

**Conti v Conti**

2012 NY Slip Op 31793(U)

July 2, 2012

Sup Ct, New York County

Docket Number: 105859/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Vincent Conti

Plaintiff (s),

INDEX NO.

105859/09

MOTION DATE

Vincent James Conti, Jr +

MOTION SEQ. NO.

001

MOTION CAL. NO.

Joanne C. Conti

Defendant (s).

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**PAPERS NUMBERED**


Cross-Motion:  Yes  No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

Motion (s) decided in accordance with  
the accompanying memorandum decision

**FILED**

**JUL 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 2, 2012

[Signature]  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York  
County of New York: IAS 10

-----x  
Vincent Conti,

Plaintiff,

-against-

Vincent James Conti Jr. and  
Joanne C. Conti,

Defendant.  
-----x

Decision/Order  
Index#105859/09  
Mot. Seq. # 001

**FILED**

JUL 09 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Judith J Gische:

Pursuant to CPLR 2219(A) the following numbered papers were considered on this motion:

PAPERS	NUMBERED
Notice of Motion, JJB affirm., exhibits.....	1
VM affirm in opp., exhibits.....	2
JJB Reply affirm.....	3

Upon the foregoing papers the decision and order of the court is as follows:

The defendants move for summary judgment dismissing the complaint. The motion is opposed by plaintiff.<sup>1</sup> Issue has been joined and this motion was timely brought after the filing of the Note of Issue. (CPLR §3212; Brill v. City of New York, 2 NY3d 648 [2004]). The motions is, therefore, properly before the court to be considered on its merits .

The complaint seeks damages for personal injuries plaintiff allegedly sustained when he slipped and fell while he was at the home of the defendants, his parents,

<sup>1</sup>Although this matter was scheduled for oral argument twice, plaintiff's attorney did not appear either time. The court, therefore, marked the matter submitted without oral argument and it is decided solely on the written record developed by the parties.

located at 7 Harborview Court in Staten Island, New York ("premises"), on January 21, 2007. The complaint states causes of action for: [1] negligent conduct (first cause of action); [2] negligence in failing to control, supervise, maintain and repair the premises and/or to warn about hazardous conditions (second cause of action); and [3] public or private nuisance (third cause of action).

The underlying claim by plaintiff is that when he exited the front door to the premises, he slipped and fell on debris that had accumulated on the cement front steps. He sustained injuries to both of his ankles, requiring surgery. He claims that the debris consisted of pieces of cement that had accumulated as a consequence of the deteriorated condition of the steps. During discovery, both plaintiff, and his mother, Joanne C. Conti, appeared for depositions. In addition, photographs of the concrete stairs were provided to the plaintiff.

#### Summary of the Arguments of the Parties

Defendants argue that the complaint should be dismissed because: the plaintiff cannot identify the location or cause of the accident and that the defendants did not create or have notice of the allegedly hazardous condition. Plaintiff argues that by identifying the three step staircase in front of the premises, and stating that he felt little stones and cement under his feet before he fell, he has provided sufficient detail of the accident to present the matter to the jury. Plaintiff does not argue that defendants created the condition. He does argue, however, that cement debris on the stairs was a recurring condition, which Joanne Conti knew about. He claims that there is sufficient evidence to raise an issue of notice.

### Discussion

A movant seeking summary judgment in its favor 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 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Defendants argue that because plaintiff cannot identify the exact step on which he fell and he is speculating that cement debris was the cause of his fall, the complaint should be dismissed. They argue that plaintiff could only speculate that he fell on debris that came from the deteriorating cement stairs.

At his deposition, plaintiff responded at one point that he was not certain what step he was on when the accident happened. He later stated that he could not tell which step he was on when the accident occurred nor could he respond with certainty whether one or both feet came out from under him when he fell (VC<sup>2</sup> ebt pp 41-55). When asked about how his feet came out from under him, he gave the follow response:

Q. How did your feet come out from under you?

A. I felt something underneath my foot like something brought me up.

Q. Something brought you up?

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<sup>2</sup>“VC” refers to the May 3, 2011 deposition testimony of Vincent Conti.

A. Yeah, like I slipped on something.

Q. You slipped?

A. Yes.

Q. Was there snow or ice on the staircase?

A. No.

Q. Was it completely clean?

A. There was debris.

Q. What kind of debris was on the stairway?

A. Like little stones and cement (indicating).

Both plaintiff, who had personal knowledge of the stairwell before the accident, and the defendants, Joanne Conti, testified to the general deteriorated condition of the staircase, before the accident, albeit not the particular debris that plaintiff now claims caused his fall.

While a plaintiff cannot speculate as to the cause of an accident (Holiday v. Hudson Armored Car and Courier Service, 301 AD2d 392 [1<sup>st</sup> dept. 2003]), causation may still be established by circumstantial evidence. (Constantino v. Webel, 57 AD3D 472 [2<sup>ND</sup> dept. 2008]). At bar, there is sufficient evidence presented from which a finder of fact could conclude that plaintiff's fall was due to the stones and cement that he felt underfoot and which he saw on the stairs immediately after his fall. This is not speculative because plaintiff stated he actually sensed (felt) the debris under his feet and then immediately observed the offending material. This provides a sufficient nexus between the material observed and the cause of the accident. (Cherry v. Daytop VII, Inc., 41 AD3d 130 [1<sup>st</sup> dept. 2007]). These circumstances are distinguishable from

those in the case of Thompson v. Comack Multiplex Cinemas (83 AD3d 929 [2<sup>nd</sup> dept. 2011]), relied upon by defendants.

In Thompson, plaintiff affirmatively stated at her deposition that she did not know the cause of her fall and only speculated, based upon her husband's observations about the condition of the stairs, that she must have fallen as a result of the deteriorated condition of the stairs. Here, however, the plaintiff is clear that he felt something under his feet, like pebbles, right before he fell and that immediately after his fall, he observed debris consistent with that sensation. There is also evidence that the source of the debris is the deteriorating cement stairs, as both plaintiff and defendant testified that they had seen similar debris before the accident. Moreover, there was no other possible source of the debris identified. (See: Montas v. JJC Constr. Corp., 92 AD3d 559 [1<sup>st</sup> dept. 2012]).

Nor is plaintiff's failure to identify the precise step on which he fell fatal to his claim. Plaintiff's testimony describes the staircase of consisting of two steps and a landing, and that his feet came out from under him after feeling stones and cement beneath his feet. (Rodroguz v. Leggett Holdings, LLC, \_\_\_ AD3d \_\_\_, 2112 WL 2299513 [1<sup>st</sup> dept. 2012]; Tomaino v. 209 East 84<sup>th</sup> Street Corp., 72 AD3d 460 [1<sup>st</sup> dept. 2010]).

Defendants separately argue that because there was no prior notice to defendants of the debris on which plaintiff fell, the case must be dismissed. Plaintiff has conceded that the defendants did not actually create the condition. Where a landowner does not actually create a hazardous condition on his or her property which causes injury to another, s/he can only be held responsible if s/he had actual or

constructive prior notice of the hazardous condition. (Boderick v. RY Management Co., Inc., 71 AD3d 144 [1<sup>st</sup> dept. 2009]). Plaintiff, however, does not claim that defendant knew about the exact concrete debris which he claims caused him to fall. Instead, he claims that the cement stairs were deteriorating and that the condition of concrete debris on the stairs was a recurring one. A plaintiff can establish constructive knowledge by proving that defendants were actually aware of an ongoing and recurring unsafe condition, which regularly went unaddressed. (Early v. Hilton Hotels Corp., 73 AD3d 559 [1<sup>st</sup> dept. 2010]; Mazerbo v. Murphy, 52 AD3d 1064 [3<sup>rd</sup> dept. 2008]).

At bar, defendant Joanne C. Conti testified that the stairs were old and "concrete was coming out from in between" (JC<sup>3</sup> ebt pp.12). She further testified that concrete from the bricks would wind up on the landing and on the steps. She stated that "from time to time" she and her co-defendant husband would see debris, consisting of concrete and brick and that her husband would clean it up. (JC ebt pp13-14). This is sufficient to raise an issue of fact for the jury regarding whether there was a recurrent condition that otherwise satisfies the requirement of prior notice. The court leaves to the trier of fact the issues of credibility.

### Conclusion

In accordance herewith it is hereby

ORDERED that defendants' motion for summary judgment is denied and it is further

ORDERED that this case is ready for Mediation and subsequent trial, it is further

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<sup>3</sup>JC refers to the May 3, 2011 deposition testimony of defendant Joanne Conti.



ORDERED that the plaintiff shall serve a copy of this decision/order on Clerk in the Office of the Trial Support so the case can be scheduled for mandatory pre-trial mediation and eventual trial; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
July 2, 2012

SO ORDERED:

J.G. J.S.C. 

**FILED**

**JUL 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE