

Rottino v Pizzulli

2024 NY Slip Op 35154(U)

October 25, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 614528/2020

Judge: Frank A. Tinari

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SHORT FORM ORDER

INDEX No. 614528/2020
CAL. No. 202301812OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. FRANK A. TINARI
Justice of the Supreme Court

MOTION DATE 4/23/24
ADJ. DATE 7/9/24
Mot. Seq. # 002 MG
Mot. Seq. # 003 MG; CASEDISP

-----X
BARBARA ROTTINO,

Plaintiff,

CHERRIFF & FINK, P.C.
Attorney for Plaintiff
70 East Sunrise Highway, Suite 500
Valley Stream, NY 11581

- against -

VINCENT PIZZULLI, JR., JANINE G. PIZZULLI,
SISTER IN CHARGE, LLC and SISTER IN
CHARGE, LLC d/b/a SISTERS IN CHARGE,

Defendants.

GALLO VITUCCI KLAR LLP
Attorney for Defendant Sister in Charge, LLC
d/b/a Sisters in Charge
90 Broad Street, Suite 1202
New York, NY 10004

-----X
VINCENT J. PIZZULLI, JR. and JANINE G.
PIZZULLI,

Third-Party Plaintiffs,

PEIRCE & SALVATO PLLC
Attorney for Defendants/Third-Party
Plaintiffs Pizzulli
8 Cottage Place
White Plains, NY 10601

- against -

SISTERS IN CHARGE, LLC and SISTER IN
CHARGE, LLC d/b/a SISTERS IN CHARGE,

Third-Party Defendants.

-----X
Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants Vincent and Janine Pizzulli, filed March 19, 2024, and defendant Sister in Charge, LLC, d/b/a Sisters in Charge, filed March 20, 2024; Answering Affidavits and supporting papers by plaintiff, filed June 14, 2024;

Rottino v Pizzulli
Index No 614528/2020
Page 2

Replying Affidavits and supporting papers by defendants Vincent and Janine Pizzulli, filed June 27, 2024, and defendant Sister in Charge, LLC, d/b/a Sisters in Charge, filed June 28, 2024; Other; it is

ORDERED that the motion by defendants Vincent Pizzulli and Janine Pizzulli (seq. 002) and the motion by defendant/third-party defendant Sister in Charge, LLC (seq. 003) are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Vincent Pizzulli and Janine Pizzulli for summary judgment dismissing the complaint and cross claims against them is granted; and it is

ORDERED that the motion by defendant/third-party defendant Sister in Charge, LLC for summary judgment dismissing the complaint and cross claims against it is granted.

Plaintiff Barbara Rottino commenced this action to recover damages for injuries she allegedly sustained when she fell while descending a single exterior step at the real property located at 76 Harbor Road, Head of Harbor New York after attending an estate sale on September 18, 2020. The subject property was owned by defendants Vincent Pizzulli and Janine Pizzulli (Pizzulli defendants) and the tag sale was being conducted at the subject property by defendant/third-party defendant Sister in Charge, LLC d/b/a Sisters in Charge (Sister). Defendants assert cross claims against one another for contribution and indemnification.

The Pizzulli defendants now move for summary judgment in their favor, arguing, among other things, that the subject single riser platform step was open and obvious and not inherently dangerous. In support of their motion, the Pizzulli defendants submit, among other things, the plaintiff's bill of particulars and supplemental bill of particulars, the transcripts of the deposition testimony of plaintiff, the Pizzulli defendants, Denise LoSquadro and Alfred Rottino, the affirmations of the Pizzulli defendants, the affirmation of Charles J. Schaffer, R.A., and photographs. Plaintiff opposes the motion and submits, among other things, her own affidavit and the affirmation of Joel Schachter, P.E. Sister does not submit any papers in opposition.

Sister also moves for summary judgment in its favor, arguing, among other things, that plaintiff cannot identify what caused her to fall, that it did not owe plaintiff a duty, and that it did not create, or have actual or constructive notice of the alleged dangerous condition. In support of its motion, Sister submits, among other things, the pleadings, the transcripts of her deposition testimony and the deposition testimony of the plaintiff, the Pizzulli defendants, and Alfred Rottino. Plaintiff opposes the motion and submits, among other things, her own affidavit and the affirmation of Joel Schachter, P.E. The Pizzulli defendants do not submit any papers in opposition.

Plaintiff testified that she fell down a single exterior step of a semi-circular front porch at the subject property on September 18, 2020, while leaving a tag sale. Plaintiff testified that she had entered the home using the same front step less than thirty minutes prior to her fall, that she held her husband's arm as she ascended the step because she thought it was higher than normal, and that there was no railing

Rottino v Pizzulli
Index No 614528/2020
Page 3

for her to use. Plaintiff testified that when she left the house, she did not notice the step because she could not differentiate between the step and the landing below. She testified that it was a dry and sunny day; that there was no precipitation on the ground; that there were no visible cracks or conditions on the surface of the step that caused her fall other than the colors of the step and landing were confusing to her; and that she “simply missed a step.”

Vincent Pizzulli testified that he and his wife owned the subject property from approximately 1998 to September, 2020. He testified that they purchased the land and then hired a contractor to construct a new house on the property, which was completed in November 1999. He testified that on the day of plaintiff’s fall, the front door entrance and steps approaching the front door existed in the same manner as when they were constructed in 1999, and were constructed of traditional shades of gray, blue and brown stones. Vincent Pizzulli testified that during the time he and his wife owned the house, there had never been any accidents or falls that occurred from entering or exiting the house through the front door.

Denise LoSquadro testified that she is the owner of Sisters in Charge, and that it was hired by the Pizzulli defendants pursuant to a written contract to conduct a tag sale at the subject property, which occurred on September 18, 2020 and September 19, 2020. LoSquadro testified that she did not witness plaintiff’s fall, but heard commotion, opened the front door, and saw plaintiff sitting on the landing below the subject step. When questioned whether plaintiff said anything to her after her fall, LoSquadro testified that “I recall her kind of saying she wasn’t paying attention.”

Alfred Rottino testified that he is the plaintiff’s husband, that he attended the estate sale at the subject residence on September 18, 2020, and that he witnessed plaintiff fall down the step. He testified that plaintiff entered the subject residence using the same front steps approximately thirty minutes prior to her fall. He also testified that he exited the residence in front of the plaintiff and successfully navigated the step himself while carrying a curio cabinet in his arms.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine

Rottino v Pizzulli
Index No 614528/2020
Page 4

matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

“To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff’s injury” (*Rushton v State of New York*, 189 AD3d 1488, 1489, 134 NYS3d 752 [2d Dept 2020]). “A landowner must act as a reasonable person in maintaining his or her property 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” (*Villalba v Daughney*, 214 AD3d 843, 843, 183 NYS3d 755 [2d Dept 2023], quoting *Cupo v Karfunkel*, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003] [internal quotation marks omitted]). However, there is “no duty to protect or warn against conditions that are open and obvious and not inherently dangerous” (*Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154, 138 NYS3d 546 [2d Dept 2020]); *see Costidis v City of New York*, 159 AD3d 871, 70 NYS3d 74 [2d Dept 2018]). “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” (*Martinez v Fairfield Hills E., LLC*, 213 AD3d 837, 837, 183 NYS3d 536 [2d Dept 2023] [citation omitted]).

Defendants have established a prima facie case of entitlement to summary judgment in their favor (*see Cortes v King Kullen Grocery Co., Inc.*, 210 AD3d 949, 179 NYS3d 275 [2d Dept 2022]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). Through the submission of deposition testimony and photographic evidence, defendants demonstrated, prima facie, that the subject step was open and obvious and not inherently dangerous (*Martinez v Fairfield Hills E., LLC*, 213 AD3d 837, 183 NYS3d 536). With plaintiff’s deposition testimony, defendants demonstrated that plaintiff was fully aware of the single exterior step on the front porch of the subject property as she had climbed that step approximately thirty minutes prior to her fall, and that she took particular note of the step because she held her husband’s arm for assistance. Plaintiff also testified that there was nothing on the surface of the step that caused her to fall and that there were no alleged illumination issues as it was a sunny, dry day.

Additionally, the Pizzulli defendants submit the affirmation of Charles J. Schaffer, R.A., a registered architect licensed in the State of New York, who affirms that, “the change in pattern of the stone flags, particularly the curved perimeter edge at the platform step, against the lower orthogonal pattern on the porch, along with the changes in the stone color, shade, and texture, provide a visual cue that the step was present.” Schaffer further affirms that as constructed, the single-riser platform step did not violate any applicable code, regulation or industry standard when constructed under the 1984 New York State Fire Prevention and Building Code and that no handrail was required. Therefore, defendants demonstrated, prima facie, that the steps were in a reasonably safe condition, and that the alleged dangerous condition was open, obvious, and not inherently dangerous (*see Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 138 NYS3d 546).

Rottino v Pizzulli
Index No 614528/2020
Page 5

In opposition, plaintiff failed to raise a triable issue of fact (*Masker v Smith*, 188 AD3d 867, 135 NYS3d 135 [2d Dept 2020], *Swinney v Nassau County*, 179 AD3d 731, 113 NYS3d 595 [2d Dept 2020], *Locke v Calamit*, 175 AD3d 560, 104 NYS3d 908 [2d Dept 2019]). Plaintiff submits her own affirmation in which she states that she “simply missed a step on what [she] believe[s] to be a dangerous one step riser just outside the front entrance.” Plaintiff also submits the affirmation of Joel Schachter, P.E., a licensed professional engineer, who states that it was his belief that the “semi-circular landing created a walking hazard, and a rectangular landing would have provided a safer exit path by providing an adequate-sized walking surface.” Schachter affirms that “[a]lthough the semi-circular slate landing was not monochromatic and had different shades of color, the discrimination of color is extremely limited in the downward cone of vision and this differential color did not serve as a warning of the single-step drop-off.” Schachter offers no opposition to the affirmation of Schaffer that the single-riser platform step did not violate any applicable code, regulation or industry standard when constructed under the 1984 New York State Fire Prevention and Building Code and that no handrail was required. The conclusory opinion of plaintiff’s expert witness coupled with plaintiff’s deposition testimony and affirmation were insufficient to raise any triable issue of fact (*Locke v Calamit*, 175 AD3d 560, 104 NYS3d 908).

Accordingly, the motions by the Pizzulli defendants and Sisters in Charge for summary judgment dismissing the complaint and any cross claims are granted.

Dated: 10/25/24


J.S.C.
HON. FRANK A. TINARI

FINAL DISPOSITION NON-FINAL DISPOSITION