

**Saravo-Schechtman v Pinchback**

2021 NY Slip Op 33415(U)

October 7, 2021

Supreme Court, Nassau County

Docket Number: Index No. 601120/19

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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SILVIA SARAVO-SCHECHTMAN, TRIAL/IAS PART 30  
NASSAU COUNTY

Plaintiff,

-against-

Index No.: 601120/19  
Motion Seq. No.: 01  
Motion Date: 05/20/2021  
**XXX**

REBECCA PINCHBACK and WARNER PINCHBACK,

Defendants.  
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**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	<b>1</b>
Affirmation in Opposition and Exhibit	<b>2</b>
Affirmation in Reply	<b>3</b>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on July 23, 2018, at approximately 9:45 p.m., when she was caused to trip and fall due to a raised concrete condition on the walkway at or near the retaining wall down the driveway of the premises located at 19 Dutchess Drive, Holmes, New York. The action was commenced with the filing and service of a Summons and Verified Complaint on or about January 16, 2019.

See Defendants' Affirmation in Support Exhibit A. Issue was joined on or about June 4, 2019.

See Defendants' Affirmation in Support Exhibit B.

In support of defendants' motion, their counsel submits, in pertinent part, that, "[t]his is a lawsuit sounding in negligence for personal injuries sustained by plaintiff due to a fall at defendants Pinchbacks' premises in Holmes, New York. The Pinchbacks owned a lake-side vacation home on Lake Dutchess. They rented the premises to Michelle (Jardine) Barcos for a week. On July 23, 2018, plaintiff Silvia Saravo-Schechtman and her daughters were guests at the premises with the Barcos family. Plaintiff was leaving the premises at approximately 9 p.m., and after exiting the front door, and walking down the front stairs, she fell when she walked off the driveway retaining wall, and sustained injuries.... Plaintiff's Bill of Particulars alleges that the defendants Pinchback were negligent in connection with their ownership and maintenance of the premises at 19 Dutchess Drive, Homes, New York, and more particularly, the walkway, retaining wall and driveway at the premises, and the lighting/illumination of those areas of the premises." *See* Defendants' Affirmation in Support Exhibit C.

In further support of the motion, defendants submit the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Defendants' Affirmation in Support Exhibit F. Counsel for defendants asserts that plaintiff testified, in pertinent part, that, "[o]n July 23, 2018 at approximately 9:00 p.m., she was involved in an incident at a lake house located several hours away from her home in Bellmore. She and her daughters had been invited to the lake house by Michelle and Mel Barcos; her daughter and the Barcos' daughter were friends, and were scheduled to attend a nearby camp together that week. She and her daughters were going to visit for a few hours with the Barcos family that day at the lakehouse (*sic*), and then she and her daughters were going to spend the night at a hotel; and drop off her daughter at camp the following day.... She arrived at the lake house somewhere between 4:00 p.m. - 5:00 p.m. The house had an attached garage, located underneath a part of the house. She parked her vehicle on

a section of the driveway that was sloped downward toward the garage, with the front of the vehicle 2-3 feet from the garage door. There was approximately 3 feet between the passenger side of the vehicle and the driveway retaining wall that was to the right of the vehicle. She got out of her vehicle, walked up the driveway, and up the front stairs, and into the house through the front door.... Once inside the house, she, her daughters, and the Barcos had dinner and socialized. The girls went Kayaking (*sic*). She did not leave the house.... At approximately 9:00 p.m., the (*sic*) decided to leave and head to the hotel where she and her daughters would be staying. When she left the house, there was visibility and she was able to see where she was going. She does not recall if there were any exterior lights on illuminating the front of the house when she left. Michelle Barcos and/or Sharon (another guest at the house) walked her to the front door. She walked out the front door; her daughters were behind her. She walked down the front stairs, and when she got to the bottom, she found that a vehicle had been parked head-in directly in front of the stairs. She then took three steps to the right, walking on black top, on a diagonal toward the rear of her vehicle parked on the sloped driveway. She took a step with her right foot and fell off the driveway retaining wall, with her right foot landing on the driveway about 3 and ½ feet below. The rest of her body then fell onto the driveway.” *See id.*; Defendants’ Affirmation in Support Exhibit G.

Also in support of the motion, defendants submit the transcript from defendant Rebecca Pinchback’s EBT testimony. *See* Defendants’ Affirmation in Support Exhibit H. Counsel for defendants asserts that defendant Rebecca Pinchback testified, in pertinent part, that, “[s]he and her husband, Warran (*sic*) Pinchback are the property owners at 19 Dutchess Drive, Holmes, New York. They purchased the premises in June of 2017. The premises is a one-family home, with three bedrooms and two bathrooms, situated on Lake Dutchess. The Pinchbacks used the

premises as a second house, for vacation, weekends, and they do short term rentals as well. The premises has a one-car garage; there is a black-top driveway, and the blacktop extends and runs along the entire front of the house.... After the premises were (*sic*) purchased, they replaced the two front porch light fixtures located on each side of the front door. They put in flood lights that illuminate the front and sides of the house. The switches for the lights are located on the wall to the left of the front door as one enters the house.... Prior to their purchase of the house, an inspection company did an inspection. No recommendations were made to them to make any repairs or modifications. There were no recommendations to put a railing on top at the driveway retaining wall. No one ever made any complaint to them about any aspect of the driveway retaining wall, and no one had fallen off the ledge of the retaining wall prior to July 23, 2018.... She used Homeway.com to do short-term rentals of the lake house. An account was set up on the Homeway's Website, with information, details and photographs of the home for rent. Potential renters then create an account, go onto the Website and do searches for what they might be looking for in a rental, and matches are made. Michelle Jardine (Barcos) rented the house for July 22-July 27 (2018). She had 'chat; conversations with Michelle via the Homeway Website, about directions to the place, suggestions for restaurants, shopping and stores nearby the house, as well as information about bed linens, towels, recommended use of the parking brake of a vehicle in the driveway, and entry into the house.... On July 28, 2018 she checked in with Michelle to see how her and her family's stay at the house had gone. On August 1, 2018, Michelle wrote back to her and informed her that a friend had come to the house for dinner and (*sic*) fallen on her way out (out of the house)." *See id.*

Defendants also submit an Affidavit in support of the motion from defendant Rebecca Pinchback. *See* Defendants' Affirmation in Support Exhibit I.

Counsel for defendants argues, in pertinent part, that, “[i]n the case at bar, defendant (*sic*) Pinchbacks’ lake house premises were in reasonably safe condition; there were no dangerous/defective conditions existing at the premises. While plaintiff alleges that the driveway retaining wall was a dangerous/defective condition, there is absolutely no proof of that, and simply because plaintiff walked off of it doesn’t make it so. Indeed, garages below homes, sloping driveways, and the accompanying driveway retaining wall are common place designs at many homes. There is nothing dangerous and/or defective about retaining walls in general. Moreover, the defendants Pinchback provided adequate lighting and illumination of the front of the house, such that anyone using the reasonable use of their senses would be able to see the ledge/top of the retaining wall, and surely be able to observe their vehicle parked and facing downward into the driveway, indicating that there would be a drop-off on the other side of the retaining wall.... Even if the retaining wall were deemed a ‘condition’ on the premises, it is so open and obvious to anyone reasonably using their common sense so as to make it not actionable. Indeed, upon the arrival at the lake house, the plaintiff parked her vehicle on the down-slope driveway, right next to the retaining wall. She then walked up the driveway, past the retaining wall, and into the home. Surely, she had to know that the retaining wall existed ... her vehicle was parked right along side (*sic*) it. Moreover, when she left the house that evening, and walked down the front stairs, and then walked to the right several steps toward the rear of her vehicle, how could she not observe that her vehicle was facing downward and that there would have to be an elevation differential between the blacktop she was walking on and the driveway!... The driveway retaining wall and sloping downward driveway on the other side of it was readily observable to anyone using their senses. It’s an open and obvious condition. Indeed, anyone standing on the walkway where plaintiff was when she came down the stairs, would look to the

right and see a vehicle in the driveway facing downhill! Surely, to anyone using their senses, the understanding would be that there is a height differential between the blacktop walkway and the driveway. If a car is in a driveway sloping downward, it's obvious that the driveway is not flat, so an elevation difference must exist between the flat surface one is standing on and the driveway.... Indeed, consider that when plaintiff went out the front door onto the porch in front of the door, she was at elevation, and had an expansive view of the driveway below, her vehicle parked in the driveway, and the retaining wall. Surely, anyone standing there and reasonably using their sense of sight would recognize that there was an elevation difference between the blacktop in front of the house at the bottom of the stairs, and the driveway on the other side of the retaining wall." See Defendants' Affirmation in Support Exhibit G.

In opposition to the motion, counsel for plaintiff asserts, in pertinent part, that, "[d]efendants attempt to escape responsibility for the hazardous condition they created by intentionally omitting so many key facts that their presentation is false and misleading. They fail to share with the court that: - this was the first time defendants had rented this vacation home; - plaintiff was their renter's (*sic*) guest, arrived during the day, and had never exited the home in dark before her fall; - defendants had instructed their renter to park cars on the blacktop right in front of the door but fail to tell the court that just such parked cars were present and plaintiff had to go around them and take a completely different route back to her car than what she had experienced in the light of day - defendants did not provide any instructions for use of the lighting on the front of the house and none of the outside lights was (*sic*) on when plaintiff exited, leaving her path lit only by light coming from inside through the front windows, completely different than what is shown in defendants' photos; - as plaintiff exited the home immediately before she fell, there was a very large bush to her right between her and her car,

blocking light that could have illuminated her path as well as blocking any view she might have had of her vehicle, so the photos defendants rely on are completely misleading. No defendant can escape liability based on just a few cherry picked facts, but must earn judgment on all of the facts. All of the facts here raise significant jury questions.”

Plaintiff submits her own Affidavit in Opposition to the motion. *See* Plaintiff’s Affirmation in Opposition Exhibit A. Plaintiff asserts, in pertinent part, that, “[o]n July 12, 2018, one of my daughter’s friends invited us to spend the day at a home they had rented on Lake Dutchess and we went the following afternoon, the 13<sup>th</sup>. When we arrived, I observed that there was blacktop along the front of the home, with a driveway on the left that sloped sharply down to a garage at the basement level.... I parked on the slope, about three feet left of the wall that is painted white.... I exited the car and walked along the side of my car up the drive and turned left coming around the back of my car and walked in an arc to the stairs and entered the home, as there were no cars parked in front of the home at that time.... My attorney has provided me with three photographs that defendants have offered to the court, showing the front of the home in bright daylight.... I see that there was a very large bush present to the left of the front door in these photographs that was no longer there when Exhibits A and B were taken. That bush would have blocked my view of the front of my car as I exited the home later that night. It is also important that these images defendants offer do not show any cars parked in front of the home as was the case when I exited the home and fell.... I stayed inside the home the entire time my children played outside, and did not leave the home until we departed for the evening. Our hosts provided some refreshments and food and I had about four ounces of punch around 6:00 p.m. but nothing more until we got up to leave around 9:00 p.m. Our host’s (*sic*) daughter escorted us to the front door and I exited with my children behind me. There was a car parked directly in front

of the stairs and I had to exit to its right. As I looked out towards my car, all I could see in the dark of the night was one solid black surface. I began to walk at an angle to the back of my car which I had come around when I came into the home hours earlier.... As I angled towards the back of my car, I expected to encounter what I had encountered when I came into the home but all I could see before me was blackness. I was placing my feet down normally when, suddenly, there was nothing below my right foot. I fell forward towards my car and down about three feet with my right foot striking the driveway that was sloping down sharply towards my right. I was totally shocked and in terrible pain. I was removed by ambulance.” *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR* § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary

judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

An owner of property has a duty to maintain the property in a reasonably safe condition. *See Kellman v. 45 Tieman Assoc.*, 87 N.Y.2d 871, 638 N.Y.S.2d 937 (1995); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *Kruger v. Donzelli Realty Corp.*, 111 A.D.3d 897, 975 N.Y.S.2d 689 (2d Dept. 2013).

In order for plaintiffs to make a *prima facie* case of negligence, they must establish the existence of a dangerous or defective condition in the first instance. *See Pillato v. Diamond*, 209 A.D.2d 393, 618 N.Y.S.2d 446 (2d Dept. 1994). Plaintiffs must also demonstrate that defendant

Hampton's negligence was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

“To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it.” *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Alami v. 215 East 68th Street, L.P.*, 88 A.D.3d 924, 931 N.Y.S.2d 647 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Hayden v. Waldbaum, Inc.*, 63 A.D.3d 679, 880 N.Y.S.2d 351 (2d Dept. 2009); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007). “A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected.” *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, *supra*; *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010); *Rabadi v. Atlantic & Pacific Tea Company Inc.*, 268 A.D.2d 418, 702 N.Y.S.2d 316 (2d Dept. 2000); *Gauzza v. GBR Two Crossfield Ave. LLC*, 133 A.D.3d 710, 20 N.Y.S.3d 147 (2d Dept. 2015); *Gebert v. Catalano*, 110 A.D.3d 951, 973 N.Y.S.2d 332 (2d Dept. 2013). *See also Minor v. 1265 Morrison, LLC*, 96 A.D.3d 1024, 947 N.Y.S.2d 167 (2d Dept. 2012); *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522, 855 N.Y.S.2d 155 (2d Dept. 2008).

To demonstrate entitlement to summary judgment in a slip and fall case, a defendant must establish, *prima facie*, that it maintained the premises in a reasonably safe manner and that it neither created the alleged dangerous condition, nor had either actual or constructive notice of that condition for a sufficient length of time prior to the incident to discover and remedy it. *See Gomez v. David Milkin Residence Hous. Dev. Fund Co., Inc.*, 85 A.D.3d 1112, 927 N.Y.S.2d (2d Dept. 2011).

Once the defendant has met this burden, the burden shifts to plaintiff to raise a factual issue as to the creation of the defect or notice thereof sufficient to require a trial of her claims. *See Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 856 N.Y.S.2d 573 (1<sup>st</sup> Dept. 2008); *Zuckerman v. City of New York*, *supra*.

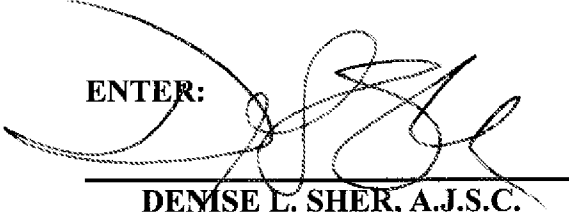
“While a landowner has a duty to maintain its premises in a reasonably safe manner (*see Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976)), it has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous [citations omitted].” *Zhuo Zheng Chen v. City of New York*, 106 A.D.3d 1081, 966 N.Y.S.2d 177 (2d Dept. 2013). An owner or occupant of a premises has no duty to warn against a condition that is open and obvious or that can readily be observed or perceived by the reasonable or normal use of one’s senses. *See Lamia v. Federated Dept. Stores, Inc.*, 263 A.D.2d 498, 692 N.Y.S.2d 738 (2d Dept. 1999); *Doyle v. State*, 271 A.D.2d 394, 705 N.Y.S.2d 389 (2d Dept. 2000). A readily observable condition does not pose an unreasonable risk of injury. *See Cortese v. Paris Maintenance*, 255 A.D.2d 354, 679 N.Y.S.2d 675 (2d Dept. 1998). The Court may determine that a condition is open and obvious as a matter of law when the established facts compel such conclusion on the basis of clear and undisputed evidence. *See Tagle v. Jakob*, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001).

Based upon the evidence and legal argument presented in the papers before it, the Court finds that plaintiff has failed to establish that any negligence on the part of defendants was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc., supra*. In the facts and evidence presented to this Court, it appears that plaintiff's accident was not the result of any alleged defective condition which the defendants knew or should have known about. Rather, the accident was exactly just that - an accident. Plaintiff provides no evidence whatsoever that the subject area of the premises where she fell was in a hazardous and/or defective and/or dangerous condition.

The Court additionally finds that there is no evidence that defendants' negligence was a substantial cause of the events which produced the injury. *See Ricco v. Kid Fit, Inc.*, 126 A.D.3d 873, 5 N.Y.S.3d 521 (2d Dept. 2015).

Therefore, based upon the above, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:  
  
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DENISE L. SHER, A.J.S.C.  
XXX

Dated: Mineola, New York  
October 7, 2021

**ENTERED**  
**Oct 13 2021**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE