

VERMONT SUPERIOR COURT  
Windham Unit  
7 Court Street  
Newfane VT 05345  
802-365-7979  
www.vermontjudiciary.org



CIVIL DIVISION  
Case No. 20-1-20 Wmcv

Messina vs. Brattleboro Savings & Loan et al

Decision on Defendants' Motions for Summary Judgment

This personal injury action was filed on January 27, 2020. Defendants Muse and Associates and Lorelee Muse (the Muse defendants) filed their motion for summary judgment on May 11, 2021, and defendant Brattleboro Savings and Loan Assoc., F.A. (BSL), filed its motion for summary judgment on August 9, 2021. The plaintiff opposes both motions.

Undisputed Material Facts

The parties agree to the following basic facts relevant to the plaintiff's complaint and these motions. As a result of a foreclosure, Brattleboro Savings and Loan Association (BSL) owned the property at 5771, 5803, and 5805 VT Route 5, Ascutney, Vermont, (the property). Lorelee Muse was a licensed real estate broker, and was doing business as Muse and Associates Real Estate, a registered trade name. BSL had listed the property with Ms. Muse for sale with an exclusive right to market agreement. Under that agreement, the Muse defendants had authority to go into the property to show it, to place and maintain a "for sale" sign and a lockbox on the property, and to take photographs of the property for marketing. They did not own or occupy the property. They had not agreed in writing or otherwise to maintain or repair the property. At the time of her alleged trip and fall, the plaintiff, Amy Messina, was a real estate agent showing the property to prospective buyers, with the advance permission of the Muse defendants. No agent of the Muse defendants was present. On January 31, 2017, at about 5:30 p.m., the plaintiff conducted a showing of the property with prospective purchasers. Neither the plaintiff nor the Muse defendants were conducting an open house at the property. The Muse defendants were aware that the showing would take place after sunset that day. Sunset occurred at around 5:00 P.M. The plaintiff asserts that she tripped and fell on a stair inside the building. She asserts that due to dim lighting it was difficult to see the stair. When she arrived with the prospective purchasers, she turned on the lights throughout the property. She had visited the property years before, when it was an operating restaurant, and was aware that it had multiple levels. She had reviewed the photographs of the property in the listing, which showed the multiple levels of the space. She had not visited the property since the business closed. She and the potential purchasers successfully descended the step in question to a lower level of the restaurant in the course of the tour, and it was as they ascended that step to go back up that the plaintiff tripped and fell, allegedly suffering significant injuries, including a broken hand, a bruised shoulder, and a black eye. Lorelee Muse visited and was inside the property several times before the incident, and saw the step where the plaintiff tripped and fell. She did not see the step that plaintiff allegedly tripped as a hazard or

different from any other step. Agents of the Muse defendants visited the property at least six times within the three months immediately prior to the plaintiff's fall. Ms. Muse was there five times. She walked through the property, gathered details about it, and took photos. BSL did not tell the Muse defendants that the stair was a trip hazard and never disclosed any other unsafe condition of the property to the Muse defendants.

The parties dispute whether a listing real estate agent of foreclosed commercial property has an obligation to notify visitors of potentially hazardous conditions at the listed property, or to remediate such conditions, and whether the Muse defendants had sufficient control or authority to provide such notice or to remediate any such conditions at this property. The parties also dispute whether the single stair in question was in fact a dangerous condition raising an obligation on the part of any of the defendants to give notice to visitors. In particular, they dispute whether it was open and obvious.

### Legal Conclusions

Summary judgment is appropriate if the statements of undisputed material facts show that “there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a), (c). The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted). The moving party “has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.” *Price v. Leland*, 149 Vt. 518, 521 (1988). Summary judgment is appropriate “where, after an adequate time for discovery, a party ‘fails to make a showing sufficient to establish the existence of an element’ essential to his case and on which he has the burden of proof at trial.” *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Under Vermont law, to prove negligence the plaintiff must show that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the breach proximately caused injury to the plaintiff. *Leclair v. Leclair*, 2017 VT 34, ¶ 10, 204 Vt. 422. In determining whether a particular defendant owes a duty to a plaintiff, the Vermont courts have generally applied the Restatement (Second) of Torts. *Leclair*, 2017 VT 34, ¶ 11 n.4. The Restatement provides that:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, § 343 (1965). As to the liability of non-possessors of land who may act on behalf of the possessors, the Restatement provides that:

One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts, § 383 (1965).

This rule generally applies to people who are engaged in activities on the land, such as contractors, and who cause harm by their act or activity, not to more passive activities. Restatement (Second) of Torts, § 383 cmt. c.

The court has not found any Vermont case law that directly addresses the liability of a real estate agent for injuries suffered by another agent or potential purchaser while they are visiting the property that is for sale. However, many other states have addressed this question. Some cases have held that a seller's agent may meet the definition of a possessor, as a person in occupation of land with intent to control it, and may be liable for harm caused on the premises as a person acting on behalf of the possessor. *Jarr v. Seeco Const. Co.*, 666 P.2d 392, 395 (Wash. App. 1983) (prospective purchaser injured at open house hosted by listing agent). A realtor with an exclusive contract to sell the property was held to be in possession for purposes of Section 343, or acting on behalf of the possessor pursuant to Section 383, in *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 823 (Tenn. Ct. App. 1992). "Of necessity, this contract gave [the realtor] the authority to take whatever possession and control of the property that would be reasonably required to effect a sale, including the power to invite prospective buyers onto the property and to conduct tours of the house." *Smith*, 846 S.W.2d at 823. See also [Hall v. Rockcliff Realtors](#), 215 Cal.App.4th 1134, 1140 (Cal. Ct. App. 2013) (realtor and owner could be liable to another realtor who was injured when showing the house, where realtor and owner were aware of defective attic staircase/ladder, which caused the plaintiff realtor's injury. Listing agent owed "a duty of care to all persons, including third persons, within the area of foreseeable risk"); *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 691 (Ind. Ct. App. 2006) (real estate broker has a duty to warn a prospective buyer of a "latent defect in the premises when the broker is aware of it"); *Anderson v. Wiegand*, 567 N.W.2d 452, 455 (Mich. Ct. App. 1997) (realtor had possession of premises for purposes of open house and as an invitor had a duty to take reasonable steps to diminish hazards to invitees); *Hopkins v. Fox & Lazio Realtors*, 625 A.2d 1110, 1113-1116 (N.J. 1993) (holding that a realtor conducting an open house had a duty to conduct an inspection of the premises and to warn attendees of any dangerous conditions discovered). *Hopkins*, like this case, involved an injury allegedly caused by a missed step.

Some cases also hold to the contrary, that a real estate agent or broker is not liable to visitors to the premises for defects that may cause them injury because they do not own, control, occupy or make special use of the premises. See, e.g., *Pirie v. Krasinski*, 18 A.D.3d 848, 850 (N.Y. App. Div. 2005) (neither homeowner nor realtor liable to potential buyer for injuries she incurred when she fell because she did not notice height difference between floor in hall and adjacent room); *Knight v. Realty USA.com, Inc.*, 96 A.D.3d 1443 (N.Y. App. Div. 2012) (prospective buyer injured when tripped over a platform in the basement at open house —on appeal court held the realtor who listed the property and showed it to buyers did not own, occupy, or control the property and did not employ it for any special use, so owed the plaintiff no duty of care).

The court concludes that, giving the plaintiff the benefit of all reasonable doubts and inferences, the question whether the Muse defendants owed the plaintiff a duty of care is disputed, and should be left to the jury to determine based on the applicable law stated above.

Both the Muse defendants and BSL also argue that even if they owed the plaintiff a duty of care, they did not breach any such duty by failing to alert the plaintiff to the stair between two different levels of the premises.

Both the Muse defendants and the primary owner, BSL, argue that this step between the two different levels of the property was an open, visible defect, if it was a defect at all, and that they had no duty to alert anyone to this step as a risk. They argue that it was not a defect that created an unreasonable risk of harm to anyone, and moreover, that the plaintiff was aware of the conditions at the premises, because she had visited before, and because only moments before her fall she had stepped down over the step without incident. The plaintiff, on the other hand, argues that this step was unmarked, that the lighting conditions were poor, and that the placement of this step was such that a warning via signage or bright colored tape was necessary to reduce the risk that the plaintiff and others might trip over it and be injured. The court again concludes that whether the plaintiff actually knew of the step, whether she should have known, and whether the step in all the circumstances amounted to a defect that created an unreasonable risk of injury of which the defendants had a duty to warn are factual questions for the jury. Again, when the plaintiff is given the benefit of all reasonable doubts and inferences, these issues are disputed and should be left to the jury to decide. Accordingly, the motion for summary judgment by the Muse defendants and BSL based on their having no duty to the plaintiff is denied.

#### Order

Both defendants' motions for summary judgment are denied.

A handwritten signature in black ink, appearing to read 'K.A.H.', is written over a horizontal line. The signature is stylized and cursive.

Katherine A. Hayes  
Superior Judge  
November 3, 2021