To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

THOMAS WILMER and ROSE MAY WILMER,

Plaintiffs,

-against-

WARBURTON HOUSES, INC., H & S PROPERTY MANAGEMENT, INC., and DORADO-WARBURTON HOUSING ASSOCIATES, L.P.,

Defendants.

----------x

DECISION and ORDER
Sequence No. 1
Index No. 59743/11

CONNOLLY, J.

The following documents were read in connection with the defendants' motion for summary judgment:

Defendants' Notice of Motion, Affirmation, Memo of Law, Exhibits	1-18
Plaintiffs' Affirmation in Opposition, Affidavits, Exhibits	19-27
Defendants' Affirmation in Reply, Exhibits	28-30

FACTUAL BACKGROUND/PROCEDURAL HISTORY

The plaintiffs commenced this premises liability action to recover damages for personal injuries allegedly sustained by the plaintiff Thomas Wilmer (Wilmer) on October 26, 2011, when he fell on a stairway within a parking structure located at 160 Warburton Avenue, Yonkers, New York.

The defendants move for summary judgment dismissing the complaint on the ground that they did not breach a duty to the plaintiffs, and even if they did breach a duty, such breach was not the proximate cause of the accident. The defendants contend that they did not create a dangerous or defective condition, or have actual or constructive notice of any such condition. The defendants also argue that the plaintiff is not entitled to punitive damages. In support of their motion, the

defendants submit deposition transcripts,[1] photographs, an affidavit from expert David E. Behnken, P.E., and an affidavit from Elkin Simson, M.D.

Wilmer testified that at approximately 6:00 p.m., on October 26, 2011, as he proceeded down the stairway from the parking lot to his apartment building, he was unable to see where to step because the stairway was dark and unlit, and that he slipped and fell on the stairs due to the lack of illumination. Wilmer testified that prior to his fall on the stairway he drank two or three cans of beer and shared a pint of vodka with his friend while sitting in his car in the parking lot. He further testified that he never complained about the lack of illumination to either the superintendent, the custodian, or the main office. However, the plaintiff Mrs. Wilmer testified that she advised the superintendent, Oscar Flores, three or four times prior to Wilmer's fall that it was dark in the parking lot and stairway area.

Oscar Flores, the superintendent for the building located at 160 Warburton Avenue, testified that he was responsible for the outdoor exterior lighting in the parking lot, and that there were six light fixtures on the upper level of the parking lot, and approximately twelve light fixtures on the lower level of the parking lot. He testified that there were also three light fixtures affixed to the exterior wall of the building that illuminated the upper level of the parking lot and the subject stairway. The six light fixtures on the upper level of the parking lot and the three fixtures affixed to the exterior wall of the building were on an automatic timer that was set to turn the lights on at 5:30 p.m. He testified that any complaints concerning the lack of lighting would be brought to his attention, and that he had not received any complaints prior to the date of the accident about the parking lot or stairway lighting.

In his expert affidavit, Mr. Behnke avers that he is a licensed professional engineer, and that he performed a site survey of the building at which time he examined and photographed the subject stairway. He opined that the subject stairway is properly configured and maintained in a safe condition for its intended use. He also observed artificial illumination in the area, provided by fixtures located adjacent to the upper, intermediate, and lower landings of the staircase. He performed light tests at 6:00 p.m., the same time of day as Wilmer's accident, and opined that even if the artificial lighting was off, the illumination levels were sufficient to perceive the stairway and descend in a safe manner.

The defendants also argue that the alleged lack of illumination was not the proximate cause of the accident insofar as Wilmer was intoxicated at the time of the accident, which impaired his concentration, sensory and motor functional capabilities. In support of this argument, the defendants submit an expert affidavit from Elkin Simson, M.D., opining that Wilmer's "ability to maintain his

---

[1] The Court has not considered the depositions of non-party witnesses Latasha Armistead, Kwame Boateng, Thomasina Suttles, and Andrew Ware because, as the plaintiffs correctly argue, the defendants have failed to establish compliance with CPLR 3116. The plaintiffs' depositions submitted by the defendants also fail to comply with CPLR 3116, but this Court will consider them insofar as the plaintiffs have waived any objection by submitting the depositions in their opposition papers.

balance was so severely limited that he would have been likely to fall, even on any flat and level surface, let alone descending stairs" (*see* Defendants' Affirmation, Exhibit d ¶ 13). He further avers that Wilmer's intoxication level would have impaired his sensory, cognitive and motor functional capabilities (*id.*).

Lastly, the defendants argue that the plaintiffs are not entitled to punitive damages because the record is devoid of any evidence of willful, wanton, or reckless conduct on the part of the defendants that would warrant such a claim, and thus, the plaintiffs' punitive damages claim should be dismissed.

In opposition, the plaintiffs argue that the defendants' motion for summary judgment is untimely since it was served by mail and not by *NYSCEF* within 60 days following the filing of the note of issue as required by the trial readiness order. The motion was served by first-class mail on the 60th day and uploaded to NYSCEF on the 66th day.

With regard to the merits of the action, the plaintiffs oppose the defendants' motion arguing that Flores never testified that he inspected the area of the parking lot or the subject stairway on the date of the accident, nor did he testify that he inspected the timers to determine whether they were properly set. Further, the plaintiffs argue that Mrs. Wilmer complained to Flores on multiple occasions that the subject staircase was dark and unlit.

The plaintiffs submit the affidavit of their expert Rudolph Rinaldi, a licensed architect, who opines, based upon his observations and the evidence in the record, with a reasonable degree of professional certainty, that the design and maintenance of the stairway, handrails, and light fixtures, as well as the poor maintenance of the light fixtures, were deficient and defective and not in compliance with the applicable building codes, and that the cumulative effect of these deficiencies, defects, and violations created a hazardous and dangerous condition, which was one of the proximate causes of Wilmer's accident.

In reply, the defendants contend that the plaintiffs' expert has failed to raise an issue of fact insofar as he fails, among other things, to provide measurements, readings, or testing to corroborate his conclusion, and did not perform testing under the same conditions as the subject accident. The defendants also argue that their summary judgment motion was timely made within the 60 days after the filing of the note of issue in that it was served by first-class mail.

LEGAL ANALYSIS/DISCUSSION

The defendants' motion for summary judgment is timely

Contrary to the plaintiffs' contention, the defendants' motion for summary judgment is timely (*see Rivera v Glen Oaks Vill. Owners, Inc.*, 29 AD3d 560, 561 [2d Dept 2006] ["A motion is made when a notice of motion is served"]; *see* CPLR 2211, 2103). The defendants' motion for summary judgment was made on July 30, 2013, (the 60th following the filing of the note of issue) when it was

served, by first-class mail, on the plaintiffs' attorneys. Pursuant to 22 NYCRR 202.5-b Section (f) (2) (ii), the defendants were permitted to "utilize other service methods permitted by the CPLR provided that, if one of such other methods is used, proof of that service shall be filed electronically" In compliance with this rule, the defendants electronically filed the affidavit of service for the instant motion.

The defendants' motion for summary judgment is denied

The defendants have established their prima facie entitlement to judgment as a matter of law by establishing that they "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" (*Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958. 959-960 [3rd Dept 2011] [internal quotation marks omitted]; *see generally Peralta v Henriquez*, 100 NY2d 139, 144 [2003] ["[A] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk"]). The defendants submitted the testimony of Flores, the building superintendent, who testified that he received no complaints about the lighting condition in the parking lot or in the stairway area where the plaintiff fell prior to the accident. He also testified that the lights in the stairway are controlled by an automatic timer that turns the lights on at 5:30 p.m., and the accident occurred at 6:00 p.m. Further, the defendants' expert opined that the illumination levels were sufficient to perceive the stairway to descend in a safe manner. This evidence is sufficient to shift the burden to the plaintiffs to proffer evidence creating a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1980]).

However, in opposition, the plaintiffs have raised a triable issue of fact. The plaintiffs submitted proof that Mrs. Wilmer advised Flores on multiple occasions that the subject stairway and the parking lot were dark and unlit (*see Peralta v Henriquez*, 100 NY2d at 144 ["[P]roviding outside lighting to one's property may be a reasonable response by a private landowner who knows, or should know, that someone will visit the property and confront a hazard that would be reasonably avoided by illumination]). Further, the plaintiffs submit an expert affidavit opining that the illumination levels were not in compliance with New York State codes, and the subject stairway was unsafe for pedestrian use (*id.* at 143; *see also Gallagher v St. Raymond's R.C. Church*, 21 NY2d 554 [1968] [the court imposed a duty on the church to illuminate the steps and handrails given the public use of the building]).

Accordingly, since there are issues of fact, the defendants' motion for summary judgment is denied.

The plaintiffs' demand for punitive damages is stricken

The plaintiffs allegations do not entitle them to punitive damages (*see Buckholz v Maple Garden Apartments, LLC.*, 38 AD3d 584, 585 [2d Dept 2007] ["Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability, or

where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness"]; *Lee v Health Force, Inc.*, 268 AD2d 564 [2d Dept 2000]). Accordingly, that branch of the defendants' motion which is to dismiss the plaintiffs' punitive damages claim is granted.

Based upon the foregoing, it is hereby

ORDERED that the branch of the defendants' motion which is to dismiss the plaintiffs' punitive damages claim is granted and the defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that all parties appear in the Settlement Conference Part on February 24, 2014 at 9:30 a.m., in Room 1600 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
December 11, 2013

HON. FRANCESCA E. CONNOLLY, J.S.C.

To: Worby Groner Edelman, LLP
Attorneys for Plaintiffs
11 Martine Avenue
White Plains, New York 10606
By NYSCEF

Havkins Rosenfeld Ritzert & Varriale, LLP
Attorneys for Defendants
170 Hamilton Avenue, Suite 210
White Plains, New York 10601
By NYSCEF