

Pierce v Centereach Fire Dist.
2012 NY Slip Op 32552(U)
October 3, 2012
Sup Ct, Suffolk County
Docket Number: 09-8580
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-19-12
ADJ. DATE 6-28-12
Mot. Seq. # 002 - MG; CASEDISP

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RONALD PIERCE and MIRIAM PIERCE,

Plaintiffs,

- against -

CENTEREACH FIRE DISTRICT,

Defendant.

-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-19; Replying Affidavits and supporting papers 20-22; Other ; it is,

ORDERED that this motion (seq. #002) by the defendant, Centereach Fire District, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed.

In this negligence action, the plaintiffs, Ronald Pierce and Miriam Pierce, seek damages personally and derivatively for injuries allegedly sustained on December 8, 2007, at the defendant Centereach Fire District's premises located at 8 Washington Avenue, Centereach, New York, when Ronald Pierce slipped and fell on an interior stairway of the building. It is alleged that the premises were maintained in an unsafe and dangerous condition in that the steps were slippery; there were no stair treads; there were no uniform step rise heights; there was no railing on both sides of the steps; the railing provided was inadequate; and the lighting was inadequate. It is further alleged that the defendant violated the 2002 Fire Code of New York State section 1012.5, and the 1976 State Building and Construction Code sections C212-4.1 (I), C2120-4 (m), and Table C212-4.1. It is claimed that the defendant had actual and constructive notice of the alleged dangerous and defective stairway.

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In support of this motion, the defendant has submitted, *inter alia*, an attorney's affirmation, copies of the summons and complaint, the answer, the verified amended bill of particulars and first supplemental bill of particulars; copies of the transcripts of the examination before trial of Kevin Reynolds dated February 22, 2011 and Ronald Pierce dated December 9, 2008; a copy of architectural plans for Centereach Fire District; the affidavit of Thomas R. Turkel and copy of his curriculum vitae; excerpts from the Fire Code of New York State (2002), Building Construction Code of the state of New York 1976, NFPA 101 Life Safety Code (1988), Building Code of New York State (2007); photographs of the stairway; excerpts from building plans 2/12/76; and plaintiff's expert exchange.

Ronald Pierce testified to the extent that on December 8, 2007, he was a volunteer firefighter at Centereach. The accident occurred on the east end stairs at the firehouse on Washington Avenue, Centereach, a little after 10:30 p.m. He was at the firehouse for a Christmas party held in the upstairs meeting hall, accessed by the subject stairway. He arrived at about 7:00 p.m. to help sell Christmas trees outside the firehouse. He and his wife went to the party inside the firehouse at about 7:30 p.m. There were about fifty people in attendance. Alcohol was being served. Pierce, who testified that he had bronchitis at the time, stated that he drank two or three beers during a one half to one hour period.

Pierce testified that he and his wife were being harassed and assaulted by Steven Brown, his lieutenant in Engine Company No. 1, because Brown wanted him to sell trees during dinnertime, which was about 8:30 p.m. Pierce testified that Brown told him to get his butt outside and sell trees, and that Brown grabbed his wife by the shoulder and spun her. They went outside to sell the trees, and came back inside when they finished. He left the party at about 10:30 p.m. He went down one flight of stairs with his wife and two friends. As he stepped onto the landing and turned, his right foot slipped, and he fell sideways down the stairs to the next landing. He did not know what he slipped on and did not see anything. Pierce described the stairs as ceramic/porcelain, very shiny. He did not know if he was holding onto the banister as he went down the stairs and stated he might have put his hand on it.

Kevin Reynolds testified to the extent that he has been employed by the Centereach Fire District for thirty years and is currently the senior firehouse attendant, in charge of approximately seven part-time and two full-time firehouse attendants. He dispatches calls, and when his boss is away, he is also in charge of the three custodians. The custodians' duties are sweeping, mopping, emptying garbage, and winter snow removal. In December 2007, he worked at the South Washington Avenue firehouse, described as a free-standing building which was completed in 1978. The main door is on Elliott Street, which enters into the lobby area, and to the left is the staircase which leads to the second floor. There were four staircases. Other than painting, there had been no renovations to the stairs since their construction.

Reynolds testified that the stairs are swept and mopped at least once every week. There are handrails on both sides of the stairs until the landing platform, with solid wall to the right as one is on the landing. There are stairs from the first floor to the second, and then another set of stairs going up, with a landing at the top of the second stairs. There are light fixtures within the stairwell itself, which use regular screw-in light bulbs and are replaced by the custodians. On December 8, 2007, there were three built-in, non-slip tread strips located on each step, which had been there since the stairs were installed.

Reynolds attended the dinner on the second floor of the building on December 8, 2007. Liquor purchased by the fire department was being served. Ronald Pierce and he were both in Engine Company No. 1. He did not witness the plaintiff's fall. He stated that he was told that the reason Ronny fell down the stairs was because "he was drunk off his ass" and that he had an argument with Steve Brown because Ronny would not sell trees. Prior to the incident, he did not receive any complaints about the stairs and knew of no incident prior to December 8, 2007 wherein someone fell on the stairs.

The defendant's expert, Thomas R. Turkel, averred that he is a certified and registered architect in New York State, and he set forth his credentials and work experience. On November 22, 2011, he personally visited the site of the accident, the grand staircase located at the Centereach Fire District Station. He stated that he took several photographs of the staircase and provided copies thereof with his affidavit. Upon inspection, he found that the stairway was in good condition and immaculately maintained. He continued that it consisted of three runs of stairs separated by two intermediate landings. They had steel stringers, metal pan treads, and metal risers. The individual stair treads were surfaced with terrazzo, which, while shiny, was not slippery. The leading edges of the terrazzo treads had three strips of carborundum tape secured to their surface to provide additional slip resistance. Thus, he opined, the treads and landings were in compliance with the Code.

Turkel continued that the 1976 Building Construction Code of the State of New York is the code applicable to the subject building. Upon inspection of the stairs, he found that the tread depths, riser heights, and their product were all in compliance with the 1976 Code. Table C212-4.1 requires a tread exclusive of the nosing to be a minimum of 9½ inches deep. Upon measuring each tread, he found the treads, exclusive of the nosing, were 10 inches deep. The riser heights were uniform at 7½ inches, plus or minus 1/8 inch, as allowed by the Code. The product of the tread of 10 inches deep multiplied by the riser of 7½ was 75, in compliance with the Code requirement that it be equal to or greater than 70 or equal to or less than 77½. The risers did not vary more than 1/8 inch in height on any run, and were thus in compliance with the applicable Code.

Turkel continued that the handrails were located on both sides of the three runs of stairs, with no obstructions on or above them tending to break a handhold. At the end, the handrails returned to the wall, as required by section C212-4.1 (m), which did not provide that the rail be continuous around the stair landing, thus complying with the Code. The handrail was 32 3/8 inches above the nosing, and the height of the top of the guardrail at the second floor was 36 inches, in compliance with the Code. Based upon his review of the Construction Codes in 1976, and the Fire Codes, he opined that the handrails were adequate. Turkel continued that the Handrail Graspability section 1003.3.3.11.3 was in effect during the 1995-2006 administration of Gov. Pataki, which section of the Code was not in effect in 1976, and that the reliance by the plaintiffs' expert, Kevin Reynolds, on the 1995- 2006 requirements, is without basis.

Turkel inspected the stairs in full darkness, taking several light meter readings. In the location of the plaintiff's fall, the light reading was 6.6 fc (foot candle), as provided by the artificial light mounted on the wall and from ceiling mounted fixtures. Turkel continued that in 1976, there was no minimum illumination requirement. Pursuant to the 1988 National Fire Protection Association section 5-8, "Illumination of Means of Egress," the minimum lighting requirement is not less than 1 fc. Thus, opined Turkel, there was sufficient lighting in the area of the staircase. Turkel concluded, based upon a high

degree of architectural certainty, that the grand staircase was in good condition and well maintained, well lighted and well built.

Based upon the foregoing, it is determined that the defendant Centereach Fire District has demonstrated *prima facie* entitlement to summary judgment dismissing the complaint on the bases that the stairway complied with the applicable state and building codes which were in effect at the time the firehouse was constructed; that there were handrails available for use which in compliance with the applicable Code; that the lighting was sufficient; and that the stairway was maintained in a reasonably safe condition and in compliance with the applicable Code.

In opposing this motion, the plaintiffs have submitted the affidavit of their expert, Peter Pomeranz, P.E., who has set forth that the materials and records which he reviewed, including six color copies of photographs of the subject steps. He stated that on January 31, 2011, he conducted an engineering inspection of the accident site. He has provided additional photographs of the accident site and copies of the statutes which he states are applicable. Pomeranz used the 2002 Fire Code of New York State, section 1012.5, and the 1979 State Building Construction Code as a basis for his opinion that the stairs and steps violated the applicable Code.

He described the brown paint stripes on top of the terrazzo and stated that the surface was smooth and not slip resistant and at the same level of the adjacent terrazzo. Pomeranz made the determination that the terrazzo steps and landing were slippery when dry while he was wearing sneakers. He made that determination based upon his use of force measurements to compute the coefficient of dry sliding friction pursuant to the 1979 Code. He set forth with a reasonable degree of engineering certainty that it is his opinion that the slippery surface of the upper intermediate landing was a proximate cause of the plaintiff's accident. He stated that a contributing factor to this accident is the failure to provide a handrail that can be grabbed. He continued that a properly dimensioned handrail might have given the plaintiff a better chance to grab the handrail to prevent or lessen the fall.

Plaintiff's expert, Peter Pomeranz, has not submitted a copy of his curriculum vitae or set forth his work experience as a basis for knowledge for his opinions. Even if the same were provided with the opposing papers, it is determined, upon consideration of said affidavit, that the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment.

Pomeranz described the stairs and indicated that the step tread and the landing on the stairs are surfaced with terrazzo. He determined that based upon the 2002 Fire Code section 1012.5 that the intermediate landing violated that Code. He described the handrail which was in place and stated that while a hand can be rested on the handrail, it is impossible to grab hold of the handrail because of its size and shape of 1½ inches by 5 ¼ inches. He concluded that based upon the 1979 New York State Building Code, the handrails are in violation of the Code. However, Pomeranz used the 2002 Fire Code of New York State, section 1012.5, and the 1979 State Building Construction Code as a basis for his opinions that the stairs and steps, and the handrails violated the applicable code. It is unrefuted that the construction of the firehouse was completed in 1978, prior to the enactment of either Code, and thus they are not applicable. It is, likewise, unrefuted that the stairs and the handrail were not renovated between 1978 and 2007 when the accident occurred.

A landowner must act as a reasonable person in maintaining his property in a reasonable safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]; *Roros v Olivia*, 54 AD3d 398, 863 NYS2d 465 [2d Dept 2005]). The plaintiff testified that he had been a member of the fire department for seven years, and he was familiar with the stairway. Testimony established that there had been no prior incidents where someone slipped and fell on the stairway, or that the handrails could not be gripped. There was no testimony that the stairway was in need of repair. The plaintiff testified that he did not see anything on the stairway which caused him to slip and fall. Testimony further established that the stairway was regularly cleaned and mopped. The defendant has established *prima facie* that the lighting in the stairway complied with the applicable code and rules. The plaintiff has submitted no evidentiary proof concerning the lighting on the subject stairway to raise a factual issue that the lighting was inadequate or in violation of any applicable code or rules (see, *Brooks v Bergdorf-Goodman Co.*, 5 AD2d 162, 170 NYS2d 687 [1st Dept 1958]). Thus, it is determined that the defendant maintained the stairway in a reasonably safe condition.

“A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. To meet its burden on the of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff’s fall” (*Mei Ziao Guo v Quong Big Realty Corp.*, 81 AD3d 610, 916 NYS2d [2d Dept 2011]). In the instant action, the plaintiff does not allege that he tripped on anything on the stairway, and he did not see anything on the stairway after he fell. While the plaintiff has asserted that the stairway was slippery, the plaintiff’s expert has not submitted proper evidentiary proof that the surface of the stairway did not comply with the applicable code and statutes. Thus, it has not been established that a dangerous condition existed on the stairway. No previous complaints had been received by the defendant about the stairway, and no one was reported to have previously slipped on the stairway. Thus, it is determined that the defendant did not have actual or constructive notice of any condition proximately causing the plaintiff to slip and fall.

While a landowner has the duty to warn of an inherently dangerous condition, the landowner has no duty to warn of an open and obvious condition (*Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]); (*Katz v Westchester County Healthcare Corporation*, 2011 NY Slip Op 1620, 917 NYS2d 896 [2d Dept 2011]). Here, the plaintiff has failed to raise a factual issue that the stairway was inherently dangerous, or that it caused or created a dangerous condition which caused the plaintiff to fall. Based upon the clear and undisputed evidence, it is determined as a matter of law that the defendant had no duty to warn the plaintiff of an inherently dangerous condition because the stairway was open and obvious, and something that the plaintiff was familiar with, had used many times in the past, and could be clearly seen with the reasonable use of his senses (see *Tagle v Jakob*, *supra*). It is not alleged that there was debris or water on the stairway where the plaintiff fell. Defendant established that plaintiff did not slip or trip on any substance or due to any defect on the stairway. The area was well illuminated, there were no prior complaints or accidents involving the subject stairway, and there were no Code violations concerning the height of the risers, or repairs which were needed on the stairs proximately causing the plaintiff to fall (see *Burke v Canyon Road Restaurant*, 60 AD3d 558, 876 NYS2d 25 [1st Dept 2009]). Additionally, it is undisputed that the risers were of proper and uniform height as required

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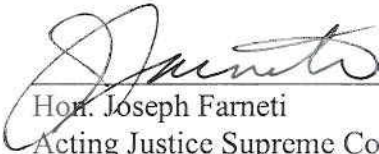
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by the applicable code. The plaintiff could not remember if he used the handrail while descending the stairs and offered no testimony that when he was falling, he could not grab onto the handrail due to its shape or dimensions. Thus, any claim that the handrails were in violation of any code or statute cannot be said to have proximately caused the plaintiff to slip and fall (*see Union Bank and Trust Co. of Los Angeles v Carnegie*, 1 AD2s 199, 149 NYS2d 122 [1st Dept 1956]).

Accordingly, the defendant's motion for summary judgment is granted, and the complaint is hereby dismissed.

Dated: October 3, 2012



Hon. Joseph Farneti
Acting Justice Supreme Court

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