

Marrero v Donovan
2024 NY Slip Op 35367(U)
September 24, 2024
Supreme Court, Queens County
Docket Number: Index No. 716779/2021
Judge: Karen Lin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 24

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CARLOS MARRERO,

Plaintiff,

Index No. 716779/2021

Motion Seq. No. 3

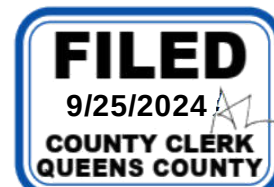
-against-

DECISION AND ORDER

DANIEL DONOVAN and JOANN DONOVAN,

Defendants.

And a Third-Party Action



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The following papers were considered on the motion and cross motion:

Papers

NYSCEF Doc. No.

Notice of Motion, annexed Exhibits, Affidavits, and Memorandum of Law40 -57, 60 - 63

Notice of Cross Motion, Affidavits and Exhibits, Memorandum of Law.....65 - 81

Reply Affirmation and Opposition to Cross Motion.....84 -87

Upon the foregoing papers, it is ordered that the motion for summary judgment and cross motion for leave to serve a Supplemental/Amended Bill of Particulars and leave to serve two expert disclosure statements are decided as follows:

Plaintiff Carlos Marrero commenced this action to recover damages for injuries he allegedly sustained on June 30, 2021, when he tripped and fell on an exterior step on a single-family home located at 239 Lexington Avenue, Oceanside, New York ("premises"). The premises was owned by the defendants Daniel Donovan and Joann Donovan. At the time of the accident, the defendants were in the process of selling the premises and plaintiff was at the premises conducting an appraisal. Plaintiff alleges that while he was taking pictures of the back of the premises, he walked through the exterior gate on the side of the premises and fell on the exterior step.

Defendants' motion for summary judgment

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint. In support of their motion, defendants submit, *inter alia*, i) the deposition transcripts of the plaintiff, defendant Daniel Donovan, and Adman Myles, the president of third-

party defendant Topaz Design Group, Inc., the contracting company that built the step and gate, ii) a copy of the appraisal report of the premises created by plaintiff, the report of plaintiff's expert engineer Harold Krongelb ("Krongelb"), which included photographs of the step at issue, and iii) the affidavit of defendants' expert engineer, Michael Simon ("Simon").

Defendants contend that they are entitled to summary judgment since plaintiff has failed to demonstrate that the exterior step was a defective condition. Specifically, defendants contend that plaintiff's expert's report is conclusory and speculative in that he fails to opine on any code or statute that defendants violated. Defendants further contend that the exterior step is not inherently dangerous.

In opposition, plaintiff contends that defendants failed to establish a *prima facie* case of summary judgment, as they failed to demonstrate that the exterior step was not inherently dangerous. He further contends that there exist questions of fact as to whether defendants departed from construction and design standards, customs, and practices by constructing the step instead of a slope on the path between the front and back yards and/or by placing the gate where it was positioned such that a four-inch landing was created.

It is well established that the proponent of a summary judgment motion must make a *prima facie* case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Generally, a property owner has a duty to maintain the property in a reasonably safe condition (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871 [1995]). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or construct notice of its existence" (*Steed v MVA Enters., LLC*, 136 AD3d 793, 794 [2d Dept 2016] [internal quotation marks omitted]). In a

premises liability case, a defendant real property owner, or a party in possession or control of real property, who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition, nor had actual or constructive notice of its existence (*Chang v Marmon Enters., Inc.*, 172 AD3d 678-679 [2d Dept 2019]). The issue of whether a condition is hidden or open and obvious is generally a question for the jury to determine and is dependent on the facts of each case (*Oser v City of New York*, 133 AD3d 728 [2d Dept 2015]). “[A] condition that is ordinarily apparent to a person making reasonable use of [their] senses may be rendered a trap for the unwary where the condition is obscured” (*Barone v Risi*, 128 AD3d 874, 875 [2d Dept 2015]).

