Begley v Gartner
2017 NY Slip Op 33484(U)
June 30, 2017
Supreme Court, Westchester County
Docket Number: Index No. 61080/2015
Judge: Charles D. Wood
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN BEGLEY,

Plaintiffs,

-against-

DANIEL GARTNER AND TINA GARTNER AND PAUL J. ZANETTE, SR.,

Defendants.

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DANIEL GARTNER AND TINA GARTNER,

Third-Party Plaintiffs,

-against-

PAUL J. ZANETTE, SR.,

Third-Party Defendant.

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DECISION & ORDER
Index No. 61080/2015
Sequence Nos. 2&3

WOOD, J.

The following documents were read in connection with the motion for summary judgment of moving Defendants/Third-Party Plaintiffs ("defendants") (Seq 2), and plaintiff's cross- motion to Amend Bill of Particulars (Seq 3):

Defendant's Notice of Motion, Counsel's Affirmation, Exhibits.
Plaintiff's Notice of Cross-Motion, Counsel's Affirmation, Exhibits.
Defendant's Reply Affirmations and opposition to Plaintiff's Cross-Motion.

This action arises out of a negligence claim brought against homeowners to recover for injuries allegedly sustained by plaintiff when he tripped and fell down exterior steps at

homeowner's residence in West Harrison. The accident happened on April 10, 2015 when plaintiff was employed by ULC Roberts, a contractor to Con Edison. He was dispatched to defendants' home to change the gas meter, and had no problems walking up all the outside stairs to ring the bell. Defendant, Tina Gartner came to the door, and she advised him that she was unaware that he was to exchange the meters. Leaving the premises, plaintiff proceeded to go down the stairs, he slipped and fell. This action was commenced on June 29, 2015 by the filing of the summons and complaint in the Westchester County Clerk's Office. Defendants now bring this motion for summary judgment dismissing the complaint. Plaintiff cross moves to amend the Bill of Particulars, and to oppose the motion.

Based upon the foregoing, the motions of the parties are decided as follows:

It is well settled that "a 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, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In

deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). The court's function on this motion for summary judgment is issue finding rather than issue determination (Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324). Further, CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

Further, the elements of common law negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]).

Generally, landowners have a duty to act in a reasonable manner to prevent harm to those on their property, and an owner's duty to control the conduct of persons on its premises arises

only when it has "the opportunity to control such persons and [is] reasonably aware of the need for such control" (D'Amico v Christie, 71 NY2d 76 [1987]; Cutrone v Monarch Holding Corp., 299 AD2d 388, 389 [2d Dept 2002]).

Here, plaintiff testified that:

Q: Describe for me now what happened from the point where you start walking down the bottom set of stairs?
A: Well, when I was walking down the stairs, you always use the handrail. I remember using the handrail. I took approximately 1, 2, 3 steps and I remember falling.
Q: And do you know what caused you to fall?
A: I lost traction in my right foot.
Q: Any do you know what caused your right foot to lose traction?
A: Not at the time. No.
(Plaintiff Tr. at 46-47)

However, later in the deposition, plaintiff testified that:

Q: So the reason that you are saying that there was something wrong with the step is because you felt it, correct?
A: When I placed my foot on the step I felt it slide off in a downward fashion.
Q: Did you feel that on any of the other stair while you were walking down?
A: No.
Q: Do you know why your foot slipped off?
A. The step was built incorrectly.
Q. How do you know that?
A: Cause it was slanted down.
Q How do you know it was slanted down. Did you observe?
A: No. I felt it when I was walking. I felt it. When I was walking down the stairs I felt something was wrong with the step as I said.
(Plaintiff Tr. At 88-89).

In support of their motion, defendants contend that plaintiff injured himself because he mis-stepped, and that there is no evidence of any defect in the subject step.

