Decker v Wallkill Hous. Dev. Co. of Carpenters & Joiners
2018 NY Slip Op 34106(U)
September 19, 2018
Supreme Court, Orange County
Docket Number: Index No. EF006410-2016
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange located at 285 Main Street, Goshen, New York 10924 on the 19th day of September, 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

DORIS DECKER,

PLAINTIFFS,

-AGAINST-

WALLKILL HOUSING DEVELOPMENT COMPANY OF CARPENTERS and JOINERS, LOCAL 964, INC. and WALLKILL HOUSING DEVELOPMENT FUND COMPANY OF CARPENTERS and JOINERS, LOCAL 964, INC.,

DEFENDANTS.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION AND ORDER
Index No. EF006410-2016
Motion Date:7/3/18
Motion Seq. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 20 were read on Defendants' motion for summary judgment:

Notice of Motion/Memorandum of Law/Affirmation of Ward Ingalsbe, III, Esq./ Exhibits A - O	1 - 18
Affirmation in Opposition of John Del Duco, III, Esq.	19
Reply Affirmation of Ward Ingalsbe, III, Esq.	20

In this premises liability negligence action, Defendants move for summary judgment on the basis that there is no evidence that Defendants had any actual or constructive notice of the condition and/or that Defendants created the condition which caused the fall. Plaintiff alleges in the complaint that on January 28, 2014, she, Doris Decker was visiting her friend Beulah Pierce at a second floor apartment owned by the Defendants. Upon leaving her friends apartment, Plaintiff put a small microwave in a mini grocery cart and attempted to go down the stairs of the building. Plaintiff claims her foot then caught on the rug causing her to fall down the staircase which injured her left wrist.

Defendants move for summary judgment dismissing the complaint on the basis that they

had no notice of the defect and that they did not create the condition which caused the fall.

The proponent of a motion for summary judgment must establish that there is no defense to the cause of action or that the cause of action or defense has no merit sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. *Bush v St. Clare's Hospital*, 82 NY2d 738 (1993). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Summary judgment is a drastic remedy and should only be granted where this burden is met and then only if the opposition to the motion fails to establish the existence of a material issue of fact requiring a trial. *Vega v Restani Construction. Corp.*, 18 NY3d 499 (2012), *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require the trial of a material question of fact on which she rests her claim or must demonstrate an acceptable excuse for her failure to meet the requirement. *Zuckerman v New York*, 49 NY2d 557 (1980).

In a premises liability case, "[a]n owner of property has a duty to maintain the property in a reasonably safe condition (*citing Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872, 638 N.Y.S.2d 937, 662 N.E.2d 255; *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868; *Kruger v. Donzelli Realty Corp.*, 111 A.D.3d 897, 975 N.Y.S.2d 689). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence

(citing *Lezama v. 34–15 Parsons Blvd*, LLC, 16 A.D.3d 560, 560, 792 N.Y.S.2d 123)." *Monastiriotis v Monastiriotis*, 141 AD3d 510, 511 [2d Dept 2016].

In this case, Plaintiff testified that she did not see any defect on the day of the fall or on any day prior to the fall when she visited her friend. (Tr. Pg 30). She also had no knowledge of any complaints from other people regarding any dangerous condition on the stairs. The building superintendent, Rejnaldo Ajazi, testified that it is his duty to maintain and keep up the interior and exterior of all the buildings and premises, including maintenance of the interior staircases; that he checks the interior of the buildings on a daily basis when he starts his shift in the mornings, (Tr. Pg 2); and that he vacuums the interior staircases on a weekly basis and never saw any defect in the rug. (Tr. Pg. 2). He further testified, that as the person who handles all the complaints in the buildings, he would be contacted if there were any defects. He testified that no complaints were made about the rug on the stairway in the building where the fall occurred.

There is also no evidence of constructive notice of a defect. "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 defendant's employees to discover and remedy it" (*citing Gordon v. American Museum of Natural History*, 67 N.Y.2d at 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *see Cassidy v. City of New York*, 121 A.D.3d 735, 994 N.Y.S.2d 635; *Rodriguez v. Shoprite Supermarkets, Inc.*, 119 A.D.3d 923, 923, 989 N.Y.S.2d 855)." *Gauzza v GBR Two Crosfield Ave. Ltd. Liab. Co.*, 133 AD3d 710, 711 [2d Dept 2015]. In the instant case there is no evidence indicating a visible and apparent condition. None of the deposition testimony of the three parties who were present on the day of the fall, indicate that there was any visible defect in the rug.

In the instant case, the Defendants sufficiently established that they did not create the

condition and the absence of notice as a matter of law. (*See, Dwoskin v Burger King Corp.*, 249 AD2d 358, 358 [2d Dept 1998]; *McClarren v Price Chopper Supermarkets*, 226 AD2d 982[3rd Dept 1996]; *Maiorano v Price Chopper Operating Co.*, 221 AD2d 698 [3rd Dept. 1995]). Plaintiff argues that a lack of recorded inspections is sufficient to raise an issue of fact. This Court disagrees. It is sufficient to offer proof that the area is cleaned on a regular basis and that no defect was observed. (See generally *Dhu v New York City Hous. Auth.*, 119 AD3d 728, 729 [2d Dept 2014] which cites *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2008]; see *Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973 [2012]; *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610, 611 [2011])." Since the plaintiff submitted no proof but only speculation, that defendant had notice and the rug was a dangerous condition, the defendant is entitled to summary judgment dismissing the complaint. Accordingly, it is hereby

ORDERED that Defendants motion is granted and this complaint is dismissed. Defendant is directed to submit judgment on notice.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 19, 2018
Goshen, New York

ENTER,

Hon. Maria S. Vazquez-Doles, J.S.C.

To: Counsel of record via NYSCEF.