Ocher v Veyland
2021 NY Slip Op 33360(U)
September 8, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035816/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
RENEE E. OCHER,

Plaintiff,

DECISION AND ORDER
(Motion # 2)

-*against*-

Index No.: 035816/2018

STEVEN J. VEYLAND and MARIA VEYLAND

Defendants.
---X
Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 10, were considered in connection with Defendants Steven J. Veyland and Maria Veyland's (hereinafter "Veylands" or "Defendants") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in her favor, and dismissing the action against her:

PAPERS	**NUMBERED**
NOTICE OF MOTION/STATEMENT OF MATERIAL FACTS/AFFIRMATION IN SUPPORT/EXHIBITS A-J	1-3
RESPONSE TO STATEMENT OF MATERIAL FACTS/AFFIRMATION IN OPPOSITION/AFFIDAVIT OF RENEE OCHER/EXHIBIT A/AFFIDAVIT OF SCOTT A. CAMERON, R.A.	4-7
AFFIRMATION IN REPLY/AFFIDAVIT OF STEVEN J. VEYLAND/AFFIDAVIT OF MARIA VEYLAND	8-10

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of the Summons and Complaint on September 28, 2018. Issue was joined with the service of an Answer on November 6, 2018. Discovery was completed and the instant summary judgment motion was filed by Defendant Maria Veyland only. Plaintiff alleges that on July 30, 2017, she was invited into the Veyland's townhouse, located at 22 Tulip Court, Nanuet, New York, in order to evaluate the property in preparation for it to be listed for sale on the market. Plaintiff alleges that she was caused to sustain injury when she fell as a result of a hidden and unexpected step-down with a 6 ½ inch height differential in an office/guest room in Defendants' home,

which ran the length of the entire room, the surface of both levels had the same hardwood and the step down was not delineated in any manner.

The Parties' Contentions

Defendant Maria Veyland previously moved for summary judgment on the ground that she had no duty to Plaintiff, which was denied by Order dated February 11, 2021. The Court is dismayed that Defendant now makes a second, successive summary judgment motion, particularly considering that discovery was completed when the first motion was made but will nonetheless decide this motion on the merits. In the instant matter, Defendants argue that the allegations do not require expert testimony since there is nothing that does not lie within the range of common experience, and as such, expert testimony should be precluded. They contend that if there are any applicable code violations, the trial judge, not an expert, can instruct the jury. Defendants further contend that Plaintiff's expert report should be excluded as "misleading" and "unnecessary."

Defendants next contend that the photographs relied upon by Plaintiff's expert are improper, unauthenticated and were unauthorized, and their use by the expert must be precluded. More specifically, they contend that the photographs were not taken by the expert but were taken by Plaintiff's attorney, without the permission of Defendants since Ms. Ocher's access to the home was specifically limited to showing the home to prospective purchasers. In what can at best be described as a "novel" argument, Defendants contend that use of the photographs must be precluded since Plaintiff, as Defendants' real estate agent, breached her fiduciary duty of loyalty to act in the best interests of the principals. Additionally, Mr. Veyland testified that the pictures were not a fair and accurate representation of the room on the day of the accident since the photo appeared "more saturated." With respect to the actual arguments in support of summary judgment, Defendants contend that the condition was "open and obvious" and not defective as a matter of law. Lastly, Defendants argue that they are entitled to summary judgment since the condition complained of was in compliance with all applicable statutes and codes, and therefore, not defective as matter of law.

In opposition, Plaintiff argues that her claim in this case is that defendants permitted to exist an optically confusing and dangerous condition which caused her to fall and sustain severe injuries. In support of this contention, they submit the affidavit of Registered Architect, Scott Cameron, who opines based upon his own site inspection, measurements, and photographs (including those authenticated by the Plaintiff which were taken shortly after the accident), that the lack of warnings of any kind such as contrast in surface colors, handrails, delineated nosing edges or other visual cues, made the 6 ½" height differential indiscernible and created the false impression of a walking surface with no step.

Plaintiff argues that expert testimony is appropriate in this case in that Mr. Cameron's testimony will aid the trier of fact in determining whether the construction, design and failure to warn/provide a visual cue of the step-down is a dangerous condition, since he has specialized knowledge in the field of architecture and construction, as well as knowledge of good and accepted architectural and construction practice for safety. With respect to the issue of the photographs, Plaintiff submits an affidavit in which she authenticates the photographs as a fair and accurate depiction of the incident location as it appeared when the incident occurred, and as such, she argues that her expert may rely upon them. Additionally, they contend that the structural makeup and design of the incident location is not at issue as defendants do not dispute that there was a single-step rise that ran the entire width of the room; that there is a change in elevation from the upper-landing to the lower-landing; and that the walking/floor surfaces of both levels are identical wood planks without visual cues of a height differential.

With respect to the "open and obvious" contention, Defendants argue that a step may be dangerous where the conditions create "optical confusions" and for that reason was not open or obvious. Lastly, with respect to the argument that summary judgment must be dismissed because there was no specific code violation, Plaintiff contends that liability may be found even where there is no violation of a code since owners and possessors of land have a duty to maintain their premises in a reasonably safe condition. Plaintiff notes that with

respect to this duty, Defendants have failed to meet their burden on summary judgment, since they fail to explain why the step-down was not a hidden, trap-like condition.

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. Basso v. Miller, 40 NY2d 233, 224, 366 N.Y.S.2d 564 (1976); Taub v. JMDH Real Estate of Garden City Warehouse, LLC, 150 A.D.3d 1301, 1302, 56 N.Y.S.3d 220 (2d Dept. 2017). "To be entitled to summary judgment, the defendant was required to show, *prima facie*, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises." Russo v. Home Goods, Inc., 119 A.D.3d 924, 990 N.Y.S.2d 95 (2d Dept. 2014). "Whether a dangerous or defective

condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." Perez v. 655 Montauk, LLC, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011).

As an initial matter, expert testimony in this matter is entirely appropriate. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." DeLong v. County of Erie, 60 N.Y.2d 296, 307, 469 N.Y.S.2d 611 (1983). Here, the expert testimony of Mr. Cameron's specialized knowledge in the fields of architecture and construction will aid the trier of fact in determining if the single-step riser creates an optically confusing path of travel and whether or not it constitutes a dangerous condition.

Nor is there any merit to Defendants' contention that Mr. Cameron should be precluded from relying upon photographs taken by Plaintiff's attorney shortly after the occurrence. "A photograph is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph accurately represents that which it purports to depict." Corsi v. Town of Bedford, 58 A.D.3d 225, 228, 868 N.Y.S.2d 258 (2d Dept. 2008). Moreover, an expert may rely upon photographs provided that the condition at issue is "reasonably inferable from the photographs." Molinari v. 167 Housing Corp., 103 A.D.3d 507, 962 N.Y.S.2d 42 (1st Dept. 2013). Here, Plaintiff attests that the photograph fairly and accurately depicts the conditions present at the time of the accident and the structural condition of the step-down is reasonably inferable from the photograph. Additionally, there is no legal basis upon which to preclude the use of the photographs based upon Defendants' theory of Ms. Ocher's breach of "fiduciary duty of loyalty" to Defendants based upon her role as their real estate agent. The cases relied upon by Defendants deal with contractual disputes relating to the sale of real estate and not personal injury sustained by a real estate agent due to the presence of an alleged dangerous condition on the property. As such, they are inapplicable to the matter at bar.

Turning next to Defendants' argument that the case must be dismissed because the step constituted an "open and obvious" condition, the Court finds that it does not constitute a basis upon which to grant the instant summary judgment motion. The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case. Clark v. AMF Bowling Centers, Inc., 83 A.D.3d 761, 921 N.Y.S.2d 273 (2d Dept. 2011). Since the "open and obvious" test incorporates a reasonableness standard, it is fact-specific and usually presents a question for resolution by the trier of the fact. Centeno v. Regine's Originals, Inc., 5 A.D.3d 210, 773 N.Y.S.2d 62 (1st Dept. 2004).

Moreover, "[i]f a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger." Westbrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69, 71, 773 N.Y.S.2d 38 (1st Dept. 2004). However, "apart from the duty to warn of dangerous condition on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it. DiVietro v. Gould Palisades Corp., 4 A.D.3d 324, 325, 771 N.Y.S.2d 527 (2d Dept. 2004). "Where a dangerous condition exists on property, the fact that the condition was open and obvious, while relieving the landowner of the duty to warn, will not relieve the landowner of its burden of demonstrating that 'he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based upon such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk.'" Id. Here, Defendants have failed to demonstrate that the step-down was "open and obvious," particularly given Plaintiff's claims that given the absence of visual cues, and that the surface of both levels was the same hardwood, the height differential was indiscernible.

Moreover, Defendants have also failed to meet their prima facie burden of demonstrating the absence of all triable issues of fact that the subject step-down was

reasonably safe and did not constitute a dangerous condition. While Defendants argue that the step down was not defective since it complied with all statutes and codes, it fails to address Plaintiff's allegation that the step down was not reasonably safe due to optical confusion and/or its claim that the step down constituted a hidden or trap-like condition. Liability can be premised upon a finding that "the color and position of a step created optical confusion, i.e. 'the illusion of a flat surface, visually obscuring [the]step.'" Buonchristiano v. Fordham Univ. 146 A.D.3d 711, 712, 46 N.Y.S.3d 76 (1st Dept. 2017); Chafoulias v. 240 E. 55th St. Tenants Corp., 141 A.D.2d 207, 210 533 N.Y.S.2d 400 (1st Dept. 1988)(Plaintiff's negligence theory of optical confusion, due to defendant's failure to mark or otherwise distinguish the steps in any meaningful fashion is legally sufficient.) Defendants' failure to address this theory of liability in any manner requires the denial of summary judgment, thus obviating the need to consider the sufficiency of the opposition papers. However, even if Defendants had met their burden, Plaintiff has raised a triable issue of fact through her testimony and expert affidavit that the lack of warnings of any kind such as contrast in surface colors, handrails, delineated nosing edges or other visual cues, made the 6 ½" height differential indiscernible and created the false impression of a walking surface with no step.

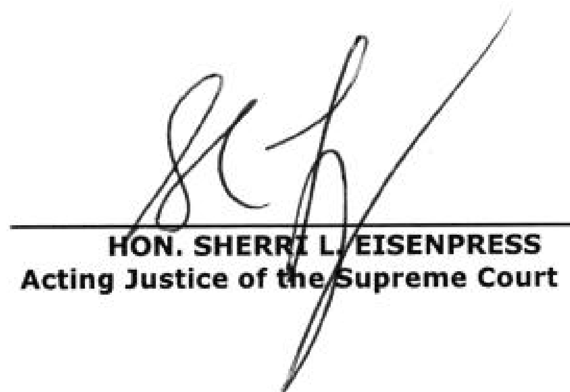
Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendants Steven J. Veyland and Maria Veyland is DENIED in its entirety; and it is further

ORDERED that all parties are to appear for a settlement conference on **October 22, 2021, at 10:30 a.m**. on Microsoft Teams. Counsel participating in the settlement conference must have knowledge of the matter, as well as authority, and must make arrangements to be able to speak to their clients with respect to settlement offers, if necessary.

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York
September 8, 2021



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

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