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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 8

FRANCISCO FANIZZA and MARIA FANIZZA, individually and as parents and natural guardians of GIOVANNI FANIZZA, a minor under the age of 14

Plaintiff(s)

Index No. 3840/03

-against-

GLORIA MAYNARD and KENNETH MAYNARD

Defendant(s)

The following papers read on this motion:

Notice of Motion x

Answering Affidavits x

Reply x

Upon the foregoing papers, it is hereby ordered that the motion by defendants, Gloria Maynard and Kenneth Maynard seeking summary judgment, pursuant to CPLR 3212 is denied for the reasons set forth herein.

Plaintiffs commenced this action to recover for personal injuries sustained allegedly by plaintiff Giovanni Fanizza , a minor, under the age of fourteen.

The plaintiff alleges he was injured on the defendant's property on September 16, 2002, while he was attempting to visit a friend who resided in an apartment maintained by the defendants in the basement of the defendants' home. Said residence is located at 290 Frederick Avenue, South Floral Park, N.Y. The plaintiff had been invited over to visit by a friend, James Burgos ("Burgos") whose parents rented the apartment from the defendant.

Plaintiff claims he had opened a screen door to the apartment and knocked. Burgos answered the door but, jokingly, he closed the door on plaintiff. Plaintiff tried to force open the door. In doing so, he slipped backward and fell into the glass panel of the wooden door.

Plaintiff contends he slipped on collected rain water on a concrete landing that had a storm drain at its center (See Ex D, pg. 26), as well as leaves (p. 26), and loose gravel (p. 16).

The Defendants' respond that they periodically inspected the premises and found no such conditions. The parties' both claim that the injury took place during the Plaintiff's attempt to access the lower apartment in the premises.

In this case, the Plaintiff argues that the Defendants' owed a duty to maintain a safe and clean entranceway to the apartment. Plaintiff states that the drain was cracked and flooded at the time of the incident (Pl. EBT, pg. 27-28).

The Plaintiff claims a landowner owes a duty to a person coming upon his land to maintain a reasonably safe condition. **(Gastin v. Association of Camps Farthest Out, Inc.,** 267 A.D.2d 1001).

A reasonably safe condition takes in all the circumstances including purpose and likelihood of injury. **(Macof v. Truman,** 70 N.Y.2d 918).

The landowners' liability for an injury caused by a defective condition requires that the existence of the defective condition be established. **(Sadowsky v. 2175 Wantagh Avenue Corp.,** 281 A.D.2d 407). Moreover, and as a general rule, whether a dangerous condition exists on real property so as to create liability depends on the particular facts and circumstances of each case and present a question of fact for the jury. **(Corrodo v. City of New York** —A.D.3d ___773 NYS2d 894).

In order to constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the incident to permit a Defendant to discovery or remedy it. **(Godron v. American Museum,** 67 N.Y.2d 836).

From the record in this case, it cannot be determined as a matter of law, whether the Defendants' had actual or constructive notice of any defect or that they had sufficient time to repair said defect. Certainly a question of a material fact exists. The Defendants' failure to discover a defective condition that should have been discovered

can be no less of a breach of due care. **Blake v. City of Albany,** 48 N.Y.2d 875.

The Plaintiff alleges that the apartment in the basement where Burgot resides is illegal. Standing alone, the illegality is not negligence. It is necessary to establish facts which link the violation to the proximate cause of the injury.

Even if the Court were to find that the condition was open and obvious, that does not preclude a finding of liability against the property owner but may go to the issue of comparative negligence. **(Cap v. Karfinkel,** 1A.D.2 48). A landlord retains a liability and a duty to keep the premises safe. **(Powers v. St. Bernadette's Roman Catholic Church,** 307 A.D.2 1219).

One who undertakes to perform inspections becomes subject to a duty to perform such a task in a non-negligent manner (**West Side Corp. v. PPG Industries, Inc.,** 225 A.D.2d 459).

Summary Judgment may be granted where there is no genuine issue of a material fact.

Thus, when faced with a motion for summary judgment, the Court's

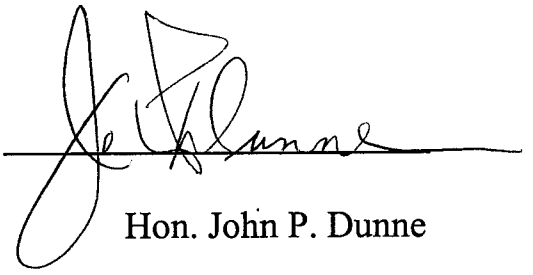
responsibility is to determine whether a genuine and material issue exists which requires a trial (**Miller v. Journal News,** 211 A.D.2d 626). The initial burden is upon the moving party to establish by tendering sufficient evidence, the absence of any material issue of fact. **Cayotte v. Gervasi,** 81 N.Y.2d 1062).

Here, the Defendants' have not met their burden.

In light of the foregoing, the Defendants' motion for summary judgment is **denied.**

It is so Ordered.

Dated: August 25, 2004



Hon. John P. Dunne