SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ADAM CHOWANIEC,

Plaintiff,

-against-

AACC INC. and NEW YORK ROOFSCAPES, INC.

Defendants.

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DECISION AND ORDER
Index No.: 157375/2016
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, defendant AACC, Inc. ("AACC") moves for summary judgment pursuant to CPLR 3212. In reply, plaintiff Adam Chowaniec ("Plaintiff") opposes the motion. For the reasons set forth below, the Court grants the motion in its entirety.

BACKGROUND FACTS

Plaintiff hired AACC, a construction company, to complete the renovation of the front and back decks of his home in Shelter Island, New York. Plaintiff retained AACC's services in August 2015 after firing co-defendant New York Roofscapes, Inc. ("NYRS") as he was unsatisfied with their progress on construction. While NYRS was still working on the property, they removed the railings from the back deck without Plaintiff's approval (NYSCEF doc No. 27, ¶ 10). Prior to commencing their work, AACC sent Plaintiff a price quote that included removal of the debris left behind by NYRS, as well as final reconstruction of the front and back deck and covered porch (*id.* at ¶ 11). However, the estimate did not include the construction of railings as Plaintiff and AACC were still discussing style options and pricing. As Plaintiff knew AACC's owner personally, the two formed a verbal agreement for the deck reconstruction, and no formal

writing exists beyond the emails exchanged between the parties, as well as invoices for work performed (*id.* at ¶ 19). The initial emailed price quote specifically notes that it excludes the cost of railings (NYSCEF doc No. 39). AACC completed the reconstruction work at the end of February 2016.

On April 8, 2016, Plaintiff and his wife, who split their time between the Shelter Island house and an apartment in Manhattan, arrived at their home around 10:45pm (*id.* at ¶ 13). Plaintiff went on the back deck, which at the time had no lighting set up, to set up some sample balusters so that his wife could view them in the morning. He took a few steps back to look at the balusters and accidentally fell off the back of the deck, sustaining various serious injuries (*id.*). Plaintiff commenced the complaint against Defendants, contending that both AACC and NYSR breached their contractual duties and acted negligently in failing to install proper safety measures on the decks. AACC now moves for summary judgment, arguing that there was no breach of contract as railings under the deck were never part of the agreement, and that Plaintiff was the sole proximate cause of his injuries. In reply, Plaintiff opposes the motion, contending that AACC nevertheless had a duty to install some sort of safety barrier, and that the question of whether Plaintiff's accident is solely attributable to his own negligence is one for a jury.

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise

a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, *"'regardless of the sufficiency of the opposing papers'"* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

To recover against a defendant in a breach of contraction action, plaintiff must demonstrate (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach (*Junger v. John V. Dinan Assocs., Inc.,* 164 AD3d 1428, 1430 [2d Dept 2018]).

To establish a *prima facie* case of negligence in a slip and fall accident, plaintiff must prove that defendant owed him or her a duty of care, and breached that duty, and that the breach proximately caused his or her injury (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Briggs v Pick Quick Foods, Inc.,* 103 AD3d 526 [1st Dept 2013]; *Pfeuffer v New York City Housing Authority*, 93 AD3d 470 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Once a defendant establishes *prima facie* entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" *(Briggs v Pick Quick Foods, Inc.,*

103 AD3d 526, *supra, citing Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1st Dept 2010], *citing Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]).

Here, as a preliminary matter, the Court notes that Plaintiff cannot argue AACC breached any sort of contractual duty, as AACC never entered into either an express nor an implied contract to install railings. The initial emailed price quote from AACC's owner Andrew Clark to Plaintiff specifically notes that "[t]his price does not include railings or materials..." (NYSCEF doc No. 39). While Plaintiff stated, at his deposition, that AACC was hired to do the decks and the railings, he also stated that an agreement was never reached for railing installation (NYSCEF doc No. 36 at 43). In the weeks leading up to the accident, Plaintiff and AACC were still discussing railing options and pricing. While AACC was certainly engaged in negotiations and submitting proposals for the railings, they never entered into an agreement to install them. Plaintiff also cannot claim that the proposals constituted an implied-in-fact contract, as implied contracts still require proof of mutual assent (*Maas v Cornell Univ.*, 94 NY2d 87, 93–94 [1999]). Since Plaintiff never accepted one of AACC's price quotes for the railings, there was no meeting of the minds, and therefore no enforceable implied agreement. Any liability on the part of AACC for Plaintiff's injuries must therefore stem not from a contractual duty, but from its own negligence.

Plaintiff argues that AACC acted negligently in failing to install safety railings under the back deck. The lack of safety railings is undoubtedly a dangerous condition that a property owner would have a duty to rectify once they were given actual or constructive notice. However, AACC is not the owner of Plaintiff's property, and therefore could only be liable if they created the condition themselves or otherwise breached a duty owed to Plaintiff. Plaintiff stated in deposition that the railings were removed by NYRS before he terminated their services and

AACC took over (NYSCEF doc No. 36 at 16). Mr. Clark also testified that AACC did install safety barricades and wooden boards over the exits while working, but they were removed by another party prior to AACC's completion of the job (NYSCEF doc No. 37 at 101-117). AACC thus took proper safety measures while working on the property. While AACC clearly owed Plaintiff and anyone else who might visit his home a duty to take reasonable safety precautions while renovating the decks, it is critical to note that Plaintiff's accident occurred over a month after AACC's workers were last on the premises completing the work. According to AACC's invoices and time sheets, February 29, 2016 was the last day any employee was on the premises (*id.* at 73-74). While Plaintiff and AACC were engaged in discussions about the railings, no time restriction had been imposed under which Plaintiff was to notify AACC of his decision (*id.* at 81-82). Plaintiff also could have chosen to work with another contractor for the railings as he was under no obligation to hire AACC. It is unreasonable to suggest that AACC remained liable indefinitely for any injuries that may occur on Plaintiff's property just because there was a chance they may eventually have been retained to complete the railings. It is thus a misrepresentation for Plaintiff to argue that AACC actively engaged in working for him at the time of the accident.

AACC also argues that summary judgment is proper as Plaintiff was the sole proximate cause of his injuries. Plaintiff, in opposition, argues that there are factual questions regarding the comparative negligence between the parties. Plaintiff cites to *Dillard v NY City Housing Authority* for the proposition that "the issue of proximate cause may be decided 'as a matter of law where only one conclusion may be drawn from the established facts,' but 'where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide'" (112 AD3d 504 [1st Dept 2013],

quoting *White v Diaz*, 49 AD3d 134 [1st Dept 2008]). Plaintiff is correct that when multiple causes of an injury are present, the apportionment of fault is a matter for the jury to determine. However, *Dillard* involved a situation where Plaintiff fell on Defendant's own sidewalk, so there was a question of Defendant's negligence in not maintaining its property. Here, Plaintiff fell on his own property under circumstances he knew were dangerous (NYSCEF doc No. 36 at 47). More critically, as discussed *supra*, AACC did not act negligently in failing to leave safety mechanisms in place after it had finished its construction, and therefore no amount of fault for Plaintiff's accident can be apportioned to AACC.

As AACC has demonstrated that there was no breach of contract and it did not breach any duty owed to Plaintiff, summary judgment is appropriate, and the complaint is dismissed as against AACC in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant AACC, Inc.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED that counsel for Defendant AACC, Inc. shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: July 9, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.