Fehl v Peskin
2021 NY Slip Op 33192(U)
November 18, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 606687/2018
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 606687/2018
CAL. No. 202100251OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 7/14/21 (006-007)
MOTION DATE 9/2/21 (008)
ADJ. DATE 9/16/21
Mot. Seq. # 006 MG
Mot. Seq. # 007 MG
Mot. Seq. # 008 MG; CASEDISP

ANN MARIE FEHL & ROBERT FEHL,

Plaintiffs,

- against -

ERIC PESKIN, LEISURE LIVING REALTY, INC., F&G REALTY GROUP, INC. d/b/a WEICHERT REALTORS-FERRERI-GROMUS, and MICHAEL D. DOCTOROW,

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Leisure Living Realty dated, May 3, 2021; by defendant Eric Peskin dated, July 6, 2021; by defendant F&G Weichert Realtors d/b//a Weichert Realtors and Michael Doctorow dated, July 9, 2021 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiffs dated, July 7, 2021 and August 25, 2021; Replying Affidavits and supporting papers by defendant Leisure Living Realty dated, July 14, 2021; by defendant F & G Weichert Realtors d/b/a Weichert and Michael Doctorow dated, September 15, 2021 ; Other ___; it is

ORDERED that the motion (006) by defendant Leisure Living Realty for summary judgment, the motion (007) by defendant Eric Peskin for summary judgment and the motion (008) by defendants F&G Realty Group and Michael Doctorow for summary judgment are consolidated for purposes of this determination; and it is further

ORDERED that the motion (006) by defendant Leisure Living Realty for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (007) by defendant Eric Peskin for summary judgment dismissing the complaint and all cross claims against him is granted; and it is further

ORDERED that the motion (008) by defendants F&G Realty Group and Michael D. Doctorow for summary judgment dismissing the complaint against them is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Ann Marie Fehl, on February 25, 2018, when she tripped and fell while touring a home owned by defendant Peskin and listed for sale through Peskin's listing agent, defendant Leisure Living. The home is located at 129A Exmore Court in Ridge, New York. Plaintiff alleges that the defendants were negligent in failing to properly maintain, manage and control the premises, and in creating a hazardous condition consisting of a change of elevation between the floor in the entry area and a bonus room that had been converted by Peskin into residential space. Plaintiff further alleges that defendants F&G Realty, d/b/a Weichert Realty-Ferreri-Gomus ("F&G Realty") and Michael Doctorow negligently failed to illuminate the premises and to warn of the height differential. Doctorow was a real estate agent with F&G Realty and was showing the premises to non-party Bernice Stephens at the time of plaintiff's accident. Plaintiff's husband, Robert Fehl, brings a derivative claim for loss of services.

Leisure Living now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not own or control the premises, and that the height differential was open, obvious and not inherently dangerous. In support, Leisure Living submits the pleadings, the deposition transcripts of the parties and of the non-party witness Maria Peskin, the listing broker for the premises. Peskin moves for summary judgment dismissing the complaint and all cross claims against him on the grounds that the height differential complained of was open, obvious and not inherently dangerous. In support of his motion, Peskin submits the pleadings and transcripts of the parties' deposition testimony. F&G Realty and Doctorow move for summary judgment dismissing plaintiff's complaint on the grounds that they owed no duty to plaintiff, that they had no control over the premises and that the height differential was open, obvious and not inherently dangerous. In support, F&G Realty and Doctorow submit the pleadings and the deposition transcripts of the parties. In opposition to the motions, plaintiff submits her own affidavit and the expert affidavit of Alfred Sutton, an architect licensed in the State of New York.

At her examination before trial, plaintiff testified that she went to the condominium unit where the accident occurred with her friend, Bernice Stephens, on February 25, 2018. Plaintiff testified that she had not been to the condominium complex prior to that day, and that she did not remember the name of the

broker who showed them the units. Plaintiff testified that she never saw a light fixture while she was in the Peskin unit and that the lights were not on. She did not say anything about the lights to anyone and never looked for a light switch. She testified that she was not concerned and that "you could see a little bit, you know walk." Plaintiff testified that were no lights near the entrance to the room where she fell and that it was dark; she never looked for a light to turn on or asked the agent to do so. Plaintiff testified that the floor of the room she fell into was the same color as the floor she was walking on and that she saw no white stripe on the floor as she entered the room. Plaintiff testified that as she walked into the room there was no floor under her foot and she fell.

At his examination before trial, Michael Doctorow testified that he was at 129A Exmore Court on February 25, 2018, in his capacity as a real estate agent on behalf of F&G Realty. He obtained a key to the premises from the lockbox after he had arranged an appointment with Leisure Living to show the unit to Bernice Stephens. It was his first time at the premises. Doctorow testified that when he arrived at the subject property he opened the door and entered into the kitchen. Doctorow testified no one was in the house and the lights were off. He testified that he did not know the floor plan and that, upon entering, he turned on the kitchen, bathroom and hall lights. He testified that those are the only three lights he can remember. Doctorow testified that plaintiff fell to the right of the front door at the entry to a side room as he was closing the front door. The floor in the room was at a lower elevation than the floor in the entryway and the floors were the same material and color. Doctorow testified that it was his practice to turn lights on and that he did so that day. He further testified that he did not know if there was a light switch in the room where plaintiff fell, that he did not believe there was a white line on the floor at the entrance to the room where plaintiff fell, and that he did not recall if there was a light fixture in the room on the day of the accident.

At his examination before trial, Eric Peskin testified that he is a real estate investor and that he owned the property in which plaintiff fell. The property is located within the Leisure Village condominium complex and he had bought and sold other properties in the complex. He used Leisure Living brokers to sell the properties and his wife, Maria Peskin, was an agent there at the time. Peskin testified that he made alterations to the unit after obtaining a permit from Leisure Village to do so. Peskin testified that he removed a wall in the unit to convert certain storage space into living space. Additionally, he changed the flooring in the converted space to match the rest of the unit. Peskin testified that after completing the work, Leisure Village inspected and approved the alterations. Peskin testified that there was a step-down of about three and a half inches to get into the new room. Peskin testified that he added a white stripe of wood molding along the passageway into the new room and around the entire room. All the work was completed prior to plaintiff's accident. Peskin testified that there was a light switch immediately to the left of the entry into the new room which controlled the ceiling light he installed. Peskin testified that selling the property was completely up to Leisure Living and he did not direct any aspect of showing the unit or selling it. He was told about the accident by someone from Leisure Living. Upon learning of the accident, he and his wife went to the property and entered through the back door off of the kitchen. Peskin testified the lights were off when he arrived.

Laura Rhunke testified for Leisure Living. She stated that she is the sole owner of the company and a licensed real estate broker. Maria Peskin worked as an independent contractor for Leisure Living.

Rhunke testified that when Peskin bought the subject property he used Leisure Living with his wife as his agent to purchase it. She testified that her company did not put up any signs to warn visitors of a change in elevation or that lights should be on before someone could look at it. She testified that "Eric made something on the floor that defined where the entry hall ended and the storage space began. It was a good thing that he did. It was obvious that there was another room beginning."

Maria Peskin testified that she is a licensed real estate broker and that she worked at Leisure Living on the date of the subject accident. Her husband owned and renovated the unit in which plaintiff fell. She testified that the only instructions Leisure Living gave to brokers for showing property was where to find the key. She testified that she found out about the accident when someone from Leisure Living called her and that she and her husband went to the unit. She testified that she asked Doctorow why the lights were not on. She further testified that she did not know if there were lights on anywhere else in the unit but she began turning on lights. Her husband was with her and he had a verbal exchange with Doctorow. Ms. Peskin testified that there was a height differential from the foyer to the room where plaintiff fell. She also testified that there was a window in the room that looked into the sunroom which was "all windows." She testified that the white line between the foyer and the room where plaintiff fell was present on day of accident and that her husband put it there during the renovation.

Plaintiff submitted an affidavit in which she avers that Doctorow was inside the unit when she arrived and the lights were off. She avers that it was dark but they could see a little bit and began to walk through the home. According to the affidavit, the same flooring material was used in the entry and the room where she fell, and plaintiff did not see the step. Because of that and the darkness she could not see the step down. Plaintiff avers that she was carefully looking forward and stepped forward expecting to step on flooring, but there was no floor underfoot and she fell. Plaintiff avers that on the day of her fall the white stripe of molding was not there.

To impose liability on a defendant for a trip and fall on an allegedly dangerous condition on its premises, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see* ***Wachovsky v City of New York***, 122 AD3d 724, 997 NYS2d 145 [2d Dept 2014]; ***Farren v Board of Edu. of City of New York***, 119 AD3d 518, 988 NYS2d 684 [2d Dept 2014]). Further, while a landowner has a duty to maintain his or her premises in a reasonably safe condition (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Gutman v Todt Hill Plaza***, 81 AD3d 892, 917 NYS2d 886 [2d Dept 2011]; ***Gradwohl v Stop & Shop Supermarket Co.***, 70 AD3d 634, 896 NYS2d 85 [2d Dept 2010]), there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous (*see* ***Tyz v First St. Holding Co.***, 78 AD3d 819, 910 NYS2d 179 [2d Dept 2010]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Roros v Oliva***, 54 AD3d 398, 863 NYS2d 465 [2d Dept 2008]; ***Pirie v Krasinski***, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]). "A court may determine whether a condition is hazardous and open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" (***Fishelson v Kramer Props., LLC***, 133 AD3d 706, 707, 19 NYS3d 580 [2d Dept 2015], quoting ***Tagle v Jakob***, 97 NY2d 165, 169, 737 NYS2d 331 [2001]). A defendant seeking to dismiss a complaint on the basis of the trivial defect doctrine "must make a prima facie showing that (1)

the defect is, under the circumstances, physically insignificant, and (2) that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 996, 103 NYS3d 128 [2d Dept 2019]). "Liability for an injury caused by a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property and where none is present, a party cannot be held liable." (***Rackowski v Realty USA***, 82 AD3d 1475, 920 NYS2d 435 [3d Dept 2011]; ***Gadani v Dormitory Auth. of State of N.Y.***, 64 AD3d 1098, 1102, 884 NYS2d 489 [3d Dept 2009], quoting ***Seymour v David W. Mape, Inc.,*** 22 AD3d 1012,1013, 803 NYS2d 250 [3d Dept 2005]).

The standards for summary judgment are well-settled. A court may grant summary judgment where there is no genuine issue of material fact and the moving party is, therefore, entitled to judgment as a matter of law (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*id.*). However, once the burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The property where plaintiff fell was listed for sale with Leisure Living and shown by real estate agent Doctorow, an employee of F&G Realty. The connection between Leisure Living, F&G Realty and Doctorow to the property is insufficient to support a finding that these defendants occupied, controlled or made special use of the premises (*see* ***Rackowski v Realty USA***, *supra*; ***James v Stark***, 183 AD2d 873, 584 NYS2d 137 [2d Dept 1992]). Absent control, a real estate broker does not owe a duty to a prospective buyer injured on the premises being shown (*see* ***Schwalb v Kulaski***, 29 AD3d 563, 814 NYS2d 696 [2d Dept 2006]). Additionally, all defendants have established their entitlement to summary judgment by submitting evidence demonstrating that the height differential was readily observable by the reasonable use of the injured plaintiff's senses and was not inherently dangerous (*see* ***Errett v Great Neck Park District***, 40 AD3d 1029, 837 NYS2d 701 [2d Dept 2007]). According to plaintiff's deposition testimony, plaintiff knew she was entering the room and was looking ahead into it (*see* ***Pirie v Krasinski***, 18 AD3d 848, 796 AYS2d 671 [2d Dept 2005]). Furthermore, Peskin showed that there was a visual cue alerting the public to the height differential. Having established a *prima facie* case of entitlement to summary judgment, defendants shifted the burden to plaintiffs to submit evidence in admissible form raising a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*).

Plaintiff's statement in her affidavit that there was no white stripe on the floor between the hallway and the room where she fell contradicts her prior testimony that she did not see the white stripe (when she was asked whether she did not see the white stripe or whether it was not there) and creates a feigned issue of fact insufficient to defeat defendants' properly supported motion for summary judgment (*see* ***Laniox v City of New York***, 170 AD3d 519, 96 NYS3d 202 [1st Dept 2019]). Furthermore, although plaintiff has tendered the affidavit of an architect who opines that the single step is a dangerous condition, the "generalized, conclusory and speculative assertion is insufficient to defeat a motion for summary judgment" (***Pirie v Krasinski***, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]) where these defendants

have established that the height differential was open and obvious and not inherently dangerous (*see* ***Behar v All Seasons Motor Lodge***, 6 AD3d 639, 775 NYS2d 183 [2d Dept 2004]).

Accordingly, the motion by Leisure Living and the motion by F&G Realty and Doctorow for summary judgment dismissing plaintiffs' complaint and all cross claims against them and the motion by Peskin for summary judgment dismissing plaintiffs' complaint are granted.

Dated: November 18, 2021

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION