

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

GAIL HELM and SCOTT HELM,	:	
	:	C.A. No: K12C-03-014 (RBY)
_____ Plaintiffs,	:	
	:	
v.	:	
	:	
206 MASSACHUSETTS AVENUE,	:	
LLC, and GALLO REALTY, INC.,	:	
	:	
Defendants.	:	_____

*Submitted: September 20, 2013
Decided: December 12, 2013*

*Upon Consideration of Defendant Gallo Realty, Inc.
Motion for Summary Judgment
GRANTED*

ORDER

Patrick C. Gallagher, Esquire, Dover, Delaware for Plaintiffs.

James D. Griffin, Esquire, Griffin & Hackett, P.A., Georgetown, Delaware for Defendant Gallo Realty, Inc.

Susan L. Hauske, Esquire, Tybout, Redfeam & Pell, Wilmington, Delaware for Defendant 206 Massachusetts Avenue, LLC.

Young, J.

SUMMARY

This concerns the Motion for Summary Judgment filed by Defendant, Gallo Realty, Inc. (“Gallo”) addressed to the Complaint of Plaintiffs Gail Helm and Scott Helm (“Plaintiffs”). Plaintiffs’ Complaint asserts a claim of negligence arising out of a fall down stairs at a rental property known as and located at 206 Massachusetts Avenue, Lewes, Delaware (the “property”).

Gallo argues that Plaintiffs’ claim should be dismissed for a variety of reasons: 1) whether Gallo’s being merely an agent for the property owner (206 Massachusetts Avenue, LLC) shields Gallo from liability for any such claims; 2) whether Plaintiffs’ signing of a rental agreement ostensibly indemnifying Gallo against claims for personal injuries precludes Plaintiffs’ claims against Gallo; and 3) whether Plaintiff Gail Helm assumed the risk of her injury by her own actions thereby foreclosing Plaintiffs’ claim.

Because of the presence of a substantial issue of material fact relative to the extent of Gallo’s control over the property, Summary Judgment cannot be granted on that assertion of shielding from liability.

As to the claim that Plaintiffs indemnified Gallo from liability for personal injury claims, the record appears to support Gallo’s Motion, in that Plaintiffs agreed in the leasing agreement that no claims could be asserted against Gallo. Because Plaintiffs argue that the relevant language may be ambiguous as it applies to a claim by Plaintiffs, and because of the following circumstance, this issue need not be addressed.

Finally, though, because the actions of Plaintiff Gail Helm, she is barred by

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her own assumption of the risk and/or majority negligence as a matter of law, the Motion of Gallo for Summary Judgment is **GRANTED**.

STANDARD OF REVIEW

In a motion for summary judgment, the burden is on the moving party to show, with a reasonable degree of certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted. When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, Summary Judgment is not appropriate. When, however, undisputed facts require a finding that Plaintiffs' claims are barred as a matter of law, Summary Judgment is to be granted. C.R. 56 (c).

DISCUSSION

On March 4, 2010, Plaintiff, Gail Helm, executed a Residential Lodging Agreement to rent the property for one week, beginning on July 10, 2010. This was a property that she and her family had rented in the previous summers of 2008 and 2009.

On July 10, 2010, Plaintiffs arrived at the property in the afternoon, following the earlier arrival of others in her family. Plaintiff ascended the stairs; considered some rugs to be in need of washing; descended the stairs with the offending rugs, putting them in a washing machine on the first floor. She returned to the second floor, where the family visited and had dinner delivered. Arguably, all of that occurred during hours when artificial light was not required.

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Then, around midnight, Plaintiff again descended the stairs to move the rugs from the washer to the dryer. In accordance with Plaintiff's testimony, the stairway had, by that time, become darkened. A light existed at the top of the stairs, though its positioning, Plaintiff claims, did not provide adequate lighting at the bottom. A light at the bottom of the stairs existed, but was not turned on, and could be activated only from the bottom of the stairs, where, according to Plaintiff, no family member, at that time, was located. A bannister ran the length of the stairs, which curved with the staircase towards the foot of the staircase. Plaintiff utilized that bannister to assist her in her descent.

As Plaintiff approached the bottom, she came to what she believed was the last step. It was not. Plaintiff fell, injuring herself. As a result, Plaintiffs filed this action, alleging negligence on the part of both named Defendants.

I. AGENT'S RESPONSIBILITY

Gallo has moved for Summary Judgment, noting that discovery has been completed. It has based its motion on several grounds. The first is that, as merely the agent for the owner/lessor, Gallo is not to be held liable for any premises liability. The parties have argued extensively – from three perspectives, actually – regarding the extent of Gallo's control, and the effect that the control has on this question. The position of agent may not, *ipso facto* shield that agent from all liability. To that effect, see *Saunders v. Preholding Hampstead, LLC*, 2012 Del. Super. LEXIS 252, at *5, following Restatement Third, Agency § 7.01, stating “a property manager owes its tenants a duty of care if the property manager exercised ‘actual control’ over the premises.” Since different testimony has asserted that

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Gallo, *inter alia* provided for cleaning the property, arranged for maintenance, and provided some level of property inspection, this issue becomes one of material fact.

As such, even without further legal analysis, the issue is not one that is appropriate for determination through Summary Judgment.

II. INDEMNIFICATION OF DEFENDANTS

The lease executed by Plaintiff contains the provision that Plaintiff, as “Guest,” indemnifies both the Owner and Gallo, the rental agent, against all liability, by reason of any claim for, among other things, bodily injury sustained by Plaintiff arising out of her use or occupancy of the property. That language, which would seem at that point to preclude Plaintiffs’ going forward, is, however, qualified. It excepts from effect claims “caused by the sole negligence of Owner.” To the extent that any surviving claim would have to be caused exclusively by someone who is not Gallo, Gallo would appear to be free of responsibility by virtue of the described indemnification.

That conclusion is even more persuasive, because of the following discussion demonstrating the presence of negligence which is not solely that of the Owner, but of Plaintiff herself.

Plaintiffs assert, though, that the described language is to some extent ambiguous. For these purposes, that assertion need not be addressed.

III. ASSUMPTION OF RISK

Any consideration of a failure to recover on a negligence claim, where proximately caused injury is indisputable, is typically the province of a jury. There

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are two exceptions to that. The first is when Plaintiff is negligent herself to such an extent that, as a matter of law, her negligence is greater than 50% of the total negligence. The second is where Plaintiff assumes the risk of her injury as a primary, as opposed to a secondary, matter.

In this case, Plaintiff has argued that Defendants were negligent in that they permitted to exist a dangerous condition, to wit: a stairway that was insufficiently lighted, giving rise to a fall by a user thereof. During argument of these motions, the parties agreed that Plaintiffs had utilized the same staircase, in an unchanged condition, for two weeks, over two prior summers, in the past, and that some ten families each summer over the ten previous years had done the same, all without incident. Yet, all that would seem to be something for argument to a jury. For purposes of these motions, the lighting condition on those stairs will be assumed to be the result of some negligence.

Plaintiffs' negligence, though, is indisputable. During her deposition testimony (given, of course, under oath), Plaintiff stated that she was aware that the stairwell was very dark, but proceeded anyway. That, alone, provides the basis for negligence, to some degree, on the part of Plaintiff. Yet, Plaintiff was far more specific than that. She stated that she "definitely" recognized the situation as a safety issue. Indeed, she stated that she "knew it was unsafe when [she] looked down." Nevertheless, she said, she thought she could handle it. When asked why she sought no help from any other family member, she responded by asking: "Why would I put them in jeopardy?"

Those actions by Plaintiff are negligent to a far greater extent than any of

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Defendants, thereby constituting comparative negligence greater than 50% as a matter of law. That precludes recovery by Plaintiff. As stated in *Triebel v. Sabo*, “when the trial judge determines that, under the facts presented, no reasonable juror could find in favor of the plaintiff, the trial judge is no longer required to submit the matter to the jury.”¹ In the case presently before the Court, the evidence, as described by Plaintiff herself, requires a finding that the Plaintiff’s negligence exceeded that of the Defendant. In such a case as is presented here, “it is the duty of the trial court, as a matter of law to bar recovery.”²

That, however, is not the sole basis for the foreclosure of Plaintiffs’ claim. As a completely separate and distinct matter of law, Plaintiff committed primary assumption of the risk of her injuries. Without question, she knew of the existence of the risk; she expressly appreciated the danger of it (even wanting to avoid exposing others to the jeopardy); but she, nevertheless, did not avoid it. There was not even any compelling reason or time element urging her on. She openly and deliberately consented to accept the risk of proceeding, as her conduct manifested.³

As a consequence, of Plaintiff’s superior negligence and primary assumption of the risk, as a matter of law, Defendant’s Motion for Summary Judgment is **GRANTED**.

¹ 714 A.2d 742 (Supr. Ct. 1998).

² *Id.*

³ *Brady v. White*, 2006 WL 2790914, *2 (Del. Super. Ct. Sept. 27, 2006) and *Frelick v. Homeopathic Hosp. Ass’n of Del.*, 150 A.2 17 (Del. Super. Ct. 1959).