Here, defendants failed to eliminate all material issues of fact that the step at issue was open and obvious, and not inherently dangerous (*see Barone v Risi*, 128 AD3d 874, 876 [2015]). It is uncontroverted that plaintiff had never been to the premises prior to the accident and that the step extended less than five (5) inches behind a wooden gate that obscured the depth of the step. Even assuming that defendants established that the depth of the step was open and obvious, this would merely negate the defendants’ obligation to warn of the condition but does not preclude a finding against a landowner for failure to maintain the property in a reasonably safe condition (*see Grandwohl v Stop & Shop Supermarket*, 70 AD3d 634 [2d Dept 2010]). Consequently, the Court finds that defendants failed to establish, as a matter of law, that they maintained the premises in a reasonably safe condition and that the step was an open and obvious condition which was not inherently dangerous.

Moreover, where there are dueling expert affidavits, summary judgment is not appropriate (*Webar, Inc. v Capra*, 212 AD2d 594 [2d Dept 1995]). The conflicting expert affidavits establish a genuine issue of fact as to whether the step constituted a hazardous condition. “Generally, the issue of whether a dangerous or defective condition exists on real property depends on the particular facts of each case and is properly a question for the trier of fact” (*Quintero v Wilner*, 74 AD3d 1042, 1043 [2d Dept 2010]). Since the defendants failed to meet its burden, the court need not consider the sufficiency of the plaintiff’s papers submitted in opposition to the motion (*see Stoppeli v Yacenda*, 78 AD3d 815 [2010]).

Plaintiff's cross motion

Plaintiff cross-moves for an order granting leave to serve i) an amended bill of particulars dated September 15, 2023, pursuant to CPLR 3025(b); and ii) two expert disclosure statements under CPLR 3101(d)(1), specifically, an architect design expert and a landscape expert (collectively "additional experts"). Plaintiff served his bill of particulars on December 11, 2021, and supplemental bill of particulars on November 14, 2022 ("original bills of particulars"). As such, this cross-motion should be treated as a one seeking leave to serve a further supplemental bill of particulars.

Defendants oppose, contending that the additional experts' opinions contradict the opinion of Krongelb, plaintiff's expert engineer. Notably, defendants contend that Krongelb opined that the step did not violate any specific code and the additional experts opine that the step violates sections of the New York State Residential Code. Defendants further contend that plaintiff's supplemental bill of particulars dated September 15, 2023, is prejudicial as it asserts new theories of liability which could not have been discerned from either the complaint or the original bills of particulars.

"Leave to amend a bill of particulars may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendments involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*Ortiz v Chendrasekhar*, 154 AD3d 867, 869 [2d Dept 2017] [internal quotation marks omitted]). Once discovery has been completed and the case has been certified as ready for trial, the party will not be permitted to amend the bill of particulars "except upon a showing of special and extraordinary circumstances" (*Schreiber-Cross v State of New York*, 57 AD3d 881, 884 [2d Dept 2008] [internal citations and quotation marks omitted]). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom (*King v Marwest, LLC*, 192 AD3d 874, 876 [2d Dept 2021] [internal citations and quotation marks omitted]). However, where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill

is made on the eve of trial, judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious (*see Navarette v Alexiades*, 50 AD3d 869, 870-871 [2d Dept 2008]).

Here, contrary to plaintiff's contention, the proposed supplemental bill of particulars raises an entirely new theory of liability, specifically, that "the step was not designed and constructed accordingly to industry standards" and that "the ground . . . was required to be sloped down to the pathway on the outside of the exit door/gate" (Proposed Supp. Bill of Particulars dated September 15, 2023, NYSCEF Doc. No. 78). Plaintiff also failed to provide a reasonable excuse for waiting almost three years after the accident and months after filing the Note of Issue; in fact, the proposed supplemental bill of particulars was e-filed only after the instant motion for summary judgment by defendants was filed (*see King v Marwest, LLC*, 192 AD3d at 876). Further, defendants will be prejudiced if leave is granted as defendants could not have discerned the new theory of liability from either the complaint or original bills of particulars. Accordingly, plaintiff's cross motion for leave to serve further supplemental bill of particulars is denied and consequently, the portion of the cross motion seeking leave for additional expert disclosure based on the claims contained therein is also denied.

For all the foregoing reasons, it is

ORDERED, that the defendants' motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that plaintiff's cross motion for leave to serve a supplemental/amended Bill of Particulars and leave to serve two expert disclosure statements is also denied; and it is further

ORDERED, that defendants shall serve a copy of this decision and order with notice of entry within thirty (30) days of the date of the decision and order.

This constitutes the decision and order of this court.

Dated: September 24, 2024



HON. KAREN LIN, J.S.C.

