

**Meagher v Birchwood at Spring Lake Homeowners  
Assn., Inc.**

2019 NY Slip Op 30924(U)

April 9, 2019

Supreme Court, Suffolk County

Docket Number: 16-1277

Judge: Denise F. Molia

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**ORDERED** that the motion (#003) by plaintiff for a trial preference is granted; and it is further

**ORDERED** that the motion (#004) by defendant Maio Building Corp. for summary judgment dismissing the complaint and the cross claims against it is granted to the extent of granting summary judgment dismissing the cross claim against it for contractual indemnification, and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on July 17, 2015, at approximately 2:00 p.m., when she tripped and fell over the first step on the walkway leading from the sidewalk to the clubhouse on the premises of defendant Birchwood at Spring Lake Homeowners Association, Inc. ("Birchwood"). In October 2012, defendant Maio Building Corp. ("Maio Building") replaced some walkways on Birchwood's premises, including the subject step. In her bill of particulars, plaintiff alleges, *inter alia*, that the design, construction, and installation of the subject step and walkway created a dangerous condition on the premises.

Birchwood moves for summary judgment dismissing the complaint and the cross claims against it on the basis that plaintiff failed to give a specific reason for the cause of an alleged accident. In support, Birchwood submits, *inter alia*, the pleadings, the transcripts of the parties' deposition testimony, and the unsworn report of its expert, Stan Pitera, a professional engineer.

At her deposition, plaintiff testified that she has lived in her unit at Birchwood at Spring Lake development for approximately 15 years. On the day of the accident, after parking her vehicle in the parking lot in front of the clubhouse building, she walked on walkways for approximately 50 feet, heading towards the clubhouse. While walking on walkway No. 3, she attempted to climb the first step. As she lifted her foot to go up the step, the bottom part of her shoe contacted the left part of the step, and she fell backwards. While on the ground for five or six minutes, she looked around the area where she fell. She testified that there was no water, oil, or debris on the step, and that she did not know what caused her to fall. At the time of the accident, she was wearing sneakers and carrying her purse and a beach bag.

At his deposition, Rick Vela testified that he is the property manager of Precision Management Group, the management company for Birchwood. He testified that he did not know of any work that Maio Building performed at Birchwood's premises.

At his deposition, John Maio testified that he is the president of Maio Building. In October 2012, Soundview Realty Corp. ("Soundview"), the property management company for Birchwood, hired Maio Building to replace some walkways at Birchwood's premises, including the subject step. Maio testified that he provided Soundview with an estimate for the replacement work. He testified that the replacement work was performed under the supervision of Soundview, and that the subject step was built under the direction and instruction of Soundview. He testified that after the work was finished, no engineer or architect conducted an inspection of the work, and that neither Soundview nor he measured the step.

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*see Basso v Miller*, 40 NY2d 233, 386

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NYS2d 564 [1976]; *Varon v New York City Dept. of Educ.*, 123 AD3d 810, 998 NYS2d 433 [2d Dept 2014]), and must warn of any dangerous or defective condition of which he or she has actual or constructive notice (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Fajardo v Schapiro*, 120 AD3d 468, 469, 990 NYS2d 269 [2d Dept 2014]). In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that plaintiff cannot identify the cause of his or her fall without engaging in speculation (see *Swietlikowski v Village of Herkimer*, 132 AD3d 1406, 18 NYS3d 250 [4th Dept 2015]; *Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 988 NYS2d 817 [4th Dept 2014]; *Altinel v John's Farms*, 113 AD3d 709, 979 NYS2d 360 [2d Dept 2014]). Although mere conclusions based upon surmise, conjecture, speculation or assertions are without probative value, a case of negligence based wholly on circumstantial evidence may be established if the plaintiff shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred (see *Dixon v Superior Discounts & Custom Muffler*, *supra*; *Seelinger v Town of Middletown*, 79 AD3d 1227, 1229, 913 NYS2d 376 [3d Dept 2010]). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (see *Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997]; *Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966, 967, 54 NYS3d 646 [2d Dept 2017]). There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (see *Trincere v County of Suffolk*, *supra*; *Mazza v Our Lady of Perpetual Help Roman Catholic Church*, 134 NYS3d 1073, 24 NYS3d 98 [2d Dept 2015]).

Here, the evidence adduced establishes that plaintiff failed or was unable to give a specific reason for the cause of the alleged accident (see *Henry v Cobleskill-Richmondville Cent. School Dist.*, 13 AD3d 968, 787 NYS2d 449 [2004]). Accordingly, Birchwood made a prima facie showing of its entitlement to summary judgment.

In opposition, plaintiff relies on the affidavit of her expert, Robert Schwartzberg, a New York licensed professional engineer, who states that he measured the height of the riser of the subject step and found that the riser height of the step on its left side and right side were 7½ inches and 8⅛ inches respectively. Schwartzberg opines that ⅝ inch differential in the riser height from side to side on the step creates a defective and dangerous condition. Further, plaintiff testified that the step caused her to fall, although she failed to specifically pinpoint what on the step caused her to fall. A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian (see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77, 19 NYS3d 802 [2015]; *Pitt v New York City Tr. Auth.*, 146 AD3d 826, 44 NYS3d 525 [2d Dept 2017]). Plaintiff has raised several triable issues of fact as to whether the alleged defect of the height differential from left to right side on the step consisted a dangerous condition so as to create liability on the part of Birchwood and whether it had actual or constructive notice of the condition (see *Rhodes-Evans v III Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]). Accordingly, the branch of Birchwood's motion for summary judgment dismissing the complaint and the cross claims against it is denied.

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As to Birchwood's application for summary judgment in its favor as to its claims against Maio Building for contractual and common-law indemnification and contribution, the Court finds a triable issue of fact as to whether Maio Building agreed to indemnify Birchwood when they entered into the contract to replace walkways at the subject premises. In any event, even assuming that there was an indemnification agreement between such parties, there is a question of fact as to whether Maio Building breached the contract by failing to perform one or more of the services for which it was responsible (*see Peycke v Newport Media Acquisition II*, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; *Baratta v Home Depot USA*, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). Moreover, there is a question of fact as to whether plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of Maio Building (*see Franklin v Omni Sagamore Hotel*, 5 AD3d 348, 772 NYS2d 534 [2d Dept 2004]; *Mitchell v Fiorini Landscape*, 284 AD2d 313, 726 NYS2d 673 [2d Dept 2001]). These questions of fact preclude the granting of Birchwood's request for summary judgment for contractual and common-law indemnification and contribution against Maio Building.

Maio Building moves for summary judgment dismissing the complaint and the cross claims against it on the grounds that it was not negligent, and that there is no triable issue of fact as to its liability for the accident. In support, Maio Building submits, *inter alia*, the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, the affidavit of John Maio, and a copy of an estimate of the replacement work, which does not contain any indemnification clause.

In his affidavit, Maio states that as to the subject replacement work performed by Maio Building, there was no written agreement containing either indemnification or insurance procurement obligation.

As a general rule, a limited contractual obligation to repair the roadway does not render the contractor liable in tort for the personal injuries of third parties (*see Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010]). However, in *Espinal v Melville Snow Contrs.*, (98 NY2d 136, 746 NYS2d 120 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

When a party, by its affirmative acts of negligence, has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (*see Espinal v Melville Snow Contrs.*, *supra*; *Figueroa v Lazarus Burman Assoc.*, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]). To make a prima facie showing of entitlement to judgment as a matter of law, Maio Building is required to establish that it did not perform any operations related to the condition which caused the plaintiff's accident or, alternatively, that if it did perform such operations, those operations did not create or exacerbate a dangerous condition (*see Diaz v City of New York*, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; *Keese v Imperial Gardens Assoc., LLC*, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

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Here, Maio Building's limited contractual undertaking to replace walkways is not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises in a reasonably safe condition (*see Linarello v Colin Serv. Sys.*, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; *Katz v Pathmark Stores*, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Nevertheless, Maio Building's submissions failed to establish its entitlement to judgment as a matter of law (*see Keese v Imperial Gardens Assoc. LLC, supra*). There are questions of fact as to whether Maio Building properly replaced walkways related to the condition of the subject step, which caused plaintiff's fall, and whether it exercised reasonable care under the circumstances. Accordingly, the branch of Maio Building's motion for summary judgment dismissing the complaint against it is denied.

Likewise, the branch of Maio Building's motion for summary judgment dismissing the cross claims by Birchwood against it with respect to the claims for common-law indemnification and contribution is denied, since there is a triable issue of fact as to Maio Building's negligence. However, as to Birchwood's cross claim for contractual indemnification, Maio Building has submitted evidence sufficient to establish, prima facie, that Birchwood was not entitled to contractual indemnification, since there was no written agreement stating that Maio Building would indemnify Birchwood (*see Cunningham v North Shore Univ. Hosp. at Glen Cove Hous., Inc.*, 123 AD3d 650, 998 NYS2d 406 [2d Dept 2014]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]). Birchwood does not oppose Maio Building's motion.

Finally, plaintiff's motion for a trial preference pursuant to CPLR 3403 (a) (4) is granted, as it is undisputed plaintiff is over 70 years of age (*see CPLR 3403 [a] [4]*). Plaintiff is directed to serve forthwith a copy of this order with notice of entry upon all parties to this action. Following such service, plaintiff shall serve a copy of this order, together with proof of service and of the payment of any required fees, upon the Calendar Clerk, who shall then place this matter on the CCP calendar on the first available date.

Dated: 4-9-19

**Hon. Denise R. Molia**

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 A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION