

Alrifai v Knobel
2022 NY Slip Op 35187(U)
November 28, 2022
Supreme Court, Richmond County
Docket Number: Index No. 152158/2019
Judge: Wayne M. Ozzi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Part 23 of the Supreme Court
of the State of New York, held in and for
the County of Richmond at 26 Central
Avenue, Staten Island, New York 10301
on the 28th day of November 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
TARIQ ALRIFAI,

Plaintiff,

Decision and Order

Index No: 152158/2019
(Motion Seq # 2)

- against -

THOMAS P. KNOBEL and
ANTOINETTE D. TERI-BUERKLE,

Defendants.
-----X

Hon. Wayne M. Ozzi, J.S.C.

The following papers were read and considered in the aforementioned motion submitted on
October 20, 2022: NYSCEF Doc Nos. 59 through 82, inclusive, for Index No: 151633/19

Defendant, Antoinette D. Teri-Buerkle (hereinafter "Defendant Teri-Buerkle" or "Teri-Buerkle") moves before the Court for an Order granting summary judgment in her favor, "dismissing the Complaint filed by Plaintiff, Tariq Alrifai (hereinafter "Plaintiff"), and all cross-claims and counter-claims, as no liability exists with regard to her based on Plaintiff's Complaint."

As further explained below, the Court hereby denies movant Defendant Teri-Buerkle's motion for summary judgment as there are questions of fact that preclude such relief in this case.

Defendant Teri-Buerkle was a tenant at the residential premises where the Plaintiff, a phlebotomist, allegedly was injured after slipping on the “winder treads” on an interior stair case and falling. The Court finds that there are questions of fact as to the whether the lighting at the time of the accident constituted a hazardous condition, whether Defendant Teri-Buerkle had notice of such condition, and whether inadequate lighting was a proximate cause of the accident.

Defendant Teri-Buerkle’s Motion

Defendant Teri-Buerkle was a tenant for more than twenty years, approximately, at the premises where Plaintiff allegedly slipped and fell in September 2018. (Exhibit J on Motion, Teri-Buerkle Affidavit, NYSCEF Doc. No. 73). Teri-Buerkle asserts that Plaintiff has failed to prove a prima facie case for negligence in this premises liability action, in that Plaintiff has not established that she either created the condition that caused the accident or had actual or constructive notice of the condition and failed to remedy it within a reasonable time. (See Viscovic v. ENK Enterprises, 282 A.D.2d 672 (2d Dept. 2001)). Teri-Buerkle points to her own deposition and her affidavit submitted on the motion to support her argument that it is uncontroverted that the lights were on at the time of Plaintiff’s fall. She relies on Plaintiff’s deposition testimony that he did not recall whether the lights were on at the time he descended the stair case to support her argument that there is no dispute over this issue. She asserts that Plaintiff’s expert, a licensed engineer (hereinafter “Plaintiff’s expert” or “the expert”) has stated that, if the lights over the stair case were turned on, they would have provided adequate lighting for those traversing the stair case. She asserts that based on this evidence, there is no question but that the lighting was adequate. She also alleges that as a tenant she is not responsible for the structure or design of the stair case, over which she has had no control and performed no repair or alteration. For all of these reasons, she argues, she cannot be liable in this case as a matter of law.

Plaintiff’s Opposition

Plaintiff opposes Defendant Teri-Buerkle’s motion for the following reasons. Plaintiff alleges that as Movant Teri-Buerkle has not met her burden of showing that the illumination in the stairway was adequate or that inadequate lighting was not a proximate cause of the accident, such that the movant cannot meet her burden of proof on the motion. Plaintiff’s expert, a

licensed engineer, examined the premises and concluded that there were structural and design hazards regarding the interior stairway as well as a hazard due to the lack of illumination. This expert opined that the lack of illumination contributed to Plaintiff's accident. Plaintiff also points to his own testimony to show that an issue of fact exists regarding the adequacy of the lighting at the time he descended the stair case. He additionally asserts that the depositions of Defendant Teri-Buerkle and Co-defendant Knobel establish that Teri-Buerkle, as a tenant, was responsible for routine maintenance, including lighting. He further notes that whether a dangerous or defective condition existed on the property of another so as to create liability depends on the circumstances of each case and generally is a question of fact for the jury. He alleges that Defendant Teri-Buerkle, as movant, has failed to show an absence of notice. He asserts that all of these issues create fact questions that preclude summary judgment.

Defendant Knobel's Opposition

Defendant Thomas P. Knobel (hereinafter "Knobel"), the owner of the premises where Plaintiff allegedly fell, opposes the motion and adopts Plaintiff's arguments in opposition. Knobel also argues that maintaining lighting was the responsibility of the movant as tenant. He further argues that on a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing of the absence of notice as a matter of law, citing to Goldman v. Waldbaum, Inc., 248 A.D.2d 436 (2d Dept. 1998), leave to appeal den., 92 N.Y. 805 (1998). Knobel, like Plaintiff, alleges that the movant has failed to make such a showing.

Defendant Teri-Buerkle's Reply

Defendant Teri-Buerkle cites to Rodriguez v. 705-7 E. 179th St. Housing Dev. Fund Corp., 79 A.D. 3d 518, 519 (1st Dept 2010) and Acheson v Shepard, 27 A.D. 3d 596, 596-97 (2d Dept 2006) in reply. She argues that Defendant's argument that the lighting was inadequate at the time of the accident is based on speculation as Plaintiff never complained about the lighting on his visits to the premises, ascended the stairs with no issue shortly before his fall, and did not remember whether the lights above or near the stairs were on or off as he descended the stairs. She further argues that the Plaintiff's expert report only mentions lighting in one paragraph and mainly addresses structural defects. She further asserts that the structural or design issues regarding the staircase as discussed in the Plaintiff's expert's report have no relevance to

defendant Teri- Buerkle, as she was a tenant and she testified she did not repair, construct or alter the staircase in any manner.

Factual Background

In their papers on the motion, the parties cite to deposition testimony; to movant Defendant Teri-Buerkle's affidavit in support of the motion; and to the conclusions of Plaintiff's expert witness regarding this motion. This evidence can be summarized as follows: Defendant Teri-Buerkle testified that the lights above the stairs were on when she opened the door for the Plaintiff, a phlebotomist, to enter the premises. She stated that Plaintiff ascended the stair case without any issue. She further testified that the lights remained on as Plaintiff was in the residence and when Plaintiff descended the stairs. She indicates that she did not follow Plaintiff when he left the second floor of the apartment, after completing his work, and descended the stairs, but remained on the second story. (Exhibit L, Movant Deposition pp. 19-20 and 25-26, NYSECF Doc. No. 75).

She further testified that, if there were issues with the lights in the apartment, including those over or near the stairs, she was responsible for removing, fixing or maintaining them. When asked whether the lights over the stairs were ever removed or changed in any way before the date of Plaintiff's accident, she testified "yes," and explained that she had a friend who would help her at her request with these things. (Exhibit L, Movant Deposition pp. 27-28, NYSECF Doc. No. 75). Teri-Buerkle never had any incident regarding the lighting on the stairs. Her mother once fell down the stairs--Teri-Buerkle explained that her mother told her that the fall occurred as she was taking the trash out and tripped over the trash bag she was carrying. (Exhibit L, Movant Deposition, pp. 29-31, NYSECF Doc. No. 75).

Teri-Buerkle also indicated that she asked the owner, Knobel, to add railings to the stairs about ten or more years ago as her mother began to have problems due to a medical condition. She avers in her affidavit submitted in support of the motion that she did not construct, direct or design this stair railing work. She also avers that she did not construct, alter, repair or design the stair case itself. (Exhibit L, Movant Deposition pp. 28-29, NYSECF Doc. No. 75; Exhibit J of Affidavit in Support of the Motion, NYSCEF Doc. No. 73). Knobel's depositions are consistent on these points.

Plaintiff testified that he entered the premises in connection with his employment as a phlebotomist to collect a blood sample. (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, NYSCEF Doc. No. 74; Exhibit A of Affidavit in Opposition to Motion, Plaintiff's First Deposition, NYSCEF Doc. No. 82). He testified that he had to go to the second story of the home to see his patient. He had been to this address a number of times previously. He testified that Teri-Buerkle was with him as he ascended the stairs without issue. He performed the blood collection and then descended the stairs. (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, pp. 19-20, NYSCEF Doc. No. 74). He testified that Teri-Buerkle accompanied him out following behind him as he descended the stairs. (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, p. 20-21, NYSCEF Doc. No. 74).

Plaintiff answered questions about how he slipped by stating that when he put his right foot down while on the turning portion of the stair case, there was no room for his foot.¹ (Exhibit A of Affidavit in Opposition to Motion, Defendant's First Deposition, page 71-73, NYSCEF Doc. No. 82). He then slid down the stairs and fell at the bottom of the stairs. (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, pp. 25-30, NYSCEF Doc. No. 74). It is undisputed that the stair case in question included several "winder stairs"—essentially "pie shaped" steps—located where the stair case direction changes, in lieu of a stair landing. (See, *i.e.*, Exhibit I, Affidavit in Support of the Motion, Photographs, NYSCEF Doc. 72). Defendant states that he fell after he made the turn, he thinks on the second step after the turn. (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, NYSCEF Doc. No. 74, pp. 22, 29 and 35)

In contrast with Teri-Buerkle's testimony that the lights remained on when Plaintiff descended the stairs, Plaintiff testified that he did not recall whether the lights over the stairs were on as he went down the stairs. Significantly, though, at several points in his depositions, he

¹ He testified in this regard as follows: Q. "Do you know what caused you to slip? A. My foot, the right foot cannot reach the step because it got no room for my foot." (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, NYSCEF Doc. No. 74, p. 26). Similarly, he testified also that when he placed his right foot down there was "nothing there to hold [his] foot." (Exhibit A of Affidavit in Opposition to Motion, Defendant's First Deposition, NYSCEF Doc. No. 82, p. 82). As explained below, the Court finds that this testimony does not preclude a jury from drawing the reasonable inference that inadequate lighting also was a proximate cause of the accident, and that Plaintiff put his foot on the narrow part of a winder tread because he could not see the edges of the tread.

stated that the stairs were dark as he descended them. He indicated that when climbing up the stairs there was more light on the stairs than when he descended. Plaintiff further testified, "If the door is closed, you can't see, it's no light. I don't remember I see light." (Exhibit A of Affidavit in Opposition to Motion, Defendant's First Deposition, pp. 71-73, NYSCEF Doc. No. 82; Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, pp. 20-21, NYSCEF Doc. No. 74). He testified that the staircase was dark as he descended it, and that he could feel the steps with his feet. (Exhibit A of Affidavit in Opposition to Motion, Defendant's First Deposition, page 71-73, NYSCEF Doc. No. 82). When asked if he could see the steps as he descended the stairs, Plaintiff stated that he could not see the stairs clearly after he made the turn in the stairs. He could only see them "a little bit." (Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, p.21-22, NYSCEF Doc. No. 74). He also testified that he could not see the steps as clearly as in a photograph of the stairs he was presented with at his deposition. He testified that the stair case was darker than the photograph depicted. (Exhibit A of Affidavit in Opposition to Motion, Defendant's First Deposition, p. 73, NYSCEF Doc. No. 82; Exhibit K of Affidavit in Support of the Motion, Plaintiff's Second Deposition, pp. 20-23, NYSCEF Doc. No. 74).

Plaintiff's expert opined that the stairs presented an inherent hazard due to a number of factors including: the presence of inadequate and excessively narrow tread widths at the winder steps; and the absence of a proper and continuous handrail that extends for the full-length of the upper and lower stair flights, to include the winder steps; improper attachment of the carpet on the steps; and inadequate lighting. (Exhibit D, Affirmation in Opposition, Report, NYSCEF Doc No. 85 at p. 7 and Exhibit C, Affirmation p. 3).

Regarding the lighting, the expert, who conducted an inspection of the premises, found that "the stair is equipped with a ceiling mounted light fixture that is located above the winder treads. There are additional ceiling mounted light fixtures located within the connecting first floor and second floor hallways." (Exhibit D, Affirmation in Opposition, Report, NYSCEF Doc. No. 85). Regarding the adequacy of the lighting, he concluded as follows:

Under natural daylight conditions, and without any contribution from the ceiling mounted light fixtures (i.e. the fixtures were turned-off), I found the illumination on the surface of the winder treads to be as low as 0.09 foot-candles. With the lights turned-on, the illumination on the surface of the winder treads was 3.59 foot-candles. For reference, it is generally accepted

within the industry and prescribed by code that a minimum 1 foot-candle of illumination shall be provided on the surface of the stairs. Without adequate illumination, the steep transition and inadequate tread width that exists at the inner narrow ends of the winder treads are obscured and not readily apparent, which can pose a hazard to stair users. Shadows created by the stair user can further conceal the edge of the narrow winder treads. Thus, if the light above the stair was not turned-on at the time of the accident, as has been reported by Mr. Alrifai, there would have been inadequate illumination; a condition that can be cited as a factor that contributed to the accident.

(Exhibit D, Affirmation in Opposition, at p. 7, NYSCEF Doc No. 85).

Discussion

A motion for summary judgment requires that the movant establish its entitlement to judgment as a matter of law by demonstrating the absence of a material issue of fact. (See Union Mut. Fire Ins. Co. v. Johnson, 189 A.D.3d 1519, 1520 (2d Dept. 2020); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985)). In considering the motion, the moving papers must be viewed in the light most favorable to the non-moving party, here, the Plaintiff. (Gesuale v. Campanelli & Assocs., P.C., 126 A.D.3d 936, 937 (2d Dept. 2015)). Once the moving party has shown that it is entitled to summary judgment, the burden shifts to the opposing party, who must demonstrate the existence of disputed questions of fact sufficient to deny summary judgment. (See Moore v. 3 Phase Equestrian Ctr., Inc., 83 A.D.3d 677, 679 (2d Dept 2011); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)).

Summary judgment should be denied where there is any doubt that a triable issue of fact exists, or where an issue of fact is arguable. (See American Home Assurance Co. v. Ameriford International Corp., 200 A.D.2d 472 (1994)). Relief is not warranted where conflicting inferences may be drawn from the evidence or where there are issues of credibility. (Scott v. Long Island Power Authority, 294 A.D.2d 348 (2d Dept. 2002) (also stating that summary judgment is only appropriate where “by no rational process could the trier of facts find for the non-moving party”)). The primary function of a Court reviewing an application for summary judgment is “issue finding” as opposed to “issue determination.” (Weiner v. Ga-Ro Die Cutting, 104 A.D.2d 331 (1984), *aff’d.* for reasons stated below, 65 N.Y. 2d 732 (1985)).

New York law generally provides that owners and occupiers of property owe a duty to each entrant to exercise ordinary, reasonable care under the circumstances. (Basso v. Miller, 40

N.Y. 2d 233 (1976)). Generally, liability for a dangerous condition on real property must be determined upon ownership, occupancy, control, or special use of the property. (Rodriguez v. 5432-50 Myrtle Ave., LLC, 148 A.D.3d 947 (2d Dept. 2017)). Thus, tenants may not be liable for certain defects, and typically are not liable for structural or design hazards. Additionally, a party cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the party either created or had actual or constructive notice of the condition. (See Battaglia v. Toys R Us, 271 A.D.2d 627, 629 (2d Dept. 2000) and Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986)). Whether a dangerous condition exists on real property depends on the particular circumstances of each case and is generally a question of fact for the jury. (See Shalamayeva v. Park 83rd St. Corp., 32 A.D.3d 387, 388 (2d Dept. 2006)).

Defendant Teri-Buerkle argues that it is uncontroverted that the lights were turned on as Plaintiff descended the stairs. The Court disagrees with this assertion for the following reasons. While it is true that Plaintiff did not directly contradict Teri-Buerkle's testimony that the lights were on as he descended the stairs, a fact finder could fairly conclude from evidence in the record that the lights were not on as he walked down the stairs. Plaintiff testified that he did not recall the lights over or near the stairs, or whether they were turned on. He testified repeatedly, however, that the stair case was dark when he descended the stairs and that he could not see the stairs clearly in the area where the winder steps were located. He also testified that the stairs were darker when he descended than they had been when he walked up the stair case. From Plaintiff's testimony that the stairs were dark as he walked down them, and the conclusions of Plaintiff's expert that the lighting was wholly inadequate around the winder steps unless the lights were turned on, a jury could draw the inference that the lights were off as Plaintiff descended the stairs.

The Court finds that such a conclusion would not be speculative but would be a fair inference from this evidence, especially reading the papers in the light most favorable to Plaintiff, the non-moving party, as is required on this motion. (See Gesuale v. Campanelli & Assocs., P.C., 126 A.D.3d at 937). As such, this evidence raises questions of fact regarding whether the lights were turned on and, given the expert's conclusions, whether the lighting was adequate at the time of Plaintiff accident.

Relatedly, Defendant Teri-Buerkle points to Plaintiff's testimony to assert that the proximate cause of the accident was Plaintiff failing to put his foot on a tread based on his deposition testimony. The Court finds that this testimony does not preclude a jury from drawing the reasonable inference that inadequate lighting also was a proximate cause of the accident, and inferring that Plaintiff put his foot on the narrow part of a winder tread because he could not see the edges of the tread. (See Hartman v. Mountain Valley Brew Pub, Inc., 301 A.D.2d 570, 570 (2d Dept. 2003) (proximate cause may be inferred from the facts and circumstances underlying the injury); Muong v. 550 Ocean Ave., LLC, 78 A.D.3d 797, 798 (2d Dept. 2010) (plaintiff need only offer evidence from which proximate cause may be reasonably inferred); Scott v. Long Island Power Authority, 294 A.D.2d 348 (2d Dept. 2002) (summary judgment is inappropriate where conflicting inferences may be drawn from the evidence)).

On the issue of notice, a party cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the party either created or had actual or constructive notice of the condition. (see Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986)). To permit a finding of constructive notice, "a condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (Deveau v. CF Galleria at White Plains, LP, 18 A.D.3d 695, 695 (2d Dept. 2005); see Gordon v. American Museum of Natural History, *supra*, 67 N.Y.2d at 837). As movant, Teri-Buerkle bears the burden of establishing her right to summary judgment, including showing an absence of notice as a matter of law. (See Goldman v. Waldbaum, Inc., 248 A.D.2d 436 (2d Dept. 1998)).

In this case, lighting on the stair case would be an apparent and visible condition to a tenant. If a jury credited Plaintiff's testimony that Teri-Buerkle accompanied him down the stairs, it could find that Teri-Buerkle had actual notice regarding the state of the lighting at the time of the accident. It then would have to determine whether the lighting was inadequate—including whether the lights were on or off—for Plaintiff to safely negotiate the stairs, and whether this contributed to the fall. A jury also could find that, as a long-term tenant, Teri-Buerkle was familiar with and on notice regarding the stair lighting, due to Plaintiff's description of the lighting and the expert's conclusion that the lighting was far from adequate unless the lights were turned on, particularly in the area of the winder steps. A jury could, of course, reach

the opposite conclusions on some or all of these issues – however, this simply bears out that these are disputed questions of fact.

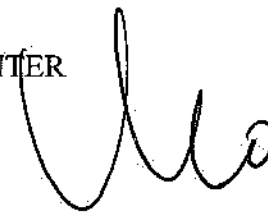
The Court agrees with Teri-Buerkle assertion that it is undisputed in the record that as a tenant she did not have control over the structural and design hazards alleged in the report, and thus cannot be liable for them. (see Rodriguez v. 5432-50 Myrtle Ave., LLC, 148 A.D.3d 947 (2d Dept. 2017)). In regard to the lighting, Teri-Buerkle testified that she was responsible for maintaining and removing the lights over the stairs. She certainly controlled the operation of the lights. Thus, there is no issue that Teri-Buerkle did not have control over the lights for purposes of duty and potential liability. While Teri-Buerkle's reply papers assert that the expert report primarily discussed structural and design issues, the report also states that the expert visited the premises and conducted a measurement of the lighting on the stairs with natural light and with the light fixtures turned on. He observed a significant difference with and without the light fixtures on. He compared the measurements he took with industry standards. While a jury may or may not accept his conclusions, the Court finds that the expert report is not based on conclusory statements or speculation such that it should not be considered in determining whether fact issues exist in the case.

Summary judgment should be denied where there is any doubt that a triable issue of fact exists, or where an issue of fact is arguable. (See American Home Assurance Co. v. Ameriford International Corp., 200 A.D.2d 472 (1st Dept. 1994)). It is inappropriate where conflicting inferences may be drawn from the evidence or where there are issues of credibility. (Scott v. Long Island Power Auth., 294 A.D.2d 348 (2d Dept. 2002)). Here, movant has failed to establish as a matter of law that the lighting was adequate; that there was an absence of actual or constructive notice regarding the lighting; and that the lack of adequate lighting was not a proximate cause of the accident. (See Swerdlow v. WSK Properties Corp., 5 A.D.3d 587, 588 (2d Dept. 2004) (movant failed to meet the initial burden of showing that lighting was adequate and not a proximate cause of the accident)). A fact finder could draw different inferences based on the testimony and the expert report regarding the issues of the presence of a hazardous condition, notice and proximate cause. These fact questions preclude summary judgment.

Consequently, for the reasons stated herein, Defendant Teri-Buerkle motion for summary judgment is hereby denied.

Dated: November , 2022

ENTER

A handwritten signature in black ink, appearing to read 'W. Ozzi', written over a horizontal line.

HON. WAYNE M. OZZI, J.S.C.