Powers v Miles
2023 NY Slip Op 33969(U)
November 3, 2023
Supreme Court, Saratoga County
Docket Number: Index No. EF20221636
Judge: Richard A. Kupferman

SUPREME COURT
STATE OF NEW YORK COUNTY OF SARATOGA

MICHAEL J. POWERS,

Plaintiff, **DECISION & ORDER**

-against- Index # EF20221636

SALLY MILES,

Defendant.

KUPFERMAN, J.,

This is a premises liability action stemming from an accident which occurred in June 2022 at the defendant's house in South Glens Falls. The plaintiff alleges that he tripped and fell on a watering can while descending the exterior deck stairs. The parties have been deposed and a note of issue has been filed. The defendant now seeks summary judgment dismissing the complaint. The plaintiff opposes the motion.

Facts
(Viewed in the Light Most Favorable to the Non-Moving Party)

At the time of the accident, the plaintiff ("Michael") was residing with the defendant ("Sally") in a two-story house. Michael paid rent monthly to Sally (his girlfriend/landlord) and helped with household services. On the day in question, Michael planned to move a trampoline in the yard for Sally. A neighbor was also enlisted to help. At some point, Michael and the neighbor walked across a wooden deck in the backyard for this reason. It was late in the afternoon. The weather was clear and sunny.

As Michael walked across the deck, he followed the neighbor towards the deck stairs. The neighbor then descended the stairs without incident. Michael, however, tripped and fell early in his descent on the stairs. Michael does not remember if he looked down. He recalls looking "out

into the yard" as he approached the stairs. Michael believes his foot encountered a watering can on the stairs prior to his fall (it was probably located on the first step down).[1] As a result, Michael fell down the steps and sustained serious injuries. Shortly thereafter, Sally (who was not present for the fall), went to the backyard. Upon observing the accident scene, she responded, "Oh God, he tripped on my cans."

The deposition testimony indicates that the stairs were approximately four feet wide with railings. At the time of the accident, there were two or four 14-inch metal watering cans located on the staircase on the sides (one or two on both sides of the stairs). Sally had placed the watering cans on the stairs for decorative purposes for the Spring and Summer. Michael believed the watering cans were empty and not filled with water.

Michael testified that he had previously noticed the watering cans on the stairs. However, he also testified that he seldom (if ever) used the deck stairs and did not remember using them before the accident. He did not know whether the watering cans had been on the deck stairs the previous year. He explained that Sally "does like to decorate and she does do different things ... around in the house, in the yard."

Analysis

The motion for summary judgment is based on two grounds. The first ground asserted is that the watering cans were open and obvious and not inherently dangerous. The second ground asserted is that there is no evidence that the landowner had notice of the alleged dangerous condition.

[1] When he was first asked at his deposition what caused him to fall, Michael testified in an equivocal manner. Nonetheless, he later confirmed during questioning by his attorney that his foot encountered the watering can before he fell.

It is well-settled that a landowner must "exercise reasonable care to maintain [his or her] premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (Anton v Correctional Med. Servs., Inc., 74 AD3d 1682, 1683 [3d Dept 2010] [internal quotation marks and citations omitted]; see Osterhoudt v Acme Mkts., Inc., 214 AD3d 1181, 1181 [3d Dept 2023]; Salomon v Prainito, 52 AD3d 803, 804-805 [2d Dept 2008]).

An owner, however, does not need to protect against an open and obvious condition that, as a matter of law, is not inherently dangerous (see Nannariello v Kohl's Dept. Stores, Inc., 161 AD3d 1089 [2d Dept 2018]; Bogaty v Bluestone Realty NY, Inc., 145 AD3d 752 [2d Dept 2016]; Mullen v Helen Keller Servs. for the Blind, 135 AD3d 837 [2d Dept 2016]; Atehortua v Lewin, 90 AD3d 794 [2d Dept 2011]; Anton v Correctional Med. Servs., Inc., 74 AD3d at 1682; Sun Ho Chung v Jeong Sook Joh, 29 AD3d 677 [2d Dept 2006]; see also Cupo v Karfunkel, 1 AD3d 48 [2d Dept 2003]).

"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" (Osterhoudt, 214 AD3d at 1181 [internal quotation marks, alterations, and citations omitted]). These fact-specific inquiries are usually jury questions (see Tagle v Jakob, 97 NY2d 165, 169 [2001]; Greblewski v Strong Health MCO, LLC, 161 AD3d 1336, 1336 [3d Dept 2018]).

The appellate courts, for example, have found issues of fact for trial, precluding summary judgment in favor of landowners, in cases where the plaintiff tripped over objects such as a table, a box, a mail bin, a pallet jack, a decorative fence, a wheelchair scale, a metal railing, and an orange warning cone, among other things (see Osterhoudt, 214 AD3d at 1181 [pallet jack]; Rosenman v

Siwiec, 196 AD3d 523 [2d Dept 2021] [decorative fence]; Pizzolo v Thyssenkrupp El. Corp., 189 AD3d 560 [1st Dept 2020] [pallet stacked with boxes]; Rivera v Rochester Gen. Health Sys., 173 AD3d 1758 [4th Dept 2019] [wheelchair scale]; Dudnik v 1055 Hylan Offs., LLC, 164 AD3d 870 [2d Dept 2018] [metal railing]; Greblewski v Strong Health MCO, LLC, 161 AD3d 1336 [3d Dept 2018] [wheel stop the same color as the ground in an allegedly poorly lit parking garage]; Dalton v North Ritz Club, 147 AD3d 1017 [2d Dept 2017] [knee-high table]; Russo v Home Goods, Inc., 119 AD3d 924 [2d Dept 2014] [empty dolly]; Pellegrino v Trapasso, 114 AD3d 917 [2d Dept 2014] [Belgian blocks]; Toro v Friedland Props., Inc., 111 AD3d 921 [2d Dept 2013] [Mickey Mouse ride]; Gordon v Pitney Bowes Mgt. Servs., Inc., 94 AD3d 813 [2d Dept 2012] [mail bin]; Beck v Bethpage Union Free School Dist., 82 AD3d 1026 [2d Dept 2011] [wheel of a book cart]; Stoppeli v Yacenda, 78 AD3d 815 [2d Dept 2010] [beam]; Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership, 70 AD3d 599 [1st Dept 2010] [metal grate]; Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69 [1st Dept 2004] [box in supermarket aisle]; Monge v Home Depot, Inc., 307 AD2d 501 [3d Dept 2003] [plant display]; see also Cassone v State of New York, 85 AD3d 837 [2d Dept 2011] [orange warning cone]).

Here, viewing the evidence in the light most favorable to the plaintiff as the non-moving party and affording him the benefit of every favorable inference, as the Court must on this summary judgment motion (see Acton v 1906 Rest. Corp., 147 AD3d 1277, 1279 [3d Dept 2017]), material issues of fact exist for a jury to determine. On the issue of the open and obvious nature of the condition, Michael admitted that he had previously observed the watering cans on the steps and that he had resided at the premises for several years. Nonetheless, the record lacks sufficient details to establish conclusively that he knew and recalled the condition on the day in question. The deposition questioning does not reveal when Michael last observed the watering cans prior to

the accident or the frequency (if any) of his observations. Michael also did not recall using the stairs for several months prior to the accident. This creates credibility issues for a jury to resolve.

The watering cans were also small (approximately 14-inches tall) and allegedly difficult to observe from the deck on which Michael was walking. In fact, the watering cans were placed at a lower elevation than the deck, having been placed on the descending steps, making them even more difficult to observe than if they had been placed at deck level. Michael was also following the neighbor and appears to have been preoccupied at the time. With the condition allegedly obstructed and Michael distracted, these circumstances could support the conclusion that the condition was a "trap for the unwary" and therefore create (at least on this record) an issue of fact for the jury to determine regarding whether the watering cans were an open and obvious condition (Rosenman, 196 AD3d at 525; see also Dalton, 147 AD3d at 1017; Gordon, 94 AD3d at 814-815).

