

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

***ELAINE PELLECHIA, et al.,*** )

***Plaintiffs*** )

**v.** )

***Docket No. 03-4-P-C***

***ALEXSANDRA FISHER COLES,*** )

***Defendant*** )

***RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT***

The defendant, personal representative of the estate of Dean L. Fisher, moves for summary judgment in this action arising out of a slip and fall. I recommend that the motion be granted.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **II. Factual Background**

The following undisputed material facts are appropriately presented pursuant to this court's Local Rule 56 in the parties' statements of material facts.

The plaintiffs leased a townhouse, Harbor View Unit No. 4 in Rockland, Maine, from Dean L. Fisher. Defendant's Statement of Material Facts ("Defendant's SMF") (Docket No. 7) ¶¶ 1-2; Plaintiff's [sic] Opposing Statement of Material Facts, etc. ("Plaintiffs' Responsive SMF") (Docket No. 9) ¶¶ 1-2. The plaintiffs moved into the townhouse at the end of August 1997. *Id.* ¶ 4. Elaine Pellechia alleges that on October 22, 1997 she fell at the top of the stairs leading from the second to the first floor in the townhouse. *Id.* ¶¶ 1, 3. She fell down the entire flight of stairs. Plaintiff's [sic] Statement of Additional Material Facts ("Plaintiffs' SMF") (included in Plaintiffs' Responsive SMF

beginning at p. 5) ¶ 4; Defendant’s Reply to Plaintiffs’ Statement of Additional Material Facts (“Defendant’s Responsive SMF”) (Docket No. 12) ¶ 4.

This stairway was the main entrance for the unit and was the only entrance used by the plaintiffs. Defendant’s SMF ¶ 6; Plaintiffs’ Responsive SMF ¶ 6. Elaine Pellechia used the stairway to go between the first and second floors every time she entered or left the townhouse. *Id.* ¶ 7. Her only concern with the stairway prior to her fall was with its narrowness and steepness. *Id.* ¶ 8. William Pellechia used the stairway on a daily basis for about the first month that he lived in the townhouse and did not notice any problems with the stairs during that time. *Id.* ¶¶ 21-22. He did not notice any looseness of the stairs in the seven months after Elaine Pellechia fell. *Id.* ¶ 37.<sup>1</sup>

At approximately 9:30 p.m. on October 22, 1997 Elaine Pellechia was headed downstairs to check the doors and the lights. *Id.* ¶¶ 13, 15. She does not know why she fell or where her feet were when she fell. *Id.* ¶¶ 17-18. She was reaching to turn on the light on her left when she started to fall. *Id.* ¶ 20. As a result of the fall, she suffered a broken wrist, cuts and bruises and was hospitalized for five days, including surgery on her wrist. Plaintiffs’ SMF ¶¶ 5-6; Defendant’s Responsive SMF ¶¶ 5-6.

In May 1998 Andrew H. Sims, Jr., a “safety expert” retained by the plaintiffs, inspected the stairway. Defendant’s SMF ¶ 23; Plaintiffs’ Responsive SMF ¶ 23. He was asked to visit the townhouse to see if he could determine a reasonable cause for the fall suffered by Elaine Pellechia. *Id.* ¶ 24. He testified that he spent 20 to 25 minutes examining the staircase without finding any defects. *Id.* ¶ 25. He testified that only after looking “in extreme detail at the very top [stair]” he noticed that “the bullnose was not totally supported all the way across” and would move “if you

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<sup>1</sup> The plaintiffs purport to deny this paragraph of the defendant’s statement of material facts, but their denial is based on an apparent misunderstanding of the assertions made and is not responsive. Plaintiffs’ Responsive SMF ¶ 37. The assertions are supported by the citation to the summary judgment record given by the defendant and are accordingly deemed admitted.

stepped on it in the exact right position with your weight almost to the edge of the bullnose.” *Id.* ¶¶ 26-27. He agreed that the looseness could only be noted when stepping on the loose area with the ball of the foot so that the weight was concentrated on the leading edge of the bullnose. *Id.* ¶ 28. His rough guess was that the bullnose was probably capable of moving “around an eighth of an inch.” *Id.* ¶ 29. The looseness extended across about one-quarter to one-third of the width of the stair;<sup>2</sup> the left edge, the middle and the right side were secure. *Id.* ¶¶ 30-31. Sims agreed that this “defect” was such that people could walk up and down the stairs every day and never notice it. *Id.* ¶ 32. He testified that in his opinion the bullnose had been loose since the construction of the stairs. *Id.* ¶ 33.

Relying on this information and a scrape mark on the wall of the stairwell “that would have been about the right position for [Mrs. Pellechia] to have hit it if she had started to fall forward and had thrown her right hand up to try and steady herself,” Sims opined that Elaine Pellechia stepped on the bullnose which rotated under her foot, causing her to lose her balance. Plaintiffs’ SMF ¶¶ 9-12; Defendant’s Responsive SMF ¶¶ 9-12.<sup>3</sup>

Dean L. Fisher and his workmen visited the townhouse on numerous occasions to put lock boxes on the thermostats and to lock the plaintiffs’ access to the paddle fan. *Id.* ¶ 16. In order to gain access to the townhouse, these maintenance people would have had to use the stairs down which Elaine Pellechia fell. *Id.* ¶ 17.

### **III. Discussion**

Under Maine law, which is applicable in this diversity action,

a landlord is not liable to a tenant for personal injuries caused by a defective condition in premises under the tenant’s exclusive control. A landlord may

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<sup>2</sup> Paragraph 30 of the defendant’s statement of material facts actually uses the words “width of the stairs,” but it is clear that the looseness at issue occurred only in the top stair.

<sup>3</sup> The defendant qualifies her response to these paragraphs of the plaintiffs’ statement of material facts, contending that Sims’s opinion is inadmissible. For the reasons discussed later in this recommended decision, it is not necessary to resolve this issue.

be found liable, even when the premises are under the tenant's exclusive control, however, under three well-recognized exceptions:

A landlord may be found liable in situations where he: (a) fails to disclose the existence of a latent defect which he knows or should have known existed but which is not known to the tenant nor discoverable by him in the exercise of reasonable care; (b) gratuitously undertakes to make repairs and does so negligently; or (c) expressly agrees to maintain the premises in good repair.

*Chiu v. City of Portland*, 788 A.2d 183, 187 (Me. 2002) (citations and internal quotation marks omitted). *See also Isaacson v. Husson College*, 332 A.2d 757, 761 n. 2 (Me. 1975) (adopting Restatement (Second) of Torts § 343). Here, the plaintiffs do not contend that they were not in exclusive control of the premises inside the townhouse and they do not offer any evidence that would allow a reasonable factfinder to conclude<sup>4</sup> that they were not. *See generally Chiu* at 187-88 (discussing nature of exclusive control by lessee). The evidence in the summary judgment record does not implicate either the second or third exceptions to the general rule of liability set forth above. The plaintiffs contend that the landlord should have known about what they characterize as a latent defect in the stairs, either by properly inspecting the premises or through the assumed knowledge of maintenance personnel who entered the townhouse during the plaintiffs' residency. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Objection") (Docket No. 8) at 5-7.<sup>5</sup>

However, the testimony of the plaintiffs' own expert effectively refutes this argument. Sims testified that he discovered the "defect" in the bullnose only after looking at the top step "in extreme

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<sup>4</sup> I reject the plaintiffs' contention, Objection at 4, that allegations of negligence must always go to a jury. Summary judgment standards apply to negligence cases as they do to all other civil actions.

<sup>5</sup> The plaintiffs contend that 14 M.R.S.A. § 6021(2) creates a duty on the part of the landlord to keep the stairs in good repair. Objection at 6. Because I conclude that the summary judgment record includes insufficient evidence to allow a jury to conclude that the landlord in this case, even if he had such a duty, had actual or constructive notice of the alleged defect in the top stair, it is not necessary to reach this argument. However, were I to reach the issue, I would reject the plaintiff's characterization of this statute, which imposes an implied warranty of fitness for human habitation on any rental of a dwelling unit, as creating a duty to prevent the existence of the defect at issue in this case. Such an expansive reading of the statute would make landlords in effect the guarantors of  
(continued on next page)

detail,” that the looseness (a movement of around an eighth of an inch) was only apparent when one stepped directly on the loose area and that people could walk up and down the stairway every day and never notice the defect. Defendant’s SMF ¶¶ 26-29, 32; Plaintiffs’ Responsive SMF ¶¶ 26-29, 32. The plaintiffs offer no evidence that would allow a reasonable factfinder to conclude that a “proper” inspection of the premises would have revealed this defect; since it was not apparent to users of the stairway and was found by Sims only after an examination in “extreme detail” that followed 20 to 25 minutes of examination during which he found no defects, Defendant’s SMF ¶¶ 25-26; Plaintiffs’ Responsive SMF ¶¶ 25-26, it would be nothing more than speculation to conclude that a “proper” examination by the landlord would have revealed the looseness at one side of the bullnose. The mere presence of maintenance personnel in the townhouse to install locks on “numerous occasions” during the plaintiffs’ tenancy, Plaintiffs’ SMF ¶¶ 16-17; Defendant’s Responsive SMF ¶¶ 16-17, provides an even more attenuated connection to any possible knowledge of the defect on the part of the landlord. These individuals, on the showing made, had no reason to inspect the stairs at all. The fact that they used the stairs puts them into the same category as all other users described by Sims, who would “never notice” the defect. Defendant’s SMF ¶ 32; Plaintiffs’ Responsive SMF ¶ 32.

This lack of evidence on an essential element of the plaintiffs’ claim makes it unnecessary to consider the defendant’s additional contentions that Sims’ testimony must be disregarded and that there is no evidence that the identified defect caused Elaine Pellechia’s fall. Defendant’s Motion for Summary Judgment, etc. (Docket No. 6) at 7-8.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant’s motion for summary judgment be **GRANTED**.

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the safety of tenants, a status not contemplated in Maine law.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 7th day of August, 2003.

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David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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**Defendant**

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