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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C.
Justice

PART 1

Index Number : 112415/2007
WINTER, EROICA
vs.
RIVERSIDE CHURCH
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 112415/07

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-L | No(s). 1

Answering Affidavits — Exhibits 1-2 | No(s). 2

Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUL 24 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 20, 2012

[redacted] 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: PART 1

EROICA WINTER,

Plaintiff,

-against-

RIVERSIDE CHURCH,

Defendant.

Index No. 112415/07

Motion Sequence 003

Decision & Order

MARTIN SHULMAN, J.:

Plaintiff Eroica Winter ("plaintiff") brings this action against defendant Riverside Church ("defendant") to recover damages for injuries she allegedly sustained when she fell on the exterior steps of defendant's premises[1] located at 91 Claremont Avenue, New York, New York, purportedly due to the steps' alleged defective condition, the lack of a handrail and other safety features. Defendant now moves for summary judgment dismissing the complaint pursuant to CPLR 3212 on the grounds that there are no triable issues of fact as to its liability. Plaintiff opposes the motion.

BACKGROUND

This action arises from plaintiff's fall that occurred on October 25, 2005 at approximately 9:00 p.m. while plaintiff was exiting via the side entrance of defendant's premises. According to plaintiff, she exited the church through a revolving door which led to a platform and two steps.[2] Plaintiff alleges her

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[1] It is undisputed that defendant occupies and maintains the premises. However, it is unclear from this record whether defendant owns the premises, is a tenant or has some other interest there.

[2] The motion includes a photograph of the area where plaintiff fell at Exhibit B. Plaintiff's expert describes the area of the fall as follows:

accident occurred when she slipped on the steps, fell to the ground and was allegedly injured. Motion at Exh. I, p. 76, lines 16-25; pp. 145-146. She testified that she did not know what caused her to fall. *Id.* at pp. 357-358. In her opposing affidavit, plaintiff avers that she would have held onto a railing or handle to descend the steps had one been there. Hill Aff. in Opp. at Exh. 1, ¶7.

Plaintiff alleged that she had not been to the Riverside Church before the day of the accident. Motion at Exh. I, p. 58, lines 7-18. At the time of the accident there was light to medium rainfall. *Id.* at pp. 72-73. Plaintiff was not aware of any objects on the stairs that did not belong there. *Id.* at p. 98, lines 5-19; p. 146, lines 5-15. It is undisputed that the area where plaintiff fell had no handrails, no metal nosing at the edge of the platform and no friction strips or color markings on the steps.

In support of the motion defendant submits affidavits from Ronald Fulford, its Preventive Maintenance Supervisor for the premises, and Richard G. Berkenfeld ("Berkenfeld"), a licensed professional engineer. Motion at Exhs. H and I. Defendant contends that it is entitled to judgment dismissing the complaint as a matter of law because: (1) the location of the plaintiff's accident complied with all New York City Building Codes and New York Administrative Code

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> There is a revolving door that leads to a platform, made of granite. There are two risers from the platform to the street level. The first riser was 7" in height, the lower 5" in height on the south side and 6" on the north side. The tread depth was 12". The exterior doors, each 3' in width, extend over the top riser. . . The platform extends 2 and ½ feet from the revolving door to the riser. Hill Aff. in Opp. at Exh. 2, ¶6.

provisions in effect on the date in question; (2) there was no dangerous and/or defective condition on defendant's premises; (3) defendant was not negligent in its ownership, operation, maintenance, management, repair and/or control of its premises on or before the date of plaintiff's accident; (4) defendant did not create a dangerous condition on its premises or have prior notice of any dangerous condition prior to plaintiff's accident; (5) any alleged defective condition existing on defendant's premises was not the proximate cause of plaintiff's accident; and (6) the alleged condition was "open and obvious" and not inherently dangerous.

In opposition to the motion, plaintiff submits an affidavit from Daniel S. Burdett ("Burdett"), a licensed professional engineer, who inspected the accident location five years later on June 15, 2010. Hill Aff. in Opp. at Exh. 2. Burdett opines that "the entrance/exit located at 91 Claremont Avenue was not in accordance to good and accepted safe engineering practice . . . and that failure to adhere to good and accepted safe engineering practice was the proximate cause to the accident suffered by the plaintiff." *Id.* at ¶10. Burdett bases his conclusion on his observations that: (1) there were no friction strips on the granite platform and tread to increase friction and reduce slipping hazards, particularly when raining; (2) there was no metal nosing or hazardous color marking delineating the edge of the platform and tread, making it more difficult to see them; (3) there was no hand grip; and (4) the two exterior doors extended over the edge of the platform and top riser, causing a distraction to those approaching the step. *Id.* at ¶7. Plaintiff argues triable issues of fact exist

precluding summary judgment since "[i]t is for the trier of fact to determine the weight and credibility" of Burdett's opinion.

Plaintiff also submits an affidavit averring in relevant part that: as she approached the steps she "was unable to clearly see the edge of the platform"; "[h]ad there been a railing or handle . . . I would have used [it] to hold onto as I started down the two steps . . ."; and when she lost her balance she "would have reached out and grabbed the railing or handle . . . had there been one." *Id.* at Exh. 1, ¶¶ 6-7. Plaintiff's affidavit echoes Burdett's observations as to the lack of metal strips, color markings and a hand rail, as well as the open exterior doors extending past the platform and over the step. *Id.* at ¶8.

In reply, defendant characterizes plaintiff's opposing affidavit as materially differing from her deposition testimony, thus evidencing an improper attempt to create a feigned factual issue. According to defendant, plaintiff most notably claims for the first time in her affidavit (and in contradiction to her deposition testimony) that she was "unable to clearly see the edge of the platform" and slipped and fell as a result. *Id.* at ¶6; see also ¶¶ 7-8; Motion at Exh. I, p. 72, lines 11-16; p. 90, lines 13-16; p. 97, lines 17-19.[3] Additionally, defendant notes that plaintiff's affidavit still fails to identify any dangerous or defective condition that allegedly caused her fall, merely speculating that the absence of a hand rail

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[3] In actuality, at her deposition plaintiff was asked if she looked at the platform area of the entry way before she fell and observed anything wrong with it. In response, plaintiff testified: "I saw something with the way – you couldn't see the second step, and the way it was built, you know, it was covering my view to go to the second step." *Id.* at pp. 104-105.

and/or other safety features contributed to her accident. Finally, defendant maintains that Burdett's conclusory affidavit should be disregarded since he fails to cite relevant industry standards, building codes and/or administrative codes, if any, to support his opinion, nor does he specify any reported building code violations.

ANALYSIS

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andre v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad, supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc., supra.*

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 (1st Dept 1990), *lv dismissed* 77 NY2d 939 (1991); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). The court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. See *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985).

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all circumstances. This entails having a sane appreciation of the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk of injury. *Peralta v Henriquez*, 100 NY2d 139, 144 (2003). Liability for a dangerous condition on or within a property is predicated upon occupancy, ownership, control or special use of the premises at issue. *Balsam v. Delma Eng'g Corp.*, 139 AD2d 292, 296 (1st Dept 1998).

Here, defendant demonstrates its prima facie entitlement to judgment dismissing the complaint as a matter of law. Plaintiff's deposition testimony establishes that she was unable to identify the cause of the accident. Motion at Exh. I, pp. 357-358. See *Daniarov v New York City Tr. Auth.*, 62 AD3d 480, 481 (1st Dept 2009) ("Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence including, inter alia, plaintiff's testimony that although there was no handrail to break her fall, she did not know how she

fell or what caused her to slip"). Instead, plaintiff's opposition offers three possible causes of her accident, *viz.*, extension of outer doors past the platform edge; the absence of hand rails; and lack of metal nosing, friction strips, color markings, etc.[4]

Building Defect

With respect to plaintiff's testimony concerning her inability to see the step because of the way the platform had been built (see footnote 3, *supra*), plaintiff offers no proof of building code violations or deviations from any specific architectural standards. See *McKee v State*, 75 AD3d 893, 894 (3d Dept 2010) ("Without proof of code violations or deviation from standards accepted by the industry, claimant failed to establish that the door sill was defectively designed"). Burdett, plaintiff's expert, alleges that the two outer doors extending over the platform edge "causes a distraction approaching and utilizing the step, increasing the possibility of mis-step. It has long been safe engineering practice to not extend doors over the platform edge and any portion of a step and riser." See Hill Aff. in Opp. at Exh. 2, ¶7d.

However, Burdett's affidavit fails to create questions of fact precluding summary judgment as it is unsupported by "nonconclusory reference[s] to specific, currently applicable safety standards or practices (citations omitted and bracketed matter added)." *Etheridge v Marion A. Daniel & Sons, Inc.*, 96 AD3d 436 (1st Dept 2012); *McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434,

[4] Plaintiff also speculated in her deposition that the rain may have caused her to slip and fall. *Id.* at p. 358.

435 (1st Dept 2010) (expert's affidavit fails to show a dangerous condition where it failed to specify the violation of any accepted industry standards or practices). As stated in *Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 (1st Dept 2011):

> An expert's opinion should be disregarded where no authority, treatise, standard, building code, article or other corroborating evidence is cited to support the assertion concerning an alleged deviation from good and accepted industry custom and practice (*Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]). "Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place" (*Hotaling v City of New York*, 55 AD3d 396, 398 [2008], *affd* 12 NY3d 862 [2009]).

Notwithstanding plaintiff's failure to establish a design defect attributable to the exterior doors, "defendant could be liable for common-law negligence due to a failure to remedy or warn of a dangerous or defective condition (citation omitted)." *McKee v State*, 75 AD3d at 894. However, no liability will be found absent proof that a defendant actually created the dangerous condition or alternatively, had actual or constructive notice thereof. *Bogart v F.W. Woolworth Co.*, 24 NY2d 936 (1969); *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 (1st Dept 2001).

Here, there is no evidence in this record of defendant having created any dangerous or defective condition as to the outer doors extending over the platform edge. Nor is there any evidence that defendant had notice that this condition was dangerous or defective. In opposition, plaintiff fails to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact as to this claimed design defect (see *Zuckerman, supra*).

Expanding on this point, plaintiff fails to refute the affidavit of defendant's employee, Ronald Fulford, who has been employed at the premises for 16 years. Motion at Exh. G, ¶1. Fulford avers that to the best of his knowledge: 1) no other accidents have taken place at the entrance where plaintiff fell and no one has made or filed any complaints about the entry way (*id.* at ¶¶ 7-10); 2) there have never been any repairs, modifications and/or alterations to this entry way (*id.* at ¶¶ 12, 15); and 3) no relevant New York City agency has issued any violations or citations (*id.* at ¶¶ 16-17). See *McKee v State*, 75 AD3d at 895 (notice element found lacking where defendant's employee testified no accidents had been reported concerning the subject doorway at least eight years prior to claimant's fall).

To counter Fulford's unrebutted averments, plaintiff's counsel cites to *Cruz v New York City Tr. Auth.*, 136 AD2d 196, 198 (2d Dept 1988), for the proposition that notice is not required where the defendant created the alleged dangerous/defective condition. However, *Cruz* is factually distinguishable inasmuch as the defendant there actually constructed the railing from which the plaintiff fell. Here, there is no evidence other than plaintiff's counsel's speculation, presumably based on defendant's mere operation and control of the premises, that defendant installed the doors in question.

Finally, even if defendant was generally aware of an unsafe condition, it would still be insufficient to put defendant on constructive notice. *Gordon v*

American Museum of Natural History, 67 NY2d 836, 838 (1986). "Because the record does not contain proof of any notice to defendant regarding the dangerousness of the [outer doors extending over the steps], that condition cannot form the basis of a negligence finding." *McKee v State*, 75 AD3d at 895 (bracketed matter added).

Hand Grips/Rails

As to the lack of hand grips and/or rails, Burdett similarly avers, without support, that hand grips "would clearly provide safer egress in the case of a slip in which the grip could help stabilize an individual." *Id.* at ¶7c. This is insufficient to create an issue of fact for the same reasons stated earlier.

Moreover, plaintiff cites no applicable building code or other regulations that defendants purportedly violated by failing to install a handrail. See *Jung v Kum Gang, Inc.*, 22 AD3d 441, 442-43 (2d Dept 2005), *lv denied* 7 NY3d 704 (2006), citing 86 NY Jur2d Premises Liability §445 ("[U]nless a stairway in . . . public premises comes within the purview of a statute requiring that handrails be provided, the owner may not be held liable for maintaining a dangerous stairway because of the absence of a handrail where the steps are in no way defective"). Nor may a reasonable inference as to causation be drawn in the absence of evidence connecting any such violations, even if alleged, to plaintiff's fall. See *Daniarov*, 62 AD3d at 481 (plaintiff's failure to testify as to what caused her accident was fatal to her cause of action and could not be cured by her expert's opinion that handrails present at accident location "violated the Building Code even if applicable, in the absence of any evidence connecting the alleged

violations to plaintiff's fall").[5] Plaintiff's bare assertion that she reached for a handrail as she was falling but that there was none, standing alone, fails to raise an issue of fact sufficient to defeat summary judgment.

Other Safety Features

Finally, with regard to plaintiff and her expert's claim that the steps lacked metal nosing at the platform edge, friction strips and/or color markings on the steps, again, there is no allegation that the absence of these safety features violates any building code or other relevant regulations. Moreover, given defendant's lack of actual/constructive notice of any alleged dangerous condition attributable to the steps (as discussed, *supra*), its failure to apply such slip preventers without any statutory requirement therefor cannot serve as the basis for a negligence finding.

As defendant has demonstrated entitlement to judgment as a matter of law and plaintiff has failed to establish the existence of a genuine issue of fact requiring a trial, summary judgment dismissing the complaint is warranted. Accordingly, it is hereby

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[5] Plaintiff's expert witness disclosure pursuant to CPLR §3101(d) provided that Burdett was expected to testify that the steps violate "New York City Building Code sections 153, 154 . . . subsequently modified to sections 26-235, 27-127, 27-128, 27-375, sections F, G, H". See Motion at Exh. F. However, his affidavit fails to cite these or any other building code provisions and plaintiff's opposition does not pursue the matter any further or refute defendant's claim that those provisions do not apply to exterior stairways such as those at issue here. See *Jung v Kim Gang, Inc.*, *supra*; *Maraia v Church of Our Lady of Mt. Carmel*, 36 AD3d 766, 767 (2d Dept 2007).

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to the parties' counsel.

Dated: New York, New York
July 20, 2012

Hon. Martin Shulman, J.S.C.