| **Amster v Kromer** |
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| 2015 NY Slip Op 32869(U) |
| November 18, 2015 |
| Supreme Court, Nassau County |
| Docket Number: 14293/13 |
| Judge: Thomas Feinman |
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# SHORT FORM ORDER

## SUPREME COURT - STATE OF NEW YORK
## COUNTY OF NASSAU

Present:

**Hon. Thomas Feinman**

Justice

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| JEFFREY AMSTER, | TRIAL/IAS, PART 8<br>NASSAU COUNTY |
| Plaintiff, | INDEX NO. 14293/13 |
| - against - | MOTION SUBMISSION<br>DATE: 10/1/15 |
| GARY KROMER and MONIQUE KROMER<br>also known as MONIQUE DAMINAY-KROMER, | MOTION SEQUENCE<br>NO. 4 |
| Defendants. | |

The following papers read on this motion:

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| Order to Show Cause Affidavits | X |
| Memorandum of Law in Support of Motion and Affidavits | X |
| Affirmation in Opposition | X |
| Reply Affirmation | X |

The defendants move for an order pursuant to CPLR §3212 dismissing plaintiff's complaint, or in the alternative, an order pursuant to CPLR §3126 dismissing plaintiff's complaint for failure to provide court ordered discovery, compel the plaintiff to provide the demanded authorizations and strike the above-captioned action from the trial calendar. The defendants submit a Memorandum of Law in support of their motion. The plaintiff submits opposition. The defendants submit a reply affirmation.

BACKGROUND

The plaintiff initiated this action to recover for personal injuries sustained on August 28, 2013 as a result of a slip and fall on the exterior steps leading to the defendants' premises at 286 Euston Road South, Garden City, New York. The plaintiff leased the premises, a single family home with a basement, two floors, and six bedrooms, from the defendants, owners of the subject property.

The plaintiff alleged, *inter alia*, that the exterior stairway riser height difference of 1.25 inches was a defective dangerous condition, that the handrail stopped before the end of the stairwell without warning, was improperly surfaced, the defendants allowed the disintegration of the banister to be corroded over an extended period of time, allowed the railing to be improper in safety surfacing. The plaintiff claims that the defendants had actual and constructive notice of the dangerous and defective condition, created the dangerous and defective condition, failed to maintain the premises in a safe condition and permitted the dangerous and unsafe condition which the defendant knew, or should have known, would cause injury, and were negligent in failing to inspect, or properly inspect the subject area.

APPLICABLE LAW

It is well established that the proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851; *Zuckerman v. City of New York*, 49 NY2d 557; *Sillman v. Twentieth Century - Fox Film Corp.*, 3 NY2d 395). The proponent of a motion for summary judgment does not satisfy this burden by merely pointing to evidentiary gaps in the plaintiff's proof. (*Nationwide Prop. Cas. v. Nestor*, 6 AD3d 409). Only if the burden is met does it shift to the opposing party to proffer evidence in admissible form raising a triable issue of fact. (*Alvarez, supra; Zuckerman, supra; Friends of Animals v. Associates Fur Mfrs.*, 46 NY2d 1065; *Autiello v. Cummins*, 66 AD3d 1072; and *Horton v. Warden*, 32 AD3d 570). Should the proponent of a motion for summary judgment fail to meet its initial burden of demonstrating entitlement to summary judgment as a matter of law, (*Alvarez, supra*), the burden does not shift to the opposing party to establish the existence of a material fact which would require a trial, (*Greenberg v. Coronet Prop. Co.*, 167 AD2d 291), and as so, the court would not need to address the sufficiency of the opposition papers. (*Winegrad, supra, Kouyate v. Chowdhury*, 76 AD3d 547; *Perez v. Johnson*, 72 AD3d 777; *Safer v. Sibersweig*, 70 AD3d 921; *Geba v. Obermeyer*, 38 AD3d 597; *Shacker v. County of Orange*, 33 AD3d 903).

"[T]he *prima facie* showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings." (*Miller v. Village of East Hampton*, 98 AD3d 1007, citing *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210). As plaintiff alleged that the defendant affirmatively created the dangerous condition, and the defendant is required to eliminate all triable issues of fact, although the defendant established that it did not receive prior written notice of the alleged dangerous condition, as the defendant failed to eliminate all triable issues of fact as to whether it affirmatively created the alleged condition, the defendant's motion was properly denied without regard to the sufficiency of plaintiff's opposition papers. (*Miller, supra*).

On a motion for summary judgment to dismiss the complaint upon lack of notice, the defendant is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law. (*Goldman v. Waldbaum, Inc.*, 248 AD2d 436). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. (*Gordon v. American Museum of Natural History*, 67 NY2d 836).

In order to demonstrate entitlement to summary judgment the defendants must make a *prima facie* showing that the defendants did not create the condition that allegedly caused the plaintiff to fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it. (*Gregg v. Key Food Supermarket*, 50 AD3d 1093; citing *Musso v. Macray Movers, Inc.*, 33 AD3d 594; *Yioves v. TJ Maxx, Inc.*, 29 AD3d 572, and *Ulu v. ITT Sheratan Corp.*, 27 AD3d 554). "This burden cannot be satisfied merely by pointing to gaps in plaintiff's case." (*Id.*, citing *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824; *Cox v. Huntington Quadrangle No. 1 Co.*, 35 AD3d 523; and *Pearson v. Parkside Ltd. Liab. Co.*, 27 AD3d 539).

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition, that duty is premised on the landowner's exercise of control over the property, as the person in possession and control is best able to identify and prevent harm to others." (*Gronski v. County of Monroe*, 18 NY3d 374). "A landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property, and control for this purpose is both a question of law and fact." (*Id.*) Generally, "a landlord who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property." (*Yehia v. Marphil Realty Corp.*, 130 AD3d 615, citing *Gronski, supra*, and *Alnashmi v. Certified Analytical Group, Inc.*, 89 AD3d 10). "However, an out-of-possession landlord may be liable for injuries occurring on the premises if 'it has retained control of the premises, is contractually obligated to perform maintenance and repairs, or is obligated by statute to perform such maintenance and repairs'." (*Id.*, citing *Denemark v. 2857 W. 8th St. Assoc.*, 111 AD3d 660; *Rivera v. Nelson Realty, LLC*, 7 NY3d 530, and *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559).

## DISCUSSION

The defendants submit that they did not cause or create a dangerous condition, and did not have any actual or constructive notice of the condition. The defendants testified that they did not receive any complaints about a defective condition with respect to the exterior stairway or stairs prior to plaintiff's fall. Additionally, the defendants submit that they did not perform any maintenance to the front stoop and steps, front landing or to the banister or metal railing along the side of the front landing. Further, the defendants claim that they did not notice that there were any defects in the railings on the right side, or that the banister separated from the frame.

The plaintiff claims that, essentially, while he was attempting to lock the exterior inner door, he stepped back onto the landing with both feet, stepped backward to open the screen door, and as there was no landing for him to step on he fell backwards, grabbed onto the railing which separated like a "V" from the bottom spindle, causing him to twist, and eventually land on his right side. The plaintiff, by way of his pleadings, alleged that the stairway was allowed to remain in a defective dangerous condition.

Although the defendants provide that they had no notice of the alleged dangerous defective condition of the stairwell and banister, and submit they never noticed such conditions, the defendants have not established that they inspected the subject exterior steps, landing, or handrails at any time prior to plaintiff's fall, nor that they properly maintained the aforesaid surfaces. (*Cox v. Huntington Quadrangle No. 1 Company*, 35 AD3d 523; *Gloria v. MGM Emerald Enters*, 298 AD2d 355). The plaintiff's pleadings include allegations that the stairway riser height was defective, improperly surfaced, that the banister was corroded and unsafe, that the defendants failed to properly inspect or maintain the exterior stairway and banister. The plaintiff exchanged, pursuant to CPLR §3101(d), its expert witness disclosure, prior to defendants' motion herein, disclosing that plaintiff intends to call Stanley Fein, PE, as an expert witness to testify that the injuries sustained by the plaintiff were a direct result of the negligence of the defendant owners of the subject premises for providing and maintaining an exterior stairway that was dangerous and hazardous. The plaintiff's expert disclosure provides, *inter alia*, that the steps exceeded the requisite height, were improperly built with an improper step geometry causing an imbalance, that the handrail stopped before the end of the stairway giving the impression that the stairway ends before it actually does. The disclosure also provides Mr. Fein's review of photographs of the exterior banister clearly indicates that the corroded condition existed over a period of time.

Here, the defendants have not met their *prima facie* burden of establishing that they have eliminated all issues of fact as to whether they did not have notice, or constructive notice, of the alleged defective condition which allegedly existed for a sufficient time to permit the defendants to remedy it. The defendants never address whether they inspected the exterior stairway or the banister, only that they did not have "notice" of it. The plaintiff's expert submits that the condition of corrosion on the banister indicates that it existed over a period of time. A plaintiff's expert's opinion is based on facts upon which his opinion is established or "fairly inferable" from the evidence. (*Tarlowe v. Metropolitan Ski Slopes*, 28 NY2d 410; *Cross v. Board of Education*, 49 AD2d 67). A plaintiff's expert's determination based on the stained concrete and ceiling ties, as well as the deteriorated basin, is within the expertise of a physical engineer. (*Perez v. Metropolitan Museum of Art*, 301 AD2d 481). A jury could infer "irregularity with, depth and appearance of a defect apparent from a concrete surface exhibited photographs" and that "the condition had to have come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care". (*Taylor v. New York City Transit Authority*, 48 NY2d 903). Whether the defendants, in the exercise of reasonable care, should have discovered and corrected the condition is a question of fact to be resolved at trial. As already provided, the defendants have not established that they properly maintained the exterior stairwell and banister.

As to defendants' submission that they are not obligated to make repairs as out-of-possession landlords, the defendant, Monique Daminay-Kromer, testified that the defendants were responsible for the structure, including the roof, steps, brick exterior walls, steps and handrails on the exterior steps. The defendant, Gary Kromer, testified that he understood, pursuant to the terms of the lease, that Mr. Kromer would be responsible for exterior maintenance.

With respect to defendant's outstanding discovery demands, the defendants are entitled to the requested discovery. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by a party or a person who possesses a cause of action. (CPLR §3101(a)(1)(2)). The Court of Appeals held that the statute providing that there shall be full disclosure of all evidence material and necessary in prosecution or defense of an action, regardless of the burden of proof, requires disclosure, upon request, "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Allen v. Crowell-Collier Publishing Company*, 288 NYS2d 449). The purpose of disclosure proceedings is to advance function of trial to ascertain truth and accelerate disposition of suits, and the statute providing for disclosure should be construed broadly to effectuate this purpose (*Id*).

Under the statute requiring full disclosure of all evidence material and necessary in prosecution of an action, the word "evidence" is not equivalent to that evidence which might be admissible on trial of the action, but means evidence required in preparation for trial. (*West v. Aetna*, 266 NYS2d 600). If there is some doubt of admissibility on trial of action, Special Term should permit discovery of the evidence and leave the ultimate decision of admissibility to the trial court. (*Id*). The information sought need not qualify as evidence admissible at the trial of an action, but only to lead to such evidence. (*Id*). Disclosure is required as to all relevant information calculated to lead to relevant evidence. (*Siegel New York Practice* §344). When a plaintiff had placed their physical condition in issue, all questions pertaining to her present and past medical history are discoverable. (*Rubino v. Albany Medical Center Hospital*, 781 NYS2d 622).

## CONCLUSION

Upon the foregoing, it is hereby,

ORDERED that the defendants' motion for summary judgment pursuant to CPLR §3212 is denied, and it is hereby further

ORDERED that the defendants' motion for dismissal pursuant to CPLR §3126 for failure to provide discovery and strike the above-captioned action from the trial calendar is denied, and it is hereby further

ORDERED that the plaintiff is hereby directed to appear for an Neurological Independent Medical Examination on January 16, 2016, and it is further

ORDERED that counsel are advised that they may not adjourn the aforesaid ordered Neurological Independent Medical Examination except by further order of this Court, but may advance the date if it serves the convenience of all parties, and it is further

ORDERED that the plaintiff shall provide the defendants with the following items within twenty (20) days of service of this order with notice of entry:

a) HIPAA compliant authorizations to obtain medical records related to plaintiff's prior loss from 1989 from the following:

- St. Vincent's Medical Center;
- Dr. Jeffrey Kaplan/South Island Orthopedic Group;
- Dr. Levine/Overbee Hollis Medical;
- Dr. Richard Reiser.

b) HIPAA compliant authorization to obtain medical records related to plaintiff's prior loss from 1994 from the following:

- Peninsula Hospital;
- Dr. Kaplan;
- Facilities where plaintiff underwent diagnostic testing.

c) HIPAA compliant authorization to obtain complete medical records, including pre and post-loss records from:

- Dr. Ackerman;
- Dr. Chu;
- Dr. Levine;
- Dr. William Facibene;
- Lenox Hill Hospital;
- Dr. Dan Brietstein/Pro Health Care Associates;
- Dr. Jeff Silber;
- Dr. Rohit Verma;
- Zwanger Pesiri - including all diagnostic films;

- Hospital where plaintiff previously underwent lumbar fusion and any doctors who treated him in connection with this prior injury.
- Authorization to obtain records related to plaintiff's application for Hurricane Sandy Funds.
- Copies of photographs taken by plaintiff which allegedly depict the condition of the banister as a result of this accident, and it is hereby further

ORDERED that should the plaintiff fail to appear for the above directed Neurological Independent Medical Examination, the plaintiff shall be precluded from testifying as to any neurological injuries, and it is further

ORDERED that should the plaintiff fail to comply with the above directives, the plaintiff shall be precluded from offering any testimony or evidence at the trial of this action with regard to any item of discovery not provided in accordance with this Order.

ENTER:

J.S.C.

Dated: November 18, 2015

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE