Sussman v MK LCP Rye LLC
2017 NY Slip Op 31557(U)
July 24, 2017
Supreme Court, New York County
Docket Number: 156066/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ANDREW SUSSMAN,

Plaintiff,

-against-

MK LCP RYE LLC, and HILTON MANAGEMENT, LLC,

Defendants.

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DECISION/ORDER

Index No.: 156066/2014
Mot. Seq. 004

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action for personal injury, defendants, MK LCP Rye LLC and Hilton Management, LLC ("Defendants") now move pursuant to CPLR 3212 to dismiss plaintiff Andrew Sussman's ("Plaintiff") amended complaint ("Complaint").

Factual Background

Defendant MK LCP Rye, LLC is the owner of the Hilton hotel located in Rye, New York (the "Hotel"). Defendant Hilton Management, LLC manages and operates the Hotel. The parties do not contest that on May 5, 2012 Plaintiff and his now-wife, Christina Schmiedel ("Schmiedel") attended a wedding at the Hotel. Plaintiff alleges that Plaintiff and Schmiedel were descending a stairway from the third-floor landing to the second-floor landing, when Plaintiff tripped and fell over the subject stairway's handrail, falling to the first-floor landing. Plaintiff filed the Complaint, alleging, *inter alia*, that the subject stairway was improperly and negligently constructed and maintained and was not in compliance with the applicable laws, codes, rules, regulations, and industry standards (Compl., ¶¶22-30; Corrected Bill of Particulars, ¶9).

Defendants' Motion

In support of their motion, Defendants argue that summary dismissal of the Complaint is warranted, as Plaintiff speculates as to the cause of his accident. Specifically, Plaintiff and Schmiedel's testimony demonstrate that Plaintiff cannot identify the cause of his fall or the exact location where his fall began. Additionally, the police investigation conducted by the Rye Brook Police Department established that Plaintiff was found lying on the first-floor landing, consistent with him having fallen over the railing, and that "no violations were found" upon investigating Plaintiff's accident (Cherkis Memorandum of Law ["MOL"], at 12). Moreover, Defendants submit the affidavit of Defendants' expert, Scott E. Derector, P.E. ("Derector") which states that there were neither structural, nor any other defective conditions affecting the subject stairway at the time of Plaintiff's accident. Further, Plaintiff fails to allege that the stairway violated a code or regulation. Additionally, Plaintiff was intoxicated and "well medicated" at the time of his accident (*id.* at 4).

Next, Plaintiff is unable to establish a triable issue of fact as to the existence of a dangerous condition. Specifically, Plaintiff failed to submit evidence establishing Defendants' negligence. Additionally, Defendants did not create a dangerous condition.

Even if Plaintiff had raised a question of fact as to the issue of a dangerous condition, Defendants argue that Plaintiff is unable to establish a triable issue of fact as to Defendants' notice of the alleged dangerous condition, since Plaintiff speculates as to the cause of his accident. Moreover, the configuration of the subject stairway remained the same since 1971.

Moreover, Derector's affidavit establishes that the subject stairway complied with the applicable laws, codes, rules and regulations at the time of Plaintiff's accident. Additionally,

Plaintiff failed to allege the violation of any specific statute in the Complaint and his Corrected Bill of Particulars ("Bill of Particulars").

Plaintiff's Opposition

In opposition, Plaintiff first argues that Defendants failed to satisfy their prima facie burden of establishing that the subject stairway was maintained in a safe and reasonable manner. Specifically, Derector's affidavit is based on his observation that the handrail only complied with the minimum regulation standards. Further Derector's assessment of the subject handrail fails to address the hazard "presented by the stairway well opening" Plaintiff fell through (Schlosser MOL ¶12).

Next, Defendants' claim that Plaintiff speculates as to the cause of his accident fails, since the testimony of Plaintiff and Schmiedel establish the circumstances leading up to and the location of Plaintiff's fall.

Further, Plaintiff's experts, Brad P. Avrit ("Avrit") and William J. Vigilante, Jr. ("Vigilante") affirmed that Defendants' failure to install adequate guardrails in conformity with applicable codes and industry safety standards was a proximate cause of Plaintiff's injury. Specifically, the condition of the subject stairway, including the inadequate handrail, the lack of any guard rail, and the opening where Plaintiff fell through, was a dangerous condition. Moreover, Plaintiff identified the location of his fall, and the experts identified the defective condition at the subject stairway. Additionally, the caselaw cited by Defendants is inapplicable to this case.

Next, triable issues of fact exist as to the dangerous condition existing on the subject stairway, and Defendants' notice of that condition. First, the testimony of Plaintiff and Schmiedel and the affidavits of Plaintiff's experts establish a triable issue of fact as to the

dangerous condition of the subject stairway and its causal nexus to Plaintiff's fall. Second, Defendants failed to establish that their lack of constructive notice regarding the dangerous condition of the stairway, as they failed to submit evidence establishing that Defendants' had no reason to believe that the stairway was dangerous.

Moreover, the deposition testimony of Alon Ben-Gurion ("Ben-Gurion"), the General manager at the Hotel from 2003 through 2013, and Andre Luciano ("Luciano"), a security officer employed at the Hotel from 1997 through 2013, demonstrate a triable issue of fact as to whether Defendants were on notice of the defective condition on the subject stairway. Ultimately, Plaintiff's experts opine that the subject stairway insufficiently guarded against falling, and was a dangerous condition and violated applicable codes and standards.

Defendants' Reply

In reply, Defendants' further argue that Plaintiff speculates as to the cause of his accident. Specifically, Plaintiff failed to identify the distinct step he was on when he fell or any condition that caused him to fall. Schmiedel witnessed Plaintiff in the course of his fall, but did not observe his slip from the stairway. Moreover, Plaintiff's experts failed to identify a defect at the "various steps which plaintiff thought he may have fallen from" (Cherkis Reply MOL, at 3). Additionally, Plaintiff failed to present non-speculative proof that a handrail would have prevented Plaintiff's accident. Plaintiff's claim that an adequately placed handrail would have prevented Plaintiff's accident is speculative as the "handrail was not part and parcel of the loss" of Plaintiff's balance (*id.*). Moreover, the caselaw cited by Plaintiff is inapposite. Further, Plaintiff's experts ignore that a misstep or loss of balance, was the only explanation presented by Plaintiff for his fall.

Next, Plaintiff's admission that he was not utilizing the subject handrail at the time of his accident precludes the condition of the handrail as a proximate cause of Plaintiff's accident. Further, Plaintiff's expert's claims that Plaintiff's accident occurred because the subject stairway was missing a guardrail. Defendant submitted the Supplemental Affidavit of Derector, which affirms that the subject handrail "acted as a guardrail system" and conformed to all applicable codes and standards (Derector Supplemental Aff., ¶2). Moreover, Avrit inaccurately measured the subject stairs and both of Plaintiff's experts misapplied inapplicable codes. Additionally, Plaintiff's argument that Derector failed to address the substantial fall hazard presented by the stairway opening fails, since his "opinions established by review of codes that the handrail was compliant within a reasonable degree of engineering certainty" (Cherkis Reply MOL, at 14). Further, since Plaintiff was not using the subject handrail at the time of his accident, Plaintiff's attempt to grasp at it after tripping on the subject stairway cannot be aproximate cause of his accident (*id.* at 16).

Defendants go on argue that Plaintiff's experts failed to demonstrate a triable issue of fact, as their conclusions were based on their misapplication of the law and standards. First, the subject stairway was in compliance with the following applicable codes: Village of Rye Brook Code Section 91-1; New York State Uniform Fire Prevention and Building Code Table 1-735; and the 2010 New York State Property Maintenance Codes Sections 306.1, 305.4 and 305.4.

Further, neither of Plaintiff's experts include a certificate of conformity as required by CPLR 2309. Moreover, Plaintiff's experts' affidavits are conclusory, as they "fail to connect the conclusions to the evidentiary proof in this case" and are irrelevant to the subject handrail (Cherkis Repy MOL, at 19). Specifically, Plaintiff's experts' assertions rely on codes and standards that are not adopted in New York, and Hilton complied with those that are adopted in

New York. Moreover, Plaintiff incorrectly argues that Defendants' duty of care went beyond "providing a safe environment in conformity with relevant building, fire and safety, construction and other codes adopted in the State of New York" (*id.* at 22). Additionally, Vigilante has not been properly established as an expert in this matter.

Further, Plaintiff failed to demonstrate that Defendants had notice of the alleged defective condition, since Defendants have not received complaints about the stairway since it was erected in 1971. Finally, Plaintiff opposition, which was filed after the filing of the note of issue, inappropriately amplified the claim in his Complaint alleging that Defendants violated specific laws or ordinances.

Plaintiff's Sur-Reply[1]

In opposition to Defendants' argument that Plaintiffs' experts' affidavits failed to comply with CPLR 2309, Plaintiff argues that Vigilante's affidavit includes a certificate of conformity and that Avrit's affidavit includes an all-purpose acknowledgment. Plaintiff also attaches two additional certificates of conformity in compliance with CPLR 2309 on behalf of Avrit and Vigilante.

Defendants' Sur Sur-Reply

In support of their opposition to Plaintiff's sur-reply, Defendants argue that Plaintiff's experts' affidavits should be excluded because they lack certificates of conformity, and Plaintiff disclosed his experts to Defendants only one day prior to filing his opposition. Moreover, Plaintiff's experts were disclosed after the note of issue and certificate of readiness had been filed. Further, the second submission of Plaintiff's experts' certificates of conformity attached to their sur-reply were not acknowledged by the officers who administered the oaths.

[1] On June 12, 2017, the Court permitted Plaintiff to submit a sur-reply addressing Defendants' argument that Plaintiff's experts failed to submit their affidavits in conformity with CPLR 2309, and Defendants' to submit a sur sur-reply in response.

Discussion

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D 'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607, 957 N.Y.S.2d 88, 91 [1st Dept 2012], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky,* 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 [1978]; *Carroll v. Radoniqi,* 105 A.D.3d 493 [1st Dept 2013]).

Arguments raised for the first time in reply are not to be considered (*Sanford v. 27-29 W. 181st St. Ass'n, Inc.*, 300 A.D.2d 250, 753 N.Y.S.2d 49 [1st Dept 2002]; *Alrobaia ex rel. Severs v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 902 N.Y.S.2d 63 [1st Dept 2010] ["The argument on which the court relied, however, was raised for the first time in defendants' reply papers, and should not have been considered by the court in formulating its decision"]). However, this rule is not inflexible. "[A] court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (*Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380, 382, 822 N.Y.S.2d 264, 266 [1st Dept 2006]).

This court will not consider the arguments made in the reply[2], except to the extent that the reply addresses Plaintiff's argument that the subject stairway violated generally accepted standards in place at the time it was constructed (*see* discussion of proximate cause, infra at 13-14, 16, 17). While Plaintiff did not have the opportunity to reply to arguments made for the first time in the reply, Plaintiff submitted sufficient evidence to demonstrate a triable issue of fact as to proximate cause and notice (*see id.*; discussion of constructive notice, infra at 18-20).

Admissibility of Plaintiff's Experts' Affidavits

CPLR 2309(c) requires that an oath taken out of state must be accompanied by a certificate of conformity. A certificate of conformity is required when an "oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation" (*Midfirst Bank v. Agho*, 121 A.D.3d 343, 351, 991 N.Y.S.2d 623, 629 [2d Dept 2014]). The court in *Midfirst* referenced Real Property Law section 309-b, titled "Uniform forms of certificates of acknowledgement or proof without this state," which provides a template and sample language for an out-of-state acknowledgement is taken in conformity with New York Law (*id.* at 350; *see* RPL 309-b[1], [2]).

