SHORT FORM ORDER

INDEX No. 11-23978
CAL No. 13-00571OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-19-13 (#001)
MOTION DATE 5-7-13 (#002)
Mot. Seq. # 001 - MG; CASEDISP
002 - MG

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DONNA SEEGER,

Plaintiff,

- against -

JOHN SENISE and HAMPTON VISTAS CONDOMINIUMS,

Defendants.

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Upon the following papers numbered 1 to 38 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause (motion sequence 001) and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10 - 14 ; Replying Affidavits and supporting papers (15 - 17) ; Notice of Motion/ Order to Show Cause (motion sequence 002) and supporting papers 18 - 31 ; Answering Affidavits and supporting papers 32 - 35 ; Replying Affidavits and supporting papers (36 - 38) ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant John Senise for an order granting summary judgment and the motion (002) by defendant Hampton Vistas Condominiums for an order granting summary judgement are consolidated for the purposes of this determination; and, it is further

ORDERED that the motion by defendant John Senise for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against him is granted; and, it is further

8-23-13

ORDERED that the motion by defendant Hampton Vistas Condominiums for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross-claims is granted.

Plaintiff seeks to recover damages for personal injuries she allegedly sustained as a result of a fall off of a second story balcony on August 13, 2010 at a residential condominium unit (located at 48 Vista Drive, Manorville, New York) owned by defendant John Senise within defendant Hampton Vistas Condominium development. Plaintiff alleges that she was caused to fall off of a balcony ledge as a result of defendants' permitting or creating a dangerous condition. She maintains in her bills of particulars, *inter alia*, that defendants permitted and allowed the stairs and stairway to "be, become and remain in a dangerous, and trap-like condition", that the stairs were negligently repaired or maintained, and that defendants caused and created a dangerous and unsafe condition at their premises. No allegations referencing the half wall, railing, or ledge were made in plaintiff's bills of particulars.

Defendant John Senise now moves for summary judgment dismissing plaintiff's complaint on the ground that plaintiff has failed to present evidence that defendants either created or had notice of the allegedly defective condition. Defendant Hampton Vistas Condominiums moves for summary judgment dismissing the complaint and cross claims on the grounds that it did not create nor have notice of any allegedly dangerous condition, that plaintiff assumed the risks inherent in sitting on the balcony ledge, and that the accident was proximately caused by plaintiff's own conduct. In support of their motions defendants include copies of the pleadings, the bill of particulars, various photographs of the balcony, transcripts of examinations before trial of plaintiff, defendant John Senise, defendant Hampton Vistas Condominiums by Claudia Tracey, and non-party witness John Senise, Jr.

During her examination before trial, plaintiff testified that she was visiting her friend, John Senise, Jr.[1] on August 13, 2010 at approximately 11:30 p.m., at Vista Drive in Manorville when she fell from a second story balcony. Plaintiff indicated that prior to her fall, she was partially sitting on the ledge of a half wall (which had no railing) on the second floor balcony by the door to the condominium (her one foot was "tippy toe" on the floor while the right foot was on a cooler) with a cell phone in her right hand as she spoke to a girlfriend on the phone. She stated that her left foot was hitting the side of the half wall inside the balcony and that her back was not leaning against anything. Plaintiff testified that while sitting on the ledge she felt nothing wrong with it, that it was not loose or wiggling, that she experienced no sensation of instability prior to falling from the half wall, and that she did not observe anything wrong with the wall prior to falling. Plaintiff stated that she had "no clue" about what caused her to lose her balance and that she was facing the staircase when she was on the ledge. This was the first time that she had sat on the ledge and plaintiff had never seen anyone else sitting on the ledge prior

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[1]Defendant John T. Senise testified that he owns the condominium known as 48 Vista Drive, Manorville, New York and that his son John T. Senise resides thereat. He indicated that his son is not known as "John T. Senise, Jr." However, during his examination before trial non-party witness, the son of defendant John T. Senise, stated that his name was John T. Senise, Jr. Therefore, for the purpose of clarity, non-party John T. Senise will be referred to herein as John T. Senise, Jr.

to the date of her accident. Plaintiff admitted that it did not occur to her that sitting on the ledge could be dangerous or that it would be possible to fall based upon the way she was sitting. She contends that she had nothing of an alcoholic nature to drink that day and that she had taken phenobarbital for a seizure disorder but that she has not had a seizure in many years. Finally, plaintiff conceded that she had told a nurse in the emergency room that "[she] had been doing [her] nails at some point before [she] fell." As a result of her fall from the balcony ledge, plaintiff claims to have sustained personal injuries for which she seeks to recover damages.

Defendant John Senise testified at his examination before trial that he owns the second floor condominium located at 48 Vista Drive, Manorville, New York. He indicated that his son, John T. Senise, Jr., lived in the unit on the date of plaintiff's accident and that from 2004, when he bought the condominium, until the present he had done no renovations on the outside of the property. Defendant John Senise averred that defendant Hampton Vista Condominiums did renovations to the outside of the units in about 2005 and that after they "re-did" the porch/balcony nothing was different as they only painted it and put new wood down on the floor. He contended that plaintiff told him and two others a couple of weeks after the incident, that "she was very foolish. She [was] very sorry that [the fall] happened. She was sitting on the balcony. She was on the phone. She was painting her nails. She was drinking [wine] and she fell."

The testimony of defendant Hampton Vistas Condominiums by Claudia Tracey, its property manager on the date of plaintiff's accident, revealed that exterior refacing for all 48 units in the complex took place in 2008. This consisted of removing old white cedar shakes and replacing them with vinyl siding, replacing stair treads, capping trim, replacing gutters, and replacing flooring on the landing areas (this is the "balcony or "porch" to which the other witnesses refer). Additionally, Ms. Tracey indicated that the board on top of the ledge on the landings was replaced with the "same" board, that plywood was replaced by "Aztec" board which had the color running through it and did not require painting. During her tenure Ms. Tracey never knew anyone to have fallen and she knew of no complaints regarding the landings after the renovations were complete.

Non-party witness John T. Senise, Jr. stated that he resided at the second floor condominium unit known as 48 Vista Drive, Manorville, New York on the date of plaintiff's accident. John T. Senise, Jr. claims that he and plaintiff began drinking wine during the early afternoon and that plaintiff consumed at least four glasses of wine prior to her fall from the balcony. He indicated that he was sleeping on the couch inside the condominium at the time of her fall but that prior to the fall "she was buzzed" and had "the giggles".

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

The owner or possessor of property has a duty to maintain his or her property "in a reasonably 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" (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976] [internal quotation marks omitted]). The scope of a landowner's duty varies with the foreseeability of the possible harm (*see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Kimen v False Alarm, Ltd.***, 69 AD3d 579, 893 NYS2d 158 [2d Dept 2010]). Irrespective of the absence of a statutory obligation, the owner and possessor of the property have a continuing common-law duty to maintain their premises so that it is safe from foreseeable harm (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Jacqueline S. v City of New York***, 81 NY2d 288, 598 NYS2d 160 [1993]; ***Kimen v False Alarm, Ltd.***, 69 AD3d 579, 893 NYS2d 158). In actions alleging premises liability, a plaintiff must establish that the defendant created the dangerous or defective condition alleged or that defendant had actual or constructive notice of the existence of such a condition for a sufficient length of time to discover and remedy it (*see* ***Rizos v Galini Seafood Rest.***, 89 AD3d 1004, 933 NYS2d 703 [2d Dept 2011]). The mere fact that an accident occurs does not mean that a defendant is liable unless the plaintiff can show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap (*see* ***Braithwaite v Equitable Life Assur. Soc. of U.S.***, 232 AD2d 352, 648 NYS2d 628 [2d Dept 1996]). And, the owner has no duty to warn of a dangerous condition that is open and obvious and can be readily observed by the reasonable use of one's senses (***Pomianowski v City of New York***, 67 AD3d 761, 888 NYS2d 608 [2d Dept 2009]; ***Hinchey v White Willow, LLC***, 42 AD3d 483, 839 NYS2d 230 [2d Dept 2007]; ***Testaverde v Lyman***, 17 AD3d 574, 793 NYS2d 182 [2d Dept 2005]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, *supra*; *see also* ***Earle v Channel Home Center Inc.***, 158 AD2d 507, 551 NYS2d 271 [2d Dept 1990]).

Here, defendants established, *prima facie*, their entitlement to judgment as a matter of law. No evidence has been put forth which shows that defendants created or had knowledge of a dangerous condition on the stairway as alleged in plaintiff's bills of particulars. Additionally, nothing in the submissions establishes that defendants had actual or constructive notice of a dangerous condition on the landing prior to her fall. Plaintiff has not shown that the alleged breach of duty by defendants (*i.e.* in creating a dangerous condition in that the railing was not in accordance with height requirements) was the primary cause of her accident. Additionally, plaintiff's own behavior in sitting on a second story ledge while speaking on the phone constitutes the proximate cause of the accident (*see* ***Pomianowski v City of New York***, *supra*).

In opposition to the motion, plaintiff submits an affidavit of a professional engineer which states in pertinent part he reviewed his site inspection report and that "[i]n my opinion, with a reasonable degree of engineering certainty, the accident and injuries sustained by [plaintiff] were caused by the negligence of the owner/management of the subject premises for providing a guard rail that was too low." The annexed site inspection report indicates that "[a]fter exiting from the front entrance door, [plaintiff] was caused to sustain serious injury when she fell over the rail on the entrance porch" and that the deck rail was 34

inches high and should have been 36 inches in height pursuant to New York State Building Code section R 312.1. Nowhere in the report or affidavit does the engineer mention the fact that plaintiff was sitting on the ledge of the deck rail. Instead, he states as "fact" in the report, despite there being no proof in the record, that plaintiff was exiting the premises when she fell over the railing. Thus, his opinions are conclusory, speculative, and unsupported by any evidentiary foundation and are given no probative force in opposition to defendant's summary judgment motion (*see* ***Buchholz v Trump 767 Fifth Ave., LLC***, 5 NY3d 1, 798 NYS2d 715 [2005]).

Accordingly, as plaintiff has failed to show that defendant created or had actual or constructive notice of a dangerous condition, and through the testimony of plaintiff, defendant has shown that plaintiff's mishap was caused by her own actions and was not proximately caused by any failure on the part of defendants, summary judgment dismissing the complaint and all cross claims is granted.

Dated: AUG. 22, 2013

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION