

**Scott v De Chafra**

2021 NY Slip Op 33971(U)

July 9, 2021

Supreme Court, Queens County

Docket Number: Index No. 701092/2019

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

YVONNE SCOTT,

Index No.: 701092/2019

Plaintiff,

Motion Date: 7/8/21

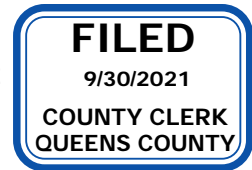
- against -

Motion No.: 27

CARMELINA DUTAN DE CHAFLA and MARIA  
JIMENEZ,

Motion Seq.: 2

Defendants.



- - - - - x

The following electronically filed documents read on this motion by defendants for an Order pursuant to CPLR 3212, granting summary judgment to defendants:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Memo. of Law-Exhibits..EF	26 - 36
Affirmation in Opposition-Exhibits.....EF	41 - 44
Reply Affirmation-Exhibits.....EF	46 - 49

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on September 10, 2018 when she tripped and fell on defendants' premises located at 147-19 232<sup>nd</sup> Street, in Queens County, New York.

This action was commenced by the filing of a summons and complaint on January 18, 2019. Issue was joined by service of defendants' answer on June 19, 2019. Defendants now move for summary judgment.

On August 4, 2020, plaintiff appeared for an examination before trial and testified that the incident occurred on September 10, 2018 at about 7:00 p.m. as she was leaving the premises after she had finished her shift as a home health aide. The premises is a two-family house. She did not have any difficulty walking up the stairs when she arrived. She did not notice anything about the steps outside the house that gave her any cause for concern. She did not make any complaints about the

condition of the steps. She fell on the cement walkway below the steps. The walkway was pitched. She was looking straight ahead. She did not realize there was a drop. She did not know there was a step down.

Defendant Maria Jimenez appeared for an examination before trial on September 18, 2020 and testified that she is a co-owner of the subject premises. The walkway and step at issue were already in place when she purchased the premises. Neither she nor anyone else performed any renovations, repairs, maintenance or other work on the walkway and step prior to the subject incident. No one ever complained to her about the step or the walkway. She never received any violations for the walkway of step.

Defendants also submit a copy of plaintiff's medical record from Queens Hospital Center. The records indicate that plaintiff "accidentally mis-stepped walking down the stairs, twisting her ankle/foot but states that she caught herself before she fell to the ground".

Based on the submitted evidence, defendants contend that summary judgment is warranted as plaintiff has failed to cite any laws, statutes, codes, regulations or ordinances violated by defendants. Moreover, even if there was a hazardous condition, the condition was open and obvious and not inherently dangerous.

In opposition, plaintiff submits a Supplemental Bill of Particulars, alleging that defendants were negligently in failing to adequately demarcate or warn of the single step rise in the walkway and violated numerous codes and regulations. Plaintiff also submits the expert affidavit of Nicholas Bellizzi, P.E. Expert Bellizzi affirms that he conducted an inspection of the subject location on Mary 26, 2021, at which time he took photographs and measurements. Expert Bellizzi concludes that the design and placement of the one step/one riser was hazardous to pedestrians and departed from the New York City Building Code, New York State Building Code, and good and nationally accepted ASTM standards for safe practices for walking surfaces. The single step riser was especially difficult to recognize partially due to its brief span of transition and the top view perspective of the pedestrian, especially since both upper and lower surfaces were made of the same material. Good and commonly accepted safe industry practice was to provide a handrail. The mis-leveled walkway surface or step was an unsafe, dangerous and hazardous condition. Expert Bellizzi further opines that defendants' negligence in maintaining the single step and/or in failing to warn, and failing to install handrails, warning signs or step orientation edging were substantial factors in the cause of the accident and the resulting injuries.

Plaintiff contends that questions of fact, therefore, exist as to whether she fell due to a poorly demarcated, unsafe step.

In reply, Michael C. Simon, P.E. submits an expert affidavit. Expert Simon inspected the subject step and walkway on May 26, 2021, and observed the premises to be well-maintained and in a state of good repair. Expert Simon concludes that the single exterior concrete step did not present a hazard or dangerous condition, was not defective or trap-like, but was safe and reasonable, and conformed to all applicable building code provisions and good and accepted construction design principles and practices.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

A defendant owner who is responsible for maintaining a premises who moves for summary judgment in a trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. Although a property owner has a duty to maintain his or her property in a reasonably safe condition, it has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (see Bloomfield v Jericho Union Free School Dist., 80 AD3d 637 [2d Dept. 2011]; Cupo v Karfunkel, 1 AD3d 48 [2d Dept. 2003]).

Here, viewing the evidence, including plaintiff's testimony about the visibility of the step and the photograph, in the light most favorable to the non-moving party, triable issues of fact preclude summary judgment (see Saretsky v 85 Kenmare Realty Corp., 85 AD3d 89 [1st Dept. 2011][denying summary judgment where the walkway in front of the premises created optical confusion]; Roros v Oliva, 54 AD3d 398 [2d Dept. 2008]). Although defendants contend that plaintiff walked over the step on the way into the home without incident, evidence, including plaintiff's expert affidavit, that the step was less visible coming out of the home is sufficient to raise a triable issue of fact (see Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69 [1st Dept. 2004]). Additionally, whether a hazard is latent or open and obvious is generally a question of fact for the jury (see Tagle v Jakob, 97 NY2d 165 [2001]).

Lastly, in light of the parties' competing expert affidavits, the issues of whether the step violated any building codes and conditions and, inter alia, whether the step was a hazard, are questions for a jury (see Hill v Lorac House, Inc., 135 AD3d 659 [1st Dept. 2016])

Accordingly, for the above stated reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is denied.

Dated: July 9, 2021  
Long Island City, N.Y.

*Robert J. McDonald*

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**ROBERT J. MCDONALD**  
**J.S.C.**

