

Lemin v Kirkwood

2021 NY Slip Op 33198(U)

July 12, 2021

Supreme Court, Orange County

Docket Number: Index No. EF008823-2018

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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SUSAN LEMIN,

Plaintiff,

-against-

JAMES H. KIRKWOOD,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008823-2018

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The following papers numbered 1-3 were read on the Plaintiff's motion in limine to preclude testimony by Defendant's designated expert:

Motion in Limine / Exhibits 1
Affirmation in Opposition 2
Reply Affirmation 3

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

This is an action for personal injury arising out of the Plaintiff's alleged trip and fall on Defendant's premises. Plaintiff moves to preclude testimony by Defendant's expert, New York State registered architect Kenneth W. Pearl. The motion is granted in part, and denied in part, as follows.

A. Code Provisions

As a registered New York State architect, Mr. Pearl is qualified by reason of his education and experience to give his expert opinion on the application to the facts of this case of New York code provisions relating to the construction and maintenance of the residential premises at issue here. On this subject, he may except as discussed hereinbelow testify at trial to matters fairly within the scope of his August 20, 2019 report.

However, Mr. Pearl must be precluded from testifying to his purported conversations with local code enforcement officials. His report states:

In addition, without revealing the specifics of this claim, be advised I have interviewed several local code officials on this matter. I have simply shown them copies of both the Plaintiff and Defendant photographs and asked them if they would take enforcement action under Sec. 302.3 of the NYS PMC.

Each said definitively - No. One said that even if he did, he would never get the support of his local Town Attorney to support such an action if needed. Each similarly described that both the garage floor and the drive themselves were in separately good condition. They acknowledged the slab had an apparent crack and worn edging, but that the condition needed an 'up-close zoomed-in' image to view. In a normal view, one described it as simply looking "weathered, but not in a state of disrepair or hazard."

If necessary, I would suggest you consider retaining a NYS-certified Code Enforcement Official to render such an opinion....

Testimony by Mr. Pearl concerning the referenced conversations with the local code enforcement officials would be inadmissible hearsay. Moreover, off-the-cuff opinions by those officials as to whether they would undertake code enforcement action with respect to a condition shown in a photograph is as a matter of law not the kind of out-of-court material upon which Mr. Pearl may reasonably rely in rendering his own opinion whether the condition of Defendant's premises violated the code provisions at issue. Indeed, Mr. Pearl frankly acknowledged that defense

counsel would need to retain a NYS-certified Code Enforcement Official to render his own opinion. Accordingly, Mr. Pearl is precluded from testifying at trial to the matters set forth in the quoted passage of his August 20, 2019 report.

B. The Mechanics of the Accident

Mr. Pearl proposes to testify that Plaintiff's account of the accident is "not physically possible", or, alternatively, "not plausible", and that "[i]n my opinion, the Plaintiff did not trip at the pavement-to-slab transition. She tripped on firm, sound, level asphalt pavement some distance well in advance of the subject pavement-to-slab transition." However, Mr. Pearl is an architect, not a qualified biomechanical or accident reconstruction expert. Defense counsel's assertion that Mr. Pearl as architect is "required to have training and experience in Ergonomics which is the study of body movements in residential, recreational, commercial and industrial premises" is not supported by Mr. Pearl or by anything in Mr. Pearl's curriculum vitae. Moreover, Mr. Pearl's opinion as to how or where the accident occurred is based not on any specialized knowledge or expertise, but rather upon a common sense analysis of Plaintiff's testimony in light of the physical conditions of the situs of the accident – that is, upon matters well within the competence of an ordinary juror. Accordingly, Mr. Pearl is precluded from testifying at trial concerning the mechanics of Plaintiff's accident.

C. Lighting Conditions

Mr. Pearl states in wholly conclusory terms that "I find the Plaintiff's allegations regarding the condition of exterior lighting to also be without merit and separately irrelevant to the fall itself as well." Neither the substance of his opinion in this regard nor the basis therefor

are stated in the August 20, 2019 report. Accordingly, Mr. Pearl is precluded from testifying at trial on the issue of lighting conditions.

It is therefore

ORDERED, that Plaintiff's motion *in limine* to preclude testimony by Defendant's designated expert is granted to the limited extent set forth hereinabove, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: July 12, 2021 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE