

Toro v McComish

2021 NY Slip Op 33410(U)

September 10, 2021

Supreme Court, Westchester County

Docket Number: Index No. 57930/2019

Judge: Alexandra D. Murphy

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This opinion is uncorrected and not selected for official publication.

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

----- X
CARMEN I. TORO,

Plaintiff,

Index No. 57930/2019

– against –

Motion Seq. 1

DONNA R. MCCOMISH,

DECISION & ORDER

Defendant.
----- X

In an action to recover damages for personal injuries, the defendant moves for summary judgment dismissing the complaint pursuant to CPLR 3212:

Papers Considered NYSCEF Doc. No. 16-29; 33-37; 39

1. Notice of Motion/Affirmation of Tulia Garavito, Esq./Exhibits A-K;
2. Affirmation of Christopher J. Trochiano, Esq. in Opposition/Exhibits A-D;
3. Reply Affirmation of Tulia Garavito, Esq.¹

Factual and Procedural Background

The plaintiff commenced this action to recover damages for personal injuries resulting from a slip and fall on a staircase within the premises located at 8 Mount Edna Place, in New Rochelle. The accident occurred on July 31, 2018, at approximately 8:00 p.m. on the stairway leading from the first floor to the second floor. The premises is a two-family dwelling constructed in 1890.

The defendant moves for summary judgment dismissing the complaint, arguing that the plaintiff is unable to identify what caused her accident.

In support of the motion, the defendant submits, inter alia, a transcript of the plaintiff's deposition testimony. The plaintiff testified that she lives in the first-floor apartment and her son lives in the second-floor apartment of the premises. The plaintiff testified that the apartment had been approved by the Section 8 housing program. Although she had signed a lease for the apartment and currently lives there, she was not living there at the time of the accident.

¹ The Court has not considered the improperly filed sur-reply and sur-sur-reply (NYSCEF doc. 43-46).

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The first time the plaintiff visited the premises, she did not go up the stairway to the second-floor apartment. She did not make any complaints to the defendant about the apartment at that time. The plaintiff, her son and her adult grandson returned to the premises on the date of the accident. They were scheduled to move in the following day. On the date of the accident, the plaintiff walked into the first-floor apartment then went upstairs to see the apartment her son was moving into. She did not have any difficulty walking up the stairway. The plaintiff was in the upstairs apartment for approximately ten minutes and began walking down the stairs with her son following behind her. She had her right hand on the handrail. The plaintiff initially testified that she walked down four steps from the top when the accident occurred. She was still holding onto the railing when she fell. According to the plaintiff, her son was not yet on the stairway when she fell. When asked what caused her to fall, she responded, “[w]hat caused me to fall was I felt funny. I felt like something bent me. Like the stairs were not level or something like that. They were not straight” (see NYSCEF doc. 26 p. 69). The plaintiff testified that there was nothing on the steps that caused her to fall.

During the deposition, the plaintiff was referred to photographs of the stairway. Contrary to her previous testimony, upon viewing the photographs she testified that she fell from the fourth step from the bottom of the stairway (see NYSCEF doc. 26 p. 76-77, 110-111).

The defendant also submits an affidavit in support of the motion. The defendant attests that she is the sole owner of the premises, which she purchased in 1976. She never received any complaints about the stairway in the premises. Prior to the plaintiff’s accident, no one had ever fallen on the stairway. The defendant never made any repairs to the stairway and never observed any problems.

In opposition, the plaintiff argues that issues of fact exist as to whether the defendant created or had notice of a defective condition on the stairway. The plaintiff argues that the excessive tread slope, lack of level, worn carpet and inadequate handrail caused her accident.

The Plaintiff’s Expert Reports

The plaintiff retained experts Paul Angelides, P.E. and Adam C. Cassel, P.E., who inspected the premises in January 2019 and prepared a first report dated March 28, 2019. The plaintiff was present for the inspection and indicated that she lost her balance and fell on the fourth step from the top of the stairway. Angelides and Cassel opined, “[t]he stair contains several defects which can be cited as factors that contributed to the circumstances of [the plaintiff’s] accident. The defects include the presence of excessive tread slope, a worn carpet, and an inadequate handrail”. Angelides and Cassel state that the defects are in violation of generally accepted industry standards, the 1951 New York State Building Code and the 2015 New York State Property Maintenance Code.

After reviewing the plaintiff’s conflicting deposition testimony that she fell from the fourth step from the bottom of the stairway, Angelides and Cassel prepared a

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supplemental expert report dated September 4, 2020. In the supplemental report, Angelides and Cassel opine that the fourth step from the top had a cross slope of 5.8% and a downward slope of 4.5%, and the fourth step from the bottom had a cross slope of 2.3% and a downward slope of 8.5%. Angelides and Cassel state that the sloping conditions on the entire stairway are excessive and do not conform to the 1951 New York State Building Code or the 2015 New York State Property Maintenance Code.

The Defendant's Expert Reports

The defendant's expert, John McManus, P.E., inspected the premises and prepared a first report dated February 4, 2020. The first report is based upon the plaintiff's account of falling from the fourth step from the top of the stairway. McManus concludes that the stairway was the original stairway from the 1890 construction and that the Building Code is not applied retroactively. McManus opines that the stairs were kept in reasonably good repair, the surface was not slippery and the carpet showed normal wear and tear.

McManus reinspected the premises after reviewing the plaintiff's deposition testimony stating that she fell on the fourth step from the bottom of the stairway. McManus prepared a supplemental report dated March 9, 2021. McManus found that fourth step from the top had a cross slope of 5.8% and a downward slope of 5.6%, and the fourth step from the bottom had a cross slope of 0.9% and a downward slope of 4.2%. McManus opines that neither the downward slope nor the cross slope would cause someone to suddenly twist or turn, particularly when holding onto the handrail.

Discussion

"To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v Apostolic Faith Mission of Portland, Oregon*, 111 AD3d 684, 684-685 [2d Dept 2013]).

Here, the defendant established entitlement to judgment as a matter of law by demonstrating, prima facie, that the subject staircase was not in a dangerous or defective condition and that she maintained the staircase in a reasonably safe condition free of any defects (see *Morrison v Apostolic Faith Mission of Portland, Oregon*, 111 AD3d 684). Further, the defendant established that neither the handrail nor the stairway violated the New York State Fire Prevention and Building Code or the Property Maintenance Code of the State of New York because the subject premises was built before the enactment of these codes (see *Navarre v Ketcham*, 122 AD3d 811, 811 [2d Dept 2014]).

In opposition, the plaintiff fails to raise a triable issue of fact (see *Hernandez v BG Mgt. 2, LLC*, 190 AD3d 707 [2d Dept 2021]). The plaintiff acknowledges that her deposition testimony is contradictory as to whether she fell from the top of the stairs or from the bottom of the stairs. The plaintiff's argument that this creates an issue of fact is without merit, as the plaintiff is attempting to create her own issue of fact without offering

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any reasonable explanation for the contradiction (see e.g. *Zylinski v Garito Contr.*, 268 Ad2d 427 [2d Dept 2000]).

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is GRANTED, and the complaint is dismissed.

Dated: White Plains, New York
September 10, 2021



HON. ALEXANDRA D. MURPHY, J.S.C.

H: CIVIL ALPHABETICAL MASTER/Toro v. McComish