

Ulla v Charles L. Schmelkin Living Trust

2020 NY Slip Op 35719(U)

September 30, 2020

Supreme Court, Queens County

Docket Number: Index No. 717189/18

Judge: Richard G. Latin

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Short Form Order

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9/30/2020

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN**
Justice

IA PART 40

**COUNTY CLERK
QUEENS COUNTY**

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BIBI ULLA,

Plaintiff,

-against-

Index No.: 717189/18
Motion Date: 9/10/20
Motion Cal. No.:67
Motion Seq. No.: 2

CHARLES L. SCHMELKIN LIVING TRUST, ELAINE
SCHMELKIN AND CHARLES L. SCHMELKIN,

Defendants.
-----X

The following numbered papers read on this motion by defendants for summary judgment, dismissing the plaintiff's complaint and all cross claims.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering-Affidavits-Exhibits.....	5 - 7
Replying.....	8 - 9

As a preliminary matter, the preliminary conference order dated January 18, 2019, stated that all summary judgment motions are due within 120 days of the filing of the note of issue. The plaintiff filed the note of issue on December 11, 2019, and as a result, summary judgment motions were to be filed on or before April 8, 2020. The Chief Administrative Judge issued an Administrative Order on March 22, 2020 in response to the COVID-19 pandemic, which in effect tolled the deadline of this motion. Hence, this motion will be considered timely.

Upon the foregoing cited papers, it is ordered that defendants' motions, pursuant to CPLR 3212, for summary judgment on the issue of liability are determined as follows:

Plaintiff commenced the instant action to recover for injuries she allegedly sustained when she moved a bed that fell apart and/or broke unexpectedly, causing her to fall in the second floor guest bedroom located at 6 Surrey Road, Great Neck, York, at 3:20 p.m. on September 27, 2018. Defendants now seek summary judgment on the basis that they did not cause the condition/defect, and there was no actual or constructive notice of the

defect.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when a movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of their motion, defendants submit, inter alia, the deposition testimony of plaintiff, defendant Elaine Schmelkin, and the affidavit of Daniel McDonough, a mechanical engineer and accident reconstructionist.

Plaintiff testified that on the date of the accident, she was working independently as a health care aide for defendant Elaine Schmelkin starting in February of 2018. She testified that her duties included some housekeeping and taking care of the defendant. The plaintiff averred that on the date of the accident, she was asked to move a bed, clean a mattress, bathroom, and a window vent in one of the upstairs bedrooms. Prior to the accident, she stated that she would change the sheets on the bed and noticed it was loose and a little bit shaky. She testified that she notified the defendant that the bed was shaky, and the defendant replied that she would fix it.

The plaintiff stated that on the date of the accident was when she first noticed a leak in the bedroom. She further stated that the defendant asked her to move the bed and break the leakage bubble. Plaintiff testified that she used a cleaning device to break the bubble, and thereafter debris fell on top of the bed. After which, she stated that she was asked to vacuum the floor and pull out the bed. She averred that as she was standing at the foot of the bed, she took hold of the knob on the left with her left hand and the foot board with her right hand, and began to move the bed, when the whole foot side of the bed fell. The plaintiff testified that she fell as a result into a chest of drawers. She averred that after she fell, she went downstairs and notified the defendant. After which she left the house and went to the hospital. She testified that she informed some of the doctors that she injured herself at home and other doctors the truth, since defendant asked her not to say that the accident occurred at her house for insurance purposes.

Defendant Elaine Schmelkin testified that she first became aware of the accident when plaintiff came downstairs. She testified that prior to the accident occurring, she was in the subject bedroom and asked plaintiff to dust and vacuum the room. She further stated that there was a wallpaper bubble on the ceiling that had been there for years, but did not say anything to the plaintiff regarding the bubble. She testified that there have been no repairs to the roof in the subject premises in five years. On the evening of the accident, she averred that she went into the subject bedroom and did not notice any paint chips anywhere and the bed was not broken, but the knobs were off the bed and on the floor. The defendant

stated that the bed in question is very heavy and does not move from room to room.

Daniel McDonough, a mechanical engineer and accident reconstructionist performed an inspection of the bed in question at the home of defendant Elaine Schmelkin. On December 16, 2019, he was provided access to the second floor bedroom where the incident occurred to inspect the bed and identify any defects. He testified that wood frame had a headboard, footboard, and side rails that were all fastened together. At the time of the inspection, he stated that the bolts were fully secured and showed no signs of being recently disturbed or adjusted. McDonough averred that the wooden frame was solidly constructed, tight and stable, and structurally sound. He opined that there was no signs of any fractures or deformation to the attachment between the side rails and the head and foot boards.

Moreover, he testified that there was no sign of any water damage, softening, swelling, or decay of any of the wooden frame structure. Furthermore, he noted that three of the four knobs were detached from the corner posts, and is it unknown when these knobs became detached. McDonough testified that the custom box base had a "T" cross section, and fit between the side rails of the base to support the mattress, which provided additional stability to the wooden frame, and prevented it from 'racking' when pulling on the head or footboards. He further noted that in the southeast corner of the room, the ceiling showed signs of repair, with the rest of the ceiling being undisturbed with no signs of recent damage or repair.

McDonough opined that there was no physical evidence whatsoever to corroborate the claim that the footboard separated from the bed, or that it was loose or shaky. He stated that it was reasonable to conclude that the condition of the bed and frame at the time of his inspection was the same as the day of the incident. Moreover, he testified that there was no sign of any bubbles in the ceiling above the bed as described by the plaintiff. In his opinion to a reasonable degree of engineering certainty that the subject bed was without defect and there is no physical evidence to support the allegation that the foot board became detached from the bed, causing the plaintiff to fall.

In opposition, plaintiff submits, inter alia, her deposition transcript as well as the affidavit of Dr. James Pugh, accident reconstructionist.

Dr. Pugh opined that the looseness and shakiness of the bed as described by plaintiff is consistent with an old, normally used bed with pocket bolt joinery. He stated that defendant should have known the necessity of tightening the hardware and maintaining the bed in good, stable condition. He further testified that it is conceivable that the footboard pulled loose because the pocket bolts had backed out of the pockets, and that such a failure could have been readily repaired simply by re-inserting the pocket bolts into the pockets and tightening them appropriately. Dr. Pugh stated that in view of the myriad of factors affecting the structural integrity of the bed over time and the fact that no remedial measures were performed on a greater-than-32-year presence of the bed in the home, he found it most likely that the footboard did indeed pull from the frame and caused the accident and the injuries suffered by plaintiff.

“A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it” (*Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 880 [2d Dept 2012]). Here, plaintiff testified that she noticed the bed was loose and shaky prior to the accident, and stated that she informed the defendant Elaine Schmelkin of the condition, and she replied that she would fix it, arguably having notice of the hazardous condition months prior to the accident. Here, affording the plaintiff the benefit of every reasonable inference that can be drawn from the testimony, the defendants failed to establish, prima facie, that they did not have constructive notice of the allegedly hazardous condition (*id.*). In the instant case, issues of fact exist as to whether the defendants fulfilled their obligation to maintain the bed in a reasonably safe condition considering the age of the bed, prior use, and arguably having been informed as to its condition by plaintiff prior to the accident. Moreover, issues of fact also exist as to the expert testimony of Dr. Pugh and Mr. McDonough as to the condition and fitness of the bed on the date and time of the accident.

Accordingly, defendants’ motion for summary judgment is denied.

Plaintiff shall serve a copy of this order, together with notice of entry, on the defendants within 30 days of the date of entry this order.

This constitutes the decision and order of the Court.

Dated: September 30, 2020



RICHARD G. LATIN, J.S.C.

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QUEENS COUNTY**