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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

SANDRA KRASNOW,

Plaintiff(s),

-against-

PATRICIA A. VARRIALE,

Defendant(s).

Index No. 16758/09

Motion Submitted: 9/21/11
Motion Sequence: 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....

Motion pursuant to CPLR § 3212 by defendant Patricia A. Varriale for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed.

Cross motion by plaintiff Sandra Krasnow pursuant to CPLR § 3126 to strike the defendant's answer or, in the alternative, to preclude consideration of defendant's expert's affidavit in support of defendant's motion for summary judgment pursuant to CPLR § 3101(d) is denied.

This action arises from an accident in which plaintiff allegedly sustained injury while a guest at a Communion party at the home of defendant on May 2, 2009. The incident occurred as plaintiff attempted to walk from the kitchen into the sunroom of defendant's home and allegedly was caused to fall as a result of an optical illusion and/or optical confusion at the location of a four inch brown wooden step constructed by defendant homeowner's husband.

According to the plaintiff's expert:

> "the improper construction of the homemade brown wooden step leading from the kitchen to the sunroom is the cause and the origin of the subject occurrence."

He further opines that:

> "[a] dangerous condition was created by . . . adding the step in an inappropriate and unsafe manner to wit: having a homemade step attached to the white saddle providing an inappropriate visual cue . . . leading persons traversing the area to believe that there was no step . . . and giving the appearance that the 2-1/2" outward protrusion from the white saddle was part of the sunroom floor."

Defendant seeks summary judgment dismissing the complaint predicated on the grounds that the subject step/sill/threshold leading from the kitchen into the sunroom constituted an open, obvious condition which was not inherently dangerous.

In opposition to defendant's motion, plaintiff has cross moved to strike defendant's answer or, in the alternative, to preclude consideration of the expert's affidavit offered in support of defendant's summary judgment motion and to preclude said expert from testifying on defendant's behalf at trial.

As an initial matter, the court finds no basis to either strike defendant's answer or preclude consideration of the expert's affidavit because defendant's attorney failed to timely disclose that an expert had been retained. Plaintiff maintains that defendant wilfully and deliberately attempted to deceive both plaintiff and the court, and gain a tactical advantage, by asserting that an expert had not been retained when the opposite was true. Although he did not disclose that the services of an engineering expert had been retained prior to the time plaintiff filed a note of issue on May 3, 2011, defendant's attorney contends, which plaintiff's attorney disputes, that an investigator, employed by Cardinal Claim Service, retained the expert engineer at the request of defendant homeowner's insurance carrier. Defendant's attorney acknowledges that a more appropriate response to the preliminary conference order would have been " 'expert information will be provided under separate cover and pursuant to the CPLR' " rather than the one offered which states that " 'defendant has not retained any expert witness, but defendant reserves the right to do so.' "

Under the circumstances extant, in the exercise of discretion, the court finds no basis to reject defendant's expert's affidavit. The court is cognizant that CPLR § 3101(d)(1)(i),

which governs pretrial disclosure of expert testimony, does not establish a specific time frame for expert witness disclosure. The court, however, has the discretion to preclude expert testimony for failure to reasonably comply with the statute. (***Lucian v. Schwartz***, 55 A.D.3d 687, 688, 865 N.Y.S.2d 643 [2d Dept., 2008]).

Given the conflicting versions of the facts *vis-a-vis* the circumstances surrounding the late disclosure, it cannot be said that defendant's attorney's explanation for the delay was unreasonable, that the delay critically undermined plaintiff's ability to oppose defendant's summary judgment motion or that plaintiff, who has fully responded to defendant's motion and offered her own expert's affidavit, would be prejudiced by the court's consideration of the expert's affidavit.

A property owner is charged with the duty to maintain the premises in a reasonably safe condition. (***Katz v. Westchester County Healthcare Corp.***, 82 A.D.3d 712, 713, 917 N.Y.S.2d 896 [2d Dept., 2011]). Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it. (***Gordon v. American Museum of Natural History***, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). To constitute constructive notice the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. (***Borenkoff v. Old Navy***, 37 A.D.3d 749, 750, 831 N.Y.S.2d 220 [2d Dept., 2007]). To be entitled to summary judgment in a trip and fall case, a defendant is required to show, *prima facie*, that she maintained the premises in a reasonably safe condition and she did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. (***Villano v. Strathmore Terrace Homeowners Assn., Inc.***, 76 A.D.3d 1061, 908 N.Y.S.2d 124 [2d Dept., 2010]). A property owner has no duty, however, to protect or warn against a condition that is not inherently dangerous and/or is readily observable by the use of one's senses. (***Neiderbach v. 7-Eleven, Inc.***, 56 A.D.3d 632, 633, 868 N.Y.S.2d 91 [2d Dept., 2008]).

Whether a condition is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted. (***Stoppeli v. Yacenda***, 78 A.D.3d 815, 816, 911 N.Y.S.2d 119 [2d Dept., 2010]). Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition but does not necessarily preclude a finding of liability against a landowner for failure to maintain the property in a safe condition. (***Cupo v. Karfunkel***, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40 [2d Dept., 2003]).

Although the open and obvious nature of a dangerous condition will not preclude a finding of liability against a landowner who causes a foreseeable risk of harm through a failure to maintain the property in a reasonably safe condition, summary dismissal is appropriate where the complained of condition was both open and obvious and, as a matter of law, was not inherently dangerous. (***Rao-Boyle v. Alperstein***, 44 A.D.3d 1022, 844 N.Y.S.2d 386 [2d Dept., 2007]).

Optical confusion such as plaintiff alleges herein occurs when conditions in an area create the illusion of a flat surface which visually obscures any steps. Findings of liability in such a case typically turn on such factors as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas or some other distraction or dangerous condition. (***Saretsky v. 85 Kenmare Realty Corp.***, 85 A.D.3d 89, 92, 924 N.Y.S.2d 32 [1st Dept., 2011].

In light of the photographs submitted by plaintiff which show an obvious drop in elevation, and plaintiff's own deposition testimony wherein she admits that at about 1:15 p.m on May 2, 2009, she walked from the kitchen into the sunroom, traversing the very same spot where she later fell without incident, and also states that it was a bright, sunny day and the area where she fell was clearly visible, defendant homeowner has made a *prima facie* showing that the step did not constitute a hazardous condition or hidden trap which proximately caused plaintiff's injuries. This was not a situation in which plaintiff failed to detect or was unaware of the elevation differential between the kitchen and sunroom or one in which the area was unlit or dimly lit.

In opposition, plaintiff has failed to submit evidence sufficient to show that the step created an optical illusion or optical confusion so as to defeat defendant's *prima facie* showing. The affidavit of plaintiff's expert is speculative, conclusory and not based on any objective standards or foundational facts. As such, it lacks probative value and is insufficient to defeat defendant's motion for summary judgment.

The foregoing constitutes the Order of this Court.

Dated: December 5, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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