

Berlin v Labelle
2023 NY Slip Op 35227(U)
February 27, 2023
Supreme Court, Westchester County
Docket Number: Index No. 58719/2021
Judge: James L. Hyer
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To commence the 30 day statutory time period for appeals as of right (CPLR 5512[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**

-----X
SALLY MARJORIE BERLIN,

Plaintiff,

-against-

CURT LABELLE and RACHEL MABEY,

Defendants.

-----X
HYER, J.S.C

DECISION & ORDER

Index No. 58719/2021

Sequence No. 2

Motion Date: 1/9/2023

The following papers, numbered 1 to 35, were considered in connection with Defendants Curt Labelle and Rachel Mabey's Notice of Motion, dated October 5, 2022, seeking summary judgment and dismissing the complaint.

PAPERS

NUMBERED

Notice of Motion/Affirmation In Support/Statement of Material Facts/Memorandum of Law/Exhs. A-Q	1-21
Affirmation in Opposition/Exhs. A-E/Statement of Material Facts/Memorandum of Law in Opposition	22-29
Reply Affirmation/Exhs. A-E	30-35

Plaintiff Sally Marjorie Berlin commenced this premises liability action against Defendants Curt Labelle and Rachel Mabey, claiming negligence and strict liability. Plaintiff claims to have slipped and fell on a landscaped rock formation in the yard of Defendants' prior residence located at 14 Westwood Drive, Harrison, New York on May 23, 2021. Plaintiff further alleges that Defendants negligently maintained or repaired the outdoor rock formation, which is further claimed to be statutorily regulated as stairs or a staircase.

Plaintiff commenced this lawsuit on June 25, 2021. Issue was joined by Defendants on July 19, 2021.

On or about August 9, 2021, Plaintiff served a Verified Bill of Particulars, asserting, *inter alia*, that her injuries were caused by Defendants' negligence, specifically (NYSCEF Doc. No. 58 at ¶8-11):

8. That the said incident and resulting injuries to the Plaintiff were caused through no fault of her own, but were solely and wholly caused by reason of the Defendants, their agents, servants and/or employees in the ownership, operation, management, placement, maintenance, design, construction of said exterior stone steps, in that the Plaintiff was caused to be and was precipitated and/or fell and sustained multiple serious and permanent bodily injuries resultant from a defective and/or improper exterior steps and/or lack of a handrail on the aforementioned steps; in improperly designing and constructing steps with uneven and inconsistent tread/riser; in causing and allowing persons, and particularly the Plaintiff to ascend and/or descend the exterior steps; in failing to warn and/or advise the persons, and in particular the Plaintiff, of the dangers and/or hazardous condition of the exterior steps leading from/to FILED: WESTCHESTER COUNTY CLERK 10/05/2022 01:00 PM INDEX NO. 58719/2021 NYSCEF DOC. NO. 58 RECEIVED NYSCEF: 10/05/2022 a patio; in failing to properly safeguard the dangerous condition created by the uneven and inconsistent tread/riser of the exterior steps and in otherwise being careless, reckless and negligent in the premises; in causing, creating and contributing to the incident herein, all in violation of the statutes, laws, rules, regulations, ordinances and provisions made and provided therefor. Plaintiff further relies upon the doctrine of Res Ipsa Loquitur.

9. -10. Actual and/or constructive notice: Both, actual and constructive, notice is claimed. Actual notice is claimed in that the Defendants, their agents, servants and/or employees created and/or had actual knowledge of the conditions complained of herein. Constructive notice is claimed in that the conditions complained of herein existed for a long and unreasonable period of time under the circumstances. Plaintiff objects to the remaining part of this demand as this demand is improper and beyond the scope of disclosure in accordance with CPLR 3043 of the Civil Practice Laws and Rules.

11. It will be claimed that the Defendants violated all applicable and relevant statutes, laws, codes, ordinances, rules, and regulation of the State of New York. Plaintiff will ask the court to take judicial notice of all those statutes, laws, codes, ordinances, rules and regulations violated, at the time of trial.

Discovery ensued. Depositions were held, and Plaintiff disclosed her expert engineer, Vincent Pici, P.E., and report following the August 25, 2021 site inspection. Defendants proffered a report of their expert, Charles J. Schaffer, R.A. on December 21, 2021. Schaffer's supplemented report, expanding upon his earlier findings, was exchanged on or about July 22, 2022.

The Court issued its Trial Readiness Order on August 4, 2022, which ordered that "[a]ny motion [*including any cross-motion(s)] for summary judgment by any party must be served via NYSCEF within 60 days following the filing of the Note of Issue; opposition papers must be served via NYSCEF within 30 days of service of motion papers; and reply papers, if any, must be served via NYSCEF within 10 days following service of any opposition papers" (NYSCEF Doc. No. 50). Plaintiff filed her Note of Issue and Certificate of Readiness that same day (NYSCEF Do. No. 51).

Sixty-one (61) days later, on October 5, 2022, Defendants filed this motion for summary judgment. Specifically, according to Defendants, Plaintiff failed to establish that the stone or rock formation in the yard proximately caused her slip and fall, or that Defendants breached any duty or obligation owed to Plaintiff such that they would be liable for negligence.

Plaintiff asserts, *inter alia*, that this motion is untimely. The Court agrees. Defendants failed to bring this motion for summary judgment within the 60 days set by the Court in the Trial Readiness Order and have failed to demonstrate good cause for its delay – albeit one day – in making this motion. Defendants did not request an extension, and they do not address this issue in their motion papers. As such, the Court declines to entertain Defendants' motion for summary judgment (*see* CPLR § 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004] [statutory and court-ordered time frames are not optional and are requirements to be taken seriously by the parties]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Hernandez v 35-55 73rd Street*,

LLC, 90 AD3d 709 [2d Dept 2011] [court correctly denied the defendants' summary judgment motions which were made returnable 12 and 54 days, respectively, beyond the deadline fixed by the court in a so-ordered stipulation, as the defendants failed to demonstrate good cause for the delay]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2d Dept 2008]; *DiBenedetto v Lowe's Home Ctrs., Inc.*, 43 AD3d 853 [2d Dept 2007]; *Marulanda v Penske Truck Leasing Corp.*, 2018 WL 3241717 [Sup Ct, Queens County 2018] [motion for summary judgment untimely when made 8 days after so-ordered stipulation and defendants failed to demonstrate good cause for delay]; *Barbecho v Const. Corp.*, 2012 WL 1062820 [Sup Ct, Queens County 2012] [motion for summary judgment untimely when made two days beyond court-ordered deadline]).

Accordingly, it is hereby

ORDERED that Defendants' motion is denied for the reason stated herein; and it is further

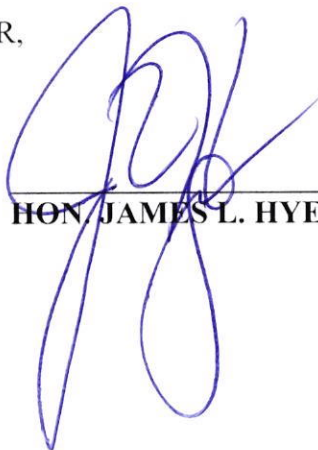
ORDERED that any issue not directly addressed herein is denied; and it is further

ORDERED that the matter is transferred to the Central Pre-Trial ADR Part for the scheduling of a settlement conference. Any questions related to that conference and its scheduling shall be directed to that Part at CPT-ADRPARTWestchester@nycourts.gov.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 27, 2023

ENTER,



HON. JAMES L. HYER, J.S.C.

To: Counsel of Record via NYSCEF