SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 102526/2010
POWERS, WILLIAM T.
vs.
31 E 31
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/12/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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 61
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JOSEPH W. POWERS by his GUARDIAN AD LITEM, WILLIAM T. POWERS,

Plaintiff,

Index No. 102526/10

-against-

31 E 31 LLC and B & L MANAGEMENT CO., INC.,

Defendants.

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Anil C. Singh, J.:

This action arises out of a tragic accident which occurred when plaintiff Joseph W. Powers (plaintiff) fell off of a roof of a building (building) owned by defendant 31 E 31 LLC (31 E 31), sustaining catastrophic injuries. B & L Management Co., Inc. is the managing agent of the building (managing agent). The action is brought by plaintiff's guardian ad litem, William T. Powers.

The present motion is brought by both defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

I. Background

The building is composed of 13 stories. Nonparty Chris Conway (Conway) occupied apartment 2C, in the back of the building on the second floor. Outside his apartment was what is described as a "setback" roof, about five feet wide, and extending the entire width of the building (setback roof). There

was no door to the setback roof, which could, however, be reached by exiting through a window measuring approximately 17 ½ by 31 inches in Conway's apartment. Although the plaintiff describes the setback roof as an "outdoor terrace" in his complaint (Not. of Mot., Ex. A, ¶ 9), there were no furniture or plants or any other signs of use on the setback roof, and no door to the setback roof. At present, there is a gutter running the length of the setback roof edge. Below the setback roof was a drop of 25 feet down a shaft to the roof of a cellar of the building next door.

Apparently, there are setback roofs on floors two through four of the building, none of which have railings or parapets. The building's managing agent denies any knowledge of the use of the second-floor setback roof as a terrace by tenants.

During the night of August 23, 2008, plaintiff and a number of friends arrived at Conway's apartment. They had all been drinking. The group made their way out of the window, and stayed out on the setback roof for a brief period of time before returning inside. At some point, they realized that plaintiff had not also returned inside. Upon a search, he was found having fallen off of the setback roof onto the roof of the cellar next door, and was gravely injured. No one saw him fall. The time was approximately 4:40 A.M. Evidence establishes that plaintiff had been out on the roof on at least one other occasion before

August 23, 2008. Immediately after the accident, plaintiff's blood alcohol level was found to be highly elevated.

Plaintiff maintains that the building was not up to code, in that it lacked a railing or parapet that would presumably have stopped plaintiff from falling off of the roof. Defendants argue that, under applicable building codes and regulations, there was no requirement that the setback roof have a railing or parapet. On this motion, defendants further argue that, if the lack of a railing or parapet was a dangerous condition, it was open and obvious, so that they did not have any duty to warn plaintiff of the condition. They lastly maintain that no tort liability lies if the matter is analyzed under doctrines of superseding cause, proximate cause or forseeability.

II. Discussion

A. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of

fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

B. Did Defendants Perpetuate a Dangerous Condition: Applicability of Building Codes

With regard to owner liability,

> [t]o be entitled to summary judgment, the defendant was required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises.

Gradwohl v Stop & Shop Supermarket Company, LLC, 70 AD3d 634, 636 (2d Dept 2010).

> Landowners have a duty to maintain their property in a reasonably safe condition whether the property is open to the public or not. The use to which one's property is put, and the frequency of that use by others, weigh heavily in determining the likelihood of injury, the seriousness of the injury and the burden of avoiding the risk.

Peralta v Henriquez, 100 NY2d 139, 144 (2003).

Plaintiff maintains that the lack of parapets or railings on the edge of the setback roof was a dangerous condition, created by defendants, which caused plaintiff's injury, and that defendants are responsible for allowing such a dangerous

condition to exist on the building. Plaintiff contends that parapets were required on the setback roof as a matter of law, under Multiple Dwelling Law § 62 (1), and under the applicable New York City Building Codes.

Multiple Dwelling Law § 62 (1) contains a broad requirement that multiple dwellings built after 1929 "shall be protected in a manner approved by the department by a parapet wall or a guard railing" on certain types of roofs on multiple dwellings. The Multiple Dwelling Law applies to buildings built before 1929, if they are thereafter converted to residential use. Multiple Dwelling Law § 9 (2).

Multiple Dwelling Law § 62 (1) specifies that it is the "department" whose rules must be followed. Multiple Dwelling Law § 4 (3) defines "department" as "the department, bureau, division or other agency charged with the enforcement of this chapter." As the New York City Department of Buildings is the department charged with enforcing building requirements, it follows that the specific building codes, such as the New York City Building Code, enacted for the use of the Department of Buildings, must be plumbed to determine such issues as the specific requirements for parapet walls.

According to defendants, and undisputed by plaintiff, the building was built in 1909. The plans for the building cannot be located. However, it is also undisputed that the New York City

Building Code (Code) of 1895 applied at the time the building was built.[1]

The applicable portion of the 1895 Code is attached to the Notice of Motion as Ex. K, and reads: "[a]ll exterior and division or party walls over fifteen feet high, excepting where such walls are to be furnished with cornices, gutters or crown moldings, shall have parapet walls carried two feet above the roof ... ." It is plaintiff's position that the setback roof, higher than fifteen feet, was required by the 1895 Code to be edged by railings or parapets. Defendants, on the other hand, maintain that such is not the case, because the building was most likely built with gutters in 1909, rather than railings or parapets. Defendants' expert goes to considerable length to explain why the building would have been built with gutters. Certainty is not possible, however, in light of the missing plans.

The Code was updated in 1916, 1938, 1968 and 2008. The requirement that a building roof need not have railings or parapets if it had gutters was carried over to the 1916 and 1938 Codes. Each new Code also had a grandfathering provision, which

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[1]Curiously, plaintiff provided to defendants, as part of his expert disclosure, a copy of a Certificate of Occupancy from 1926 which plaintiff's expert contends applies to the building. However, the annexed Certificate of Occupancy applies to a totally different building on East 40th Street, and so has no bearing on this case. Not. of Mot., Ex. R.

provides that a building in compliance with the prior Code will also be considered in compliance with the new Code. Therefore, if the building were in compliance with the 1895 Code, it would be in compliance with the 1916 and 1938 Codes.

The Code of 1968[2] changed the requirement regarding parapets. It states that:

> Buildings that are more than twenty-two feet in height and have roofs that are flatter than twenty degrees to the horizontal shall be provided with a parapet not less than three feet six inches high, or be provided with a three foot six inch high railing or fence, or a combination of a parapet and railing or fence which together are not less than three feet six inches high.

1968 Code § 27-334 (C26-503.4). However, like the previous Codes, the 1968 Code provided for the grandfathering of buildings in compliance with the prior Code. Thus, a building in compliance with the 1938 Code would be in compliance with the 1968 Code. Consequently, if the building had gutters in 1909, and continued to have them up until 1968, it would be considered in compliance with the 1968 Code, regardless of the update in the 1968 Code regarding parapets. Defendants maintain that such is the case.

The building was converted to residential use in 1979. The 1968 Code contains a provision regarding alterations which states that "[i]f the cost of making alterations in any twelve-month period shall exceed sixty percent of the value of the building,

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[2]Annexed to Notice of Motion, Ex. N.

the entire building shall be made to comply with the requirements of this code, except as provided in section 27-120 of this article." 1968 Code § 27-115 (C26-102.3). 1968 Code § 27-120 (C26-103.6) provides that

> [a]t the option of the owner, regardless of the cost of the alteration or conversion, an alteration may be made to a multiple dwelling or a building may be converted to a multiple dwelling in accordance with all requirements of this code or in accordance with all applicable laws in existence prior to December sixth, nineteen hundred sixty eight, provided the general safety and public welfare are not thereby endangered.

