SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 08

Index No.: **300435/2011**
Motion Calendar No. 9
Motion Date: 08/07/17

FRANCISCO MOLINA,

Plaintiff(s),

-against-

SAMUEL J. DIMON and CHERYL DIMON,

Defendant(s).

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this Motion Summary Judgment.

Papers	Numbered
Notice of Motion and Exhibits (A through E) in Support.....	**1**
Affirmation in Opposition and Exhibits.....	**2**
Reply Affirmation.....	**3**

Upon the foregoing papers, and after oral argument, the Decision/Order on this Motion is as follows:

Defendants Samuel J. Dimon and Cheryl Dimon, move for an order granting summary judgment, pursuant to CPLR § 3212, dismissing the complaint of plaintiff Francisco Molina.

Background

This action arises out of a slip and fall accident that occurred on September 30, 2010, when plaintiff went to the defendants' home at 102 Highland Avenue, Rye, New York to deliver a package. As plaintiff was leaving the defendants' porch, after knocking and hearing no one, he slipped and fell on the defendants' step. In his verified bill of particulars, plaintiff claims he was caused to slip on mildew on a wooden back porch, causing him to fall on the stairs, resulting in bodily injury. In a supplemental bill of particulars, plaintiff alleges that defendants were negligent, *inter alia*, in venting moisture from the interior sources of their premises unto the porch and permitting mold growth and moss conditions to exist in an area of excessive shade. Plaintiff also allege Building Code violations in that the step risers were not in conformity with applicable law.

Plaintiff's Deposition

At the time of the incident plaintiff was a Federal Express employee and had gone to the defendants' premises to deliver a package. Plaintiff testified that he walked up to the front door and saw a sign requesting that deliveries be made around the back; that he went around the left side of the house and saw a porch made of dark wood, with approximately four steps leading up to a small landing; that the steps and landing were dry (see page 17); that he knocked on the side door and receiving no answer, he prepared to leave; that as he stepped down with his right foot unto the first step, his foot slipped off of the first step, causing him to fall (see pages 18-19). According to plaintiff, there was a railing present on his left side to hold on to as he descended the steps but he did not use the railing because "the conditions, they looked fine to me. I wouldn't think that there was anything wrong with this particular step. As I was coming down everything seemed to be safe" (see page 21); when he first went up the stairs, he did not notice anything slippery about the steps and while on the landing he did not notice anything slippery nor was there any dirt or debris on the landing (see page 22). After falling, he picked himself up and looked at the step and did not observe anything , other than the step was dark (see page 24); that he then ran his finger over the step he had slipped on and something slippery came off onto his finger (see page 25); that he did not know what it was and that as far as he knows, that one spot on the first step was the only slippery area (see page 26).

Deposition of Samuel Dixon

Mr. Dixon and his wife are owners of the subject premises, a two story brick colonial, which they purchased in 1996 and have resided there up until the time of the accident. He first became aware of the incident when someone from Federal Express came to the house sometime after and asked to take photographs of the steps where plaintiff claimed he fell (see page 31). Mr. Dixon testified that they would use this door/stairway infrequently, when grilling or to get access to the bird feeder (see pages 27-28); that neither he nor anyone else ever slipped on that stairway; that he had never done any work to the steps, which were there when they purchased the house (see pages 28-29); and that after learning of the incident, he went and inspected the steps and did not see anything unusual or slippery (see pages 33-34). Mr. Dixon testified that he has never been told that there was mold on his side porch, nor does he ever recall seeing green moss on the side

porch (see page 36).

Defendant's Contentions

There is no evidence to support plaintiff's claim that he was caused to slip and fall on the staircase due to the presence of mold or mildew. Since plaintiff cannot offer proof as to what actually caused his accident, he instead relies on conjecture and surmise. Such speculation cannot establish a prima facie case in negligence against the defendant. Not only is there a lack of notice of a dangerous condition, plaintiff cannot even show that a dangerous condition existed on the steps to the side porch. No evidence has been presented which would indicate that defendants were in any way negligent or had notice of any defective condition relating to the steps. Without such evidence, plaintiff's claim against defendants must fail. The only evidence that there was anything wrong with the steps, is the plaintiff's testimony that after falling, he ran his finger over the step that he claimed to have slipped on and that something slippery came off on his finger. There is no evidence as to what this alleged slippery substance was; how it came to be on the step; when it was first on the step and whether defendants had a reasonable opportunity to be aware of said alleged condition and had sufficient time to remedy same.

Plaintiffs Opposition

Defendants have not met their burden of proof as they have failed to prove that there was no dangerous condition on their wooden steps at the time plaintiff fell or that they did not create the dangerous condition. Defendants have the burden of establishing when the area in question was last inspected. Defendants have not done so in this case. There is also no evidence submitted regarding the conditions of the premises on the day of the accident or the cleaning and/or inspection of the area in question.

Plaintiff relies on the affidavit of its expert Joseph Laquatra, Ph.D, who after reviewing the deposition transcripts and photographs exchanged between the parties, opined that mold spores and algae were permitted to grow at the accident location where there existed a dryer vent and fireplace exhaust; and that due to the lack of maintenance, along with it being in a shady area exposed to sources of moisture, the mold would thrive and create a slippery surface that would cause a person to fall. According to Dr. Laquatra, the presence of algae and mold spores is in

violation of New York State Property Maintenance Code §304.

Plaintiff also contends that the height of the step risers and the depth of the step threads varied and were inconsistent, which is a violation of the Building Code. In this regard plaintiff submits the affidavits of Elaine Sforza and Richard Robbin, as well as the report of Richard Braunstein. Plaintiff argues that despite being aware of photographic evidence and expert proof served during discovery, defendants have failed to address any of these issues. This evidence itself raises questions of fact as to the defendants' negligence under the circumstances and once again shows that defendants failed to meet their initial burden.

Defendant's Reply

Contrary to plaintiff's counsel's assertions, plaintiff was repeatedly asked at his deposition what caused him to fall. On each occasion, plaintiff could not identify what caused him to fall. Plaintiff, likewise cannot show that a dangerous condition existed. The failure of plaintiff's expert to have ever visited the site is grounds for rejecting his opinion as speculative and conclusory. Plaintiff, who was there at the time of the accident, never claimed to have seen any mold or algae on the step where he claimed to have slipped.

Also, prior to plaintiff's alleged accident, defendants had never received any complaints about the makeup or the layout of the steps on the porch. Furthermore, as the accident happened as plaintiff was stepping from the landing to the first step, the uniformity of the height of the step risers and the depth of the remaining stairs is irrelevant as to how the accident occurred and should be disregarded. The information in the Braunstein report based upon an inspection of 4/6/12, over one and a half years after the alleged accident, must also be rejected as having no relevance to the conditions that existed on the date of this accident.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient

"evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, supra; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman,* supra at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, supra at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief' (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], affd, 62 NY2d 686 [1984]).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; see *Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, lv. denied 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, 837-38, 501 NYS2d 646, 647 (1986)). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition

was ongoing and recurring in the area of the accident, and such condition was left unaddressed (see also *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]. By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; see also Gordon v American Museum of Natural History, 67 NY2d 836, supra)

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiffs injury (see *Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.,* 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], lv dismissed 97 NY2d 677, 738 NYS2d 292 [2001]).

Here, defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff did not know what had caused him to fall (see *Hunt v Meyers*, 63 A.D.3d 685, 879 N.Y.S.2d 725; *Slattery v. O'Shea*, 46 A.D.3d 669, 847 N.Y.S.2d 595 [plaintiff, who was walking in the defendant's parking lot, and who allegedly slipped on ice and fell, was unable to identify the cause of her accident]; *Karwowski v New York City Tr. Auth.*, 44 A.D.3d 826, 844 N.Y.S.2d 96 [The plaintiff allegedly was injured when he fell while descending a stairway in the Nassau Avenue subway station in Brooklyn. At his statutory hearing pursuant to General Municipal Law § 50-h, and at his examination before trial, the plaintiff testified that he did not know what caused him to fall, although he noted that there was snow and rain falling at the time of the accident, and that the subway steps were wet.]).

As the Court of Appeals has opined, absent notice of a dangerous condition, a case should

not be submitted to the jury and summary judgment should be granted. See *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-38, 501 NYS2d 646, 647 (1986).

The Court agrees with defendants that with respect to plaintiff's argument that defendants violated the Building Code, based upon the expert's description of an area conducive to the growth of slippery moist mold/algae, this condition should apply equally to the entire wooden structure, including the steps, the landing and the handrail. Yet plaintiff's testimony is that the wood was dark, that it was dry; that there was no dirt or debris on the steps and that he did not think there was anything wrong with the steps. Other than the slippery substance he felt on the step where his foot had slipped, he did not see or feel anything on the steps.

Clearly, plaintiff's testimony is at variance with the expert's report and thus his opinion must be rejected as conclusory and speculative, as it is based on alleged conditions that are contrary to the conditions plaintiff testified existed at the time of the accident.

In the instant case, there is a lack of evidence regarding what is the dangerous condition. Plaintiff correctly points out that the defendants have the burden of showing when and how the condition in question was last maintained in order to obtain summary judgment. But, in this case, as the cause of plaintiffs alleged accident is unknown, even to plaintiff; defendants would be at a loss to know what to show.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for an order granting summary judgment, pursuant to CPLR § 3212 dismissing the complaint of plaintiff Francisco Molina is granted and the instant Complaint is dismissed. The Clerk of the Court is directed to enter judgment accordingly. And it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff

This constitutes the decision and Order of the Court.

MAY 0 8 2018

DATE

HON. DONALD MILES, J.S.C.