

<b>Kemble v Pizza Picnic, Inc.</b>
2020 NY Slip Op 35064(U)
November 13, 2020
Supreme Court, Ulster County
Docket Number: Index No. EF2019-1033
Judge: Richard Mott
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ULSTER

-----X  
DIANE KEMBLE,

Plaintiff,

DECISION/ORDER

-against-

Index No. EF2019-1033

R.J.I. No. 55-19-0752

Richard Mott, J.S.C.

PIZZA PICNIC, INC. and PATRICIA SIRNI,

Defendants.  
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Motion Return Date: September 24, 2020

APPEARANCES:

**Plaintiff:** Michael A. Mainetti, Esq.  
Mainetti & Mainetti, P.C.  
130 N. Front Street  
Kingston, NY 12401

**Defendants:** Rebecca C. Kilduff, Esq.  
Kaufman, Borgeest & Ryan  
200 Summit Lake Drive  
Valhalla, NY 10595

Mott, J.

Defendants move for summary judgment dismissing this negligence action. Plaintiff opposes.

***Background***

Plaintiff tripped and fell when her left toe caught on the single concrete step at the top of an asphalt ramp in the parking-lot entrance to Defendant Pizza Picnic Inc.'s (Defendant) leased premises.<sup>1</sup>

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<sup>1</sup> Defendant Patricia Sarni is landowner/lessor, the lease requires Defendant to maintain the parking/sidewalk areas and the Defendant installed the ramp in 2006-2007.

### ***Parties' Contentions***

Defendants claim that Plaintiff's misstep, by her own admission, caused her fall. They insist the step was open and obvious to anyone making reasonable use of their senses, as its edge is painted yellow and is not inherently dangerous. They cite the lack of prior reports of accidents and Plaintiff's bi-monthly visits to the location for 3 years prior without incident. In addition, they proffer the affidavit of engineer Ernest Gailor that the step conforms to code as it is uniformly 6¾" high across its 71" width, has a handrail which extends 5" from the step towards the ramp and that there is no variation in step-height caused by unevenness in the pavement at the bottom of the step. Moreover, they cite Plaintiff's deposition that she fell because "the step was higher than I expected it to be and the catching of my foot caused me to fall." Finally, they contend that Plaintiff's expert proffer does not conclude the step was defective and fails to acknowledge its yellow edge or accessible handrail.

Plaintiff claims that her expert proffer raises an issue of fact as to whether the ramp-step transition is defective, as it is non-compliant with code per the affidavit of Building Code and Certified Building Trade Professional Paul Economos (Economos). She cites her deposition that the ramp surface was uneven, making her right foot slightly higher than her left, so that when she stepped up with her left foot, it caught on the step. Further, she cites Economos' opinion that the ramp slope is 13.281 %, which substantially exceeds the 10% maximum allowable, thereby requiring a handrail or a 3'-long level area as staging for the step, which is lacking here, per NYS Uniform Fire Prevention and Building Code (Uniform

Code) §§ 765.2 (e) and (f), respectively.<sup>2</sup> Finally, she cites Economos' observation that the step riser is 7" high on the left and 6 ¾" at center and to the right.

***Discussion/Summary Judgment/ Premises Liability***

To prevail on summary judgment, the moving party must establish *prima facie* entitlement to judgment as a matter of law "by adducing sufficient competent evidence to show that there are no issues of material fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "Only when the movant bears this burden and the nonmoving party fails to demonstrate the existence of any material issue of fact will the motion be properly granted." *Staunton v Brooks*, 129 AD3d 1371 [3d Dept. 2015]. Courts must assess the facts in the light most favorable to the nonmoving party, affording same every available inference in his/her favor. *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016].

In a negligence action based upon premises liability, a defendant must establish that "its property had been maintained in a reasonably safe condition," and that it did not create the hazard that caused plaintiff's fall "or have actual or constructive notice thereof." *Mister v Mister*, 2020 NY Slip Op 06328 [3d Dept Nov. 5, 2020]. Moreover, the existence of an open and obvious condition "does not relieve [a defendant] from all duty" to maintain her/his premises in a reasonably safe condition. *Id.*

Here, Defendants' expert proffer is insufficient to warrant summary judgment since it fails to address Plaintiff's expert proffer as to Uniform Code violations in the ramp-step transition, which is consistent with Plaintiff's deposition that an uneven surface leading to

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<sup>2</sup> "765.2 (e) Ramps which serve as an exit or part thereof shall not have a gradient of more than 1 in 10...No handrails shall be required where ramps have a slope of less than 1 in 12."

"765.2 (f) Where a stairway connects with, or is continued in any direction by means of, a ramp ...there shall be a level area or platform the full width of the ramp or stairs and not less than three feet in length."

the step caused her fall. Therefore, even if Defendants have met their initial burden, Plaintiff has raised a triable issue of fact in rebuttal as to whether a dangerous condition existed and contributed to Plaintiff's fall. *Page v State*, 72 AD3d 1456, 1459 [3d Dept 2010] (material question of fact as to whether building code violation existed precluded summary judgment for defendant in negligence action); *Spallina v St. Camillus Church*, 53 AD3d 650, 651 [2d Dept 2008] (fact issues presented as to whether the failure to equip ramp with handrails violated building code ordinances and whether same was a proximate cause of the accident); *Bingell v County of Schuylers*, 260 AD2d 926 [3d Dept 1999] (expert affidavit creates issue of fact as to whether defendant created defective condition during original installation); cf., *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009] (dismissal appropriate where plaintiff's expert failed to cite any violations of industry standards or accepted practices).

Accordingly, the motion is denied.

This constitutes the Decision and Order of this Court. The Court is E-filing this original Decision and Order, but Plaintiff is not relieved, thereby, from compliance with the provisions of CPLR §2220 with regard to notice of entry.

Dated: Hudson, New York  
November 13, 2020

  
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RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Statement of Material Facts, Memorandum of Law and Affirmation of Rebecca C. Kilduff, Esq., dated August 3, 2020 with Exhibits A-L;
2. Opposition Affirmation of Michael A. Mainetti, Esq., dated September 8, 2020 with Exhibits A-B;
3. Reply Affirmation of Rebecca C. Kilduff, Esq., dated September 22, 2020.