SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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CLAUDIO FABRIZI and RITA FABRIZI,

Plaintiffs,

-against-

THE ESTATE OF JAMES G. FITCHETT, HELEN MCCOY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JAMES G. FITCHETT, CRISS CROSS REALTY, INC., PATRICIA ROSASCHI, FRANKLIN GATE REALTY, LTD. and GIOVANNA FINI,

Defendants.

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THE ESTATE OF JAMES G. FITCHETT, HELEN MCCOY,INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATEOF JAMES G. FITCHETT,

Third Party Plaintiffs,

-against-

FRANKLIN GATE REALTY, LTD., and GIOVANNA FINI,

Third Party Defendants.

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TRIAL/IAS PART 17

INDEX # 5002/10

Motion Seq. 1,2,3
Motion Date 10-20-11
Submit Date 2.1.12

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... x
Answering Affidavit ..... x
Reply Affidavit..... x

Motion brought by the defendants/third party defendants Franklin Gate Realty, LTD and Giovanna Fini (Motion Sequence No. 1) for an order, pursuant to CPLR 3212, granting summary judgment and dismissal of the plaintiffs' complaint in its entirety, as well as summary judgment and dismissal of the third party action as asserted against them, is **GRANTED**.

Motion brought by the defendants Criss Cross Realty, Inc., and Patricia Rosaschi (Motion Sequence No. 2), for an order, pursuant to CPLR 3212, granting them summary judgment and dismissal of the plaintiffs' complaint in its entirety, is **GRANTED**.

Motion brought by the defendants/third party plaintiffs, The Estate of James G. Fitchett and Helen McCoy, Individually and as Executrix of the Estate of James G. Fitchett (Motion Sequence No. 3), for an order, pursuant to CPLR 3212, granting summary judgment and dismissal of the plaintiffs', Claudio Fabrizi and Rita Fabrizi's complaint in its entirety, dismissal of cross claims asserted against them by co-defendants, and an order pursuant to CPLR 3116(a), striking portions of plaintiffs' deposition testimony, is **DENIED**.

This action involves an accident occurring on October 25, 2009 at the residential premises located at 238 Jefferson Street, Franklin Square, New York (the subject premises).

The majority of the facts in this case are not in dispute. As executrix of defendant Estate of James G. Fitchett (hereafter Estate), defendant Helen McCoy was tasked with selling Mr. Fitchett's home at the subject premises owned by the Estate. Mrs. McCoy listed the home with defendant Criss Cross Realty, Inc. (hereafter Criss Cross), of which defendant Patricia Rosaschi works in the capacity of President. Ms. Rosaschi listed the home on Long Island's multiple listing service in order for other real estate agents to show the home to prospective buyers. To

allow other agents to show the home to prospective buyers, Ms. Rosaschi placed a lock box on the side door for entry by anyone showing the house. Plaintiff Claudio Fabrizi (hereafter Fabrizi) was a prospective buyer of the home. He made an appointment with Giovanna Fini of defendant Franklin Gate Realty (hereafter Franklin Gate) for her to show him the home at 3:00 p.m. on October 25, 2009. This appointment was communicated by Franklin Gate to Criss Cross. On the day of the appointment, however, Fabrizi called to reschedule to 7:00 p.m., and this change was not communicated to Criss Cross. Mr. Fabrizi and Ms. Fini arrived at the house a little after 7:00 p.m. and it was dark outside. Ms. Fini entered the home through the side door, using her cell phone light to open the lock box. Once inside, Ms. Fini had difficulty looking for a light switch. At some point, Mr. Fabrizi attempted to help her look for the light switch and fell down a flight of stairs which was across from the side door, causing Mr. Fabrizi to sustain personal injuries.

With respect to the accident, Fabrizi testified that he arrived at the subject premises after 7:00 p.m. to find Ms. Fini of Franklin Gate waiting (Fabrizi Transcript at 23-4). Fabrizi and Ms. Fini approached the side door of the house, which was not illuminated on the inside or outside (*Id.* at 27-8). While standing partially inside and partially outside the home, but unsure how his feet were positioned, Fabrizi reached with his right hand to search for a light switch as Ms. Fini struggled to find one (*Id.* at 38-9). Fabrizi alerted Ms. Fini that there was no switch, but was unsure if she responded (*Id.* at 38-9). Fabrizi stated that he had one foot on the door saddle, and was unsure if the other foot was inside or outside the house at the point where he searched for a light switch (*Id.* at 39).

Plaintiffs claim that defendants were negligent and that each of their negligence was the proximate cause of Fabrizi's fall and his injuries. Plaintiffs claim Estate created a dangerous condition by neglecting to maintain, clean and inspect the home and failing to provide proper lighting on the side of the house. Plaintiffs further claim that Criss Cross was negligent in choosing to install the lock box on the side door, where Criss Cross knew or should have known it was unsafe because of the lighting, rather than the front door to the house. Criss Cross was also negligent in failing to warn prospective buyers about the unlit condition on the MLS listing and failing to alert the homeowner of the condition, as industry standards dictate. Finally, plaintiffs claim that Franklin Gate was negligent in that they also failed to warn of the dangerous condition and failed to exercise reasonable care by trying to show the house under the dark conditions, thus launching an instrument of harm which caused Fabrizi's fall.

Regarding his fall, Fabrizi originally stated that the next thing he remembered after reaching for a light switch was waking up in the hospital (*Id.* at 41). However, an errata sheet submitted by plaintiffs attempts to change this response to "next thing I remember was taking a step and then falling into darkness. That is the last thing I remember." Among the other deposition answers altered, regarding the question "do you have any recollection of falling," the errata sheet changes Fabrizi's answer from "no," to "I don't recollect falling but I recall not finding the ground. The next step, I thought was going to be there, was not there. I made that step but felt nothing under my feet --- that is the last thing I remember."

Prior to addressing the merits of the within motions for summary judgment, this court considers the admissibility of this errata sheet. The Estate argues that the errata sheet should be precluded because the changes were substantive and the witness provided no reason for the

changes. Defendant objected to the errata sheet on June 8, 2011, and received no response. Also, The Estate claims that, upon being asked by an independent medical examiner after the errata sheet was submitted, Fabrizi repeated his original story that he did not remember what caused him to fall and not the changed account of remembering stepping into darkness.

Plaintiffs claim the failure to provide reasons for the errata sheet changes was because the sheet used supplied no room for explanation of why the changes were made, but believed the reasons were self evident. Additionally, they claim the court has the authority to allow the changes even if no reasons were provided, and should do so as the changed testimony is not contradictory to earlier testimony, and having suffered a traumatic brain injury, some details have resurfaced as Fabrizi's memory is improving. Fabrizi provides an affidavit to this effect and the corroborating affirmation of Dr. Jay E. Yasen.

This court finds that the plaintiffs' errata sheets are inadmissible since they failed to timely submit a statement of the reasons for the substantive changes in Fabrizi's deposition testimony. CPLR 3116(a) covers the signing and physical preparation of deposition transcripts. It allows for changes to be made by a witness to their testimony so long as they are accompanied by a statement of the reasons for the changes. Additionally, CPLR 3116(a) states "no changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Plaintiff's affidavit and his doctor's affirmation, which were prepared mere days before plaintiffs submitted their opposition papers, eight months after the errata sheets were submitted, rather than accompanying the sheets as provided by the statute, are insufficient to

overcome this failure as they were untimely submitted without good cause for the delay (*Kelley v. Empire Roller Skating Rink, Inc.*, 34 AD3d 533 [2nd Dept. 2006]; *Riley v. ISS Intl. Serv. Sys.*, 284 AD2d 320 [2nd Dept. 2001]).

The Estate moves for summary judgment contending there is no evidence that a defective or dangerous condition existed on the property, that there was no actual or constructive notice of such a condition, and that the subject premises was maintained in a reasonably safe manner. Therefore, it argues no duty to warn can be imposed on the Estate. Further, the Estate argues that based on the testimony of the plaintiff, any claim concerning the cause of plaintiff's fall would be purely speculation since the plaintiff had testified and told doctors that he could not recall how he fell or what caused him to fall. It argues speculation is insufficient to prove proximate cause, thus, plaintiff cannot prove liability against Estate.

Criss Cross moves for summary judgment, claiming they did not launch an instrument of harm by placing the lock box on the side door. They argue while this had the effect of bringing people to the side door rather than the front door, the mere placement of the lock box cannot constitute a proximate cause of the plaintiff's accident. Criss Cross argues that it was not aware that plaintiff's appointment had been changed from 3:00 in the afternoon, while it was light outside, to 7:00 in the evening, when it was dark. Additionally, Criss Cross claims that, as a real estate broker, they have no responsibility for the safety of a house, since they did not occupy, control, maintain or make special use of the property. Criss Cross argues that it had no duty to warn prospective buyers of a potentially unlit condition on the side entrance of the house and accordingly, without a duty there can be no negligence.

Franklin Gate moves for summary judgment, contending that as a real estate broker, it had no duty of care to prospective buyers, and additionally did not own, occupy, control or make special use of the property such that a duty would arise. Franklin Gate claims their only connection to the subject premises was to show it to prospective buyers, and thus it had no duty to maintain the house in a safe condition.

"It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395, 165 NYS2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]; *Bhatti v Roche,* 140 AD2d 660, 528 NYS2d 1020 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor ( *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 489 NYS2d 884 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear

on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates,* 191 AD2d 631, 595 NYS2d 236 [2nd Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 165 NYS2d 498 [1957], *supra*)." (*Recine v. Margolis,* 24 Misc. 3d 1244A; 901 NYS2d 902)

Applying these principles to the case at bar, defendants Estate and McCoy failed to make a prima facie showing of entitlement to summary judgment as a matter of law. Analyzing the testimony of defendant Helen McCoy, it is apparent that there are issues of fact with respect to the lighting conditions at the subject premises which preclude summary judgment. She testified that although her husband installed a lighting system in the kitchen and living room, such interior lights were scheduled to turn on from 5:00 pm until 11:00 pm. There was no lighting system for the exterior of the house. She did not know if there were any light fixtures in the area at the side entrance or the landing just inside the side entrance. Moreover, the light switch to the basement was not located at the landing level but was located two steps up toward the kitchen on the wall. Ms. McCoy testified that she and her husband would drive past the premises on occasion at night to be sure that the living room lights were on. There is no testimony with respect to an inspection of the outdoor lighting conditions.

Non-party witness Eugene McCoy testified at a deposition of this matter. He corroborated the testimony of his wife, Helen McCoy. He testified that there were no exterior lights at the premises; that someone first walking into the side entrance in October 2009 might have to walk up some stairs to the left of the entrance in order to reach a light switch; that he installed a 25 year old timer for interior lights in the living room and kitchen scheduled to turn on from 5:00 pm to 11:00 pm.; that he and his wife would drive by the premises on occasion to see that the interior lights were working; that he couldn't recall when they last passed the premises prior to the accident; that he had not changed a light bulb in the two fixtures in the two and one-half years from April 2007 until the date of the accident; and that no work was done on the premises other than landscaping and a one day clean up.

It is well established that "[a] landowner is liable for the dangerous or defective condition on his or her property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it'" (*Anderson v. Weinberg*, 70 AD3d 1438 [4th Dept. 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it" (*Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 869 NYS2d 222 [2008] citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

"To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (see *Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285 [2006]; *Feldmus v Ryan Food Corp.*, 29 AD3d 940, 941 [2006]; *Yioves v T.J. Maxx, Inc.*, 29 AD3d at

573; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d [436] at 437 [2005]; *Lorenzo v Plitt Theatres*, 267 AD2d 54, 56 [1999])." (*Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 598-99, 869 N.Y.S.2d 222 [2008]). Absent notice, a landowner may nevertheless be under an affirmative duty to conduct inspections of the premises as would be reasonable under the circumstances (*Pommerenck v. Nason*, 79 AD3d 1716 [4th Dept. 2010]; *Hayes v. Riverbend Housing Co., Inc.*, 40 AD3d 500 [1st Dept. 2007]).

The court finds that the Estate and McCoy failed to meet their initial burden of proving lack of constructive notice of a dangerous or defective condition based upon the deposition testimony of Helen and Eugene McCoy. Their testimony reveals that, at the time of the accident, they were aware of the lack of exterior lighting at the side door where the lockbox was located, the lack of interior light switch inside the side door on the landing leading to the kitchen and basement, and the lack of a door guarding the entry of the basement. Moreover, the witnesses could not confirm when the last time an inspection of the premises occurred.

The court further finds that there exists a question of fact whether the lack of any lighting at the exterior and interior side entrance constituted an inherently dangerous concealed condition and, as such, was a concealed hazard not visible to prospective purchasers traversing the entry into the home. It is for the jury to determine whether the Estate and McCoy breached their duty to warn plaintiff and whether it was foreseeable that the plaintiff would fall down the stairs. "'...the rule that landowners, who have or should have reason to expect that persons will find it necessary to encounter the obvious danger, owe a duty of reasonable care to either warn such persons of the danger or to take other reasonable steps to protect them from it" (*Comeau v Wray*, 241 AD2d 602, 603). Specifically, the duty to warn against known or obvious dangers arises

where the landowner has reason to expect or anticipate that a person's "attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it"(Restatement [Second] of Torts A§ 343A [1], Comment f)." (*Spannagel v. State of New York*, 298 AD2d 687, 689, 748 NYS2d 421 [2002]). In the case at bar, a jury may reasonably find that plaintiff was sufficiently distracted when entering the premises by looking for a light switch, thus, causing the fall down the darkened basement stairs.

Therefore, defendant Estate's and McCoy's motion for summary judgment dismissing plaintiffs' complaint is **DENIED.**

The court now turns to defendant Criss Cross' motion. As a general rule, liability for a dangerous condition on property is predicated upon ownership, occupancy, control, or special use (*James v. Stark*, 183 AD2d 873 [2nd Dept. 1992]; *Millman v. Citibank*, 216 AD2d 278 [2nd Dept. 1995]). In *Bruhns v. Antonelli*, 255 AD2d 478 (2nd Dept. 1998), the court concluded that the listing real estate agent who provided access to premises to a broker, who was injured while showing the property, owed no duty of care to the injured broker and could not be held liable for the existence of an allegedly dangerous condition on the property. Here, as in *Bruhns*, there is no evidence to raise an issue of fact that the defendant owned, occupied, controlled, or made special use of the property. Thus, no duty exists on behalf of Criss Cross.

Therefore, defendant Criss Cross' motion for summary judgment dismissing plaintiffs' complaint is **GRANTED**.

Finally, the court considers defendant Franklin Gate's motion. Like Criss Cross, there is no evidence that Franklin Gate owned, occupied, controlled or made special use of the subject premises (*James v. Starks*, supra; *Millman v. Citibank*, supra). Absent control, a real estate

broker does not owe a duty of care to a prospective buyer injured on the premises being shown (*Schwalb v. Kulaski*, 29 AD3d 563 [2nd Dept. 2006]; *Perez v. Garfield & Co., Inc.*, 2003 WL 1793057 [N.Y.Sup. 2003]). Franklin Gate's only connection to the property was to show it to prospective buyers, as evidenced by the fact that no one representing Franklin Gate had ever gone to the property before the occurrence of the subject accident. As such, Franklin Gate owed no duty to prospective buyers and had no knowledge of any alleged defect.

Therefore, Franklin Gate's motion for summary judgment is also **GRANTED**.

Having granted defendants Franklin Gate's application for summary judgment dismissing plaintiff's complaint on the basis that there is no liability, all cross-claims against defendants Franklin Gate and Giovanna Fini are hereby dismissed.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Submit judgment on notice.

Dated: Mineola, New York
March 26, 2012

ENTER:

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