| **Hutchison v Kursh** |
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| 2020 NY Slip Op 33226(U) |
| October 2, 2020 |
| Supreme Court, New York County |
| Docket Number: 153499/18 |
| Judge: Sherry Klein Heitler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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HEATHER HUTCHISON,

Plaintiff,

-against-

ESTATE OF STEPHEN KURSH a/k/a STEPHEN KURSH a/k/a STEPHEN OAKLEY KURSH

Defendants.

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Index No. 153499/18
Motion Sequence 01

**DECISION AND ORDER**

**SHERRY KLEIN HEITLER, J.S.C.**

In this personal injury action, the Estate of Stephen Kursh (Defendant) moves for an order pursuant to CPLR 3212 dismissing this action in its entirety. Among other things, Defendant argues that: plaintiff Heather Hutchison (Plaintiff) cannot show her injuries were proximately caused by Defendant's actions because she is unable to recall the accident; the premises where Plaintiff was injured was not defective in any way; and even if there was a defect, it was open and obvious and therefore not actionable. As set forth below, Defendant's motion is denied.

This action arises from a March 3, 2016 incident during which Plaintiff fell approximately thirteen feet from an unenclosed opening in a loft located inside an apartment owned by the Defendant. The building in question, a 3-story commercial space located at 165 West 107th Street in Manhattan, is currently owned by Stephen Kursh but was held by the Defendant, the estate of Mr. Kursh's father, at the time of the accident.

Plaintiff and Mr. Kursh have known each other for over 25 years and were friends before the accident. In the days prior, she had discussed with Mr. Kursh her intention to travel to New York to attend several art shows. Mr. Kursh offered her use of the apartment for the duration of her visit. Plaintiff testified that, when she entered the apartment around midnight after attending several

shows, she climbed up to the loft and then fell off as she was changing the sheets. She described the apartment setup and accident as follows[1] (Plaintiff's Deposition pp. 90, 113-119, 122-23, 125-26):

Q. Did you see how would you get to the bed when you were there that first time before you went to the fair?

A. Yes.

Q. Can you explain that?

A. It was a – it was vertical steps supported by a single column in the center, 90 degrees, no handrails.

* * * *

Q. Approximately, what time of the day was this that you went up the stairs before the accident occurred at least on this one occasion?

A. It was around midnight. . . .

Q. After you went up the stairs . . . after returning from the fair, what did you do when got to the top of the stairs?

A. I made the bed. . . .

Q. Did you have any trouble seeing anything on the second level when you reached the top of the stairs?

A. No. . . .

Q. Can you describe how much space there is up there?

A. There's not much space.

Q. Do you know how high the ceiling is from the bottom?

A. I was unable to stand all the way up. . . .

* * * *

Q. When you put the fitted sheet on the bottom of the bed, where were you standing?

A. Well, when I put it on the – as facing the bed, when I put it on the right, I was kneeling on the bed. When I put it on the left of the foot, what you're referring to the bottom of the bed, I was to the side where there's a small amount of space to stand on the floor.

Q. That was immediately adjacent to the stairwell?

A. The foot of the bed on the left, yes, is immediately adjacent to the stairwell.

Q. Were you conscious of that when you were putting the sheet on the bed?

A. Oh, yes. Very conscious.

Q. So, did you do anything to make sure you didn't somehow fall into the stairwell? . . .

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[1] Ms. Hutchison was deposed on September 11, 2019 and October 3, 2019. See NYSCEF Docs 30-31 (Plaintiff's Deposition).

A. I knelt on the bed and I knelt on the floor.

* * * *

Q. Were you able to make -- did you then put the comforter back on?

A. No, I then misstepped with my right foot. . . .

Q. . . .You mentioned that both feet were on the side of the bed while you were putting the flat sheet on. How close was your foot to the stairwell opening when you were putting the flat sheet on?

A. Right up against it. There was nowhere else for my feet to be.

Q. Can you tell me how it was that you misstepped resulting in your fall at that point?

A. I just put my right foot back a couple of inches and it threw me – it threw me off balance and there was nothing to grab onto, absolutely nothing.

Mr. Kursh was deposed on October 7, 2019.[2] Like the Plaintiff, Mr. Kursh did not reside in New York City full-time but would stay in the apartment a few times a month. He allowed family, friends, and employees to utilize the apartment from time to time, having done so about 15 times in the three years prior to the accident (Kursh Deposition pp. 34-35, 54-56). Mr. Kursh testified that the loft area is approximately seven by nine feet, and four and a half feet in height. The opening of the loft is located at the foot of the bed, is about two-feet wide, and runs the length of the bed. Mr. Kursh conceded that there is no railing around the opening of the loft (*id.* at 43-44, 46). A photograph of the stairs and opening in question was identified by Mr. Kursh at his deposition (see picture).

Importantly, the Plaintiff and Mr. Kursh offered contradicting testimony as to whether Plaintiff should stay out of the loft area. Mr. Kursh testified that the loft was only for him, his wife, and his son (*id.* at 36-40, 42):

Q. When your mother and her husband would stay overnight in the office, where – as far as you know, where would they sleep?

[2] NYSCEF Doc. 32 (Kursh Deposition).

A. On the sleeper sofa.

Q. Do you know if they ever slept in the loft bed?

A. I know that they didn't.

Q. How do you know?

A. It is my bed, all right.

Q. What about your aunt?

A. No. . . .

Q. And then what about your friend? . . .Do you know where your friend would sleep?

A. He sleeps on the sleeper sofa, the guest bed. . . .

Q. When you spoke with Ms. Hutchison at that second conversation prior to her stay in March of 2016, did you tell her the loft bed was your bed?

A. I told her that the bedding for the sleeper sofa was in a plastic box and she told me she brought her own. She traveled with her own linens. . ..

Q. Did you have any other discussion with her about the loft bed? . . .

A. I don't think so. . . .

Q. What about her sleeping in the sleeper sofa, was that in person or over text?

A. I think that was on the phone.

Q. Did you give her any specific instructions about how to maneuver the bed into the sofa position [sic]?

A. Yes.

Q. What is that you told her?

A. Remove the pillows and that you can fold the bed down if you feel it is necessary. . . .

* * * *

Q. Are you aware of any instance where anyone, other than you or your wife, have slept in the loft bed?

A. My son.

Q. Anyone else?

A. No.

The Plaintiff, on the other hand, testified that Mr. Kursh gave her the choice of sleeping in the loft or on the sofa (Plaintiff's Dep., pp. 86-87):

Q. Did he give you any instructions as to where you should sleep in the apartment?

A. He said I had a choice of the couch or the bed.

Q. How did he give you those instructions?

A. I believe he said, "You could sleep on the couch or the bed." . . .

Q. Did he tell you that he wanted you to sleep on the couch and not in the loft space?

A. No.

Q. So if he indicated that is what he directed you to do, he would not be being truthful?

A. Yes.

Plaintiff was first treated by her primary care physician, Dr. Marilyn Halpin, on April 12, 2016, approximately a month after the accident.[3] Dr. Halpin has stated (Halpin Report, pp. 44, 68):

> The patient reports that she fell 14 feet from a loft approximately 1 month ago. She walked off a ledge and landed on her feet. She does not know what happened. She said afterward she took a shower and she said she felt like had been meditating. She does not know if she lost consciousness or not.
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> * * * *
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> This is a 51-year-old right-handed white female with [sic] longtime history of smoking marijuana with a recent fall from 14 feet from a loft approximately 1 month ago. She walked off a ledge and landed on her feet. The patient had an episode witnessed by her husband the day prior to admission where she developed around 7:30PM [sic] she all of a sudden became unresponsive, clenched her head, looked down, subsequently her husband noted that she had a blank state... Of note, the patient is not quite sure how she walked off a ledge 1 month ago. She states that she may have been confused and they have had a seizure-like event at that time. She felt like she had an out-of-body experience at the time as well.

In support of its motion, Defendant submits the affidavit and report of Professional Engineer David Behnken,[4] who avers, among other things, that the loft from which Plaintiff fell was actually a storage area that was constructed and maintained in accordance with all applicable building codes (Behnken Report, p. 4): "The elevated storage area is not considered occupied or an occupied space and, as such, is not required to be accessible via a code compliant stairway. [Mr. Behnken] opines that the elevated storage area and ships ladder which provided access are safe for their intended use."

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[3] NYSCEF Doc. 33 (Halpin Report).

[4] NYSCEF Doc. 34 (Behnken Report).

In opposition, Plaintiff submits a report prepared by Professional Architect Harry Meltzer.[5] In relevant part, Mr. Meltzer opines (Meltzer Report, ¶¶ 4, 6, 9):

> My inspection of the accident location revealed that it was legally a commercial space, based on the Certificate of Occupancy, that was being used instead as a residential space with a loft area used as a bedroom/sleeping area installed inside of a closet area adjacent to the living room.
>
> The opening of the loft came upon the user as a dangerous and unexpected trap. Good and accepted architectural industry design safety practice . . . requires that landings shall be provided at the head and foot of each flight of stairs . . . landings and platforms shall be enclosed on sides by walls, grills, or guards at least three feet high. In my professional opinion, the staircase and subject opening in the bedroom loft area required a handrail and guardrail around it.
>
> In general terms, the subject loft bedroom created a dangerous and hazardous condition by having an unguarded opening in the platform.
>
> Defendant's expert also refers to the stairway access to the sleeping loft as a "ship's ladder". The defense expert, however, ignores that the subject staircase does not meet the proper safety specifications of a ship's ladder. Good and safe design principles of a ship's ladder require handrails that continue up past the opening with the inclusion of a self-closing gate protecting the opening.

## DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is

[5] NYSCEF Doc. 41 (Meltzer Report).

required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

It is settled that landowners have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *See Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). A violation of applicable building code may be evidence of negligence, but does not constitute negligence per se. *See Elliott v City of New York*, 95 NY2d 730, 734 (2001). Similarly, a building's owner's compliance with applicable building codes does not require dismissal of a claim if there is a triable issue whether the defendant was negligent under the common law. *See Kellman v 45 Tiemann Assocs.*, 87 NY2d 871, 872 (1995); *Maldonado v 1992 Fulton Realty Corp.*, 23 AD3d 177, 177 (1st Dept 2005).

Counsel argues that Defendant could not have breached its duty given Dr. Halpin's report that Plaintiff did not recall how her accident occurred. In support Defendant cites to *Novoni v La Parma Corp.*, 278 AD2d 393, 393 (2d Dept 2000), in which the plaintiff claimed to have been injured when he fell inside a restaurant's men's room. He testified at his examination before trial that he did not know the cause of his fall, but more than a year later in opposition to the restaurant's summary judgment motion he submitted an affidavit claiming that he was certain he slipped on a piece of ice. The trial court declined to consider the affidavit since it presented a feigned factual issue designed to avoid the consequences of his earlier admission. *Id.* at 393. The present case is different insofar as Plaintiff's earlier statement is contained within medical records, not deposition testimony, and her latter statement was deposition testimony as opposed to an affidavit submitted to

avoid summary judgment. This is not to say that the medical records are not relevant – they are – but they do not entitle the Defendant to summary judgment. Rather, they present a credibility issue for a jury to consider at trial. *See Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013); *Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996).

Defendant also asks this court to ignore the principle of comparative negligence in favor of the long-abandoned assumption of risk doctrine, vestiges of which now apply only to a very limited number of cases such as those involving athletic activities. *See* CPLR 1411; *Custodi v Town of Amherst*, 20 NY3d 83, 87 (2012). Indeed, the two cases cited by Defendant on this issue, *Belloro v Chicoma*, 8 AD3d 598 (2d Dept 2004) and *Giugliano v County of Nassau*, 24 AD3d 504 (2d Dept 2005), involve entirely different facts from the case at bar. In *Belloro*, a plaintiff was deemed to have assumed the risk of injury in attempting to enter his room through the second story window by climbing a ladder that was placed on top of another ladder. And in *Giugliano*, a 13-year old went snowboarding in a county-owned area located behind his aunt's house, hit a piece of the garbage underneath the snow, fell off the snow board and broke his arm. The child's suit against the county was dismissed on the ground that he voluntarily assumed the risk of his sporting activity, especially since he was aware the area was filled with garbage beneath the snow.

Lastly, Defendant argues that the condition was open and obvious and, therefore, not actionable. "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." *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997) (quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993]). Summary judgment is appropriate if the condition complained of is "both open and obvious and, as a matter of law, not inherently dangerous." *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 (1st Dept 2009). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only

determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 (1st Dept 2004). "To establish an open and obvious condition, a defendant must prove that the hazard 'could not reasonably be overlooked by anyone in the area whose eyes were open.'" *Powers v 31 E 31 LLC*, 123 AD3d 421, 422 (1st Dept 2014) (citing *Westbrook,* 5 AD3d at 72). "The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses." *Powers*, 123 AD3d at 422.

Defendant primarily discusses two cases in this regard, *Murray v Dockside 500 Mar., Inc.*, 32 AD3d 832, 833 (2d Dept 2006) and *Boyd v New York City Hous. Auth.*, 105 AD3d 542 (1st Dept 2011).[6] Again, both are distinguishable from the unique facts of this case. *Murray* involved a slip and fall at a catering hall on a step that was covered in dark carpeting. In awarding the catering hall summary judgment, the court noted that the steps were code compliant and that there was enough ambient light to make the condition open and obvious. Moreover, plaintiff's expert, who never inspected the site, could not show that the color and texture of the carpet created the optical illusion described by the plaintiff prior to her fall. The plaintiff in *Boyd* leaned back against what he thought was a sturdy, three-foot-high black iron fence surrounding an area of greenery. It turns out the section he leaned against was an unlocked gate which swung inward, causing him to fall. Defendant submitted evidence that the plaintiff had lived in the building for years prior to the accident, that the gate had always been unlocked, and that there were no prior complaints. As such the court determined that the condition was both open and obvious and not inherently dangerous.

[6] Defendant inadvertently references *Ortiz v New York City Hous. Auth.*, 85 AD3d 573 (1st Dept 2011), in which the court denied the defendant's summary judgment motion, but counsel quotes from and analyzes *Boyd*.

The totality of the circumstances in this case preclude Defendant from obtaining summary judgment. In reaching this determination, the court finds that there is a significant issue of fact as to whether the Plaintiff had a choice to sleep in the loft area or on the sleeper sofa. Defendant categorically denies that this was the case, but the court is required to accept Plaintiff's testimony that Mr. Kursh offered her the bed in the loft as true for purposes of this motion. *See Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 (1st Dept 2012). This loft area, as sworn to by Defendant's own expert, may have been code compliant for a commercial space, but that is not how Defendant utilized it. It is also undisputed that the loft had low ceilings, no guardrails or handrails, and that the opening to the floor below was both unenclosed and directly adjacent to the bed. Combined with Plaintiff's testimony that she was offered the loft as a sleeping location, the court finds that there is enough to send the issue of liability in this case to a jury. To the extent Plaintiff's own conduct contributed to her injuries, this too is an issue for a jury.

**CONCLUSION**

The court has considered Defendant's remaining arguments and finds them to be without merit. Accordingly, and in light of the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that counsel appear for a virtual conference on November 19, 2020 at 9:30AM.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

**DATED:** Oct 2, 2020

**SHERRY KLEIN HEITLER, J.S.C.**