Collins v Comilloni
2020 NY Slip Op 34985(U)
January 27, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50256/2018
Judge: James W. Hubert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JASON COLLINS,

Plaintiff,

-against-

DECISION & ORDERS

Index No. 50256/2018

Motion Seq. No. 1

DONALD COMILLONI and MARILYN BRENNAN, a/k/a MARILYN COMILLONI

Defendants.

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Hubert, J.S.C.

Before the Court is a motion pursuant to CPLR §3212 filed by the above-captioned defendants (Defendants) seeking summary judgment against the plaintiff Jason Collins (Plaintiff) dismissing the complaint on the grounds that no material issues of fact exist on the question of Defendants' negligence alleged to have caused injury to the Plaintiff. The Court has reviewed the submissions of the parties including the Affirmation in Support of the Defendants' motion and the exhibits annexed thereto; the Plaintiff's Affirmation in Opposition to the Defendants' motion and the exhibits annexed thereto; the Eye Witness Affidavit in Opposition, and the Defendants' Reply Affirmation. After due consideration of the submissions, pleadings, legal arguments and relevant case law, the Court denies the Defendants' motion for summary judgment.

The accident, a trip and fall by the Plaintiff as he was leaving the home of the Defendants located on Granite Springs Road in Granite Springs, occurred on November 1, 2017 around 6:15 p.m. Plaintiff's injuries included rupture of a tendon and ligaments of the right ankle as well as bone contusion and fracture.

The Plaintiff, accompanied by his wife Melissa Collins and a realtor, had gone to the Defendants' house on the date of the accident to look at it for possible purchase. As they left the home, they exited from the side of the house to traverse along the exterior walk-way owned and maintained by the Defendants.

It was dark at this time and there was no exterior lighting. As he stepped out of the house and onto the walkway, the Plaintiff stated at his deposition that his right foot rolled because the step was loose, wobbly and unstable. The Plaintiff, unable to maintain balance in the absence of a handrail, was unable to prevent himself from falling and sustaining injury. At the Plaintiff's deposition, a photograph of the front of the house marked as "exhibit A" was shown to him. He identified a "crack/gap in the step" which caused him to fall (Affirmation of the Defendants, ¶7).

In her affidavit, Melissa Collins states that she returned to the property the following day to inspect the area where her husband fell. She described the step as "not level" in addition to being "wobbly and loose." She further observed a "gap between the pavers."

The deposition testimony of Defendant Donald Comilloni revealed that the Defendants became owners of the house in 1991. The house was "remodeled entirely in 1999," and no repairs of the front of the house were made after that date. Mr. Comilloni further testified that there were no "incidents or accidents that dealt with the steps" prior to the accident on November 1, 2017. The Defendants were not at home during the Plaintiff's visit to the house on the evening of November 1, 2017 and did not witness the fall.

The Defendants plead entitlement to summary judgment on two grounds: (1) no notice of defect; and (2) any defect observed and alleged by the Plaintiff as causing the accident was "trivial" and thus not actionable.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v. Citibank*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers. However, if the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).

As numerous courts have held, a defendant property owner who is responsible for maintaining a premises and who moves for summary judgment in a slip and fall case involving the property has the initial burden of making a prima facie showing that it neither created the condition that caused the accident nor had actual or constructive notice of it's existence for a sufficient length of time to discover and remedy it. *See*, e.g., *Pryzywalney v. New York Tr. Auth.*, 69 A.D.3d 598, 892 N.Y.S.2d 181 (2d Dep't 2010); *Shehata v. City of New York*, 128 A.D.3d 944, 946, 10 N.Y.S.3d 265 (2d Dep't 2015).

To provide constructive notice, a defect must be visible and apparent and exist for sufficient time, pre-accident, to permit discovery and remedy by the owner. *Pryzywalney v. New York Tr. Auth.*, *supra* at 599. To meet its initial burden of showing lack of constructive notice, the defendant must put forth some evidence of when the area in question was last cleaned or

inspected in relation to the time the plaintiff fell. *Id.* .

In the instant case, the photographs purporting to show the step(s) that caused the fall (exhibit A, Plaintiff's deposition) do show gaps between the "pavers," that make up the two tread steps leading immediately from the front door down to the walkway. In addition to the gap on the top step, there appears to be a crack as well. The gaps and the crack shown in the photographs may fairly be said to be "visible and apparent."

As to the time of existence, the gaps appear to have been part of the step construction, in as much as the tread step gaps appear in two more tread steps positioned at intervals further along the walkway leading from the doorway. As stated by Mr. Comilloni at his deposition, no repairs of the front of the house were made after the date when repairs to the house were last done (1999). Thus presumably the stair tread configuration shown in the photographs existed for years prior to the accident. While it my be said that the Defendants did not regard the tread step condition or configuration as presenting a hazardous condition, it cannot be fairly stated that the configuration and condition of the tread would have never been noticed by the Defendants who would have traversed the walkway any time they exited or entered the front door.

Thus it would appear that, at a minimum, there are issues of fact that cannot be cast aside as a matter of law. As a result the Defendants have failed to make a prima facie showing that they neither created the condition that caused the accident nor had actual or constructive notice of it's existence for a sufficient length of time to discover and remedy it.

As to whether the defects, identified in the photographs as accident causes, are "trivial," it cannot be said as a matter of law that they are. This remains a question of fact to be determined by a jury.

A property owner may not be held liable for trivial defects that may not be properly regarded as traps or nuisances, but may instead be regarded as defects over which a pedestrian might merely stumble, trip or stub toes. *Cabezas v. Ramos*, 173 A.D.3d 1131, 101 N.Y.S.3d 643 (2d Dep't 2019). Nevertheless, in determining whether a defect is trivial, the court must examine all of the facts presented, such as the step(s) width, depth elevation irregularity, and appearance, as well as the time, place and circumstances of the injury. *Id.*

A defendant seeking summary judgment on the basis that the alleged defect is trivial must make a prima facie showing that the defect is physically insignificant and that the surrounding circumstances do not increase the risk the defect poses before the burden shifts to the plaintiff. *Supra*, at 644.

No measurements of the alleged defects have been presented by the Defendants as proof of triviality even though defect measurements are regarded as relevant facts on the issue. Nevertheless, measurements by themselves are typically not dispositive. *See*, *Hutchinson v. Sheridan Hill House Corp.* 26 N.Y.3d 66, 77, 19 N.Y.S.3d 802 (2015). However, in the instant matter, the surrounding circumstances may well be said to cast broader light on the issue.

At the time of the accident, it is not disputed that when the Plaintiff and his family exited the residence in question it was dark outside. While there were exterior light fixtures to illuminate the stairs and pathway, the lights were never turned on at any time so the area was fully dark. *Supra*, at 78. The stair treads were dark gray and not visible in significant detail. A rubber mat on the top step covered from view a significant part of the "gap" between the two step treads. No railing or other such item was present to guide ones step or provide stabilization.

In addition, the location (the exit itself) may be regarded as a factor. The Plaintiff, his

wife and child were leaving the house to return home and the fall took place as they exited the door. In their assessments of whether a trivial defect did or did not exist, courts have recognized that while exiting through a doorway, pedestrians are "naturally distracted from looking down at their feet" making a measurably small defect more dangerous than might otherwise be perceived. *Id.*

Upon due consideration, the Court determines that the motion of the Defendants for summary judgment must be denied. The admissible evidence proffered by the Defendants does not meet the burden of proof necessary to make a prima facie showing of entitlement to summary judgment as a matter of law and fails to demonstrate the absence of any material issues of fact. As such, consideration of the Plaintiff's opposition is not necessary. Accordingly, it is hereby

ORDERED, that the motion of the Defendants is denied, and it is further

ORDERED, that the parties shall appear in the Settlement Conference Part, Courtroom 1600, on Tuesday, March 10, 2020 at 9:15 in the forenoon for pre-trial conference.

The foregoing constitutes the decision and orders of the Court.

Date: White Plains, New York
January 27, 2020

James W. Hubert

Hon James W. Hubert
Justice Supreme Court