Esposito v Reed
2019 NY Slip Op 34765(U)
March 21, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 613058/2016
Judge: Paul J. Baisley, Jr.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X
JOANN ESPOSITO and GIOVANNI ESPOSITO,

Plaintiffs,

-against-

CATHERINE REED,

Defendant.
----------X

INDEX NO.: 613058/2016
CALENDAR NO.: 201702458OT
MOTION DATE: 8/2/18
MOTION SEQ. NO.: 001 MG; CASEDISP

PLAINTIFFS' ATTORNEYS:
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Upon the following papers numbered 1 to 31 read on this motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers 1-26; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27-29 ; Replying Affidavits and supporting papers 30-31 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequence no. 001 of defendant for summary judgment dismissing the complaint is granted.

Plaintiff Joann Esposito commenced this action to recover damages for injuries she allegedly sustained on July 13, 2015, when she fell down an interior staircase of a home owned by defendant Catherine Reed. Plaintiff's husband, Giovanni Esposito, filed a claim for loss of services. Plaintiff alleges, among other things, that the staircase constituted a dangerous condition on the premises in that it was in a "darkened condition", that the steps and landing were not the proper size, and that defendant was negligent in failing to repair the alleged dangerous condition on the staircase or warn of its existence.

Defendant now moves for summary judgment dismissing the complaint arguing that there is no evidence the staircase constituted a dangerous condition on the premises, that she had no notice of the alleged defective condition, and that the plaintiff's conduct in opening the basement door and entering the dark staircase was the proximate cause of her injuries. In support of her motion, defendant submits copies of the pleadings, the bill of particulars, and transcripts of the parties' deposition testimony. Plaintiffs oppose the motion arguing that triable issues of fact exist as to whether defendant's premises contained a defective first riser. In opposition, plaintiffs submit an expert affidavit.

At her deposition, plaintiff testified that she was at a party at defendant's home on the

incident date and that she was last at the home approximately five or six years before the date of the incident. She testified that she drank two alcoholic beverages while in defendant's backyard and then she needed to use a bathroom. Plaintiff testified that she asked another partygoer where to find the bathroom and was told to go inside the house, through the kitchen, and that she would see the bathroom in the hall. She testified that as she entered the kitchen, she did not ask anyone inside about the bathroom's location but that she went into the unlit hallway to find it. Plaintiff testified that she knocked on the door she believed to be the bathroom, and that, not hearing any response, she opened the door and reached in front of her to turn on a light. She testified that the next thing she remembered after reaching for a light was being down at the bottom of the basement stairs. Plaintiff testified that she looked up the stairs from her position on the floor and saw the door at the top of the stairs. She testified that she climbed back up the stairs, and that, once she was at the top of the stairs in the hallway, she saw the bathroom facing her in the opposite direction from where she stood. Plaintiff testified that she did not recall how many wooden stairs she climbed or whether handrails were present. She testified that there was nothing in either the hallway or on the stairs that caused her to trip. Plaintiff further testified that she did not trip down the stairs and that she never previously used the bathroom in defendant's home.

At her deposition, defendant testified that she has owned the home since 1999 and that both the basement stairs and door to access the basement were present when she moved in. She stated that neither the door nor the stairs have been repaired or altered since she took ownership except the stairs were painted and a carpet runner was installed on them. Defendant testified that during the party no one asked her for the bathroom's location. Defendant testified that she has known plaintiff as a coworker for approximately twenty years and that plaintiff had been to her home a few times in the past when she used the bathroom. She testified that on the incident date she hosted an outdoor party for a coworker and that at one point she was informed that plaintiff was in the bathroom. Defendant testified that she never heard anyone scream nor did she hear the sound of anyone falling. She testified that she was in the kitchen when she heard plaintiff call out to her from inside the bathroom, and that plaintiff told her she fell down the stairs looking for toilet paper. Defendant testified that plaintiff also told her husband that she fell down the stairs looking for toilet paper and that he gave her an ice pack. She testified that 911 was called to assist plaintiff and that plaintiff told both the police and ambulance personnel that she fell down the stairs.

Defendant further testified that when the house was first purchased, a home inspection was completed and that she was not notified as to whether the basement steps met the proper building codes. Defendant testified that there was a latch-type lock and a doggy door on the basement door, which existed since she bought the home, and that the handrails on the staircase were in place when she bought the home. She stated that the only time she locked the basement door was when her young grandchildren came to visit. Defendant testified further that no one has ever complained to her about the basement steps nor has anyone fallen on those steps since

she has owned the home.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). If the moving party meets this burden, the burden then shifts to the opposing party, who must demonstrate evidence of the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure of the moving party to make this *prima facie* showing requires denial of the motion (*Winegrad v New York Univ. Med. Ctr.*, *supra*).

An owner or possessor of real property has a common law duty to maintain such property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the potential injury, and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; *Basso v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). To establish liability in a trip-and-fall action, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). In addition to notice, the plaintiff must also demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see Dapp v Larson*, 240 AD2d 918, 659 NYS2d 130 [3d Dept 1997]). Where a plaintiff is unable to give a specific reason for the cause of an alleged accident, he or she may not recover based on pure speculation (*see Hunt v Meyers*, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; *Visconti v 110 Huntington Assoc.*, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; *Barland v Cryder House*, 203 AD2d 405, 610 NYS2d 554 [2d Dept 1994]).

Defendant has established her entitlement to summary judgment as a matter of law through plaintiff's testimony. According to her testimony, plaintiff never asked defendant the location of the bathroom nor did she ask anyone to put a light on in the hall as she proceeded though the kitchen into an allegedly dark hallway to locate the bathroom. Here, plaintiff's "conduct in opening the basement door and entering the unlit staircase resulted in an open and obvious danger of which defendant had no duty to warn" (*Koval v Markley*, 93 AD3d 1171, 1172, 940 NYS2d 367 [4 th Dept 2012]; *see Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]; *Duclos v County of Monroe*, 258 AD2d 925, 685 NYS2d 549 [4th Dept 1999]). Plaintiff did not recall what the stairs looked like or whether handrails existed; rather, the last thing plaintiff recalled was reaching for a light, looking for a step and then ending up on the basement floor. There is no evidence that the stairs were dangerous or defective nor has anyone ever complained to defendant about the steps.

The mere happening of an accident does not establish liability of a defendant for negligence (*see Scavelli v Carmel*, 131 AD3d 688, 15 NYS2d 214 [2d Dept 2015]; *Foley v*

Golub Corp, 252 AD2d 905, 676 NYS2d 308 [3d Dept 1999]). Absent evidence that defendant's alleged negligence was a proximate cause of her accident, there can be no liability (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Here, plaintiff testified that there was nothing either in the hallway or on the stairs that caused her to trip. Rather, plaintiff opened a door she mistakenly believed to be a bathroom and proceeded to walk forward, causing her to fall down the basement staircase to the bottom of the stairs.

In opposition, plaintiffs do not raise triable issues of fact. Plaintiffs' submissions in opposition fail to show that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see Deal v Woods*, 48 AD3d 1093, 851 NYS2d 772 [4th Dept 2008]; *O'Connor v Lakeview Assocs., LLC*, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; *Collins v City of New York*, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf. Stanojevic v Scotto Bros. Rest. Enters.*, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Moreover, the conclusions set forth in plaintiffs' expert affidavit are unsubstantiated, conclusory, and fail to raise a triable issue of fact. Plaintiffs' expert's reliance on the New York State Uniform Fire Prevention and Building Code for his assertion that the first step's riser height exceeded the maximum prescribed height and "possibly" caused plaintiff's fall is unpersuasive in that it ignores the fact that plaintiff herself testified that she did not trip nor did she knowingly step down onto stairs at the time of her fall. Thus, there is no evidence from which a jury could rationally conclude that plaintiff's fall was more likely due to the alleged defective step or defendant's failure to warn of the stairs existence rather than her own loss of balance or misstep (*see Costantino v Webel*, 57 AD3d 472, 869 NYS2d 169 [2d Dept 2008]; *Scott v Rochdale Vil., Inc.*, 65 AD3d 621, 883 NYS2d 726 [2d Dept 2009]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: March 21, 2019

J.S.C.