| **Breslin v Van De Berghe** |
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| 2018 NY Slip Op 31930(U) |
| July 27, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 29610/12 |
| Judge: Jr., Paul J. Baisley |
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[* 1]

Short Form Order

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

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----------------------------------------------------------X
JILL BRESLIN and ALEX BRESLIN,

Plaintiffs,

-against-

ADAM VAN DE BERGHE and KATHERINE VAN DE BERGHE and ANDROMEDA LANDSCAPING,

Defendants.
-----------------------------------------------------------X
ADAM VAN DE BERGE and KATHERINE VAN DE BERGHE,

Third-Party Plaintiffs,

-against-

ANDROMEDA LANDSCAPING,

Third-Party Defendants.
-----------------------------------------------------------X

INDEX NO.: 29610/12
CALENDAR NO.: 00532/2017OT
MOTION DATE: 10/26/17
MOTION SEQ. NO.: 006 MG
MOTION SEQ. NO.: 007 MG; CASEDISP

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Upon the following papers numbered 1 to 47 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-14; 15-32 (including Memorandum of Law); Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33-39; 40-41; Replying Affidavits and supporting papers 42-43; 44-45; 46-47; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the following motions are consolidated herein solely for purposes of this determination; and it is further

***ORDERED*** that the motion (motion sequence number 006) of defendants Adam Van De Berghe and Katherine Van De Berghe for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint and any cross claims asserted against them, is granted; and it is further

***ORDERED*** that the motion (motion sequence number 007) of defendant/third-party

defendant Andromeda Landscaping for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint and any cross claims asserted against it, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Jill Breslin on July 4, 2012 when she tripped and fell on a step at residential premises known as 67 Wichard Boulevard, Commack, New York, owned by defendants Adam Van De Berghe and Katherine Van De Berghe (the "Van De Berghes"). The installation of the step was performed by defendant/third-party defendant Andromeda Landscaping ("Andromeda"). Plaintiff's spouse, Alex Breslin, seeks damages for the loss of services, society and companionship. By her bill of particulars, plaintiff alleges that defendants were negligent, *inter alia*, in allowing a dangerous or defective condition to exist on their premises. A third-party action against Andromeda Landscaping seeks damages for breach of contract, contribution and indemnification.

The Van De Berghes now move for summary judgment dismissing the complaint, alleging that they were not negligent and that there are no triable issues of fact as to their liability for the accident. The Van De Berghes contend that plaintiff is unable to identify what caused her to trip and fall, and that they had no actual or constructive notice of any alleged defective condition of the step. In support, the Van De Berghes submit, *inter alia*, copies of the pleadings, the bill of particulars and the transcripts of the parties' deposition testimony. In opposition, plaintiffs argue that the defendants failed to establish a *prima facie* case of entitlement to summary judgment.

Andromeda also moves for summary judgment in its favor. In support of its motion, Andromeda submits, *inter alia*, copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony and photographs of the step. Andromeda contends that it was not negligent and that it owed no duty to plaintiff. As to the Van De Berghes' motion, Andromeda opposes its claims for indemnification.

At her deposition, plaintiff testified that on the day of the accident she, her spouse and son had attended a barbeque party at the Van De Berghe residence. Plaintiff testified that as she exited the rear door of the Van De Berghe residence carrying a tray of condiments, she stepped out of the door with her right foot onto the step and fell. She described the rear entrance as having an interior door, a glass storm door, and a step that leads to the patio. Plaintiff stated that approximately ten minutes prior to the accident, she had ascended the same step and opened the rear glass door to assist Katherine Van De Berghe with the set-up for the party. Plaintiff testified that when she exited the house, the glass door was held open for her by Joseph Ruffino, a guest at the party. Plaintiff further testified that as she descended onto the step she was looking forward and her view of the subject step was unobstructed by the tray. She testified that her "ankle rolled" and she fell forward onto the step and the patio. Plaintiff testified that the photographs offered at her deposition accurately depicted the step which existed on the day of her accident. She stated that the step was not very high from the patio, her feet were dry and that she did not recall any glare from the sun or shadow caused by the roof prior to her accident.

At his deposition, Alex Breslin testified that on the day of the accident he was at the Van De Berghes' barbeque party, and that he did not observe plaintiff's accident. He testified that he heard plaintiff scream and observed her lying on the ground. He stated that the plaintiff did not inform him of the cause of her accident. He testified that he never previously observed anyone fall and was not aware of any incidents in the subject area prior to plaintiff's accident.

At a deposition, Katherine Van De Berghe testified that on the day of the incident plaintiffs were guests for a barbeque party at her premises. Katherine testified that while she was inside the kitchen of the premises she observed plaintiff carrying a tray outside of the rear door, heard plaintiff "yelling," and that she observed plaintiff on the ground. She described the rear of the house as having an interior door, storm door with glass and a step that leads to the patio. Ms. Van De Berghe testified that she did not observe plaintiff's accident, and that Ruffino informed her that plaintiff's foot "slipped off the edge of the step" as plaintiff exited the rear door of the premises. Ms. Van De Berghe testified that she did not observe plaintiff having any difficulty walking and that plaintiff did not complain about the step or the door prior to her accident. Ms. Van De Berghe testified that the photographs offered at plaintiff's deposition accurately depicted the door, step and the patio on the day of the accident. Ms. Van De Berghe testified that approximately three years prior to plaintiff's accident, Andromeda installed a patio and a step from the rear door, and that one to two months later, the step was extended with an additional row of bricks at the rear door of the premises. Ms. Van De Berghe further testified that the same row of the step was replaced with a different paver style and color by Curb Appeal Masonry of L.I., Inc., approximately one year later. Ms. Van De Berghe testified that she did not have any complaints about the step or the rear door, and that no one had fallen exiting the rear door in the subject area prior to plaintiff's accident.

At a deposition, Adam Van De Berghe testified that on the day of the incident he did not observe plaintiff's accident, and that Ruffino informed him that plaintiff missed the step and fell. He testified that the photographs offered at plaintiff's deposition accurately depicted the step and the patio on that day. Mr. Van De Berghe testified that he did not recall plaintiff or anyone express complaints about the step or patio, and that no person fell from the step prior to plaintiff. Mr. Van De Berghe stated that he had a contract with Andromeda to install, among other things, a step from the rear door leading to the patio of the premises prior to plaintiff's accident.

At his deposition, Kevin Papile testified on behalf of Andromeda that Andromeda had a contract with the Van De Berghes, and that he installed, among other things, a patio and a step at their premises prior to the incident. He testified that the step and patio were constructed with pavers, and that the step was installed by the rear door of the premises. He stated that he did not recall the Van De Berghes making any complaints regarding the steps or patio, and that he was unaware of any accidents allegedly caused by the steps prior to plaintiff's incident.

The proponent of a motion for summary judgment must make a *prima facie* showing of

entitlement to judgment as matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Upon the proponent establishing a *prima facie* showing of entitlement to a summary judgment, the burden then shifts to the opponent to proffer evidence in admissible form sufficient to establish a material issue of fact requiring a trial of the action; however, mere conclusions and unsubstantiated allegations are insufficient (*Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

A property owner has a duty to maintain his or her property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]), and has no duty to warn or protect against an open or obvious condition on property which, as a matter of law is not inherently dangerous (*Ramos v Cooper Investors, Inc.*, 49 AD3d 623, 854 NYS2d 149 [2d Dept 2008]). "To constitute constructive notice, the dangerous condition 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" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; *Lococo v Mater Cristi Catholic High Sch.*, 142 AD3d 590, 37 NYS3d 134 [2d Dept 2016]). Generally, whether a defective condition exists on property depends on the particular facts and circumstances of each case and is a question of fact for the jury to decide (*Shmidt v JPMorgan Chase & Co.*, 112 AD3d 811, 977 NYS2d 349 [2d Dept 2013]; *Rogers v 575 Broadway Assoc., L.P.*, 92 AD3d 857, 939 NYS2d 517 [2d Dept 2012]).

In a trip and fall negligence case, a plaintiff must demonstrate that the defendant either created the condition that caused the accident or had actual or constructive notice of the condition (*see Rivera v 916 Peekskill Main Realty, Inc.*, 147 AD3d 802, 46 NYS3d 201 [2d Dept 2017]; *Rizos v Galini Seafood Rest.*, 89 AD3d 1004, 933 NYS2d 703 [2d Dept 2011]; *Crawford v AMF Bowling Ctrs., Inc.*, 18 AD3d 798, 796 NYS2d 687 [2d Dept 2005]). In addition to notice, the plaintiff must also demonstrate that the alleged dangerous condition was the proximate cause of his or her injury (*see Gordon v American Museum Natural History*, *supra*; *Califano v Maple Lanes*, 91 AD3d 896, 938 NYS2d 140 [2d Dept 2012]; *Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]). Furthermore, the plaintiff must prove it was "more likely" or "more reasonable" that his or her injury was caused by defendant's negligence than by some other agency (*see Gayle v City of New York*, 92 NY2d 936, 680 NY2d 900 [1998]). Moreover, in a trip and fall action, a plaintiff's inability to identify the cause of his or her fall is fatal to the action, as any finding that the defendant's negligence proximately caused the plaintiff's injuries would be based on speculation (*see Smith v Jesadan Meat Corp.*, 120 AD3d 1332, 991 NYS2d 805 [2d Dept 2014]; *Rivera v 916 Peekskill Main Realty, Inc.*, *supra*; *Morgan v Windham Realty, LLC*, 68 AD3d 828, 890 NYS2d 621 [2d Dept 2009]; *Louman v Town of Greenburgh*, 60 AD3d 915, 876 NYS2d 112 [2d Dept 2009]).

Here, the Van De Berghes established their *prima facie* entitlement to summary judgment with evidence demonstrating that plaintiff was unable to identify what caused her to fall and that they did not create or have notice of any alleged defective condition of the step (*see Gani v Avenue Rd Sepharic Congregation*, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]; *Dennis v Lakhani*, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]; *Rizos v Galini Seafood Rest., supra*; *Manning v 6638 18th Ave., Realty Corp*, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]). Plaintiff testified that when she exited the rear door she was looking forward, her view of the subject step was unobstructed, her "ankle rolled" and she fell.

Plaintiffs' submissions in opposition to the motions are insufficient to raise a triable issue of fact as to defendants' negligence (*see Hoovis v Grand City 99 Cents Store, Inc.*, 146 AD3d 866, 45 NYS3d 524 [2d Dept 2017]; *Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 995 NYS2d 747 [2d Dept 2014]; *Sama v Sama*, 92 AD3d 862, 939 NYS2d 113 [2d Dept 2012]). Plaintiffs' submissions in opposition include, *inter alia*, the affidavits of nonparty witnesses Ben Greenberg, Joseph Ruffino, the affidavit of Nicholas Bellizzi, a consulting engineer, and photographs of the step.

In his affidavit, Ben Greenberg stated that on the day of the accident, he was sitting in the Van De Berghes' backyard at the bar, and that he had a clear and unobstructed view of the subject area where plaintiff fell. According to him, the step is approximately six inches high, and was clean and free of debris on that day. He stated that when plaintiff exited the rear door of the premises, she took a step, tripped and fell. He stated that it appeared that her fall was a result of the rear door swinging out farther than the step, and that she did not realize that the landing was short in size. He stated that he never previously was inside or in the backyard of the Van De Berghe's premises prior to plaintiff's incident.

In his affidavit, Joseph Ruffino stated that he was a guest at the defendant's premises for a barbeque party, and that he was standing in the subject area prior to plaintiff's accident. Ruffino stated that plaintiff stepped out completely onto the landing, and that when she stepped from the landing to the patio, her right foot hit the edge of the step, and that she fell onto the ground. According to Ruffino he stated that the landing appeared to be small, and that the "step gives the appearance that you are already on the patio."

In his affidavit, Nicholas Bellizzi, a professional engineer, states that he conducted a site inspection of the step and patio and that he observed a raised rectangular shaped platform constructed of brick pavers at the base of the rear door of Van De Berghe's premises. He avers that the same color pavers were used on the step and patio, and that there was no color contrast between the step and patio. Bellizzi opines that the surface of the platform "camouflaged" and "concealed" the view of the patio and "blended" when exiting the rear door of the premises. He opines with a reasonable degree of certainty that the step and patio area created an "unidentifiable and indistinguishable" step down and an "optical illusion" of the height differential between the step and patio. He avers that the step down was camouflaged, concealed from view, and that it

caused plaintiff to experience an "optical and spatial confusion" that significantly contributed to her accident. He also avers that the step violates the American Society for Testing and Materials Standard for Safe Walking Surfaces and New York State Maintenance Code.

Contrary to plaintiff's contentions, the expert witness's affidavit did not establish that he possesses the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or his opinion rendered is reliable (*see O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]). Bellizzi states in his affidavit that he is a professional engineer but his credentials do not indicate whether he has knowledge or an understanding of steps. The Court notes that plaintiff's opposition papers did not include Bellizzi's curriculum vitae. Even if his affidavit were considered, it is insufficient to meet plaintiffs' burden as Bellizzi improperly relied on evidence not in the record when making his findings (*see Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1 [1959]; *Wright v New York City Hous. Auth.*, 208 AD2d 327, 624 NYS2d 144 [2d Dept 1995]). There was no testimony by plaintiff that she fell due to an "optical illusion" between the steps and the patio. Opinion evidence must be based on facts in the record or personally known to the witness (*Casssano v Hagstrom, supra*). Bellizzi's vague, speculative conclusions that the step and patio constructed in the same color created an "unidentifiable and indistinguishable "optical illusion" and "spatial confusion," that "would" exist when someone exited the premises, do not raise a triable issue of fact as to whether defendants breached a duty to plaintiffs (*see Rivera v J. Nazzaro Partnership, L.P., supra*; *Camenzuli v YMCA of Long Is., Inc.*, 118 AD3d 736, 987 NYS2d 209 [2d Dept 2014]. While Bellizzi also asserts that the height differential in the step and patio area violates certain provisions of the Building Code, it is noted that plaintiff's bill of particulars did not allege any specific building code violations (*Wenzel v 16302 Jamaica Avenue, LLC*, 115 AD3d 852, 982 NYS2d 489 [2d Dept 2014]; *Miki v 335 Madison Ave., LLC*, 93 AD3d 407, 940 NYS2d 38 [1st Dept 2011]); *lv denied* 19 NY3d 814, 955 NYS2d 552 [2012]). In any event, plaintiff failed to show that the various Building Code provisions allegedly violated by defendants are applicable to this action, and the alleged violations of the American Society for Testing and Materials Standard and Property Maintenance Code of the State of New York, which set forth standards, not mandatory requirements, are insufficient to raise a triable issue.

As to Andromeda Landscaping's motion for summary judgment, a right to indemnification arises out of a contract, express or implied, between the indemnitor and the indemnitee, and can be sustained only if the indemnitor breached some duty owed to the indemnitee (*see Racquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997]; *Charles v William Hird & Co., Inc.*, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). In contrast, to establish a claim for contribution, it must be shown that two or more tortfeasors share responsibility of an injury in violation of duties they respectively owed to the injured person (*Smith v Sapienza*, 52 NY2d 82, 87, 436 NYS2d 236 [1981]), or that a duty of care independent of contractual obligations was owed (*see Miranti v Brightwaters Racquet & Spa, Inc.*, 246 AD2d 518, 666 NYS2d 946 [2d Dept 1998]; *Phillips v Young Mens's Christian Assn.*, 215 AD2d 825, 625

NYS2d 752 [3d Dept 1995]). Here, Andromeda established a *prima facie* case that it owed no duty of care to plaintiff (*see Espinal v Melville Snow Constrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Barone v Nickerson*, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]), and that it owed no duty of care to the Van De Berghes independent of its contractual duties. Andromeda also established that it fulfilled the obligations it owed under the agreement with the Van De Berghes and that the additional row of bricks on the step that it installed was subsequently replaced by another contractor prior to plaintiff's accident. As no issue of fact was raised by plaintiffs or the Van De Berghes in opposition to the motion, summary judgment dismissing the third-party complaint is granted.

Accordingly, the motions are granted.

Dated: July 27, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.