In any event, even if the condition was open and obvious, a plaintiff's familiarity of a dangerous condition and its obviousness "does not preclude liability on a landowner as a matter of law; rather, it is a factor that impacts the foreseeability of an accident and the comparative negligence of the injured party" (Osterhoudt, 214 AD3d at 1181 [internal quotation marks omitted], citing MacDonald v City of Schenectady, 308 AD2d 125, 129 [3d Dept 2003]; Cupo v Karfunkel, 1 AD3d 48, 53 [2d Dept 2003]; and Cohen v Shopwell, Inc., 309 AD2d 560, 561 [1st Dept 2003]; see also Barley v Robert J. Wilkins, Inc., 122 AD3d 1116, 1118 [3d Dept 2014]; Timmins v Benjamin, 77 AD3d 1254, 1255 [3d Dept 2010]). As such, as a prerequisite to prevail on this motion Sally was required to demonstrate that the condition was not inherently dangerous as a matter of law.

This case, however, is factually distinct from cases which have found that the alleged dangerous condition was not inherently dangerous as a matter of law, such as where the plaintiff

fell at a department store while attempting to walk past a merchandise rack; where the plaintiff tripped over a wheel stop in a parking lot; where the plaintiff tripped over a treadmill in a gym; where the plaintiff tripped over a "Slip and Slide" in a yard; where the plaintiff walked into a metal bedframe positioned along one of the walls of the medical unit of a county jail; and where the plaintiff tripped over yellow warning tape used to block off the sidewalk in front of a construction site (see Nannariello, 161 AD3d at 1089; Bogaty, 145 AD3d at 752; Mullen, 135 AD3d at 837; Atehortua, 90 AD3d at 794; Anton, 74 AD3d at 1682; Sun Ho Chung, 29 AD3d at 677).

Those cases generally involved much larger objects or ones typical for the property and located in an area reasonably suitable for their nature. Unlike in those cases, the watering cans were much smaller and placed on a pathway commonly used for walking. The watering cans were also allegedly difficult to observe from the deck level given that they were placed at a lower elevation on one of the descending steps. These conditions support a conclusion that it was foreseeable that someone could trip on the watering cans, and that the injuries could be very serious based on the fall from the elevated height. The watering cans were also light and easy to move and therefore could have been placed elsewhere for decorative purposes, making the burden of avoiding the risk relatively small.

Based on the totality of the circumstances, the Court cannot conclude as a matter of law that the watering cans on the stairs were not inherently dangerous. The determination of whether Sally breached her duty of care to maintain the premises in a reasonably safe condition and the extent of Michael's comparative fault, among other things, are issues for the jury to determine (see e.g. Rosenman, 196 AD3d at 523; Rivera, 173 AD3d at 1758; Dudnik, 164 AD3d at 870; Dalton, 147 AD3d at 1017; Russo, 119 AD3d at 924; Pellegrino, 114 AD3d at 917; Gordon, 94 AD3d at

813; Beck, 82 AD3d at 1026; Stoppeli, 78 AD3d at 815; Westbrook, 5 AD3d at 69; Monge, 307 AD2d at 501).

Further, it is not fatal that Michael initially provided equivocal testimony on the cause of his fall. As explained above, he later clarified during his deposition that his foot encountered the watering can prior to his fall. In addition, the other evidence presented on the motion also permits a reasonable inference that Michael tripped on the can (see e.g. Timmins, 77 AD3d at 1256).

The Court further rejects the contention that Sally did not have sufficient notice of the dangerous condition prior to the accident. The moving papers fail to adequately address this issue for purposes of this motion. It is also undisputed that Sally placed the watering cans on the stairs. This renders the notice requirement inapplicable (see Osterhoudt, 214 AD3d at 1183; Barley, 122 AD3d at 1118; Westbrook, 5 AD3d at 75).

It is therefore,

ORDERED, that the defendant's motion is **DENIED**; and it is further

ORDERED, that the parties and their counsel shall appear for an in-person settlement conference at the courthouse (with the insurance adjuster readily available by telephone) on **February 7, 2024 at 3:00 p.m**. The parties should be prepared at the conference to provide the Court with a witness list and discuss the anticipated number of days required to conduct the trial.

This shall constitute the Decision & Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. The Court further directs the parties to serve notice of entry in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Dated: November 3, 2023
at Ballston Spa, New York

HON. RICHARD A. KUPFERMAN
Justice Supreme Court