

Menna v Dugan

2020 NY Slip Op 35141(U)

April 28, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605099/18

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

ANGELO MENNA,

Plaintiff,

-against-

DEBORAH DUGAN,

Defendants.

TRIAL PART 20
NASSAU COUNTY

MOTION # 02
INDEX # 605099/18
MOTION SUBMITTED:
FEBRUARY 7, 2020

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3**

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Plaintiff commenced this action for personal injuries allegedly sustained as the result of an accident that occurred on March 23, 2017, at defendant’s premises, located at 25 Elliot Place, Merrick, New York. Plaintiff alleges that her left foot went through a step on the stairway between the first floor and the basement of the house that collapsed as the plaintiff was descending.

Defendant’s Contentions

Defendant contends that she did not create or have notice of any defective conditions involving the stairs. She owned the property for the past 29 years and she did not know of any problems with the steps at any time prior to plaintiff’s accident, nor did he ever sense any instability with the stairs at any time. Defendant contends he did not create a hazardous condition and lacked any type of notice regarding the stairs. Since defendant she has owned the home, there have been no repairs or alterations to the stairs.

Plaintiffs Deposition Testimony

Plaintiff's accident occurred on March 23, 2017 at the defendant's home located at 25 Elliot Place, Merrick New York. Plaintiff is the brother-in-law of the defendant. At the time of plaintiff's accident he resided at his cousin's home. However the plaintiff has resided, and currently resides with his sister-in-law at 25 Elliot Place, on and off for the last 25 years. At the time of the accident, plaintiff was visiting his nephew. He went to see if his nephew was in the basement because his nephew lives in the basement. Prior to plaintiff's accident, he has been down in the basement "more than ten times but less than a hundred". He has "hung out" in the basement before. The staircase was lit and he was able to see when he walked down the stairs. The stairs he was using which led from the first floor to the basement were made of wood. The stairs did not make any noises. There is a handrailing. He does not recall if he used the handrail. When plaintiff got to the second or the third to last step the step collapsed and his foot went through it. stairs.. Plaintiff did not notice any defects before he hit the third to last step.

Plaintiff's Contentions.

Defendant failed to meet her burden of proof in moving for summary judgment. The description of the defect alone from the testimony of the parties is sufficient for the court to deny the motion. The defect at issue is not a latent one, the defective condition of the stairs is easily confirmed from the photos taken shortly after the accident which were authenticated by plaintiff and defendant. Plaintiff contends that the photographs and descriptions of the steps at issue clearly show warped steps that were susceptible to exactly what occurred to plaintiff on the day of the accident. Given the evidence of warped and cracked defective steps, plaintiff submits that defendant's motion must be denied in its entirety . Plaintiff cites to multiple cases including *Johnson v. 675 Coster Street Housing Development Fund*, 161 AD3d 635 (1st Dept 2018) and *Genova v. City of New York*, 165 AD3d 486 (1st Dept 2018) (see exhibit A, Aff. in Opp. Papadopoulos).

Defendant's Deposition Testimony

Defendant testified as follows. She owned the property since approximately 1998, and lived in it since the late 1980s. The stairs leading to the basement were made out of wood, with no handrail. She described her stairs as stable. She has not made any repairs to the stairwell. She never received and complaints about the condition of the stairs.

Discussion

An owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it (*see Gordon v. American Museum of Natural History, supra; Lee v. Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 799, 762 NYS2d 800). Moreover, constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection (*see Lee v. Bethel First Pentecostal Church of Am., supra; Rapino v. City of New York*, 299 AD2d 570, 750 NYS2d 319; *Ferris v. County of Suffolk*, 174 AD2d 70, 76, 579 NYS2d 436).

In the case at bar, defendant made a *prima facie* showing of entitlement to summary judgment by submitting evidence which established that she neither created nor had actual or constructive notice of the latent defect which caused the plaintiff's foot to go through the stairs.

In opposition plaintiff has raised a question of fact on the issue of whether the defect was latent. To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit a defendant to discovery and remedy it

(*Ferlito v. Great S. Bay Assocs.*, 140 AD2d 408, 408-09, 528 NYS2d 111 [1988]). Photographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photographs (*see, Id., see also Karten v. City of New York*, 109 AD2d 126). By submitting photographs, supported by deposition testimony, plaintiff shows that the condition may have come into being over such a length of time that knowledge thereof should have been acquired by the defendant. (*Id., see also, Taylor v. New York City Tr. Auth.*, 48 NY2d 903; *see also, Blake v. City of Albany*, 48 NY2d 875).

Accordingly, defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R

DATED: April 28, 2020

ENTERED

May 01 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE

/S/

HON. JACK L. LIBERT
J. S. C.