Defendants in the first instance bear the burden on summary judgment to establish prima facie that no questions of law exist which would deny them summary judgment. Defendants' assertion that the original structure had gutters is based on the expert, Mr. Dennis' opinion that it is virtually certain that the building when constructed had rear setbacks. However, the records do not bear this out because the 1909 plans cannot be located. Mr. Dennis' opinion is based on an assumption that the building did not have parapets in 2007. Therefore, it never had parapets and was originally constructed with gutters. This opinion based on assumptions does not make out a prima facie case warranting the drastic remedy of summary judgment.

Furthermore, the alterations to the building in 1979 at a cost of $1,380,000, might indicate that defendants should have brought the building up to the 1968 Code, perhaps requiring parapets at that time. As set forth above, 1968 Code § 27-116

requires that the entire building be brought to the 1968 Code if the cost of the alterations exceeds 60% of the value of the building. Although defendants' expert offers that the value of the building is probably many multiples of the cost of the renovation, because of its size, the court is never told the actual value of the building.[3] Absent that fact, defendants have failed to meet their burden on summary judgment to establish that they did not have to provide parapets or railings to the setback roof after the alterations of 1979.

Reference to section 27-120 of the 1968 Code is not relevant, since there were no alterations made to the setback roof itself which might effect the "general safety and public welfare."

The 2008 Code was enacted several weeks before plaintiff's accident. It also contains grandfathering language which would allow the building to remain in its original state, unless it was required to be changed as a result of alterations in 1979. Defendants argue that, even if the 2008 Code applied, the 2008 Code, as found in section BC 1509.8, does not require parapets on the type of roof involved in the present action, so that the matter of the alterations in 1979 is still irrelevant. Their argument is that the section reads that: "[b]uildings greater

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[3]It should be noted that defendants' engineer would not be qualified to render such an opinion.

than 22 feet (6706 mm) in height with roof slopes less than 2.4 units vertical in 12 units horizontal (20 percent slope) shall be provided with *a* parapet, railing fence, or combination thereof, not less than 42 inches (1067 mm) in height [emphasis added]."

Defendants argue that the use of the words "*a* parapet," instead of "parapets," means that only the penultimate roof of the building requires parapets or railings. However, the section refers to "roof *slopes*" in the plural. Therefore, it may apply to all roofs on a building in excess of 22 feet. Even if the 2008 Code applied, it is undisputed that the drop below the setback roof was 25 feet, so there is no question that the section would apply if the alterations under the 1968 Code required defendants to upgrade the building with parapets or railings in 1979.

B. Open and Obvious Condition

Defendants maintain that, whether or not there should have been parapets, plaintiff could, by the use of his senses, see that the existence of a sheer 25-foot drop without a parapet was a danger to be avoided.

> If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to *warn* a visitor of the danger. The theory underlying the "open and obvious" doctrine is this: Where a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided. Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as

> no benefit would be gained by requiring a warning [internal quotation marks and citations omitted].

Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 71 (1st Dept 2004). The Court in *Westbrook* adopted the findings of the other judicial departments that the question of whether a condition is open and obvious only goes to the obligation to warn, and the issue of comparative negligence on the part of the plaintiff. *Id.* at 72-73. Therefore, while defendants make much of the open and obvious nature of the hazard, especially as plaintiff had been on the roof previously, and so had reason to know of the potential hazard, the fact that the unprotected drop was open and obvious does not necessarily obviate defendants' potential liability. *See also Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 (1st Dept 2011)(open and obvious condition "not fatal to plaintiff's negligence claim ..."); *Salvador v New York Botanical Garden*, 74 AD3d 540, 541 (1st Dept 2010)(open and obvious condition does not "obviate the owner's duty to ensure that its premises are maintained in a reasonably safe condition"); *Francis v 107-145 West 135th Street Associates, Ltd. Partnership*, 70 AD3d 599 (1st Dept 2010)(same); *Lawson v Riverbay Corp.*, 64 AD3d 445 (1st Dept 2009)(same).

Defendants refer to many cases involving falls from "natural geographic phenomena" (*Cohen v State of New York*, 50 AD3d 1234, 1235 [3d Dept 2008]), in which the open and obvious nature of the

hazard negates the defendant's liability. However, these cases, involving naturally occurring hazards not created by defendants, seem to form an exception to the rule that the open and obvious nature of a defect goes only to the obligation to warn and comparable negligence. *See Melendez v City of New York*, 76 AD3d 442, 443 (1st Dept 2010)(court discusses exception for "natural geographic phenomena"). Under *Melendez*, *Westbrook v WR Activities-Cabrera Markets* (5 AD3d 308, *supra*) is still good law.

Regardless, time and again since *Melendez*, the Appellate Division, First Department, has granted summary judgment to defendants who can show that a condition upon which a plaintiff sustained injuries was open and obvious, and therefore not inherently dangerous. *See e.g. Lazar v Burger Heaven*, 88 AD3d 591, 591 (1st Dept 2011)(placement of chair was an "open and obvious condition and not inherently dangerous"); *Buccino v City of New York*, 84 AD3d 670, 670 (1st Dept 2011)(speed bump and legally parked car where plaintiff fell were "'plainly observable and did not pose any danger to someone making reasonable use of his or her senses [citation omitted]'"); *Rivera v City of New York*, 57 AD3d 281 (1st Dept 2008)(plaintiff could not raise issue of fact as to danger of readily observable speed bump).

This court is persuaded by the more thoroughly thought-out decisions that abide by *Westbrook*, and holds that the existence of an open and obviously dangerous condition does not, in and of

itself, negate the landowner's duty to maintain the premises in a reasonably safe condition. Therefore, if parapets were required on the setback roof by law, and the edge of the setback roof is thereby found to be an open and obvious danger, defendants are only relieved of the obligation to warn plaintiff of the potential danger, but are not wholly relieved of their obligation to keep the premises reasonably safe, which depends on their obligation, if any, to provide parapets.

Plaintiff refers to the case *Lesocovich v 180 Madison Avenue Corporation* (81 NY2d 982 [1993]), which involved a plaintiff who fell off of a roof that did not have parapet walls. The Court found issues of fact as to whether the defendant had used reasonable care to prevent people from using the roof, whether it was forseeable that persons would use the roof recreationally, and whether the building required parapets under the then applicable Code.

In *Lesocovich*, there was evidence that the roof was used recreationally in the past, and that the building staff may have been aware that it was so used. Forseeability of whether persons were known to use the roof is a question of fact in the present matter, since defendants have provided the testimony of defendants' superintendent, who claims that he never saw anyone on the roof, while plaintiff has produced the testimony of a tenant, who claims to have seen the setback roof used for the

purpose of smoking outside Conway's apartment. And, unlike in *Lesocovich*, there did not appear to be any arrangement for sitting or socializing on the setback roof. Although the roof in *Lesocovich* was also accessed only through a window, there was a closed-off door and a porch on the roof, as well as cinder blocks used for seating, indicating that, at some prior point in time, people used the roof. This evidence merely shows that *Lesocovich* was a stronger case, not that there is no question of forseeability herein.

In the present case, there is a question of whether or not defendants were liable for the creation of a dangerous condition on the setback roof. There is a question of forseeability. There is also an issue of plaintiff's comparative fault, should it be determined that the defendants had failed a duty to keep the premises in a reasonably safe condition. Defendants have not, as they claim, established prima facie on this motion that plaintiff's negligence was the sole proximate cause of his accident, despite his intoxicated state and familiarity with the setback roof. Nor have defendants established, as they urge, that plaintiff's actions were a "superseding cause" of his injuries.

In sum, an issue of fact is raised as to whether defendants created a dangerous condition. Should the condition of the setback roof turn out to be legal, there is a question of fact as

to whether defendants owed a common law duty to protect plaintiff from the open and obvious nature of the danger.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint brought by defendants 31 E 31 LLC and B & L Management Co., Inc. is denied.

Dated: 12/12/12

ENTER:

J. S. C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE