

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: November 25, 2020

529908

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SUSAN A. HILL,

Respondent,

v

MEMORANDUM AND ORDER

PAUL B. AUBIN,

Appellant.

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Calendar Date: October 16, 2020

Before: Lynch, J.P., Mulvey, Devine, Pritzker and  
Colangelo, JJ.

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Law Offices of John Wallace, Hartford, Connecticut (Murry S. Brower of counsel), for appellant.

Martin, Harding & Mazzotti, LLP, Albany (Cassandra A. Kazukenus of counsel), for respondent.

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Colangelo, J.

Appeal from an order of the Supreme Court (Powers, J.), entered July 11, 2019 in Schenectady County, which denied defendant's motion for summary judgment dismissing the complaint.

In March 2014, plaintiff fell and sustained severe injuries to her hip after stepping on a wooden floorboard plank that cracked as she was exiting the attic of defendant's two-family home. Plaintiff resided in the second-floor apartment since 1995 under predecessor owners, and her tenancy continued when defendant purchased the home in 2008 and moved into the

first-floor apartment. The wooden floorboard that snapped had been cut by the prior owners to accommodate a ventilation pipe into the attic.

In January 2017, plaintiff commenced this action against defendant alleging, among other things, negligent maintenance of the attic flooring. Following joinder of issue and discovery, defendant moved for summary judgment dismissing the complaint, contending that he could not be held liable for the alleged dangerous condition of the attic floor because it was a latent condition that he neither created nor of which he had actual or constructive notice. Supreme Court denied the motion, prompting this appeal.

We affirm. "As the party seeking summary judgment, defendant bore the initial burden of demonstrating that [he] had maintained the property in a reasonably safe condition and that [he] did not create or have actual or constructive notice of the specific alleged[] dangerous condition that resulted in plaintiff's injury" (Firment v Dick's Sporting Goods, Inc., 160 AD3d 1259, 1259-1260 [2018] [internal quotation marks and citation omitted]; see Torgersen v A&F Black Cr. Realty, LLC, 158 AD3d 1042, 1042 [2018]; Kraft v Loso, 154 AD3d 1265, 1265 [2017]).<sup>1</sup> Constructive notice, in contrast to actual notice, requires that the condition be "visible and apparent and exist[] for a sufficient period of time prior to the accident to permit the defendant to discover it and take corrective action" (Rose v Kozak, 175 AD3d 1656, 1658 [2019] [internal quotation marks, brackets and citations omitted]; see Torgersen v A&F Black Cr. Realty, LLC, 158 AD3d at 1042; Beck v Stewart's Shops Corp., 156 AD3d 1040, 1041 [2017]).

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<sup>1</sup> Given that the condition of the floorboard plank preexisted defendant's purchase of the home, plaintiff does not allege that defendant created the alleged dangerous condition. Plaintiff also does not allege that she provided defendant with actual notice of the condition of the wooden floorboard, as plaintiff never discussed the pipe and floorboard with defendant or the prior owner.

In support of his motion, defendant submitted, among other things, the parties' deposition testimony, a building inspection report dated November 2008, photographs of the interior of the attic and the affidavit of an engineer. As relevant here, plaintiff testified that, on the day of the accident, she and a friend cleaned up the attic at defendant's request by moving the boxes that she wanted to remain in the attic to one side and removing other boxes from the attic that she no longer needed to store. When they were done, plaintiff's friend descended the stairs. As plaintiff started walking to the stairs, the at-issue wooden floorboard cracked, causing her foot to go into the board, at which time her body twisted and she lost her balance and fell onto the floor below. Although the parties agreed that there was at least three feet of visible floor from the top stair of the attic, the parties disagreed on whether the ventilation pipe and condition of the wooden floorboard that was cut to accommodate the pipe were readily observable at the time of the accident and at any time prior thereto.

Plaintiff claimed that the view of the pipe was unobstructed, as none of her boxes or storage items was in front of or around the pipe prior to or at the time of the accident. In contrast, defendant testified that plaintiff's boxes obstructed any view of the pipe, and the boxes were not moved to allow for inspection of the floor underneath the boxes during the pre-purchase inspection of the house, or at any time thereafter, despite the roof leakage and water damage that was revealed by the inspection. Defendant further testified that he was not aware of the vent pipe coming through the flooring until after he was shown photographs of the cracked board after the accident, even though he had been in the attic on multiple occasions prior to the accident to change the furnace filter, which had been last changed in November 2013. Defendant also testified that the pipe could very likely be a bathroom vent, as a bathroom had been redone prior to his purchase of the house, noting that, if it was a bathroom vent, "[i]t's bad practice to be venting a pipe like that into an attic space from a bathroom. It should be going up the soffit or the roof or the side of the building." Defendant, who testified that he had experience in remodeling houses and was made aware of water damage to the

attic, failed to inspect the entire attic floor before he purchased the house, and instead limited his inspection and that of his structural engineer to the flooring "from the point of the stairs to the furnace."

Defendant also submitted the affidavit of a professional engineer, who opined, based solely on a review of the pleadings, deposition testimony and some of the photographs taken of the floorboard, that a visual inspection of the floorboard in question would not have revealed that it was structurally infirm. Specifically, the engineer opined that "[t]he subject floorboard that failed had apparent lack of support due to installation workmanship by the builder. This condition was hidden as a latent defect and was not readily observable by visual inspection of the floor walking surface." Although defendant's engineer never conducted a visual inspection of the cracked floorboard in person to support his conclusion that its condition was latent, not patent, this, in and of itself, is not fatal (see Pereira v Quogue Field Club of Quogue, Long Is., 71 AD3d 1104, 1106 [2010]; Torres v W.J. Woodward Constr., Inc., 32 AD3d 847, 849 [2006]). However, a review of the record does not reveal whether the engineer relied solely upon three grainy photos admitted as deposition exhibits or the much more detailed photos included in plaintiff's expert report. As such, defendant's affidavit, as presented, lacks foundation and is of limited probative value at this juncture (see Delosh v Amyot, 186 AD3d 1793, 1794 [2020]).<sup>2</sup> Given defendant's own testimony – that there was three feet of visible floor on the top landing of the attic, that he accompanied the structural engineer during the inspection of the attic in November 2008 and that he was

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<sup>2</sup> Even if the affidavit of defendant's engineer is credited and satisfied defendant's threshold burden as to notice, the affidavit of plaintiff's expert, who actually observed the floorboard at issue and opined that the defective condition of the floorboard was evident, is more than sufficient to raise an issue of fact as to whether the defective condition was latent or not, particularly in light of plaintiff's deposition testimony that her storage boxes did not obstruct a view of such floorboard.

present in the attic every 6 to 12 months thereafter to change the furnace filter – we agree with Supreme Court that a reasonable person viewing the at-issue floorboard would have readily seen the large cutout in the wooden floorboard to accommodate the ventilation pipe and questioned the structural integrity of that floorboard. Accordingly, viewing the evidence in the light most favorable to plaintiff, as the nonmoving party, we find that defendant failed to meet his initial burden of demonstrating that he maintained the property in a reasonably safe condition and that he did not have constructive notice of the specific alleged dangerous condition that resulted in plaintiff's injury (see Firment v Dick's Sporting Goods, Inc., 160 AD3d at 1259-1260; Torgersen v A&F Black Cr. Realty, LLC, 158 AD3d at 1042; Kraft v Loso, 154 AD3d at 1265). As defendant's submissions leave unresolved questions of fact, Supreme Court properly denied defendant's motion for summary judgment (see Firment v Dick's Sporting Goods, Inc., 160 AD3d at 1259; Torgersen v A&F Black Cr. Realty, LLC, 158 AD3d at 1044).

Mulvey, Devine and Pritzker, JJ., concur.

Lynch, J.P. (concurring).

I respectfully concur. Defendant's expert, a professional engineer, reviewed photographs of the attic floor that depict the area around the ventilation pipe and the floorboard that failed. In her brief, plaintiff acknowledges that defendant's expert reviewed the photographs taken by plaintiff's expert and in no way calls into question the quality of the photographs. Defendant's expert observed that "[t]he floorboard photographs depict no visible evidence of deterioration or rot and appeared to be of sound material." He described the attic floor as made of "full thickness conventional wood planks" and noted that the floor complied with relevant building codes. He concluded that the floorboard failed due to an "apparent lack of support" when it was installed. The expert characterized this condition as a latent defect that would not be revealed upon a visual inspection. In my view, the expert's affidavit was sufficient to satisfy defendant's threshold burden of demonstrating that he

lacked actual or constructive notice of any defect in the floorboard (see Pereira v Quogue Field Club of Quogue, Long Is., 71 AD3d 1104, 1106 [2010]; Torres v W.J. Woodward Constr., Inc., 32 AD3d 847, 849 [2006]). That said, I agree with the majority that the affidavit of plaintiff's expert raised a genuine question of fact as to whether the floorboard defect was latent. For this reason, I agree that Supreme Court properly denied defendant's motion for summary judgment.

ORDERED that the order is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial "R".

Robert D. Mayberger  
Clerk of the Court