

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Dougherty v. 359 Lewis Ave. Assoc., LLC

2021 NY Slip Op 00835 (App. Div. 2021) · No. 2019-05927 · Decided February 10, 2021

SUMMARY

The Appellate Division, Second Department, affirmed the denial of a property owner's motion for summary judgment in a premises-liability action. The court held that the absence of a code violation did not resolve common-law negligence issues and that the defendant failed to establish lack of constructive notice of an unguarded fire-escape stairway opening.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Cheryl E. Chambers, J.P.; Leonard B. Austin, J.; Hector D. LaSalle, J.; Valerie Brathwaite Nelson, J.
JURISDICTION	New York
DECIDED	February 10, 2021
DOCKET	2019-05927
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from an order denying its motion for summary judgment dismissing the personal-injury complaint.
STANDARD OF REVIEW	On a motion for summary judgment, the defendant property owner must make a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of it. The motion must be denied if the movant fails to eliminate triable issues of fact.
PRECEDENTIAL VALUE	Published New York intermediate appellate opinion
PARTIES	359 Lewis Avenue Associates, LLC v. Richard Dougherty

TOPICS

premises liability personal injury negligence comparative fault appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the defendant established entitlement to summary judgment by showing that the unguarded stairway opening was not a dangerous or defective condition because it complied with applicable codes and statutes.
2. Whether the defendant established prima facie that it lacked constructive notice of the allegedly dangerous condition.
3. Whether the allegedly open and obvious danger or the plaintiff's conduct in standing with his back to the opening absolved the defendant of liability at the summary-judgment stage.

HOLDINGS

1. The absence of a violation of a specific code or ordinance is not dispositive of common-law negligence claims; a landowner may be negligent for departing from generally accepted customs and practices even when the condition complies with relevant codes and ordinances.
2. A defendant is not entitled to summary judgment where it fails to establish prima facie that it lacked constructive notice of a dangerous condition that was visible, apparent, and present for a sufficient period to permit discovery and remediation.
3. An open-and-obvious condition and allegations that the plaintiff was negligent bear on comparative negligence but do not, by themselves, absolve the defendant of liability.

KEY QUOTATIONS

"In a premises liability case, a defendant property owner who moves for summary judgment 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" (at 1)

"A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (at 2)

FACTUAL BACKGROUND

On March 18, 2016, Richard Dougherty was inspecting a building owned by 359 Lewis Avenue Associates, LLC. He was standing on a 16 3/8-inch-wide platform on the fourth floor of a fire escape when he fell through an open stairway that lacked a guardrail and landed on the third-floor platform. The fire escape had existed since approximately 1905 to 1907, and the defendant had owned the building since 2010.

PROCEDURAL HISTORY

Richard Dougherty commenced an action for personal injuries allegedly sustained when he fell through an unguarded stairway opening on the defendant's fire escape. The defendant moved for summary judgment,

arguing that the condition did not violate applicable codes or statutes and that it lacked constructive notice. The Supreme Court, Kings County, denied the motion, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Kellman v 45 Tiemann Assoc., 87 NY2d 871, 872
- Locke v Calamit, 175 AD3d 560, 561
- Steed v MVA Enters., LLC, 136 AD3d 793, 794
- Beri v Chung Fat Supermarket, Inc., 125 AD3d 587, 587
- Romero v Waterfront N.Y., 168 AD3d 1012, 1013
- Alexis v Motel Oasis, 143 AD3d 926, 927
- DeCarlo v Vacchio, 147 AD3d 724, 724-725
- Swerdlow v WSK Props. Corp., 5 AD3d 587, 588
- Fortune v Western Beef, Inc., 178 AD3d 671, 672
- Gordon v American Museum of Natural History, 67 NY2d 836, 837-838
- Stancarone v Sullivan, 167 AD3d 676, 678
- Dunitz v J.L.M. Consulting Corp., 22 AD3d 455, 457