

**Cusato v Amato**

2018 NY Slip Op 34219(U)

March 21, 2018

Supreme Court, Albany County

Docket Number: Index No. 900775-17

Judge: Richard M. Platkin

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

ROSA CUSATO,

Plaintiff,

**DECISION**  
**&**  
**ORDER**

-against-

DOMINICK AMATO,

Defendant.

Index No. 900775-17

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

BASCH & KEEGAN, LLP  
*Attorneys for Plaintiff*  
(Derek J. Spada, of counsel)  
307 Clinton Avenue  
P.O. Box 4235  
Kingston, NY 12402

LAW OFFICES OF THERESA J. PULEO  
*Attorneys for Defendant*  
(Kimberly A. Sierra and Murry S. Brower, of counsel)  
P.O. Box 2903  
Hartford, CT 06104

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Hon. Richard M. Platkin, A.J.S.C.

This is a premises liability action brought by plaintiff Rosa Cusato, who fell while descending the exterior staircase of the residence owned by her friend, defendant Dominick Amato. Discovery is complete, a note of issue was filed on August 22, 2017, and the case is assigned a day certain for jury trial of May 7, 2018. Defendant now moves for summary judgment dismissing the complaint. Plaintiff opposes the motion.

### **BACKGROUND**

On December 10, 2016, plaintiff visited defendant at his home in the City of Albany. At approximately 6:00 p.m., plaintiff was leaving the house carrying a loaf of bread and an apple pie. Defendant walked plaintiff to the front door and followed plaintiff outside to see her off. There were various decorations and potted plants on and about the exterior stairs, and a guardrail was missing on the right side of the staircase (as viewed from inside the home). Plaintiff took one or two steps and then fell to the ground, thereby sustaining various injuries (*see* Cusato EBT, pp. 34-46; Cusato Aff., ¶¶ 2-7; Amato EBT, pp. 5-13).

Plaintiff commenced this action on January 31, 2017, alleging negligence. In her verified bill of particulars, plaintiff cites the missing handrail, the lack of adequate lighting and the placement of flower pots at the top of the stairs as the bases for her negligence claim (*see* Sierra Aff., Ex. C, ¶ 14).

Defendant moves for summary judgment on the grounds that: (1) he had no notice of the allegedly dangerous conditions; (2) he maintained the premises in a reasonably safe condition, as evidenced by the house's compliance with the applicable building codes; and (3) plaintiff cannot establish causation because she does not know what caused her to fall. Plaintiff opposes

the motion, arguing that defendant has failed to sustain his initial burden, and, in any event, the evidence submitted in opposition to the motion suffices to raise triable questions of fact as to the issues that are the subject of the motion.

### ANALYSIS

Summary judgment is a drastic remedy and should only be granted if there are no material issues of disputed fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). In evaluating a motion for summary judgment, a court should simply determine whether, viewing the evidence in the light most favorable to the opponent of the motion, material issues of disputed fact preclude the grant of judgment as a matter of law (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The party moving for summary judgment has the initial burden of coming forward with admissible evidence to demonstrate the absence of any material issues of fact, and the “[f]ailure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the initial showing has been made, the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action (*see id.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

On this motion for summary judgment, defendant is “required to establish as a matter of law that [he] maintained the property in question in a reasonably safe condition and that [he] neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof” (*Richardson v Rotterdam Sq. Mall*, 289 AD2d 679, 679 [3d Dept 2001]; *see Beck v Stewart’s Shops Corp.*, 156 AD3d 1040, 1041 [3d Dept 2017]; *Mazerbo v Murphy*, 52 AD3d

1064, 1065 [3d Dept 2008], *appeal dismissed* 11 NY3d 770 [2008]). Defendant also may establish his entitlement to judgment as a matter of law by demonstrating the absence of proximate causation based on “plaintiff’s inability to identify the cause of the fall” (*Rivera v 916 Peekskill Main Realty, Inc.*, 147 AD3d 802, 803 [2d Dept 2017] [internal quotation marks and citations omitted] [collecting cases]; *see also Larkins v Hayes*, 267 AD2d 524, 525 [3d Dept 1999]).

**A. Notice/Causation**

Defendant argues that plaintiff cannot establish that he had actual or constructive notice of any dangerous condition because plaintiff does not know what caused her to fall (*see Sierra Aff., Ex. D [Cusato EBT]*, p. 58). Defendant similarly contends that plaintiff’s inability to identify the cause of her fall forecloses a finding of proximate cause. In making these arguments, defendant emphasizes that plaintiff did not testify in her deposition that she tripped over a flower pot, attempted to grasp a missing handrail or fell due to a lack of adequate lighting.

However, in his own deposition testimony, which was submitted in support of the motion (*see Sierra Aff., Ex. E [Amato EBT]*),<sup>1</sup> defendant testified that he was aware that the handrail had broken off of the staircase years prior to plaintiff’s fall (*see id.*, p. 8). Defendant further testified that plaintiff tripped over what “was possibly a plant,” as he had a plant on the staircase in “a plastic container” having “a 6-inch diameter with 8 to 10 inches going up” (*id.*, pp. 12-13). Defendant, who personally observed plaintiff’s fall, also testified that she fell to the right side of the staircase – the side that was missing the handrail (*see id.*, p. 13; *see also Cusato EBT*, p. 37).

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<sup>1</sup> The version of the transcript submitted by defendant is not signed, sworn or certified. Although neither side raised this as an issue, the copy submitted by plaintiff in opposition to the motion is in admissible form.

While defense counsel emphasizes that plaintiff did not testify as to the cause of her fall (*see* Sierra Aff., ¶¶ 9, 21, 31, 37), plaintiff did describe the various items placed on and about the staircase, including decorations and potted flowers/plants on each side of the door (*see* Cusato EBT, pp. 34-37, 53-54). Moreover, review of the deposition transcript shows that plaintiff was asked only one question as to whether she “kn[ew] why [she] fell,” at which point defense counsel moved on to other topics (*see id.*, pp. 58-59; *see also O’Connor v Aerco Intl., Inc.*, 152 AD3d 841, 842 [3d Dept 2017] [defendant “cannot satisfy (his or her) initial burden by merely pointing to gaps in a plaintiff’s proof”]).

Inasmuch as defendant’s own proof raises triable questions of fact as to the issues of notice and proximate causation, the Court concludes that defendant has failed to meet his initial burden as to these issues (*see Kelly v Mall at Smith Haven, LLC*, 148 AD3d 792, 794 [2d Dept 2017]; *Hanes v Narracci*, 113 AD3d 1125, 1126 [4th Dept 2014]; *Godfrey v Town of Hurley*, 68 AD3d 1527, 1528 [3d Dept 2009]; *Belles v United Church of Warsaw*, 66 AD3d 1470, 1471 [4th Dept 2009]). In any event, even assuming that defendant had met his initial burden of demonstrating the absence of actual or constructive notice and/or the lack of proximate causation, the Court concludes that the evidence submitted by plaintiff in opposition to the motion suffices to raise triable issues of fact.

In her affidavit in opposition, plaintiff avers that she “tripped on an object, which [she] believe[s] was a flower pot . . . , as opposed to something else, because there were no other objects in the vicinity on which to trip” (Cusato Aff., ¶¶ 6, 8). Plaintiff also explains that she “did not see the flower pot immediately before [she] tripped on it because the exterior of [defendant’s] house was dimly lit” (*id.*; *see* Cusato Aff., Exs. B & C [photographs of premises]).

Plaintiff further testified that “the flower pot was located near the side of the staircase without a handrail, and [she] fell down this side of the staircase. As such, there was no handrail or anything for [her] to grab onto in an attempt to stop [her] fall” (Cusato Aff., ¶ 7).

Addressing her deposition testimony, specifically the part where she stated that she did not know what caused her to fall, plaintiff correctly observes that she was merely asked one question in this regard and was therefore prevented from stating the details now claimed by defendant to be lacking (*see id.*, ¶¶ 8, 10). Thus, the Court does not find this to be a situation where a plaintiff proffers an affidavit that directly contradicts his or her prior deposition testimony (*compare Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2d Dept 2014] [collecting cases], *lv denied* 26 NY3d 907 [2015]; *Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256, 257 [2d Dept 1997]).

Based on the foregoing, defendant has failed to demonstrate his entitlement to dismissal of the complaint based on lack of actual or constructive notice or the absence of proximate causation.

#### **B. Breach of Duty**

In seeking to establish that he maintained the premises in a reasonably safe condition, defendant submits the affidavit of his expert engineer, Chet J. Zaremba, who opines that defendant’s exterior staircase complied with the 2015 building codes and that the contrary opinions of plaintiff’s expert, Alden P. Gaudreau, P.E., are speculative (*see Sierra Aff., Ex. G [Zaremba Aff.]*, ¶¶ 14-24). However, defendant’s expert does not state that the staircase complied with the applicable building codes that were in effect *at the time of construction* of defendant’s home over 40 years ago (*see Amato EBT*, pp. 4, 7-8; *cf. Reid v Schalmont School*

*Dist.*, 50 AD3d 1323, 1324-1325 [3d Dept 2008]). In any event, compliance with the building code “is not . . . dispositive of plaintiff’s claim, which is premised on common-law negligence” (*Roberts v United Health Servs. Hosps., Inc.*, 128 AD3d 1210, 1211 [3d Dept 2015]), and the Court is satisfied that defendant’s longstanding failure to replace the missing handrail, together with the presence of tripping hazards on the staircase, suffice to raise triable issues of fact as to whether defendant maintained the premises in a reasonably safe condition.

Defendant also has failed to establish, *prima facie*, that the flower pots and other items on or about the staircase were open and obvious and not inherently dangerous. “A condition that is generally apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted,” and “[t]he determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances” (*Dalton v North Ritz Club*, 147 AD3d 1017, 1017 [2d Dept 2017] [internal quotation marks, brackets and citations omitted]; see *Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014]; *Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [1st Dept 2004]). Moreover, “the open and obvious nature of an allegedly dangerous condition does not, standing alone, necessarily obviate a landowner’s duty to maintain his or her property in a reasonably safe condition,” although it may be relevant to the issue of the plaintiff’s comparative negligence (*MacDonald v City of Schenectady*, 308 AD2d 125, 127-129 [3d Dept 2003]; see *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

In this regard, both parties testified that plaintiff fell after descending one or two steps while holding various food items in her hands (see Cusato EBT, pp. 43-45; Amato EBT, pp. 6-7, 12-13). Further, as noted above, defendant expressly acknowledged that plaintiff tripped on what

“was possibly a plant” in a “plastic container” that he had placed there earlier (Amato EBT, pp. 12-13), and he concedes that there was no “actual [lighting] fixture that was attached to the house,” and the area was illuminated only by decorative lighting at the time of the accident (*id.*, pp. 9-12). Thus, defendant’s own proof raises triable issues of fact as to whether the allegedly dangerous condition on his staircase “was open and obvious and not inherently dangerous given the surrounding circumstances at the time of the accident” (*Dalton*, 147 AD3d at 1018; *see Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 761-762 [2d Dept 2011]; *Tertulien v Smith*, 2012 WL 9570613, \*2 [Sup Ct, NY County 2012] [involving similar facts and proof]).

Finally, even assuming that defendant had met his initial burden, plaintiff’s expert engineer opines, among other things, that:

Based on data . . . reviewed, it appears that . . . [d]efendant’s house was built in 1970. Barring any changes to the entranceway, the State Building Code applicable to one and two family dwellings that was in effect in 1964 would have been applicable at the time of construction. That Building Code states that open sides of stairways shall have guards and handrails (§ A205-6), meaning both handrails were required when the home was built. Removal of the left handrail and guardrail (ascending) would violate this section of the Building Code (Gaudreau Aff., ¶ 15).

Plaintiff’s expert also opines that the lighting provided by defendant at the doorway – a red, low-wattage decorative bulb – was inadequate, and he notes the absence of any moonlight at the time of plaintiff’s accident (*see id.*, ¶¶ 4-5, 10).

Thus, plaintiff’s expert concludes, “within a reasonable degree of engineering certainty,” that:

[T]he subject stairway was in a dangerous condition at the time of [plaintiff’s] trip and fall accident. The top landing had no guardrail on an open side; the stairway top landing contained a tripping hazard

which was the flower pot; the stairway landing width was reduced by the flower pot; and the stairway was not adequately lighted (*id.*, ¶ 19).

The expert further opines that the staircase violated various building codes, including the 1964 Building Code “that was applicable when the stairway was built,” and that plaintiff would not have tripped and fallen had the aforementioned defects in and on the staircase not been present (*id.*, ¶¶ 20-21).

Based on the foregoing, defendant has failed to demonstrate as a matter of law that he maintained the premises in a reasonably safe condition.

### CONCLUSION

Based on the foregoing, it is

**ORDERED** that defendant’s motion for summary judgment is denied in all respects.

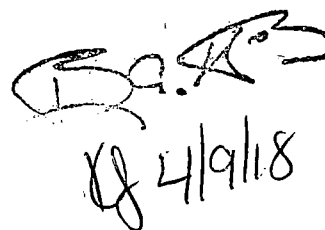
This constitutes the Decision & Order of the Court, the original of which is being transmitted to plaintiff’s counsel; all other papers are being sent to the Albany County Clerk. The signing of this Decision & Order shall not constitute entry or filing under CPLR 2220, and counsel is not relieved from the applicable provisions of that section respecting filing, entry and Notice of Entry.

Dated: Albany, New York  
March 21, 2018

  
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RICHARD M. PLATKIN  
A.J.S.C.

Papers Considered:

NYSCEF Nos. 7-16.

  
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