

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 12-01786

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

DEBORAH BELSINGER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

M&M BOWLING & TROPHY SUPPLIES, INC., DOING
BUSINESS AS VISTA LANES; VISTA LIQUORS, INC.
AND MELVIN F. ALLEN, DEFENDANTS-RESPONDENTS.

JAMES R. MCCARL & ASSOCIATES, MONTGOMERY (JAMES R. MCCARL OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered July 5, 2012. The order granted the motion of defendants for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion seeking summary judgment dismissing the claims for negligence and failure to warn and reinstating those claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she fell inside defendants' bowling alley. The accident occurred when plaintiff, after entering the building, unknowingly stepped down from a concrete step located immediately inside the doorway. There is a 4½-inch drop from the top of the step to the floor below. The second amended complaint, as amplified by the bill of particulars, alleges that defendants were negligent in, inter alia, permitting a dangerous condition to exist on the premises, namely, the cement step inside the doorway; failing to warn of the dangerous condition; and failing to provide adequate lighting for the entryway.

We conclude that Supreme Court erred in granting defendants' motion for summary judgment insofar as it sought dismissal of the negligence and failure to warn claims. We therefore modify the order accordingly. With respect to the negligence claim, we note that "[i]t is beyond dispute that landowners and business proprietors have a duty to maintain their properties in [a] reasonably safe condition" (*Di Ponzio v Riordan*, 89 NY2d 578, 582), and "whether a dangerous or

defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]). Here, defendants failed to meet their initial burden of establishing as a matter of law that the step in question was not inherently dangerous (see *Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219; see also *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533; *Eisenhart v Marketplace*, 176 AD2d 1220, 1220). Although defendants submitted evidence establishing that the relevant building codes were inapplicable and that defendants had never been issued a citation for the step or the entryway, compliance with such codes " `does not necessarily preclude a jury from finding that the . . . [step or the entryway] was part of or contributed to any inherently dangerous condition existing in the area of [plaintiff's] fall' " (*Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032; see *Eisenhart*, 176 AD2d at 1220). Moreover, " `[c]ompliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof' " (*Hayes*, 100 AD3d at 1532, quoting *Miner v Long Is. Light. Co.*, 40 NY2d 372, 381).

We similarly conclude that defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law with respect to plaintiff's failure to warn claim (see generally *Barry v Gorecki*, 38 AD3d 1213, 1216). Although there was a sign on the door that read "Caution Step Down," defendants acknowledged that the sign would not be visible to someone for whom the door was being held open and, here, plaintiff alleges that her son was holding the door open for her. In any event, the sign was faded and accompanied by several other signs, thus potentially reducing its effectiveness. In addition, defendants did not paint or mark the step with bright colors or otherwise draw attention to it. Because defendants failed to meet their initial burden of proof with respect to the negligence and failure to warn claims, we need not consider the sufficiency of plaintiff's opposing papers with respect to those claims (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We further conclude, however, that defendants met their initial burden as a matter of law with respect to plaintiff's inadequate lighting claim (see generally *Steuer v HSBC Bank USA, N.A.*, 82 AD3d 1680, 1680-1681, *lv denied* 17 NY3d 705). Specifically, defendants submitted evidence demonstrating that the lighting in the entryway complied with applicable industry standards and was otherwise adequate, and in opposition plaintiff failed to raise an issue of fact (see generally *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418-419). The court therefore properly granted that part of defendants' motion for summary judgment dismissing that claim.