

Kazanovich v CVA Props., LLC
2021 NY Slip Op 30114(U)
January 8, 2021
Supreme Court, Kings County
Docket Number: 523807/2017
Judge: Reginald A. Boddie
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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 8th of January 2021.

PRESENT:

Honorable Reginald A. Boddie
Justice, Supreme Court

-----x
BELLA KAZANOVICH,

Plaintiff,

-against-

CVA PROPERTIES, LLC, CENTRAL
VETERINARY ASSOCIATES, P.C. AND
CENTRAL VETERINARY ASSOCIATES II P.C.,

Defendants.
-----x

Index No. 523807/2017
Cal. No. 20, 21 MS 1, 2

DECISION AND ORDER

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KINGS COUNTY CLERK

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers Numbered
MS 1, 2 Docs. # 18-51

Upon the foregoing cited papers, defendants' motion and plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212, are decided as follows:

Plaintiff commenced this action against defendants to recover for personal injuries allegedly sustained on September 8, 2017, at approximately 7:00 PM, as a result of a trip and fall on the exterior steps at 73 West Merrick Road, Valley Stream, New York. The premises is owned by defendants (hereinafter CVA) and used to operate a veterinary practice. Defendants renovated the premises, including the exterior stairway in 2005. Plaintiff was attempting to ascend the exterior stairs to the clinic when she initially fell on the bottom step and again on the threshold step at the doorway.

Defendants moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff failed to establish defendants were negligent. Specifically,

defendants argued plaintiff was the proximate cause of her own accident and failed to identify any defects in the subject stairway or cite any violations of any pertinent building codes.

Defendants further argued the stairway was not defective and they had no notice of any alleged defects. Plaintiff opposed and cross-moved for summary judgment on the grounds that defendants had notice of and created the defect and were negligent per se.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

Here, to establish entitlement to summary judgment, defendants must demonstrate that it neither created the defective condition nor had actual or constructive notice of its existence (*e.g. Friedman v 1753 Realty Co.*, 117 AD3d 781, 783 [2d Dept 2014]). Defendants proffered plaintiff's testimony arguing that she only claimed the bottom step as the cause of her accident, failed to identify any specific defect, was unable to negotiate the initial step, and was dizzy and in pain when she stepped onto the threshold and fell again. Further, they proffered the expert affidavit of Jeffrey Schwalje, a licensed engineer, who inspected the stairway on February 27, 2019, and concluded that within a reasonable degree of engineering certainty, the subject stairway was not defective, was in compliance with New York State building codes, and the design, construction and maintenance of the stairway and doorway entrance was not a proximate cause of plaintiff's accident. Moreover, defendants proffered the testimony of Laura Fertile,

defendants' head receptionist, who averred she used the subject stairway on a daily basis and there were no complaints or accidents related to the subject stairway other than the one claimed by plaintiff. The Court notes, plaintiff's challenge to defendants' proffer of Mr. Schwalje's expert affidavit in support of this motion is without merit (*see* CPLR 3212 [b]). Therefore, having established their prima facie entitlement to summary judgment, the burden shifts to plaintiff to raise a triable issue (*see Winegrad*, 64 NY2d at 853 [1985]; *see Friedman*, 117 AD3d at 783).

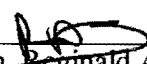
Plaintiff rebutted defendants' argument that she was unable to identify any defect in the staircase which caused her fall by citing her testimony that the bottom step was "too tall" and caused her to fall. Plaintiff further argued defendants caused and created this defect and were negligent per se when they caused renovations to be made to the stairway in 2004, which violated the applicable building code. Plaintiff proffered the expert inspection report and affidavit of David Jimenez, a licensed architect, who researched the applicable building codes, inspected the stairway on January 6, 2020, and inspected the records and filings pertaining to the subject premises at the Valley Stream Building and Zoning Department on January 27, 2020.

Mr. Jimenez opined, "[w]hen the building went through an alteration the proposed plans showed the reversed stairs with a code compliant condition (Plans on image 'H'), but when constructed (Image 'C' and drawings 'I') a single step condition was created. [,]" [which is not permitted by the building code]. He further opined there were several relevant violations of applicable building codes, including excessive riser heights, non-permitted single steps at the bottom onto the sidewalk and top at the entrance and defects with the handrails. He concluded these building code violations rendered the stairway defective and contributed to the happening of plaintiff's accident.

Plaintiff further argued defendants had actual and constructive notice of both the hazardous step at the bottom and the dangerous condition at the top threshold step, as defendants themselves applied for permits to alter and make structural changes to the premises in 2004, and taped a sign above the entrance threshold that read, "Caution Watch Your Step."

To establish a prima facie case of negligence, the plaintiff in a slip and fall case must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition (*see Sanchez-Acevedo v Mariott Health Care Serv.*, 270 AD2d 244 [2d Dept 2000]). Here, plaintiff presented evidence that she believed her initial fall was due to the height of the bottom step, which Mr. Jimenez opined defendants caused to be renovated in violation of applicable building codes and divergent from the proposed plans. Plaintiff therefore met its prima facie burden of establishing defendants caused or created the defective condition. Defendants argued, in opposition, that the town approved the permits for the renovation. Although this argument failed to rebut plaintiff's entitlement to summary judgment, the opinion and conclusions of defendants' engineering expert raised a triable issue. Accordingly, defendant's motion and plaintiff's cross-motion for summary judgment are denied.

ENTER:


Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.

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