The failure to attach a certificate of conformity to an affidavit is not fatal (*Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673, 891 N.Y.S.2d 394, 395 [1st Dept 2009], citing *Smith v. Allstate Ins. Co.*, 38 A.D.3d 522, 523, 832 N.Y.S.2d 587, 589 [2d Dept 2007]. Moreover, courts may disregard such defects unless an objecting party demonstrates that a substantial right has been prejudiced (CPLR 2001; *Redlich v. Stone*, 51 Misc. 3d 1213(A) [Sup. Ct., NY County 2016], citing *Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504 [1st Dept 2007]).

[2]Specifically, the Court declines to address the arguments addressing the substance of Plaintiff's experts' affidavits and Defendants argument that Vigilante's affidavit should not be considered. The Court will consider Defendants' argument that Plaintiff failed to comply with CPLR 2309, as it is discussed by the sur-reply and sur sur-reply.

CPLR 3212(b) was recently amended to provide that: "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit."

Plaintiff's experts' affidavits are admissible. Plaintiff submitted certifications of conformity on two separate occasions. First, in his opposition, Plaintiff submitted two certificates of conformity, the "California All-Purpose Acknowledgement," on behalf of Avrit, and the out-of-state affidavit of Vigilante bearing a notary seal, together with the appropriate certification, both complying with the oath formalities of CPLR 2309(c) (*Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504, 837 N.Y.S.2d 67 [1st Dept 2007]). Next, in his sur-reply, Plaintiff attached the additional certificates of conformity on behalf of Avrit and Vigilante, which both conform to the oath requirements of CPLR 2309(c), Further, Defendant has not demonstrated any prejudice by Plaintiff's initial failure to attach the certificate.

Defendants, argue—for the first time—in their sur sur-reply that Plaintiff's experts' out-of-state affidavits should be excluded because Plaintiff failed to conform to CPLR 2309(c) and untimely disclosed his experts. In support of their argument, Defendants rely on *Scott v. Westmore Fuel Co.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dept 2012), wherein the court held that plaintiff's expert's out-of-state affidavit was inadmissible because it failed to conform to the oath requirements of CPLR 2309(c) *and* plaintiff disclosed his expert after the note of issue and certificate of readiness was filed. Here, as addressed above, Plaintiff's experts' out-of-state affidavits meet the oath requirements set forth in CPLR 2309(c). Moreover, the *Scott* decision

was issued prior to the 2015 amendment of 3212(b) requiring the Court to consider Plaintiff's experts' affidavits despite his non-disclosure of the experts under CPLR 3101(d)(1)(i).

Proximate Cause

In order for a plaintiff to establish a prima facie case of negligence, he must prove that: (1) the defendants owed him a duty of care; (2) the defendants breached that duty of care; and (3) the breach was the proximate cause of his injuries (*Solomon v. City of New York*, 66 N.Y.2d 1026 [1985]).

It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk (*Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 141-42, 718 N.Y.S.2d 287 [2000]; *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [1976]). In order to recover damages for a breach of this duty, a party must establish that the landowner created, or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493, 646 N.E.2d 795 [1994]; *Mejia v. New York City Tr. Auth.*, 291 A.D.2d 225, 226, 737 N.Y.S.2d 350 [2002]). Thus, 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 did not cause the condition and that it did not have actual or constructive notice of the condition (*Sabalza v. Salgado*, 85 A.D.3d 436, 924 N.Y.S.2d 373, 375 [1st Dept 2011]; *Espinoza v. Federated Dep't Stores, Inc.*, 73 A.D.3d 599, 600, 904 N.Y.S.2d 3, 4 [1st Dept 2010]).

"It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his

or her injury" (*Siegel v. City of New York*, 86 A.D.3d 452, 454 [1st Dept 2011]; *see also Morrissey v. New York City Tr. Auth.*, 100 A.D.3d 464, 464 [1st Dept 2012]; *Washington v. New York City Bd. of Educ.*, 95 A..D.3d 739, 739-40 [1st Dept 2012]).

However, a plaintiff's failure to identify the cause of his fall is not necessarily fatal to his claim. The Appellate Division, First Department has held that identification of the location where plaintiff's accident took place, together with expert testimony identifying the defective conditions at that site, is sufficient to raise an issue of fact as to whether the accident was caused by the allegedly defective condition (*Berr v. Grant*, 149 A.D.3d 536, 52 N.Y.S.3d 352, 353 [1st Dept 2017] [holding that plaintiff's testimony identifying where he fell, with his expert's testimony identifying the "defects, dangerous conditions, and code violations at that site" were sufficient to establish a triable issue of fact]; *Rodriguez v. Leggett Holdings, LLC*, 96 A.D.3d 555, 947 N.Y.S.2d 429 [1st Dept 2012]; *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 440, 906 N.Y.S.2d 528 [1st Dept 2010]); *see also Vosper v. Fives 160th, LLC*, 110 A.D.3d 544, 545, 973 N.Y.S.2d 589, 591 [1st Dept 2013] [holding that plaintiff's testimony identifying the defective condition that caused his fall, together with his expert's report explaining that the "structural defects he observed, all in violation of applicable Building Code provisions, caused or contributed to the condition"]).

"Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68 [2002]; *Buchholz v. Trump 767 Fifth Ave.*, LLC, 5 N.Y.3d 1, 831 N.E.2d 960 [2005]).

Here, Defendants made a prima facie showing of their entitlement to summary dismissal of the Complaint by submitting Plaintiff and Schmiedel's deposition testimony, wherein they were unable to identify the cause of Plaintiff's fall.

Derector, a Professional Engineer licensed in New York State, with twenty-one years of field experience in the areas of construction engineering, building code implementation, construction safety and environmental hazard, affirmed that he measured the subject handrail to be 32 inches above the nosing of the first and second treads of the subject stairway (*id.*, ¶¶1, 8-9), and maintains that the subject handrail was "properly constructed, maintained safe for its intended use and violated no known applicable code, standard or ordinance" (*id.*, ¶15). Derector further affirmed that the subject stairway was in compliance with the following relevant building codes: the 1956 New York State Uniform Fire Prevention and Building Code; Village of Rye Brook Code Section 91-1; the 1984 New York State Uniform Fire Prevention and Building Code; New York State Multiple Dwelling Law, Section 52; and the 2010 New York State Property Maintenance Code, Sections 306, 305.4, and 305.5.

In opposition, Plaintiff demonstrates a triable issue of fact through his and Schmiedel's deposition testimony, and the affidavits of his experts. First, Plaintiff submits testimony from himself and Schmiedel identifying the site where Plaintiff's accident occurred. Plaintiff testified that as he stepped onto the first or second step of the subject stairway, he slipped and lost his balance (Cherkis Aff., Ex L, Transcript of Plaintiff Deposition, dated January 6, 2016, pp.91:18-93:24). Plaintiff instantaneously reached out to grab the handrail located on the left side of the subject stairway, but he was unable to grasp it (93:9-95:24). After Plaintiff's failed attempt to grab the handrail, his side hit the inner railing and he fell through the opening in the stairway. Further, Schmiedel testified that Plaintiff was behind her descending the subject stairway, and

she witnessed Plaintiff's thigh "kind of touching" the handrail and that his legs were the last to go over the handrail (Cherkis Aff., Ex. P, Transcript of Schmiedel Deposition, dated April 26, 2016, pp.75:22-77:8).

Next, Plaintiff submits the affidavits of his experts, Avrit and Vigilante, establishing that the defective condition, namely the inadequate handrail, absence of guardrail and unprotected opening, caused the condition that caused Plaintiff's accident.

Avrit, a licensed Civil Engineer with over twenty-five years of experience in conducting investigations and analysis relating to premises safety issues (Avrit Aff. ¶1), affirmed that the lack of adequate guardrail posed a falling hazard on the subject stairway.

Avrit additionally establishes that the subject stairway violated standards calling for the implementation of guardrails not less than 42 inches high. Avrit affirmed that the "Generally Accepted Standards Applicable to the State Building Construction Code" issued in 1968 and 1971 ("Generally Accepted Standards"), identifies the then-current National Fire Protection Association No. 101 ("NFPA") as a generally accepted standard[3] (¶¶23-24; Schlosser Aff., Exs. 8, 9).

Section 5-3161 of the NFPA indicates that "[e]ach new stair, . . . and stairs leading from mezzanines which form part of a path of travel to such exits, shall be guarded against falls over the open edge and shall have handrails on both sides except that handrails shall not be required on level landings or balconies." Further, "[g]uards shall be not less than 42 inches high" (NFPA

[3] The definition of a "general accepted standard" is as follows:

> A generally accepted standard is defined in the State Building Construction Code as a specification, code, rule, guide or procedure in the field of construction, or related thereto, recognized and accepted as authoritative. The Code Manual for the State Building Construction Code indicates acceptable methods of compliance with the performance requirements of the Code and therefore is acceptable as a generally accepted standard (Schlosser Aff., Ex. 8).

5-3165[c]), and to be measured "from a point on the tread one inch back from the leading edge or from the floor of landings or balconies" (*id.*, § 5-3165[a]).

Avrit indicates that he personally inspected the Hotel on June 2 and 3, 2014, including the subject stairway (Avrit Aff., ¶4). He further affirms that the Hotel (and subject stairway) was constructed in 1971. According to his measurements, the "handrails adjacent to this unprotected stairwell opening ranges between 30-3/8 inches and 30-1/2 inches," and not 32 inches as stated in Derector's affidavit (*id.*, ¶8). Further, no guardrail or other protection was installed on the subject stairway to protect against falling off the stairs and through the stairway opening (*id.*, ¶¶8, 17). Additionally, Avrit affirmed that the subject handrail was not intended to also function as a guardrail, since it was below the average human's center of gravity.

Avrit went on to address the danger caused by the subject handrail failing to provide a guardrail to prevent a user from falling through the 39-1/2-inch-wide stairway opening. Specifically, Avrit affirmed that a guardrail is typically required to be above a person's center of gravity, so that "if one were to fall against the guardrail, the person's body would stay on the inside of the guardrail as opposed to flipping over the top of the railing" (*id.*, ¶19). Avrit further affirmed that,

> "the handrail height on the subject stairwell is lower than the center of gravity for a typical adult, including plaintiff . . . . Thus, the center of gravity for the plaintiff, who is 5' 5" tall is well above the 30-1/2-inch height of the handrails abutting the stairwell opening"

(*id.*, ¶20).

Avrit also notes that the subject stairway is in violation of several codes applicable to the subject stairway that require a guardrail not less than 42-inches in height (1973 Uniform Building Code §§ 3305(a), 1716; 2009 International Building Code §§ 1013.1, 1013.2; 2010

New York State Property Maintenance Code § 702.1). Avrit concluded that the subject stairway was not maintained in a reasonably safe manner, as it inadequately guarded against falls through the stairway opening, that "defendants unreasonably allowed a dangerous and hazardous condition to exist" (Avrit Aff., ¶38), and that it violated the applicable generally accepted standards. Moreover, Avrit opined that Defendants' failure to install an adequate guardrail on the subject stairway was a proximate cause of Plaintiff's fall.

Next, Vigilante affirms that he is a principal of Vigilante Forensic and a "Human Factors/Ergonomics Expert with experience in researching, designing and evaluating various safety issues, including safety and risk issues, and analyzing risk perception matters" (Vigilante Aff., ¶1). Vigilante goes on to affirm that he personally inspected the Hotel on June 4, 2014, and affirmed that the subject stairway is in violation of several codes applicable to the subject stairway that require a guardrail not less than 42-inches in height (2009 International Building Code § 1013.2 ; 1984 Basic National Building Code of 1984 § 827.2).

Additionally, Vigilante affirmed that the subject handrail was below the Plaintiff's center of gravity and insufficient in height to prevent an average adult from toppling over it. Moreover, Vigilante agrees with Avrit that the absence of an adequate guardrail along the open side of the stairway was a proximate of Plaintiff's accident (Vigilante Aff., ¶44[ii]).

Here, Plaintiff and Schmiedel's testimony together with the affidavits of Plaintiff's experts establish a triable issue of fact as to the cause of Plaintiff's accident. Specifically, Plaintiff and Schmiedel's deposition testimony establish the site where Plaintiff's accident occurred. Moreover, Avrit and Vigilante established that the absence of a guardrail on the subject stairway was not compliant with the Generally Accepted Standards at the time of the construction of the hotel and had the appropriate guardrail been in place, then Plaintiff's accident

would not have occurred. Even if Vigilante's affidavit were not considered by the Court, Avrit's affidavit provides a non-speculative basis to deny Defendants' motion.

Further, even if the Court did consider Defendants' argument that the codes cited by Avrit and Vigilate are inapplicable, Derector's own affidavits create an issue of fact as to when the Hotel was constructed, and therefore, whether the absence of a guardrail was in violation of applicable codes at the time of construction (*compare* Derector Aff., ¶6 *with* Derector Supplemental Aff., ¶3).

Defendants' argument that Plaintiff's failure to use the handrail at the time of accident precludes him from asserting the allegedly defective handrail as the proximate cause of his accident is unsupported by their cited caselaw. Defendants cite to *Reed v. Piran Realty Corp.*, 30 A.D.3d 319, 818 N.Y.S.2d 58 (1st Dept 2006), wherein the court held that defendant's motion for summary dismissal was granted since plaintiff's expert failed to connect the defective condition to plaintiff's accident. Moreover, in *Reed*, the plaintiff argued that the stair he tripped on *and* the handrail were defective, whereas here, Plaintiff argues the defective condition was the absence of a guardrail on the subject stairway (*id.* 320).

Further, Defendants failed to submit evidence demonstrating that the Generally Accepted Standards are not applicable to the subject stairway. Derector's assertion that Defendants complied with the Generally Accepted Standards since the subject stairway purportedly complies with the New York State Building Code is unavailing, since a violation of a local code is not dispositive of the question of whether Defendants breached its duty of care (*Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872, 638 N.Y.S.2d 937 [1995]; *see Zebzda v. Hudson St., LLC*, 72 A.D.3d 679, 680, 897 N.Y.S.2d 727, 729 [2d Dept 2010]).

Defendants reference to *Courtney v. Abro Hardware Corp.*, 286 A.D. 261 (1st Dept 1955) and *Alvia v. Mutual Redevelopment Houses, Inc.* 2008 NY Slip Op. 8969 (1st Dept 2008), are likewise misplaced, since the alleged defective stairways in those cases was the complete lack of a handrail, whereas in the present case, the alleged defective condition is the absence of the appropriate guardrail.

Defendants cite to several Appellate Division, Second Department cases—all of which were decided prior to *Babich* and its progeny—to establish that Plaintiff's failure to identify the cause of his fall is insufficient to raise a triable issue of fact (*Denicola v. Costello*, 44 A.D.3d 990 [2d Dept 2007]; *Bottiglieri v. Wheeler*, 38 A.D.3d 818 [2d Dept 2007]; *Lissauer v. Shaarei Halacha, Inc.*, 37 A.D.3d 427 [2d Dept 2007]; *Birman v. Birman*, 8 A.D.3d 219 [2d Dept. 2004]; *Bitterman v. Grotyohann*, 295 A.D.2d 383 [2d Dept 2002]). As addressed above, Plaintiff identified the site of his fall and his experts' identification of a defective condition at that site to connect the defect to his accident.

Additionally, Defendants reference to *Fernandez v. VLA Realty, LLC*, 45 A.D.3d 391 (1st Dept 2007) and *Rodriguez v. Cafaro*, 17 A.D.3d 658 (2d Dept 2005), is misplaced, since those decisions do not indicate whether the plaintiffs in those cases submitted expert testimony identifying a defective condition.

Accordingly, the branch of Defendant's motion for summary judgment on the basis that Plaintiff failed to establish the cause of his accident, is denied.

Constructive Notice

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*Gordon v. American Museum of Natural History*, 67 N.Y.2d

836 [1986]; *see also Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]; *Guttierez v. Lenox Hill Neighborhood House, Inc.*, 4 A.D.3d 138, 771 N.Y.S.2d 513 [1st Dept. 2004]; *Lemonda v. Sutton*, 268 A.D.2d 383, 702 N.Y.S.2d 275 [1st Dept. 2000]; *Segretti v. Shorenstein Co., E., L.P.*, 256 A.D.2d 234, 682 N.Y.S.2d 176 [1st Dept 1998]). A defendant property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*Gordon*, 67 N.Y.2d 836; *see also O'Connor-Miele v. Barhile & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1st Dept 1996]). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493 [1994]; *see also Gordon*, 67 N.Y.2d 836; *Segretti*, 256 A.D.2d 234).

Here, Defendant has failed to make a prima facie showing that it did not have notice of the allegedly dangerous condition.[4] Defendants contend that they are entitled to summary judgment, as "Plaintiff has not established that Defendants received any notification of specific concerns about the safety of the stairwell, violations of the stairwell, not for handrails or failure maintain the premises" (Cherkis MOL at 7). This argument is unavailing, since on a motion for summary judgment, it is Defendants', and not Plaintiff's, initial burden to establish that it did not cause or have actual or constructive notice of the allegedly dangerous condition.

Further, the evidence submitted by Defendant is insufficient demonstrate that it did not have constructive notice of the alleged defect. Specifically, whether the subject stairway complies with building code is not dispositive of Plaintiff's claim, which is premised, among other things, on common-law negligence principles (*Kellman*, 87 N.Y.2d 871). Moreover, the

[4] The parties agree that Defendants did not create the alleged defective condition.

fact that the "stairway structure remained as constructed in 1971," does not, without more, establish prima facie showing of lack of constructive notice (Cherkis MOL at 11).

Even assuming that Defendants had met their initial burden, Plaintiff raises a material issue of fact as to Defendants' constructive notice of the alleged defective stairway. The affidavit of Kai Fischer ("Fischer"), the general manager of the Hotel since December 2013, indicated that the stairway where Plaintiff's accident took place "is considered the main stairway at the hotel," and has been in its current configuration since 1971 (Fischer Aff. ¶14). Ben-Gurion testified that Defendants "instituted . . . inspections . . . that included public space" within Hotel (Schlosser Aff., Ex 1, Ben-Gurion Dep. Trans. dated March 29, 2017, 33:18-24). Moreover, the testimony of Luciano establishes that he was trained to be aware of "tripping hazards, broken glass, things like that" (Schlosser Aff., Ex 2, Luciano Dep. Trans. dated March 30, 2017, 24:11-19). Luciano further testified that he was trained to look for hazards on the stairs, including "tripping hazards, if they're [stairs] broken, missing parts," and personally conducted daily inspections regarding safety hazards within the property (37:16-20).

As discussed above, there is a question of fact as to whether the height of the handrail constitutes a dangerous condition. The affidavits of Fisher, Ben-Gurion, and Luciano underline the fact that defendants have known for years how the handrail was configured. It is a question of fact for the jury not only whether that configuration was a dangerous condition, but also whether those years were enough time for defendants to discover that the handrail was insufficient and remedy the condition.

Accordingly, the part of Defendant's motion for summary judgment on the basis that Plaintiff fails to establish Defendants' notice of the allegedly defective condition, is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's, amended complaint pursuant to CPLR 3212, is denied, with prejudice, as to Plaintiff's claim that the alleged defective condition violated the Generally Accepted Standards. It is further

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's amended complaint pursuant to CPLR 3212, is denied, with prejudice, as to Plaintiff's common-law negligence claim. It is further

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's amended complaint pursuant to CPLR 3212, is denied, without prejudice, as to Plaintiff's claim that the alleged defective condition violated applicable code. It is further

ORDERED that counsel for Defendants, MK LCP Rye LLC and Hilton Management, LLC, shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 24, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.