

Garwood v Werther

2022 NY Slip Op 34835(U)

April 29, 2022

Supreme Court, Queens County

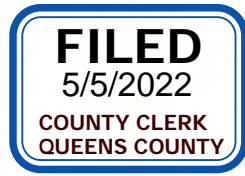
Docket Number: Index No. 704524/18

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

SABRINA GARWOOD,

Index No. 704524/18

Plaintiff(s),

Motion

- against-

Date

November 16, 2021

Motion

Cal. Nos. 16 & 17

ALBERT WERTHER, DIANE WERTHER, G. PIETRO,
LLC and WENDELL HOME CENTER, INC.,

Defendant(s).

Motion

Seq. Nos. 4 & 5

The following e-filed papers read on these motions by defendants, Wendel Home Center, Inc. (Seq. 4) and G. Pietro, LLC (Seq. 5) for an order granting summary judgment, pursuant to CPLR 3212 and dismissing the complaint and cross claims.

Papers
Numbered

- Notices of Motion (Seq. 4) - Affirmation - Exhibits..... EF 67-92
Affirmation in Opposition - Exhibits - Memorandum of Law. EF 93-96
Affirmation in Opposition - Exhibits - Memorandum of Law. EF 122-128
Reply Affirmation - Exhibit..... EF 132-133
Notices of Motion (Seq. 5) - Affirmation - Exhibits -
Memorandum of Law..... EF 98-120
Memorandum of Law in Opposition - Exhibit..... EF 138-139
Reply Affirmation..... EF 140-141

Upon the foregoing papers, it is ordered that the motions are determined as follows:

This action arises from injuries allegedly sustained by plaintiff on November 17, 2016 when she tripped and fell as she was exiting premises owned by defendants, Albert Werther and Diane Werther located at 147 Lawn Lane, Oyster Bay, New York. As a result of the occurrence, plaintiff commenced this action against the Werther defendants as well as defendants, Wendel Home Center, Inc. and G. Pietro, LLC who allegedly performed work at the premises prior to plaintiff's accident.

Defendants, Wendel and Pietro move for summary judgment, dismissing plaintiff's complaint and any cross claims, on the ground that they did not owe a duty to plaintiff. Plaintiff testified that the accident happened as she was exiting the Werther defendants' home from a side entrance located in the den or living area. This entrance accessed the driveway and was described as consisting of two doors and a step, which led to a concrete landing and more steps. Plaintiff testified that as she stepped down from the doorway, "[she] didn't have anything to hold onto, [she] missed [her] step" causing her to fall. She characterized the step down from the door to the landing as steep. Plaintiff denied making any complaints about the side entrance to the Werther defendants prior to the accident. Plaintiff denied knowledge of any construction or maintenance work performed in the area of the exterior side entrance prior to her accident.

The Werther defendants testified that from the time they owned the premises in 1984 until the time of plaintiff's accident, they did not make any changes to the height of the step in question. The Werther defendants further testified that they were responsible for maintaining their home. Defendant, Albert Werther testified that prior to plaintiff's accident, defendant, Wendel replaced the two doors at the side entrance and sometime thereafter, defendant, Pietro replaced rotted wood located below the step with a piece of white wood and a strip of wood located above the step with a new piece of wood of the same dimensions. Albert Werther denied that Wendel did any work to the step. According to Albert Werther, aside from work performed by defendants, Wendel and Pietro, there was no other work performed to the side entrance prior to plaintiff's accident.

William Ritter testified on behalf of defendant, Wendel as its managing partner, that on December 16, 2013, Wendel contracted with the Werther defendants to replace the doors located at the aforesaid left side entrance of their home. The new doors were measured to fit an existing opening. Although Wendel provided the doors, the actual door installation was performed by Phil-Ed, Wendel's installers. Aside from replacing the doors, Ritter denies performing any other work to the side entrance, including changing or replacing the step below the doors.

Gustavo Pietrantoni testified on behalf of defendant, Pietro as its owner, that in 2014, the Werther defendants hired him to perform home improvements to the interior and exterior of their home. The work included replacing rotted wood below the step of the side entrance with a white piece of wood. Pietrantoni testified that the height of the step was not impacted by replacing the old wood with the white wood. Pietrantoni denied replacing the wood strip, located on top of the step.

It is well settled that "[to] hold a defendant liable in common-law negligence, a plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the injury". (*Federico v Defoe Corp.*, 138 AD3d 682, 684 [2d Dept 2016].) The existence of a duty is a threshold question to be determined by the court in the first instance. (*See Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10

[2d Dept 2011].) In the absence of any duty, there can not be a breach, and thus no liability can be imposed. (*See Han Hao Huang v "John Doe"*, 169 AD3d 1014 [2d Dept 2019].)

Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third person (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Izzo v Proto Constr. & Dev. Corp.*, 81 AD3d 898 [2d Dept 2011]), a contractor may be liable in tort to a third party "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely". (*Barone v Nickerson*, 140 AD3d 1100, 1101 [2d Dept 2016], citing *Espinal v Melville Snow Contrs.*, 98 NY2d at 140; *see Bernal v Acs Sys. Assoc.*, 197 AD3d 603 [2d Dept 2021]). In moving for summary judgment, a contracting party is only required to negate the specific exception pled by plaintiff in the complaint and bill of particulars as part of its *prima facie* showing. (*See Mavis v Rexcorp Realty, LLC*, 143 AD3d 678 [2d Dept 2016].)

In the case at bar, although plaintiff pled general allegations of negligence in the complaint and bill of particulars against defendants, Wendel and Pietro, including allegations of negligent construction, modification, replacement, and repair of the step in question, the moving defendants address all three of the exceptions announced by the "Espinal" court as part of their *prima facie* showing. In support of its motion, defendant, Wendel makes a *prima facie* showing that the work it performed for the Werther defendants was limited to the replacement of the two doors and did not involve the step in question. Similarly, notwithstanding the sufficiency of its expert's affidavit, defendant, Pietro establishes that its work to the side entrance was limited to replacing the wooden piece below the step, and in no way changed the structure or the height of the step. Through the parties' deposition testimony, defendants demonstrated that they neither created nor exacerbated the alleged dangerous conditions. (*Barone v Nickerson*, 140 AD3d 1100.) Furthermore, the moving defendants made a *prima facie* showing that plaintiff did not rely on their continued performance of a duty nor did either of them entirely displace the Werther defendants' obligation "to maintain the premises safely". Therefore, the moving defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law by establishing that they did not owe plaintiff a duty of care. (*See Johnson v City of New York*, 102 AD3d 746 [2d Dept 2013]; *Brathwaite v New York City Hous. Auth.*, 92 AD3d 821 [2d Dept 2012].)

In opposition, plaintiff has failed to raise a triable issue of fact as to whether Wendel and Pietro's performance of their contractual obligations created or exacerbated a dangerous condition. (*See Barone v Nickerson*, 140 AD3d 1100.) Contrary to plaintiff's allegations, the moving defendants' failure to establish the height of the step does not preclude summary judgment herein in the absence of any evidence that either defendant altered the height of the step in any way.

Accordingly, the motions for summary judgment are granted and the complaint, including any cross claims against defendants, Wendel Home Center, Inc. and G. Pietro, LLC, is hereby dismissed.

The caption shall be amended as follows:

SABRINA GARWOOD,

Index No. 704524/18

Plaintiff(s),

- against-

ALBERT WERTHER and DIANE WERTHER,

Defendant(s).

IT IS ORDERED that movants shall serve a copy of this order within 30 days of entry on all parties and the Clerk of Queens County. Upon service, the Clerk of Queens County shall amend the caption of this action.

Any future motions shall contain the amended caption.

Dated: April 29, 2022



DARRELL L. GAVRIN, J.S.C.

