| **McKrell v Keefe** |
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| 2025 NY Slip Op 32742(U) |
| July 25, 2025 |
| Supreme Court, New York County |
| Docket Number: Index No. 152997/2020 |
| Judge: David B. Cohen |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID B. COHEN** **PART** **58**

***Justice***

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BARBARA MCKRELL, MICHAEL WANTA

Plaintiff,

- v -

ANTHONY KEEFE,

Defendant.

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**INDEX NO.** 152997/2020

**MOTION DATE** 11/12/2024

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

In this premise liability action, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs oppose.

## I. BACKGROUND

### A. Pertinent Undisputed Facts (NYSCEF Doc. 37)

This case arises out of a personal injury suffered by plaintiff McKrell (plaintiff) on defendant's property, located at 171 Lake Shore Drive, South Kortright, New York, on July 13, 2019 (premises). At that time, the premises included an elevated wooden deck attached to the rear of the house on the main, first-floor, level. The deck was built with vertical posts that contained square cut-outs; horizontal wooden railings fit into the cut-outs and were nailed in place. Defendant did not make structural changes, or otherwise repair, any of the railings before the incident.

The accident occurred between approximately 10:00 p.m. and 11:00 p.m., when, while attempting to climb from ground level onto the elevated deck in order to re-enter the home, plaintiff stood on an overturned wheelbarrow and grasped a horizontal railing attached to the deck. As she pulled herself up, the railing detached from the posts, causing her to lose her balance and fall backward to the ground. Plaintiff did not know how the railings were secured and did not examine the detached railing after the fall.

B. Plaintiff's Deposition (NYSCEF Doc. 47)

Plaintiff was visiting the premises after being invited by Laura Dotolo, who was at the time defendant's fiancé. The deck was furnished with an outdoor seating and dining area, with a view of the lake adjacent to the premises, and a path leading to the lake.

On the evening of the accident, plaintiff, defendant, Dotolo, and two of defendant's neighbors ate dinner and consumed alcohol together at the premises. Defendant and Dotolo began to argue during dinner, which persisted for the rest of the night.

Eventually, plaintiff, defendant, Dotolo, and the neighbors went down to the lake, and at some point, Dotolo and defendant left the lake area and headed inside the home. Eventually, defendant came back to the lake and announced that he and Dotolo would be staying inside the house for the rest of the evening. As he began to walk back, plaintiff followed him, and they entered the home through the front door.

Later, defendant came downstairs, grabbed his keys, and said he was leaving. Plaintiff followed him outside and watched him drive off. She then attempted to return inside through the front door, but it was locked. She knocked on the door, but no one answered, so she walked around the house searching for another means of entrance.

As she walked around, plaintiff noticed that the sliding door that connected the house to the deck had been left open, and she decided to try and climb onto the deck to enter the premises. Using a wheelbarrow that was stored under the deck as a step, she attempted to hoist herself up onto the deck's surface, at which point the railing detached, causing her to lose her balance and fall backwards.

### C. Defendant's Deposition (NYSCEF Doc. 54)

Defendant bought the premises in 2013 after a full inspection. He periodically maintained the deck by sanding and repainting the railings two to three times during his ownership, most recently in approximately Spring 2018. Defendant never made changes to the fastenings of the railings, and received no complaints about them.

Shortly before the incident, defendant hired Edward Picc to take measurements and provide a pricing estimate for potential railing replacements on the deck. Defendant wanted to replace the railings to have a simpler aesthetic and a better view of the lake. Picc did not do a full inspection because "there was no reason for him to do that", but he observed the deck during this process.

## II. ANALYSIS

### A. Party Contentions

Defendant seeks summary judgment, arguing that he neither created nor had actual or constructive notice of any defect in the railing that failed. He points to undisputed evidence that he purchased the house with the deck already built, periodically sanded and re-stained it, and had never seen or received complaints about loose railings before the accident. Because the alleged defect was latent and non-discoverable on reasonable inspection, he maintains that no duty was

breached. Defendant also asserts that plaintiff's late-night decision to climb the railing "like a ladder" to reach the deck was an unforeseeable, superseding act that breaks any causal chain, entitling him to judgment as a matter of law.

Plaintiff counters that defendant fails to establish prima facie entitlement to summary dismissal as he relied only on his own affidavit and did not submit any expert opinion, photographs, or maintenance records to prove the deck was safe. Plaintiff argues that her photographs show that the deck was composed of aged, worn wood, and it is undisputed defendant had hired a contractor to replace the railings before the accident, facts from which a jury could infer notice. Plaintiff argues that deck components do not simply detach absent negligence; at a minimum, triable issues exist as to whether defendant's maintenance was adequate and whether her chosen means of re-entry was reasonably foreseeable once she found herself locked out. Plaintiff further invokes the doctrine of *res ipsa loquitur*, arguing that a railing's sudden failure while under defendant's exclusive control permits the fact-finder to infer negligence.

B. Legal Conclusions and Analysis

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004]). On a summary judgment motion, the court must view all facts in "the light most favorable to the non-moving party" (*Flanders v Goodfellow*, — NY3d —, —, 2025 NY Slip Op 02261, *7 [2025] citing *Ortiz v Varsity Holdings, LLC,* 18 NY3d 335 [2011]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "After the moving party has demonstrated its prima

facie entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to a third party, the potential that such injury would be of a serious nature, and the burden of avoiding such risk" (*Rodriguez v Kwik Realty, LLC,* 216 AD3d 477, 478 [1st Dept 2023]. "[A] defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition, nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]).

1. Creation and notice

"To constitute constructive notice, a [hazardous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a landowner or its agent] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *accord Franco v D'Agostino Supermarkets, Inc.*, 34 AD3d 328, 329 [1st Dept 2006]).

"[I]t is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law (*Giuffrida v Metro N. Commuter R. Co.,* 279 AD2d 403 [1st Dept 2001]). A defendant may demonstrate a lack of constructive notice "by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last

inspected or cleaned before the plaintiff fell" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]).

Plaintiff contends that defendant had actual and constructive knowledge of the deck's defect, and that a reasonable inspection of the area would have revealed its danger. Where "an object capable of deteriorating is concealed from view, 'a property owner's duty of reasonable care entails periodic inspection of the area of potential defect'" (*Doherty v 730 Fifth Upper, LLC*, 227 AD3d 606, 607 [1st Dept 2024] *quoting Hayes v Riverbend House. Co.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809, 844 [2007]).

Here, as defendant did not provide evidence of the alleged pre-purchase inspection report, nor establish that the condition could not have been discovered by a diligent inspection, he fails to meet his burden of establishing that he lacked actual or constructive notice of the alleged condition (*Rosario v Cao*, 223 AD3d 485 [1st Dept 2024] [defendant did not show lack of notice of defect in deck]; *Hayden v 334 Dune Road, LLC*, 196 AD3d 634 [2d Dept 2021] [lack of notice of defective porch railing not shown, as defendants had not inspected railing in eight months after purchasing premises or submitted proof that defect was latent and could not have been discovered by reasonable inspection]; *cf. McMahon v Gold*, 78 AD3d 908 [2d Dept 2010] [defendants, who purchased home after deck had already been installed, showed lack of constructive notice based on affidavit of professional engineer, who stated that defect in deck was latent and not readily observable]).

To the extent that defendant relies on proof that Picc inspected the deck before the accident and found no issues, defendant testified that Picc only "observed" it, and, in any event, defendant provides no evidence as to what Picc had observed.

As defendant does not establish lack of notice of the condition, it is immaterial whether he created it (*Rosario*, 223 AD3d at 485).

2. Intervening/superseding cause

Defendant argues that plaintiff's decision to climb onto the deck by applying her weight onto the railing was an unforeseeable, superseding cause of her injuries.

"An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the fact is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (*Powers v 31 E 31 LLC*, 123 AD3d 421 [1st Dept 2014]).

To establish that a plaintiff's conduct was the sole proximate cause of his or her injuries, a defendant must show that the plaintiff engaged in reckless, unforeseeable or extraordinary conduct, i.e., that the plaintiff recognized the danger and chose to disregard it" (*id.*). However, "'[b]ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences,' whether an intervening act is foreseeable or extraordinary under the circumstances 'generally [is] for the fact finder to resolve'" (*Turturro v City of New York*, 28 NY3d 469, 484 [2016] *quoting Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). "Questions of foreseeability are for the court to determine as a matter of law when there is only a single inference that can be drawn from the undisputed facts" (*Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 252 [1st Dept 2002] [internal citations omitted]).

In *Powers v 31 E 31 LLC*, where the intoxicated plaintiff suffered injuries resulting from falling off a setback roof of a building owned and managed by the defendants, the court rejected defendant's superseding cause argument, reasoning that "defendants have not established as a matter of law that plaintiff's act of walking out onto the setback roof was a superseding or

intervening cause that severed the causal connection between his injuries and any negligence on their part. . . and defendants did not establish that plaintiff either knew, or should have known, that his conduct was dangerous". (*id*.).

Here, defendant offers no evidence addressing what the plaintiff knew or should have known about the danger inherent to her act of climbing the deck's railing, and thus, whether plaintiff's conduct was foreseeable under the circumstances presents a question of fact not resolvable on this motion.

3. *Res ipsa loquitur*

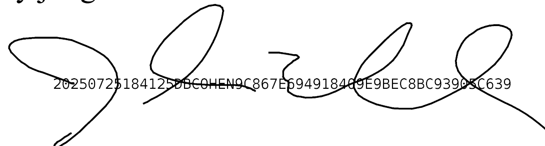
"The submission of a case to a jury on the theory of *res ipsa loquitur* is warranted when the plaintiff can establish that: (1) the accident is of a type that does not occur in the absence of negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Mejia v New York City Tr. Auth.*, 291 AD2d 225, 277 [1st Dept 2002] [internal citations omitted]).

Plaintiff contends that the deck and railing were in defendant's exclusive control, and such components do not incidentally collapse absent negligence. However, as plaintiff's contributory negligence, if any, is still in issue, the third element is not satisfied, and whether res ipsa loquitur applies must be determined at trial as well.

## III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.




| 7/25/2025 | | | | | | |
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| DATE | | | | DAVID B. COHEN, J.S.C. | | |
| CHECK ONE: | ☐ CASE DISPOSED | | | ☒ NON-FINAL DISPOSITION | | |
| | ☐ GRANTED | ☒ DENIED | | ☐ GRANTED IN PART | | ☐ OTHER |
| APPLICATION: | ☐ SETTLE ORDER | | | ☐ SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ INCLUDES TRANSFER/REASSIGN | | | ☐ FIDUCIARY APPOINTMENT | | ☐ REFERENCE |