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SHORT FORM ORDER

COPY

INDEX No. 14-16832
CAL. No. 16-01423OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-29-16
ADJ. DATE 5-5-17
Mot. Seq. # 001 - MG; CASEDISP

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PATRICIA MEISSER and DAVID MEISSER,

Plaintiffs,

- against -

PETER GOMEZ, SANDY GOMEZ and ABC COMPANIES 1-5 (a fictitious name meant to Describe maintenance/construction companies whose names are presently unknown),

Defendants.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 15 ; Answering Affidavits and supporting papers 16 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Peter Gomez and Sandy Gomez for summary judgment dismissing the complaint against them is granted.

This action was commenced by plaintiff Patricia Meisser to recover damages for injuries she allegedly sustained on December 30, 2013, when she slipped and fell while exiting the home of defendants Peter Gomez and Sandy Gomez. Patricia Meisser's husband, David Meisser, asserts a derivative claim for loss of services.

Defendants Peter Gomez and Sandy Gomez now move for summary judgment in their favor, arguing that their home's exterior steps, wet with rainwater, do not constitute a dangerous or defective condition. In support of their motion, defendants submit copies of the pleadings; transcripts of the parties' deposition testimony; transcripts of the deposition testimony of nonparties Rachel Ida Pariser, Maria Cottone, Christine Gambella, and Kristina Komsic; seven photographs; and a copy of plaintiffs' expert exchange.

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Plaintiff Patricia Meisser testified that on the night in question, she attended a party held at the home of her colleague, Sandy Gomez. Mrs. Meisser indicated that she visited the Gomez residence on two occasions prior to here incident, but does not recall using the home's front steps. She stated she had not lodged any complaints regarding those steps, and was unaware of any other incidents related thereto. Mrs. Meisser testified that her colleague, Rachel Pariser, picked her up from her home on December 29, 2013, and drove both to the subject premises, known as 31 Vernon Street, Patchogue, New York. Mrs. Meisser stated that they arrived at the subject premises at approximately 9:00 p.m., that it was drizzling rain, but that the temperature was "not that cold considering the time of year." She indicated that there were approximately four steps leading up to the front door of the home, that there was no ice or snow on the steps, and that she had no trouble entering the home.

Mrs. Meisser testified that, during the course of the party, she consumed two alcoholic beverages and ate dinner. She indicated that at approximately 12:30 a.m. on December 30, 2013, she and Ms. Pariser decided to leave. Mrs. Meisser stated that as they exited the home's front door, it still was raining, and Ms. Pariser successfully proceeded down the front steps first. Mrs. Meisser testified that the stairs had a handrail on each side and that she was carrying her purse and coat in her arms. She indicated that she successfully took one step down the steps, but then "slipped." She explained that "[b]oth [of her feet] slipped out, but [her] right slipped out . . . first, because [she] landed with [her] left foot underneath the right." She testified that she looked at the steps after she fell, but did not observe any ice, snow, or debris on them. Upon questioning as to what she slipped on, Mrs. Meisser stated "just the step, I guess, it was slippery."

Mrs. Meisser further testified that Mrs. Gomez visited her in the hospital the next day, at which time Mrs. Meisser elaborated upon the cause of her fall. Mrs. Meisser indicated that she told Mrs. Gomez "I slipped on the steps . . . the steps were slippery, and other people had noticed that the steps were slippery as well." Upon questioning as to the cause of the slippery steps, Mrs. Meisser stated it was due "[m]ostly [to] the drizzle and rain that had kind of happened that day and night."

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). However, "the owner has no duty to protect or warn against an open and obvious

condition which, as a matter of law, is not inherently dangerous" (***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 866, 999 NYS2d 840 [2d Dept 2014]). It is also well settled that "a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (***Copley v Town of Riverhead***, 70 AD3d 623, 624, 895 NYS2d 452, 453 [2d Dept 2010]; *see* ***Richardson v JAL Diversified Mgt.***, 73 AD3d 1012, 901 NYS2d 676 [2d Dept 2010]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (***Altinel v John's Farms***, 113 AD3d 709, 710, 979 NYS2d 360, 362 [2d Dept 2014]; *see* ***Ingram v Long Is. Coll. Hosp.***, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). However, the mere fact that an outdoor walkway is wet is not sufficient to establish the existence of a dangerous condition (***Bernal v 521 Park Ave. Condo***, 128 AD3d 750, 9 NYS3d 358 [2d Dept 2015], *see* ***Patrick v Cho's Fruit & Vegetables***, 248 AD2d 692, 671 NYS2d 274 [2d Dept 1998]; *see also* ***Gerber v Rosenfeld***, 33 AD3d 662, 822 NYS2d 312 [2d Dept 2006]).

The Court finds defendants have established a prima facie case of entitlement to summary judgment by submitting evidence that plaintiff's accident was not due to a dangerous condition on the premises (*see* ***Acheson v Shepard***, 27 AD3d 596, 811 NYS2d 781 [2d Dept 2006]). While property owners have a duty to maintain their property in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]), they are not insurers of the safety of people on their property (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). Plaintiffs do not allege there was a foreign substance or an obstruction on the steps where Mrs. Meisser allegedly slipped. None of the deposed witnesses testified that he or she had observed a dangerous condition on the subject steps in the past. Each, save Mrs. Meisser, was able to negotiate the steps that night without incident. Defendants have also established that they did not create or have notice of the alleged dangerous condition on the staircase by submitting testimony that neither plaintiffs nor anyone else complained about the condition of the steps in question, and that the wetness of the steps was due to rainfall (*see* ***Ingram v Long Is. Coll. Hosp.***, *supra*; ***Bernal v 521 Park Ave. Condo***, *supra*). Therefore, the burden shifted to plaintiff to raise a triable issue of material fact (*see generally* ***Alvarez v Prospect Hosp.***, *supra*).

Plaintiffs oppose defendants' motion, arguing that a slippery condition on the subject steps was not the sole proximate cause of plaintiff's injuries. Rather, plaintiffs claim the stairs' treads and risers deviated from the requirements of the Residential Code of New York State (2003) (the Building Code). In support of that contention, plaintiffs submit Patricia Meisser's own affidavit, and the affidavit of Richard Berkenfeld, a professional engineer.

In her affidavit, plaintiff Patricia Meisser states that her "gait *was* affected as [she] descended the stairs . . . [and she] was caused to become unstable, off-balance, and my foot landed awkwardly on the stair tread, which caused [her] to slip" [emphasis in original]. She further states that "there was no non-

slip surface on the treads of the stairs . . . [and that she] believe[s] that if a non-slip surface was present [she] may have been able to regain balance."

In his affidavit, Mr. Berkenfeld swears that he took detailed measurements of the stair treads in question and found that their width and height varied more than was permissible by the Building Code. Specifically, Mr. Berkenfeld measured a 11/16th of an inch difference between the riser heights of the first and second steps down from the upper landing. Then, he found a 1/8th of an inch difference between the riser heights of the second step and the third step down. As to the difference between the riser height of the third step down and the fourth step down, he found none. Mr. Berkenfeld states that, with regard to the depth of the staircase's treads, measurements revealed that the third tread down from the landing was 3/4 of an inch shorter in depth than the upper two. He states that the maximum difference between riser heights, or tread depths, must be less than 3/8ths of an inch to conform to the Building Code. He opines that a variance in riser heights "is an insult to human locomotive gait" and "caused a hazardous and dangerous condition to exist at the time of [Mrs. Meisser's] accident." Mr. Berkenfeld further states "the fact that the stairs lacked a non-slip surface application, violated the Property Maintenance Code of New York State, that became effective on December 28, 2010 and was in effect at the time of the plaintiff's accident."

The Court finds plaintiffs have not raised a triable issue of material fact (*see* ***Humphrey v Merivil***, 109 AD3d 792, 971 NYS2d 211 [2d Dept 2013]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Generally, a violation of the Building Code "constitutes only some evidence of negligence," and it is "the plaintiff's burden to also establish that the violation proximately caused her injuries" (***Scala v Scala***, 31 AD3d 423, 424-425, 818 NYS2d 151 [2d Dept 2006] [internal citations omitted]). Ordinarily, it is for the trier of fact to determine the issue of proximate cause, but the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (*id.*). Here, fatal to plaintiffs' opposition to this motion is Mrs. Meisser's deposition testimony that she slipped as she took a second step down the stairs. She did not claim that the stairs were made slippery by any act of defendants, or that there was some particular characteristic of the stairs' construction that rendered them dangerous and the proximate cause of her fall (*see* ***McCarthy v Jones***, 139 AD3d 682, 30 NYS3d 332 [2d Dept 2016]; *cf.* ***Cook v Rezende***, 32 NY2d 596, 347 NYS2d 57 [1973]). A slippery exterior condition created by rainfall is not sufficient to prove a dangerous condition (*see* ***Bernal v 521 Park Ave. Condo***, *supra*).

The Court finds Mrs. Meisser's affidavit was tailored to avoid the consequences of her prior deposition testimony (*see* ***LeBron v H.E.L.P. I of New York***, 30 AD3d 473, 817 NYS2d 106 [2d Dept 2006]). She stated numerous times in the course of her examination before trial, in unequivocal terms, that her fall was occasioned by her slipping on the wet wooden steps. She did not give even the slightest indication, despite numerous opportunities to do so during her deposition, that her fall was due to an unevenness in those steps. Therefore, plaintiffs offer no unfeigned evidence that there was another proximate cause of their injuries (*see* ***Maglione v Seabreeze By Water, Inc.***, 116 AD3d 929, 984 NYS2d 132 [2d Dept 2014]; ***Thompson v Commack Multiplex Cinemas***, 83 AD3d 929, 921 NYS2d 304 [2d Dept 2011]; ***Conry v Avellino***, 287 AD2d 478, 731 NYS2d 205 [2d Dept 2001]).

Mr. Berkenfeld conducted his testing of the subject wooden steps approximately two-and-a-half years after the alleged incident. He offers no indication that natural aging or seasonal warping would not have altered the dimensions of the stairs' components over such an extended period. Further, he neglected to perform tests of the steps' coefficient of friction (*see* ***Ceron v Yeshiva Univ.***, 126 AD3d 630, 7 NYS3d 66 [1st Dept 2015]). Such testing may have determined whether the steps were dangerously slippery, or if their natural state was "non-slip" (*see* ***Mermelstein v East Winds Co.***, 136 AD3d 505, 24 NYS3d 643 [1st Dept 2016]). Absent such testimony, Mr. Berkenfeld's findings are merely feigned issues of fact unsupported by Mrs. Meisser's own description of her accident and cannot defeat summary judgment (*see* ***Amster v Kromer***, ___AD3d___, 2017 NY Slip Op 03720 [2d Dept 2017]; ***Bardales v VAM Realty Corp.***, 124 AD3d 707, 998 NYS2d 650 [2d Dept 2015]).

Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: 7-10-17

[redacted]
A.J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**