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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J.S.C. Justice

PART 23

Index Number : 111742/2009

LOPEZ, ELVIN

VS.

CHAN, ELIZABETH ANGELA , et al.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/26/12

MOTION SEQ. NO. _____

motion for Summary judgment

No(s). 1, 2

No(s). 3

No(s). 4

Upon the foregoing papers, it is ordered that this motion is granted on default to the extent of dismissing defendant Elizabeth Angela Chan's summary judgment and the cross claims against that defendant 1/26/12 and the Clerk is directed to enter judgment accordingly,

PI is further

ORDERED that the balance of the motion is denied,

This constitutes the decision and order of this Court. A separate Opinion

FILED
MAR 14 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: New York, New York, March 9, 2012

ENTER: _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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ELVIN LOPEZ,

Index No.111742/09

Plaintiff,

OPINION

-against-

ELIZABETH ANGELA CHAN and KAMARAN GROCERY,

Defendants.

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ELIZABETH ANGELA CHAN,

Third-Party Plaintiff,

-against-

FUAD MOHAMED HASSAN,

Third-Party Defendant.

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RICHARD F. BRAUN, J.:

This is a personal injury action arising out of a fall by plaintiff on basement stairs leading down from the sidewalk while delivering beer to a market at the subject premises. Defendant Elizabeth Angela Chan (defendant), the out-of-possession owner, moves for summary judgment contending that the basement stairs were not dangerous, that she did not cause or create a dangerous condition, and that she did not have actual or constructive notice of a dangerous condition on the stairs.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927 [1st Dept 2010]). To defeat summary

judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

"A defendant who moves for summary judgment in a slip-and-fall case 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 for a sufficient length of time to discover and remedy it (citations omitted)." (*Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410 [1st Dept 2004].) An out-of-possession landlord is generally not liable for a dangerous condition in leased premisses unless he, she, or it is contractually obligated to make repairs or he, she, or it reserved in the lease a right of reentry and the dangerous condition amounts to a significant design or structural defect that constitutes a statutory or code safety violation (*see Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008]).

Defendant's expert maintains that there was no violation of the Building Code provision upon which plaintiff relies (New York Administrative Code § 27-375[e][2] and [f]) because the stairs were a limited access stairs not subject to those provisions (*cf. Ram v 64th St.-Third Ave. Assoc., LLC*, 61 AD3d 596, 597 [1st Dept 2009] [where the Court held that the Building Code provisions relied upon did not apply]). Plaintiff's expert counters by asserting that the stairs were interior stairs subject to those Code provisions that require designated and consistent riser height and tread width as well as handrails, with which the subject stairs did not comply.

"Interior Stair" is defined by New York Administrative Code § 27-232 as "[a] stair within a building, that serves as a required exit." "Access Stair" is defined in New York Administrative Code § 27-232 as "a stair between two floors, which does not serve as a required exit." "Exit" is

defined as "[a] means of egress from the interior of a building to an open exterior space ..." "Required exit" is not a defined term in the Code, though "required" "mean[s] required by the provisions of this code." Subchapter 6 of the Code is dedicated to required exit facilities (*see* New York Administrative Code § 27-354), and both plaintiff and defendant discuss the applicability of provisions of the subchapter.

Defendant had the right to reenter the subject premises under paragraph 13 of the lease. Construction of the Code is a matter for the court (*see DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]). Defendant has failed to establish as a matter of law that New York Administrative Code § 27-375(e)(2) and (f)(1) and (2) do not apply to the stairway here. Plaintiff has shown through his submissions including his expert's affidavit that defendant may have failed to correct a structural violation under Administrative Code § 27-375(e)(2) and (f)(1) and (2) (*see Sanchez v Irun*, 83 AD3d 611, 612 [1st Dept 2011]; *Nameny v East New York Sav. Bank* (267 AD2d 108 [1st Dept 1999]; *cf. Cusumano v City of New York*, 15 NY3d 319, 324 [2010] [where the Court held that Administrative Code § 27-375 (f) did not apply because the stairway from the first floor to the basement was not an "interior stair"]; *Mansfield v Dolcemascolo*, 34 AD3d 763, 764 [1st Dept 2006] ["Because the configuration and location of the stairway is not at issue, the applicability of the requirements of the Administrative Code of the City of New York for 'interior stairs' is a question of law to be resolved by the court (citations omitted)."]; *DeRosa v City of New York*, 30 AD3d at 326 [1st Dept 2006] [where Administrative Code § 27-375 (f) was not applicable to a stairway at Yankee Stadium from the field level seats to Monument Park]).

Thus, there are questions of fact that must be tried in this action. Accordingly, except for an award on default to defendant of summary judgment dismissing the cross claims against defendant,

the motion was denied by this court's separate decision and order of March 9, 2012.

Dated: New York, New York
March 12, 2012

RICHARD F. BRAUN, J.S.C.