

Jean-Charles v Carey
2021 NY Slip Op 32997(U)
February 17, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 622141/2018
Judge: Martha L. Luft
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

ORDER
CASEDISP

RAMONA JEAN-CHARLES, x

Mot. Seq. No.: 001 - MG
Orig. Return Date: 07/28/2020
Mot. Submit Date: 10/27/2020

Plaintiff,

PLAINTIFF'S ATTORNEY
The Odierno Law Firm, PC
145 Pinelawn Road, Suite 130 North
Melville, NY 11747

-against-

JENIANN CAREY,

DEFENDANT'S ATTORNEY
Irene A. Schembri, Esq.
James F. Butler & Associates
P.O. Box 9040
300 Jericho Quadrangle, Suite 260
Jericho, NY 11753

Defendant.
_____ x

ORDERED that defendant Jeniann Carey's motion for an order granting summary judgment in her favor and dismissing the complaint is granted.

This is an action to recover damages allegedly sustained by the plaintiff Ramona Jean-Charles as a result of an accident which occurred on February 3, 2017. By her verified complaint, as amplified by her verified bill of particulars, the plaintiff alleges, among other things, that on the date of the accident, she was delivering mail at the defendant Jeniann Carey's residence during her course of employment as a postal worker when she fell off the front exterior steps to the ground.

The defendant now moves for summary judgment dismissing the complaint, arguing, *inter alia*, that the plaintiff cannot make a prima facie case of negligence, as she cannot establish what caused her to fall. In support, the defendant submits, among other things, transcripts of the parties' deposition testimony and exhibits authenticated by the parties at their depositions. In opposition, the plaintiff submits several documents, including a copy of a verified bill of particulars and an affidavit of Harold Krongelb, Professional Engineer.

At her deposition, the plaintiff testified that she was employed as a postal worker on the date in question, that she was delivering mail at the premises, the premises was on her regular

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route, and that she had that same route for about eight years. Although regular mail was delivered to a mailbox at the street, on this date, the plaintiff testified that she had a request for re-delivery of a certified letter, which she was delivering to the front door of the premises, where she had made deliveries in the past. The plaintiff further testified that there was a walkway to the stoop at the front of the house at the premises, with two or three steps to the front door. On previous occasions when she approached the front door of the premises, the plaintiff testified that she had encountered a dog, who would begin barking a few feet before she got to the steps. The plaintiff testified that she never had any encounters with the dog where it was aggressive with her, and she was not aware of any complaints about the dog. The plaintiff further testified that the post office procedure for a home with a dangerous dog is for the postal worker to fill out a warning card to alert other postal workers to the dog's presence at the home, that she described a dangerous dog as one that attacks, and that she never filled out a warning card for the dog at the premises.

The plaintiff testified that, in general, when she approached the premises, she would hear a dog barking, and that she heard same on the date of the accident. The plaintiff testified that on the date of the accident, she first heard the dog when she was approximately ten feet from the house, that the dog's bark became more aggressive as she got closer, and that she could hear him banging against the window and barking. The plaintiff further testified that she arrived at the top step, then knocked on the door or pressed the doorbell, at which time the dog sounded like it was outside of the house, so she prepared for the impact of the dog. The plaintiff further testified that it sounded like the dog was coming from the left side of the house, so she turned her body to the left to see what direction the dog was coming from, and that is when she fell backward. However, the plaintiff testified that she never actually saw the dog outside of the house. The plaintiff testified that she does not recall whether she slipped on anything, as she was attempting to get through what she believed to be an impending dog attack. The plaintiff testified that she remained on the ground for a couple of seconds after she fell, that she got up, and that she returned to her truck and called her office. As to the weather on the date of the accident, the plaintiff testified that it was clear day, and that there was no snow or ice on the steps or on the ground.

At her deposition, the defendant testified that she has owned the premises since 1995, that she owns a male dog named Cody, which is part boxer and part shepard, and that she adopted Cody in 2015. The defendant testified that the dog is affectionate, that he would go to the windows in the front of the house and bark if he heard someone coming towards the house, that Cody never bit anyone, and that she never received any complaints about the dog prior to the date of the accident. The defendant testified that the house was renovated in 2004, which included installing new front steps, that this renovation was inspected, and that the steps passed inspection. The defendant further testified that, prior to the date of the accident, no one ever complained to her about the steps, that no one ever fell on the steps, and that she never received a summons or ticket for any type of dangerous condition concerning the steps. The defendant testified that she was working at the time of the accident, and that she did not learn of it until

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2018 when she received notice in the mail regarding this lawsuit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment, failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form ... and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (see *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Frank v JS Hempstead Realty, LLC*, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; *Guzman v State of New York*, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Donohue v Seaman's Furniture Corp.*, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]). To establish a prima facie case of negligence in a premises liability action, a plaintiff must establish that the defendant owed him or her a duty of care, that a dangerous or defective condition on the premises caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (see *Sermos v Gruppuso*, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; *Starling v Suffolk Cty. Water Auth.*, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]). A defendant moving for summary judgment must show, prima facie, that it did not create the dangerous or defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discover and remedy it (see *McElhiney v Half Hollow Hills Cent. Sch. Dist.*, 158 AD3d 615, 70 NYS3d 237 [2d Dept 2018]; *Schwartz v Gold Coast Rest. Corp.*, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]).

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]). Moreover, the mere happening of accident does not establish liability of a defendant for

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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]). The inability to identify the cause of an injured party's fall is fatal to a cause of action to recover therefor because a finding that a defendant's negligence, if any, proximately caused the injuries would be based on speculation (*see O'Connor v Metro Management Development, Inc.*, 130 AD3d 698, 15 NYS3d 59 [2d Dept 2015]; *Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 995 NYS2d 747 [2d Dept 2014]). Where it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation (*see Hod v Orchard Fields, LLC*, 111 AD3d 794, 975 NYS2d 162 [2d Dept 2013], quoting *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 735 NYS2d 585 [2d Dept 2001]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

Here, the defendant's submissions, namely the parties' deposition testimony, demonstrates that the plaintiff was unable to identify the condition which caused her to fall without resorting to speculation, thereby establishing her prima facie entitlement to summary judgment (*see Priola v Herrill Bowling Corp., supra; Ash v City of New York, supra; Patrick v Costco Wholesale Corp., supra*). The plaintiff's testimony establishes that, although she believed that the defendant's dog was about to attack her, she did not actually see it at the time of the accident. Further, the plaintiff testified that the weather was clear on the day of the accident, and that there was no snow or ice on the steps which could have caused her to slip and fall. As for the steps, the defendant's testimony established that she had no actual or constructive notice of the allegedly dangerous condition, as she testified that the steps were constructed in 2004, that they passed inspection, and that she received no complaints or summonses regarding them (*see McElhiney v Half Hollow Hills Cent. Sch. Dist., supra; Schwartz v Gold Coast Rest. Corp., supra*).

The defendant having met her burden on the motion, the burden then shifted to the plaintiff, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form ... and must "show facts sufficient to require a trial of any issue of fact" (*see Zuckerman v City of New York, supra*). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff alleges that she fell because there was no railing on the steps, but this allegation is belied by her deposition testimony whereby she stated that she did not look for something to grab onto until she had already begun to fall. Further, although the plaintiff's expert Harold Krongelb opines that the lack of a handrail was a substantial cause of her fall, the plaintiff did not testify that her fall was caused by lack of a handrail, and she has not presented any other evidence to connect this alleged building code violation to the accident (*see Maglione v Seabreeze By Water, Inc.*, 116 AD3d 929, 984 NYS2d 132 [2d Dept 2014]; *Antelope v Saint Aidan's Church, Inc.*, 110 AD3d 1020, 973 NYS2d 769 [2d Dept 2013]; *Kloepfer v Aslanis*, 106 AD3d 956, 966 NYS2d 151 [2d Dept 2013]). Additionally, as Mr. Krongelb never inspected the accident location, his opinion regarding causation is impermissibly speculative and lacks probative value (*see Mauskopf v 1528 Owners Corp.*, 102 AD3d 930, 958 NYS2d 759 [2d Dept

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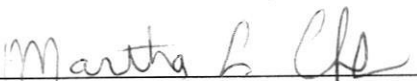
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2013]; *Roldan v New York University*, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]). Finally, the Court notes the diagram in Mr. Krongelb’s affidavit appears to depict a pedestrian stepping *on* a platform, not *off* a platform. As Mr. Krongelb’s affidavit does not tender admissible evidence as to causation, it is insufficient to raise a triable issue of fact (see *Zuckerman v City of New York, supra*; *Maglione v Seabreeze By Water, Inc., supra*; *Roldan v New York University, supra*).

Accordingly, the defendant’s motion is granted.

ENTER

Date: February 17, 2021
Riverhead, New York


HON. MARTHA L. LUFT, A.J.S.C.

Final Disposition

Non-Final Disposition