SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

_____x **Index No. 601768/16**

FREDERIC LIEBRADER,

Motion Seq. No.: 001
Motion Submitted: 6/13/18

Plaintiff(s),

-against-

XXX

BARBARA MCLAUGHLIN AS EXECUTRIX OF THE ESTATE OF PATRICIA SWEIKATA,

Defendant(s).

_____x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Barbara Mclaughlin as Executrix of the Estate of Patricia Sweikata (McLaughlin), moves this court for an order, pursuant to CPLR 3212, granting her summary judgment and dismissing the complaint against her. Plaintiff, Frederic Liebrader (Liebrader) opposes the motion.

Liebrader commenced this negligence action by service of a summons and complaint dated March 16, 2016. Issue was joined by the service of an answer dated

March 31, 2016. The case certified ready for trial on December 5, 2017 and a note of issue was filed on February 19, 2018.

According to the pleadings and parties' depositions, on May 14, 2013, Liebrader was working for ADT, a home security company, and was going to McLaughlin's home to perform a demonstration of a security product for her. The walkway up to the front door of the house was red brick, and had steps, but the distance between the steps was not uniform. It appears from the pictures that one would have to go up four steps to reach the front door, but the distance between steps one and two was significantly shorter than the distance between steps two and three, and three and four. The distance from step four to the front door appears longer than that of the distance between steps one and two, but shorter than the distance between the other steps

Liebrader testified that as he approached the front door he traversed the first two steps without a problem. As he approached the third step, McLaughlin either opened the front door or came outside. As he was looking at her and not the steps, he "made a misstep" at the third step and fell, landing on his left side, causing injuries. McLaughlin now moves for summary judgment, arguing no duty of care was violated.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v.*

City of New York, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

"To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

While a landowner has a duty to maintain its premises in a reasonably safe manner (*see Basso v. Miller*, 40 NY2d 233, 241 [1976]), it has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see Tyz v. First St. Holding Co., Inc.*, 78 AD3d 818 [2d Dept 2010]; *Maraia v. Church of Our Lady of Mount Carmel*, 36 AD3d 766 [2d Dept 2007]). Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the circumstances of each case and is generally a question of fact for the jury (*see Surujnaraine v. Valley Stream Cent. High School Dist.*, 88 AD3d 866 [2d Dept ; *Katz v. Westchester County Healthcare Corp.*, 82 AD3d 712 [2d Dept 2011]). However, once a defendant establishes a condition is open and obvious, it is up to the plaintiff to raise a triable issue of fact (*see Tyz v. First St. Holding Co., Inc.*, 78 AD3d 818 [2d Dept 2010]).

"The scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition. However, a landowner has no duty to warn of an open and obvious danger" (*Cupo v. Karfunkel*, 1

AD3d 48, 51 [2d Dept 2003]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a prime facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006].

In support of her motion, McLaughlin relies on, *inter alia*, the pleadings, her deposition transcript, Liebrader's deposition transcript and pictures of the area where Liebrader fell. In particular, McLaughlin focuses Liebrader's testimony where he indicates he made a misstep: "Yeah, I think I started up that third step and at that time, the lady came of the house to open– or she opened the door there and I saw her and then I made a misstep on that third step and I fell on my left side and left shoulder." Liebrader acknowledges seeing no defect on the steps, nor any garbage, debris or pets. This was confirmed by pictures of the steps he was shown at the deposition and testified were a fair and accurate representation of how the steps appeared on the day he fell. He was also carrying a briefcase in his right hand and a box in his left hand.

Based on the foregoing, the court finds McLaughlin has established entitlement to summary judgment as a matter of law. The burden shifts to Liebrader to raise a material issue of fact requiring a trial of the action.

In opposition, Liebrader also references his deposition testimony. In particular, he

focuses on that part of the testimony where he states the steps were both different distances from one another and "maybe" different heights. Liebrader's counsel claims that McLaughlin startled Liebrader when she opened the door, though Liebrader never claims as much in his deposition. Counsel also references the "defective formation" of the walkway, specifically the difference in distance and heights among the steps. However, there is no evidence that the steps were different heights, other than Liebrader saying "maybe" they were. Further, there is no evidence that the different distances among the steps was a "defective condition". The only evidence presented is the pictures, and they depict a wide, well-maintained stairway which appears easy to view and navigate. Assuming the steps constituted a defect, it was open and obvious and not dangerous.

Nothing in the opposition papers indicates McLaughlin had actual or constructive notice of a dangerous condition, or that there was any such dangerous condition. Further, it is clear from his deposition testimony that Liebrader does not know what caused him to fall. Counsel acknowledges as much by stating "Only upon Plaintiff's additional review of the steps and pictures was he able to determine that the cause of his fall was due to uneven steps." However, the fact that he needed to go back and look around to determine what made him fall renders his opinion on the cause of the fall speculative. Where a plaintiff in a slip and fall case cannot identify that which made him fall without employing speculation, the cause of action must be dismissed. (*Vojvodic v. City of New*

York, 148 A.D.3d 1086 [2nd Dept. 2017]). While causation can be established by inference from the circumstances of the particular incident, that there could have been many possible causes of the fall undermines such an argument. *Id.* Herein, it is just as likely that a misstep, or loss of balance, caused the fall. (*Hahn v. Go Go Bus Tours, Inc.*, 144 A.D.3d 748 [2nd Dept. 2016]). In fact, Liebrader himself blames the accident on a "misstep". As such, Liebrader is unable to raise a material issue of fact.

Accordingly, it is hereby

ORDERED, that McLaughlin's motion for summary judgment is GRANTED. The complaint is dismissed.

This constitutes the decision and order of the court.

Dated: August 23, 2018
Mineola, New York

JAMES P. McCORMACK, J.S.C.

ENTERED
AUG 27 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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