Plaintiff counters that defendants became owners of the property in 2003, and they built the stairs in 2006, about 9 years before the accident. Plaintiff offers the Report of his expert, Yarmus Engineering, P.C. dated March 3, 2017. Andrew R. Yarmus, P.E. graduated with a

Bachelor of Science degree from the School of Civil and Environmental Engineering at Cornell University with a minor in Operations Research and Industrial Engineering. Yarmus is a licensed Professional Engineer and a New York State Certified Code Enforcement Official, and holds many other positions and is a member of engineer related societies. Yarmus asserts that they conducted visual observations and measurement at the subject premises on March 7, 2016. He points out that defendants did not file for nor did they ensure that their contractor filed on their behalf a construction permit for the stair altercation. He claims had they done so, it is more likely than not that the municipal building department inspections of the subject steps would have caused to be corrected the subject excessive tread slope. He cites violations of code requirements regarding the steps of the subject premises. The slope of the subject tread is approximately 4.35 times greater than the maximum slope permitted by Code and custom and practice. On the basis of the findings, the expert concludes that there was neglect by those responsible for the design, construction and maintenance of the subject steps , and that there was a lack of warning to those visiting the premises as to the deficiencies.

In light of the foregoing, a triable issue of fact exists as to whether defendants were placed on notice of the sloped stairs. "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 permit [the defendants] to discover and remedy it" (Bergin v Golshani, 130 AD3d 767, 768 [2d Dept 2015[). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (Hoffman v Brown, 109 AD3d 791, 792 [2d Dept 2013]). Without evidence as to when they last inspected the step prior to accident, or that the allegedly sloped step was a latent defect that could not have been discovered upon a reasonable inspection,

defendants failed to establish prima facie, that they lacked constructive notice of the allegedly defective step (130 AD3d 767, 768). There is a triable issue of fact as to what defendants knew of the subject step and that the condition of the step was a recurring one. "A defendant with actual knowledge of an ongoing and recurring dangerous condition may be charged with constructive notice of each specific reoccurrence of the condition" (Cassidy v. City of New York, 121 AD3d 735, 736 [2d Dept 2014]).

Based upon the foregoing, defendants failed to eliminate all material questions of fact in connection with the alleged defective step or of a recurring hazardous condition such that they could be charged with constructive notice of the alleged defective step which caused the injured plaintiff to fall (Zerilli v W. Beef Retail, Inc., 72 AD3d 681, 682 [2d Dept 2010]).

In light of defendants' failure to meet their initial burden, the sufficiency of plaintiffs' opposition papers need not be considered (Bergin v Golshani, 130 AD3d 767, 768 [2d Dept 2015]). Accordingly, defendants' motion for summary judgment (Seq 2) is denied for failure to make a prima facie case for judgment as a matter of law.

Plaintiff's motion to amend the Bill of Particulars is governed by the same standards as those applying to motions to amend pleadings (Scarangello v State, 111 AD2d 798, 798–99, [2d Dept 1985]). It is well settled that "leave to amend a complaint should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not result in surprise or prejudice to the opposing party" (Old World Custom Homes, Inc. v Crane, 33 AD3d 600 [2d Dept 2006]; Lucido v Mancuso, 49 AD3d 220 [2d Dept 2008]).

Plaintiff's counsel contends that in the Bill of Particulars, it was erroneously cited to the International Residential Code when it should have simply cited to the NYS Residential Code, as

correctly stated in plaintiff's expert report. The difference is in name only as the underlying provisions are exactly the same. "Both require, verbatim, that the walking surface of treads and landings of stairways shall be sloped no steeper than one unit vertical in 48 inches horizontal (2 - percent slope)" (Plaintiff's Counsel's Affirmation at p. 3). Plaintiff's counsel explains it was incorrectly cited to the IRC because the current rendition of the NYS Code refers to the International Code. This change would have no substantive effect on plaintiff's claims. Defendants have known that the issue in this case is the slope of the steps since the complaint.

Defendants' counsel argues that plaintiff certified the case as trial ready, and that plaintiff served the expert exchange without listing the New York State Residential Code. Had defendants known about the Code, perhaps they would have hired their own expert and now they will be unduly prejudiced.

Considering these arguments, the court finds that as no inordinate delay has been shown and no showing of prejudice to defendants, the court grants the amendment to the Bill of Particulars.

All matters not specifically addressed are herewith denied. This constitutes the decision and order of the court.

For the stated reasons, it is hereby:

ORDERED, that defendant's motion for summary judgment (Seq 2) is Denied; and it is further

ORDERED, that plaintiff's motion to amend the Bill of Particulars (Seq 3) is granted, and the amended bill of particulars is deemed served; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the

parties within ten (10) days of entry, and file proof of service within five (5) days of service in accordance with NYSCEF protocols; and it is further

ORDERED, that the remaining parties are directed to appear on Tuesday Aug. 15, 2017, 2017, at 9:15 A.M, in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: June 30, 2017
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF