail, he stated that they never spoke about it at all.

Appended to the transcript of Mr. Acosta's deposition testimony is a notarized "correction sheet" wherein he writes, among other things: "I felled (sic) to mention at the deposition that Mrs. Ortiz did mention talking to Jesse (son) about the railing being in need of repaires (sic) before the accident . . . while we were sitting around the kitchen table." Mr. Acosta also writes that his daughter, Ana Maria, "will attest to the conversation."

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

To recover against a defendant in a negligence action, plaintiff must prove the defendant owed him or her a duty of care and that the breach of that duty resulted in the injuries sustained by the plaintiff (*see* ***Kimbar v Estis***, 1 NY2d 399, 153 NYS2d 197 [1956]; ***Lugo v Brentwood Union Free School Dist.***, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of

foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). However, "the owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 866, 999 NYS2d 840 [2d Dept 2014]).

Regarding the exterior areas of a premises, it has been held that unless a hazardous condition is present, landowners are generally not required to illuminate their property during all hours of darkness (*see* ***Miller v Consol. Rail Corp.***, 9 NY3d 973, 848 NYS2d 599 [2007]). The court in ***Savage v Desantis***, 56 AD3d 1013, 1015, 868 NYS2d 787 (3d Dept 2008), *appeal denied* 12 NY3d 709, 881 NYS2d 19 (2009), held that "to extend the common-law duty of the property owner above and beyond providing access to working light fixtures in [a] stairwell by imposing a requirement that owners provide continuous stairwell lighting during all hours of darkness would place a new and an undue burden on owners."

The Court finds defendant has established a prima facie case of entitlement to summary judgment (see ***Nomura***, *supra*). Here, the evidence submitted by defendant demonstrates that the staircase in question was not inherently dangerous, that she was not aware of any dangerous condition on the subject premises, that she switched-off the upstairs foyer's light only after her guests had gone to bed, that there were multiple lighting sources available to plaintiff, and that she had no notice that the handrail was not properly affixed to the wall (*see* ***Bluth v Bias Yaakov Academy for Girls***, *supra*; ***Lezama v 34-15 Parsons Blvd, LLC***, *supra*; ***Savage v Desantis***, *supra*).

The burden, therefore, shifted to plaintiff to raise a triable issue of material fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). In opposition to the motion, plaintiff submits copies of the pleadings, transcripts of the parties' deposition testimony, her own affidavit, an affidavit of nonparty witness Ana Maria Castillo, a transcript of the deposition testimony of nonparty Jose B. Acosta, and eleven photographs.

In her post-deposition affidavit, plaintiff claims that the bulb that was in the lamp on her side of the bed "appeared to be of a rather dim wattage, and did not illuminate and/or extend out into the hallway in any way, shape and/or form." She also states that, as she was falling down the stairs, she was able to grab the handrail with her right hand but that it "immediately pulled out from the wall, causing my body to twist."

In her affidavit, plaintiff's daughter, nonparty witness Ana Maria Castillo, alleges that "as [she] went up the stairs [she] noticed that the single wrought iron handrail . . . was loose and shaking." She, like her mother, avers that the light from the table lamp in their bedroom was "dim" and "did not extend out into the hallway." She states that after her mother had fallen down the stairs, she saw that

"the section of the handrail which was located towards the center of the staircase was resting on the stairs and the upper end of said handrail was still attached by the top of the staircase." Ms. Castillo further states that Ms. Ortiz told her that "the handrail had been very loose for some time" and that she "had asked her son, Jessie, to repair the handrail," but "that he had never quite gotten around to it."

Plaintiff's counsel cites to a number of cases in support of the argument that defendant was negligent in turning off the upstairs foyer light in her home, but each is inapposite. In ***Sawyers v Triosi***, 95 AD3d 1293, 945 NYS2d 188 (2d Dept 2012), plaintiff specifically searched for a light switch, could not locate the light switch, and later learned that said light switch was located far from the staircase she fell down. Further, plaintiff in that case was completely unfamiliar with the layout of the area she was walking through, intentionally stepped through a doorway believing it led to a restroom but, in actuality, it led to a staircase. Here, plaintiff admitted at her deposition that she purposely avoided turning any lights on, as she did not want to wake her sleeping daughter. Also, plaintiff here had not only visited the subject premises numerous times in the past, but had actually walked the same path to the bathroom earlier in the night. In ***Pollack v Klein***, 39 AD3d 730, 835 NYS2d 290 (2d Dept 2007), plaintiff was being led by another individual down a dark hallway in a residence of which she was totally unfamiliar. That scenario, once again, is different from that of the instant matter, wherein Mrs. Acosta was well aware of the physical layout of defendant's home. Plaintiff here admits to simply misjudging where she was standing at the time of her fall and taking "too many" steps to her left. Given the bathroom's close proximity to the stairway, had plaintiff desired for her path to be illuminated, all she needed to do was switch the bathroom light on. Plaintiff's reliance on ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 (2d Dept 2014), is similarly misplaced as that case found a duty to provide safe ingress and egress to members of the public, which included adequate illumination on exits and entrances.

The vast majority of cases denying summary judgment to moving defendants in situations factually similar to this one involve plaintiffs who had no control of an area's illumination, such as exterior spaces (*see* ***Peralta v Henriquez***, 100 NY.2d 139, 760 NYS2d 741 [2003]; ***Steed v MVA Enters., LLC***, 136 AD3d 793, 26 NYS3d 98 [2d Dept 2016]; ***Guilfoyle v Parkash***, 123 AD3d 1088, 1 NYS3d 188 [2d Dept 2014]; ***Wolfe v North Merrick Union Free Sch. Dist.***, 122 AD3d 620, 996 NYS2d 125 [2d Dept 2014]) or in commercial buildings (*see* ***Kempter v Horton***, 33 AD3d 868, 824 NYS2d 308 [2d Dept 2006]; ***Liptrot v Theater at Madison Square Garden***, 281 AD2d 398, 721 NYS2d 388 [2d Dept 2001]; ***Shirman v New York City Transit Auth.***, 264 AD2d 832, 695 NYS2d 582 [2d Dept 1999]). In those instances, plaintiffs were reliant on other parties, whom had exclusive control of the lighting conditions, to ensure a well-lit walkway. On the other hand, it has been held that when a property owner delegates control of the lighting to those persons on the property, the owner has not breached his or her duty of reasonable care (*see* ***Savage v Desantis***, *supra*; *contrast* ***Quinlan v Cecchini***, 41 NY2d 686, 394 NYS2d 872 [1977] [triable issues existed when light switches were rendered inaccessible when blocked by entrance door and plaintiff forced to traverse a treacherous area in darkness]). Here, the Court finds that it was not unreasonable for defendant to switch off the lights in her house after she believed her house guests were asleep (*see* ***Perruzza v L & M Creations of New York***, 114 AD3d 919, 981 NYS2d 435 [2d Dept 2014] [defendants' use of a timer to extinguish exterior lighting after a reasonable period deemed proper]).

Plaintiff has similarly failed to raise a triable issue of fact regarding the allegedly defective handrail. Plaintiff has not submitted competent evidence that the handrail was loose prior to her grabbing it during her fall, that the handrail could have prevented plaintiff's alleged injuries given the fact that she was mid-fall at the time she grabbed it, or that defendants had notice of any defective condition (*see* ***Jefferson v Temco Servs. Indus.***, 272 AD2d 196, 708 NYS2d 21 [1st Dept 2000]; *contra* ***Indence v 225 Union Ave. Corp.***, 38 AD3d 494, 831 NYS2d 489 [2d Dept 2007] [plaintiff grabbed "wobbly" handrail, and handrail's movement actually caused her to lose her balance and fall]).

Accordingly, defendant's motion for summary judgment dismissing the complaint against her is granted.

Dated: OCT 17 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**