Karris v Simon
2018 NY Slip Op 34279(U)
December 3, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 16-618172
Judge: Martha L. Luft

SHORT FORM ORDER

INDEX No. 16-618172
CAL. No. 17-02164OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice Supreme Court

MOTION DATE 2-27-18
ADJ. DATE 4-10-18
Mot. Seq. # 001 - MD

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SARA KARRIS and GREGORY KARRIS,

Plaintiffs,

- against -

ANDREA SIMON,

Defendant.

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Upon the following papers read on this motion for partial summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated January 18, 2018 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by defendant, dated March 22, 2018 ; Replying Affidavits and supporting papers by plaintiff, dated April 6, 2018 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiffs' motion for summary judgment on the issue of defendant's negligence is denied.

Plaintiff Sara Karris (hereinafter plaintiff) commenced this action to recover damages for personal injuries she allegedly sustained on October 31, 2015, when she slipped and fell while attempting to descend a four-step, wooden staircase at a residence known as 27 Lesley Lane, Old Bethpage, New York, which is owned by her aunt, defendant Andra Simon. Plaintiff's husband, Gregory Karris, brought a derivative claim for loss of services. By their bill of particulars, plaintiffs allege that the staircase constituted a dangerous condition on the premises, as the wooden treads "had a shiny, glossy and slippery finish." They also allege defendant was negligent, among other things, in failing to make the staircase "less slippery," in failing to provide "slip resistant material" on the steps, in failing to have adequate handrails and bannisters, and in failing to warn of the alleged dangerous

condition.

Plaintiffs now move for summary judgment in their favor on the issue of negligence, arguing that defendant and her husband created the alleged slippery condition on the staircase when they applied varnish to the wooden steps sometime in 1992 or 1993, and that defendant had actual knowledge of two other incidents where people slipped on the steps. Plaintiffs further argue that the steps were in a worn condition, and that defendant violated her duty of care as a landowner by failing to remedy such condition. Transcripts of the parties' deposition testimony are submitted in support of the motion. Defendant opposes the motion, arguing, in part, that there is no evidence that the staircase constituted a dangerous condition on the premises, and that plaintiff cannot identify what caused her foot to slip.

A party seeking summary judgment must make a prima facie showing that he or she is entitled to judgment as a matter of law by presenting sufficient admissible evidence showing that there is no triable issue of material fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 598 [1980]). If the moving party fails to meet this burden, summary judgment must be denied, regardless of the sufficiency of the opposing party's papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). If the moving party does establish entitlement to summary judgment, the burden shifts to the opposing party to present admissible, factual evidence showing that a genuine issue of material fact exists to defeat the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 598).

In general, a landowner has a duty to maintain his or her property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). The duty to keep premises in a reasonably safe condition is not dependent upon the plaintiff's status as an invitee, licensee or trespasser, or upon the status of the property as public or private (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564). Rather, a landowner "must act as a reasonable [person] in maintaining [his or her] property in a reasonably safe condition in view of all of 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). However, a landowner is not an insurer of the safety of people on his or her property (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442; ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]), and has no duty to warn or protect against an open or obvious condition which, as a matter of law, is not inherently dangerous (*see* ***Ross v Bretton Woods Home Owners Assn., Inc.***, 151 AD3d 774, 55 NYS3d 417 [2d Dept 2017]; ***Oldham-Powers v Longwood Cent. Sch. Dist.***, 123 AD3d 681, 997 NYS2d 687 [2d Dept 2014]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]).

To establish a prima facie case of negligence in a slip-and-fall action, a plaintiff must show that the defendant owed him or her a duty of care, that his or her injuries were caused by a dangerous or defective condition on the subject property, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Farren v Board of Educ. of City of New York***, 119 AD3d 518, 988 NYS2d

684 [2d Dept 2014]; ***Shea v Massapequa Union Free Sch. Dist.***, 117 AD3d 817, 985 NYS2d 675 [2d Dept 2014]; ***Davis v Rochdale Vil., Inc.***, 63 AD3d 870, 882 NYS2d 194 [2d Dept 2009]; ***Rubin v Cryder House***, 39 AD3d 840, 834 NYS2d 316 [2d Dept 2007]; *see generally* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Donatien v Long Is. Coll. Hosp.***, 153 AD3d 600. 57 NYS3d 422 [2d Dept 2017]). To provide constructive notice, the dangerous or defective condition must have been visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Kyte v Mid-Hudson Wendico, Inc.***, 131 AD3d 452, 15 NYS3d 147 [2d Dept 2015]; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]).

Moreover, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442). Although proximate cause may be inferred from the facts and circumstances surrounding the plaintiff's injury, there must be sufficient evidence to permit a finding of proximate cause based not upon speculation, but upon the logical inferences drawn from such evidence (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Simion v Franklin Ctr. for Rehabilitation & Nursing, Inc.***, 157 AD3d 738, 69 NYS3d 64 [2d Dept 2018]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Thus, a plaintiff in a slip and fall action may not recover damages for personal injuries when there is only a bare possibility that his or her fall was caused by the defendant's negligence (*see* ***Visconti v 110 Huntington Assoc.***, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 NY2d 947, 621 NYS2d 511 [1994]). And while the issue of proximate cause ordinarily is for the trier of fact, it may be decided as a matter of law "where only one conclusion may be drawn from the established facts" (***Derdiarian v Felix Contr. Corp.***, 51 NY2d at 315, 434 NYS2d 166; *see* ***Howard v Poseidon Pools***, 72 NY2d 972, 534 NYS2d 360 [1988]).

Plaintiff's submissions are insufficient to establish a prima facie case of entitlement to judgment in her favor on the issue of defendant's negligence (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923). Plaintiff testified at her deposition that she visited defendant's split-level house and used the subject staircase to access the main living area approximately once or twice a week for more than 20 years. She testified that, upon arriving at the house on the day of the accident, she removed her shoes and socks before ascending the subject staircase, and that she remained at the premises, visiting with family members, for a couple of hours. She explained that prior to her fall, as she walked to the staircase, she observed her aunt and her cousin's friend sitting on the lower steps, near the wall where a handrail was mounted, and that she intended to pass them on the right side of the staircase, where there was no handrail. According to plaintiff's deposition testimony, the accident occurred as she began to descend the staircase, when her right foot slipped as she stepped down onto the first step, causing her to body to fall backwards down to the bottom landing. She testified that she did not observe any objects, debris, water or other substance on the floor of the living area or on the staircase before or after her accident, that she was still barefoot when she slipped, and that she did not come into contact with either her aunt or her cousin's friend when she fell down the stairs.

Defendant testified at her deposition that she and her husband purchased the house in 1989 and rebuilt the staircase in 1992 or 1993. She stated that a varnish was applied to the wooden treads when the staircase was rebuilt, and that no other work has been performed on the treads. Defendant testified that she does not apply wax or any cleaning products on the treads of the staircase, which she described as having a worn appearance. She testified that she was sitting on the second or third step, facing the front door, at the time of the alleged accident, and that she did not see plaintiff fall down the staircase. Rather, she observed plaintiff on the floor of the foyer, and assumed she slipped. She also testified that at least five years before plaintiff's accident, her own foot slipped off the bottom step of the staircase, and that her daughter had an incident on the staircase that she assumed was caused by her foot slipping on a step.

Contrary to the assertions by plaintiffs' counsel, defendant's deposition testimony that the wooden treads on the staircase were worn, that varnish had not been applied to them since the early 1990s, that on one occasion her foot slipped off the bottom step, and that she believes her daughter also slipped on the steps on a separate occasion, does not create a prima facie case that the staircase constituted a dangerous condition on the property (*see* ***Coletti v Chemical Bank***, 258 AD2d 431, 684 NYS2d 587 [2d Dept 1999]; ***Varrone v Dinaro***, 209 AD2d 508, 619 NYS2d 79 [2d Dept 1994]; *see also* ***Murphy v Conner***, 84 NY2d 969, 622 NYS2d 494 [1994]; *cf.* ***Johnson v 675 Coster St. Hous. Dev. Fund***, 161 AD3d 635, 77 NYS3d 406 [2d Dept 2018]; ***Garcia v New York City Tr. Auth.***, 269 AD2d 142, 703 NYS2d 4 [1st Dept 2000]). Significantly, there is no evidence that the wooden tread on such step was slippery due to moisture, debris or some other substance on its surface. In fact, plaintiff did not testify that the step was slippery. Rather, plaintiff's deposition testimony indicates simply that her bare foot slipped when it came in contact with the first step. Generally, in the absence of the negligent application of wax or polish, there is no liability for a slip and fall on a walking surface due to smoothness (***Conry v Avellino***, 287 AD2d 478, 478-479, 731 NYS2d 205 [2d Dept 2001]). There also is no evidence in the record that the lack of a handrail on the right side of the staircase contributed to the accident (*see* ***Plowden v Stevens Partners, LLC***, 45 AD3d 659, 846 NYS2d 238 [2d Dept 2007]).

Accordingly, plaintiffs' motion for summary judgment in their favor on the issue of defendant's negligence is denied.

Dated: December 3, 2018

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**