

Kruger v Swartz

2021 NY Slip Op 32909(U)

April 1, 2021

Supreme Court, Ulster County

Docket Number: Index No. EF2018-1349

Judge: Christopher E. Cahill

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

GREGORY KRUGER AND SUSAN KRUGER,

PLAINTIFFS,

**DECISION AND
ORDER**

-against-

Index No. EF2018-1349

STEVEN SWARTZ AND TINA SWARTZ,

DEFENDANTS.

SUPREME COURT, ULSTER COUNTY
MOTION RETURN DATE: JANUARY 15, 2021

HON. CHRISTOPHER E. CAHILL, JSC

APPEARANCES: METZGER INJURY LAW
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Attorneys for Defendants
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Albany, New York 12207

Cahill, J.

Plaintiffs commenced this premises liability action seeking damages for injuries sustained by plaintiff Gregory Kruger when, on April 24, 2015, his foot and

leg broke through deck flooring located on defendants' property while he was performing carpentry work there. Issue was joined, discovery ensued, and defendants now move for summary judgment dismissing the complaint in its entirety. Defendants argue that they are entitled to summary judgment because they neither created nor had actual or constructive notice of the defective condition. They further claim that the defect was latent and not discoverable by reasonable inspection. Plaintiffs oppose the motion on the basis that defendants breached their duty to maintain the deck in a reasonably safe condition.

On a motion for summary judgment, the movant bears the initial burden "of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form" (*DeBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326, 1326 [3d Dept 2010]). "Only if that burden is met does the burden then shift to [non-movant] to raise a triable issue of fact" (*id.*). "To prevail on [a] motion for summary judgment [in a premises liability action], [the] defendant [is] required to establish that its property had been maintained in a reasonably safe condition, and that it did not create a dangerous condition that caused [the] plaintiff's fall or have actual or constructive notice of that condition'" (*Mister v Mister*, 188 AD3d 1334, 1334 [3d Dept 2020] quoting *Maurer v John A. Coleman Catholic High School*, 91 AD3d 1168, 1168 [2012]). Moreover, "whether defendants have conducted reasonable inspections of the premises is usually a question of fact for the jury to resolve in determining whether defendants fulfilled their duty to

maintain the premises in a reasonably safe condition” (*Dufrain v Hutchings*, 112 AD3d 1212, 1212-1213 [3d Dept 2013]).

Viewing the evidence in a light most favorable to plaintiffs, (see *id.* at 1213), the court concludes that defendants failed to meet their prima facie burden to establish that they maintained the deck in a reasonably safe condition. In support of the motion, defendants offer their deposition testimony and plaintiff Gregory Kruger’s deposition testimony. The proof offered to show whether defendants maintained the deck in a reasonably safe condition consists of defendants’ own statements that no one ever informed them the deck needed treatment and that neither defendant was able to recall whether the deck had ever been painted or treated. Missing from defendants’ proof is any evidence of things that *were* done to maintain the deck. To the contrary, defendants testified that no one was responsible for removing snow from the deck. And to the extent that defendants rely upon their own testimony that they regularly inspected the deck to show that they maintained it in a safe condition, the court concludes that this is a question for the trier of fact (see *Dufrain v Hutchings*, 112 AD3d at 1212-1213).

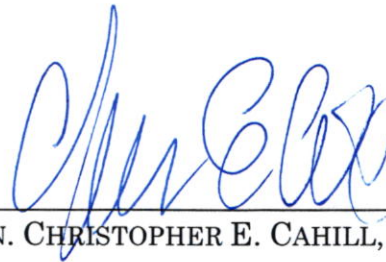
Accordingly, it is

ORDERED that defendants’ motion for summary judgment is denied.

This constitutes the decision and order of the court. The original decision and order is being transmitted to plaintiffs’ counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order

does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable rules respecting filing and service.

Dated: Albany, New York
April 1, 2021



HON. CHRISTOPHER E. CAHILL, JSC

Papers Considered

1. Notice of Motion dated July 8, 2020;
2. Affirmation of Allen F. Light, Esq. dated July 8, 2020 with exhibits;
3. Defendants' Memorandum of Law;
4. Affidavit in Opposition of Gregory Kruger dated December 15, 2020 with exhibits;
5. Affirmation in Opposition of Mark J. Metzger, Esq. dated December 16, 2020; and
6. Reply Affirmation by Allen F. Light, Esq. dated January 15, 2021.