Carmel v Young Men's & Young Women's Hebrew Assn.
2020 NY Slip Op 34057(U)
December 7, 2020
Supreme Court, New York County
Docket Number: 152741/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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KAY CARMEL

Plaintiff,

- v -

THE YOUNG MEN'S AND YOUNG WOMEN'S HEBREW ASSOCIATION,

Defendant.

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INDEX NO. 152741/2018

MOTION DATE 10/27/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 96, 97

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by Defendant The Young Men's and Young Women's Hebrew Association d/b/a 92nd Street Y ("Defendant") for an order pursuant to CPLR 3212, granting summary judgment as to Defendant and dismissing the Complaint by Plaintiff Kay Carmel ("Plaintiff") in its entirety is GRANTED for the reasons stated herein; and the Cross-Motion by Plaintiff for an order granting leave to supplement her bill of particulars to assert certain regulations that were allegedly violated is GRANTED as explained hereinafter.

BACKGROUND

A. Overview

This is an action based in premises liability. On the afternoon of February 8, 2018, Plaintiff fell as she was walking up the outdoor steps located on Lexington Avenue and 92nd Street leading into Defendant's building at 1395 Lexington Avenue, New York, New York, also known as 92nd Street Y ("Premises" or "the building"). (Plaintiff EBT at 32:04-08, 39:02-05, NYSCEF Doc No 58; Bill of Particulars ¶ 1at 1, NYSCEF Doc No 57; *see also* Verified Complaint ¶¶ 7-9, 11, NYSCEF Doc No 55.) Plaintiff alleges, *inter alia*, that Defendant failed to maintain the subject steps and entrances to the Premises in a safe condition. (*Id.* ¶ 10.) Plaintiff specifically alleges in her Complaint and Bill of Particulars that Defendant was negligent in failing to have adequate hand railings at the subject steps. (*Id.*) Plaintiff further alleges that Defendant failed to comply with applicable laws including but not limited to the 1968 Building Code of the City of New York 27-375 ("1968 Building Code"). (*Id.*)

It is undisputed that the instant incident was captured in a surveillance video by Defendant which was previously exchanged prior to Plaintiff's deposition and has been submitted into the record as evidence. (*See* NYSCEF Doc No 53.)

B. Deposition Testimonies

1. Deposition of Plaintiff

Plaintiff stated in her EBT, dated October 31, 2018, that on the afternoon of February 8, 2018, which was a "nice winter day," she was walking up the subject outdoor steps when her right foot slipped off at the edge of the third step, which she describes to be the top step leading to the two front doors of the building, and she "began to stumble" and fell. (Plaintiff EBT dated Oct 31, 2018, at 33:19-34:05, 36:04-09, 45:19-25, NYSCEF Doc No 58.) Plaintiff further stated that "[she] tried to right [herself], by bringing [her] left foot up and seeing if [she] could get [her] balance, there was no rail to go hold onto and [she] seemed to have fallen." (*Id.* at 34:06-09.) Referencing the railings, she stated that she did not remember seeing them. (*Id.* at 40:05.) She further stated that she was looking around for something to grab onto when she was unbalanced, but it was too far away from where she was. (*Id.* at 40:05-09.) Plaintiff further clarified: "I must have been close enough to -- grab the door or -- handle of the door, I don't know; I can't remember that exact distance, but it was close." (*Id.* at 57:09-13.) Plaintiff described the handle of the front doors as a "pull handle." (*Id.* at 61:22-62:05; 60:18-62:24.) She stated that at the time that she fell, she was looking at the "far right door." (*Id.* at 61:12-14.) However, she stated that she did not think that she reached the door. (*Id.* at 62:23-24.)

Plaintiff further stated that she was carrying a purse, which she described to be a "wristlet, something that suspends from [her] wrist." (*Id.* at 37:20-38:12.) She stated that the wristlet was on her right hand. (*Id.* at 38:08-09.) Plaintiff also stated that she did not remember seeing the railings when she was going up the stairs and she said that she did not use the ramp because it was harder to use the ramp than the stairs. (*Id.* at 40:13-17; 39:13-19.)

Plaintiff described the subject steps in her EBT as not high but "very deep" and "wide," meaning "more distance [than average] between the front edge and where it meets the riser." (*Id.* at 41:16-18; 42:11-43:03, 48:23-24.) However, Plaintiff stated in her EBT that even though she noticed this "erratic … pattern"—although not sure whether before, during, or after her fall—she did not think to reach out for the railing as she was walking up the steps. (*Id.* at 43:04-44:13.) In fact, she did not remember seeing the railings. (*Id.* at 39:25-40:09.) She added that the steps were not in any way slippery. (*Id.* at 62:25-63:05.) She further added that the stairs had no kind of debris, seams, or breaks. (*Id.* at 48:03-24.**)**

2. Deposition of Defendant's Witness Michael Lam, Director of Engineering

Michael Lam ("Lam") had been the director of building operations and engineering for four years at the time of his EBT dated June 6, 2019, and his responsibilities regarding Defendant's premises entailed oversight over the way the building is run, *e.g.*, the porter services, maintenance crew, mechanics, and housekeeping. (Lam EBT dated June 6, 2019, at 7:09-13; 8:10-13, NYSCEF Doc No 59; *see also* Lam CV.) Lam stated that, as part of his duties, he was responsible for maintaining and repairing the common areas of the building which included the subject outdoor steps. After having reviewed the incident report and related images from the incident, Lam stated that the subject steps where the incident happened had not changed in any way since the time of the incident. (*Id.* at 11:25-12:07; 17:21-25.) Lam further testified

that the subject steps had not been altered since the time of the original installation, which was 1929. (*Id.* at 12:08-19.) Lam also testified that if there had been any repair or alteration to the subject stairs, there would be a record of it with the Defendant. (*Id.* at 13:05-11; 13:18-22.) Lam stated that if there were any repairs or any maintenance done on the subject steps, it would be part of his responsibilities to oversee them. (*Id.* at 19:13-16.)

Lam stated that he was not aware of any incidents prior to that of Plaintiff's involving the subject steps. (*Id.* at 18:02-08.) Lam further stated that as part of the routine maintenance of the building, inspections were done of the physical building, including the subject steps. (*Id.* at 19:22-25.) Lam stated that he runs three shifts with respect to the steps and during every shift, "the supervisor checks for cleanliness, debris, and [he himself] on a daily basis check[s] for debris or defects as [he] walk[s] the building." (*Id.* at 20:08-15.)

3. Affidavit of Defendant's Engineering Witness Anthony M. Dolhon, P.E.

Anthony M. Dolhon ("Dolhon") stated in his affidavit/report that he is a principal engineer with Dolhon Forensics, has a Bachelor of Science degree in Civil and Environmental Engineering from Clarkson University and a Master of Science degree in Civil Engineering from the University of Vermont. (Dolhon Aff ¶ 1, NYSCEF Doc No 51.) He stated that he was retained by Defendant to "to investigate the existing condition and also to assess the code compliance" of the subject steps. (*Id.* at 2.)

Based on his in-person visit of the Premises on September 3, 2019, a review of the publicly available records of the Department of Buildings, publicly available photographs, the surveillance video, pleadings and discovery, transcripts of the EBTs, and the relevant building code provisions, Dolhon opined that the existing conditions and construction did not cause or contribute to Plaintiff's incident at hand. (Dolhon Report at 5, 10, 17, NYSCEF Doc No 51.) Dolhon further opined that Plaintiff's incident occurred due to a "misstep." (*Id.* at 15.) Dolhon further opined that the stairs, in particular treads, risers, upper landing and handrails were constructed in compliance with the THL [Tenement House Law][1] and maintained in good working condition. (*Id.* at 16, 17.) Dolhon further opined that the building code violations as alleged in the Plaintiff's Complaint and Bill of Particulars either do not apply to tenement housing at the time of construction or do not apply retroactively to lawfully permitted construction. (*Id.* at 17.)

In his report, Dolhon stated that "[e]arly photographs taken in 1930 and 1938, which are available on 92Y's website reveal that the groundbreaking occurred in June 1929, the cornerstone was placed on November 17, 1929, and dedicated on October 26, 1930. These photographs also depict the main entrance and the stairs without handrails." (*Id.* at 4.)

[1] As will be discussed further, at the time of the construction of the subject building, there were at least two different regimes that controlled the construction of the buildings in New York depending on the nature of the building: THL and the 1922 NYC Building Code. (*See Grimmer v Tenement House Dept. of City of New York*, 204 NY 370 [1912]; *see also infra* pages 10-13.)

Dolhon further stated that Defendant's building is a "cultural and community center, with dormitory style housing[.]" (*Id.* at 3.) He further stated that, based on certificates of occupancy, the building was and still remains a residential building. (*Id.*)

Dolhon further stated that, based on the construction drawings, the main entrance consisted of three side-by-side, exterior straight flight of stairs, with a revolving door at the top of the center stairs (which was changed sometime after construction as per Plaintiff's picturesand EBT). Dolhon further stated that the northernmost stairs (i.e., left side of the drawing) has since been reconfigured as a pedestrian ramp. (Dolhon Report at 4.) Dolhon further stated that the construction of the subject steps, in particular the treads, risers, and upper landing, are consistent with the excerpt of the construction drawing for the main entrance depicted in Exhibit 4A[2], marked June 6, 2019, with the exception that handrails were subsequently installed at some time after the stairs were constructed. (*Id.* at 4, 16.)

Dolhon further stated that he measured the stairs as part of his report and the height of the risers varied from 6.125, 7, and 7 inches in ascending order. Dolhon further stated that "[b]oth treads were measured to be 15.125 inches long[,] [t]he upper landing was measured to be 2 feet 8 inches long[,] [t]he width [of] the upper landing varied between 6 feet 9 inches wall to wall at the face of the door and 8 feet 6.75 inches at the leading edge, and [t]he handrail measures approximately 1 inch wide by ¾ inches in height." (*Id.* at 11.)

4. Affidavit of Plaintiff's Architectural Witness Richard Robbins, R.A.

Richard Robbins ("Robbins") stated in his affidavit that he is a registered architect. (Robbins Aff ¶ 1, NYSCEF Doc No 71.) Robbins has a Bachelor of Science in architectural technology from New York Institute of Technology. (*Id.* at 11.) Based on a review of the records of the Premises, including the subject steps, the EBT of Plaintiff, the surveillance video, the report of Defendant's witness Dolhon, and an in-person inspection of the subject staircase on June 25, 2019, Robbins opined that because the Premises are used for both business and

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[2] According to Dolhon's affidavit and report, the construction drawings describe the subject steps as to the following:

> "1. Three risers between the upper landing and the sidewalk;
> 2. Overall height of the stairs between the upper landing and the sidewalk is to be 1 foot 11 inches (assuming this height is evenly distributed among 3 risers, the height of each riser is approximately 7-3/4 inches);
> 3. The width of the stairs is to vary between 7 feet 5-3/8 inches wide at the face of the building to 9 feet 3 inches at the outermost face of the encased columns between adjacent flights;
> 4. The outermost face of the column encasement is to be 2 feet 0 inches wide;
> 5. No handrails are specified." (NYSCEF Doc No 51 at 4.)

However, Exhibit 4A, which is what Dolhon seems to rely on in his report for the above construction drawing and relevant information, has not been made part of the record on this motion.

residential use, with the majority use being business use, the applicable statute is the 1922 NYC Building Code ("1922 Building Code") and not the THL. Robbins further opined that the below conditions violate the applicable codes and rendered the subject staircase hazardous and dangerous and that the hazardous and dangerous condition existed on the subject staircase at the time of the Plaintiff's accident. (Id. ¶¶ 6, 11, 28, 40.)

Robbins opined specifically that:

a. "The stair riser heights are not uniform. The riser heights vary by as much as 5/8" (inch) and become higher with each step up[;]
b. The product of the top riser height and the adjacent stair tread, in the location where the accident occurred, is 106.875 [inches squared]. The 1922 NYC Building Code requires ["the product of the tread, exclusive of nosing, and the riser, in inches, shall not be less than seventy nor more than seventy-five, but risers shall not exceed seven and three-quarter inches in height, and treads, exclusive of nosing, shall not be less than nine and one-half inches wide."] (1922 NYC Building Code §153(4)[3], Exhibit 5 to Eilender Affirmation). Therefore, 106.875 [inches squared] is a code violation[;]
c. The stair lacks an intermediate handrail. The stair's width at the top of the flight is 100" (inches). The 1922 NYC Building Code requires that any stair wider than 88" (inches) have an intermediate handrail. (1922 NYC Building Code §153(6)[4], Exhibit 5 to Eilender Affirmation). Therefore, lack of an intermediate handrail is a code violation[;]
d. The stair has not been maintained in a safe and code-compliant condition." (*Id.* ¶¶ 6, 11, 25, 29, 32, 33, 34, 35.)

Robbins further opined that "[t]he existing railings for the subject stairs are located on the sides of the staircase and the door handles are in the middle which is a poor design because even if someone was holding onto the railings on the sides, they would have to release their hold to grab the door handle to enter the building." (*Id.* ¶ 22.)

Robbins further opined that "[a]n intermediate or center railing would be even more important here because the door handles of the two entrance doors at the top landing are centrally located with respect to the adjacent stair, and so Ms. Carmel felt obliged to ascend the middle section of the stair flight." (*Id.* ¶ 37.) "Had an intermediate handrail been present, as is required by code, Ms. Carmel would have been able to avail herself of the support she required in ascending the subject stair. This deficiency was either a cause of Ms. Carmel's accident or at the very least would have prevented her from falling all the way down the stairs." (*Id.* ¶ 38.)Robbins additionally opined that the Defendant further violated NYC Administrative Code Sections 28-301.1 and 28-302.1.

[3] *See infra* page 11.
[4] *See id.*

C. Parties' Contentions

1. Defendant's Moving Papers

Defendant in sum and substance argues that it has met its burden by demonstrating that there was a lack of any breach of duty to the Plaintiff. Defendant specifically argues that the statutes cited by Plaintiff in her Complaint and Bill of Particulars, namely the 1968 Building Code of the City of New York 27-375 ("1968 Building Code"), is inapplicable to Defendant. Defendant moreover argues that there was no hazardous condition at the time of Plaintiff's incident. Defendant finally argues that the surveillance tape, which depicts the incident at hand, demonstrates "irrefutable evidence" that Plaintiff "simply lost her balance[,]" and that was the sole proximate cause of the incident. (Memo in Supp ¶¶ 35, 42, 47 NYSCEF Doc No 50.) Defendant further argues that even assuming, arguendo, that there were building code violations, the alleged violations were not the proximate cause of the Plaintiff's accident. (*Id.* ¶ 47.)

Defendant argues, *inter alia*, that "there is no evidence to support plaintiff's allegations that of defective doors, defective door handles, inadequate lighting or inadequate crowd control[.]" (*Id.* ¶ 22.) Defendant further argues that "as documented by the video footage, the plaintiff did not even make it to the door or door handle but lost her balance independent of anything." (*Id.* ¶ 22.) Defendant further argues that "there is no indication of a defective riser or tread." (*Id.* ¶ 23.) Defendant argues that "[P]laintiff had no problem with the first two stairs and, through no hazardous condition or defect, simply lost her footing while ascending the third step." (*Id.* [internal citations omitted].) Defendant further argues that "[P]laintiff did not utilize the handrails that were readily available on both sides of the stairs." (*Id.* ¶ 24.) Defendant further states that "there was only one other individual ascending the staircase as [Plaintiff] did, providing her with ample room to ascend the staircase with aid of either handrail." (*Id.* ¶ 25.) Defendant further adds that [Plaintiff] failed to utilize the handicap ramp which was readily available adjacent to the stairs and furnished with handrails." (*Id.*)

Furthermore, Defendant submits that its engineering witness Dolhon, based on his review of the record, opined that the subject stairs, the treads, risers, and handrails are in good working condition and that they were in good working condition at the time of the incident. (*Id.* ¶ 26.)

Defendant moreover submits that its director of engineering, Lam, testified that he regularly inspects the staircase and is unaware of any prior incidents at the subject location. (*Id.* ¶ 27 [internal citations omitted].)

Defendant additionally submits that its engineering witness Dolhon, citing various certificates of occupancy, opines that there is a lack of a defective condition. (*Id.* ¶ 27. [internal citations omitted].)

Defendant argues that the building code sections cited by Plaintiff are inapplicable and, therefore, "[Defendant] had no obligation to comply with the cited building codes." (Memo in Supp ¶ 28, NYSCEF Doc No 50.) Defendant submits that its engineering witness Dolhon opined that the Premises were constructed in 1929 and is a "cultural and community center, with dormitory style housing[,] is intended for business and residential use, with ten floors plus a

basement and subbasement[,]" and "remains a residential building," and as such, contrary to Plaintiff's allegation in her Complaint and Bill of Particulars, the Premises are not governed by the 1968 Building Code of the City of New York 27-375 ("1968 Building Code"), but rather are governed by and in accordance with the Multiple Dwelling, or Tenement House Law ("THL"). (Memo in Supp ¶¶28, 29, 30 [citing Ex A, K [The Certificate of Occupancy No. 16552 dated June 24, 1930].) Defendant submits that the Building Code of the City of New York ("BCCNY") has a provision (1922 BCCNY §1 [2] [Matter Covered]) which exempts buildings and structures covered by the THL from the various provisions of the BCCNY. (*Id.* ¶ 31.)

Defendant specifically argues that the staircase at issue is compliant with the requirements of the applicable THL statute, 1922 THL 35,[5] for handrails, treads and risers as set forth in the THL and was not required to have a center handrail or the proportions of risers and treads as set forth in the 1968 Building Code. (*Id.* ¶¶ 30, 32 34.)

Defendant further argues that the staircase at issue is compliant with the requirements of 1922 THL 21[6] for risers and treads, which require "all stairs to be constructed with a rise of not more than eight inches and with treads not less than ten inches wide[.]" (*Id.* ¶ 33.) Defendant submits that its engineering witness Dolhon measured that the height of the risers varied from 6-1/8, 7, and 7 inches, respectively ascending, and the width of the treads was 15-1/8 inches. (*Id.*)

Defendant alternatively argues that there is no evidence to support the allegation that non-skid treads or defective or inadequate riser or tread, doors, door handles, lighting, or crowd control caused or contributed to Plaintiff's fall. (*Id.* ¶¶ 37-46.) Defendant argues that, as shown in the video, Plaintiff, "chooses to forego the hand railings readily available on both sides of the stairs and walks up the middle of the stairs where she simply loses her balance." (*Id.* ¶ 42.) Defendant further argues that, even if there was a building code violation, Plaintiff is unable to prove proximate cause. (*Id.* ¶ 45.)

2. Plaintiff's Cross-Motion and Opposition to Defendant's Motion

Plaintiff cross moves pursuant to CPLR 3025 (b) for leave to supplement her bill of particulars and alleges further violations under the 1922 NYC Building Code Sections 153 and 154; 2014 NYC Building Code, NYC Health Code Article 131: Buildings Sections 131.05 and 153.19; and NYC Administrative Code Sections 27-127, 27-128, 28-301.1 and 28-302.1. (Affirm in Opp to Defendant's Motion and In Supp of Plaintiff's Cross-Motion, ¶ 31, citing Ex 6 [Proposed Supplemental Bill of Particulars], NYSCEF Doc No 64; *see also id.* ¶ 34, 40-42.) Plaintiff argues that the 1922 Building Code is applicable as "only the top 5 floors were ever used for residential purposes, and the balance of the building was always used for commercial purposes." (*Id.* ¶ 55.)

Plaintiff submits that its architectural witness Robbins opines that the subject staircase's width at the top of the flight is 100 inches and should have an intermediate handrail under the

[5] *See infra* page 13.
[6] *See infra* page 12.

1922 Building Code Section 153 (6)[7], which requires staircases wider than 88 inches to have an intermediate handrail. (*Id.* ¶¶ 28, 35, 36, 37, 39.)

Plaintiff further argues that the stairs have irregular heights. (*Id.* ¶ 37.) Plaintiff submits Robbins' findings that the riser heights vary by as much as 5/8 inch and become higher with each step up, which violates "the 1922 Building Code, among other codes." (*Id.* ¶¶ 39, 66.)

Plaintiff further argues that "[t]he product of the top riser height and the adjacent stair tread, in the location where the accident occurred, is 106.875 [inches squared,]" and, as such, violates the 1922 Building Code Section 153(4)[8], which requires that "the treads and risers of stairs shall be so proportioned that the product of the tread, exclusive of nosing, and the riser, in inches, shall not be less than seventy nor more than seventy-five [inches squared]." (*Id.* ¶ 39.)

Plaintiff further argues that irrespective of code violations, the subject staircase "did not comply with good and nationally accepted construction, maintenance and safety practices." (*Id*. ¶ 51, citing *Zebzda v Hudson St LLC*, 72 AD3d 679, 680-81 [2d Dept 2010].)

Plaintiff further argues in the Affirmation in Opposition to Motion and in Support of Cross-Motion that "[P]laintiff's deposition testimony that she reached out for a handrail and had nothing to 'grab onto' constitutes proof in admissible form that the failure to provide an intermediate handrail …. at the very least may have been a proximate cause of the accident." (*Id.* ¶ 75.) Plaintiff further argues that "to use [handrails situated on the far edges of the subject staircase] would have been futile because the handles to the doors are too far away and she would have had to release her grasp of the handrail to reach the door handles anyway[.]" (*Id.* ¶ 76.)

3. Defendant's Reply and Opposition to Plaintiff's Cross-Motion

Defendant in its attorney's affirmation in reply requests that any allegations not contained within Plaintiff's Bill of Particulars should be disregarded and the allegations should be limited to what was pled. (Defendant's Opp to Cross-Motion and Reply Affirm ¶¶ 4-11, NYSCEF Doc No 96.) Defendant nonetheless argues that any newly cited code provisions are either inapplicable and/or not the proximate cause of Plaintiff's alleged injuries. Defendant argues that as the Premises remained a "residential building," neither the 1922 nor the 1968 Building Code applies. (*Id.* ¶ 16; *see also id.* ¶ 16 n 1.) Defendant argues that, contrary to Robbins' argument, "the 1922 and 1968 code[s] make no mention of 'mixed use' when discussing the Tenement House (Multiple Dwelling) exception[.]" (*Id.* ¶ 22.) Further, Defendant argues that the various certificates of occupancies clearly demonstrate that the building is residential and remains in compliance with all applicable laws. (*Id.* ¶ 23.) Defendant argues that "there was no requirement for a center handrail or the cited dimensions as to treads and risers." (*Id.* ¶ 17.) Defendant, in its attorney's reply affirmation, further argues that Plaintiff's argument that "the steps are … poorly designed" is not supported by evidence and is insufficient to defeat a motion for summary judgment. (*Id.* ¶ 24.) Defendant further argues that, assuming arguendo that the aforementioned code provisions apply, there is no proximate causation. (*Id.* ¶ 34.)

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[7] *See infra* page 11.
[8] *See infra* page 11.

DISCUSSION

A. Standard of Review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff ... the court on a summary judgment motion must indulge all available inferences[.]" (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

B. Applicable Law

Generally, a property owner "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." (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotations and citations omitted]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].) In particular, property owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of those on their premises. (*Russo v Home Goods, Inc.*, 119 AD3d 924, 924 [2d Dept 2014] [internal citations omitted].)

In order to be held liable, a property owner must be aware of the alleged defective or dangerous condition, either by having created it, or having actual knowledge of the condition, or constructive notice of it. "To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986].)

A defendant property owner moving for summary judgment in a slip-and-fall action "has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury[;]"or that the condition was open and obvious and not inherently dangerous as a matter of law. (*Ross v Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421 [1st Dept 2011]; *Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633 [2d Dept 2011]; *Bloomfield v Jericho Union Free School Dist.*, 80 AD3d 637 [2d Dept 2011]; *Pryzywalny*

v. New York City Tr. Auth., 69 AD3d 598 [2d Dept 2010]; *Casiano v St. Mary's Church*, 135 AD3d 685 [2d Dept 2016].)

In cases where it is alleged that the subject area was negligently designed or constructed, "[t]he legal issue is … whether the design of the building violated building safety standards applicable at the time it was built. Because such standards must take into account numerous safety concerns, they will not always be able to eliminate every source of possible injury. If a building was constructed in compliance with code specifications and industry standards applicable at the time, the owner is under no legal duty to modify the building thereafter in the wake of changed standards." (*Hotaling v City of New York*, 55 AD3d 396, 397 [1st Dept 2008], *affd*, 12 NY3d 862 [2009]; *see also 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."].)

As previously mentioned, there were at least two competing codes that governed the design, construction and maintenance of the buildings in New York City at the time that the subject building was erected in 1929: the Tenement House Law and the Building Code. This dual regime is partially the result of the then-cities of Brooklyn and New York merging into a single municipal entity in 1898—and establishing what New Yorkers now know as "the Five Boroughs." However, this dual regime also reflects a policy decision that a distinct municipal code was necessary to regulate "tenement houses" which" [i]n its primary and common application, it suggests the dwellings of the poor" whom unlike the city's more fortunate residents—as Judge Cardozo explained—were "unable to care for themselves." (*Altz v Leiberson*, 233 NY 16, 19 [1922].)

A tenement house, as defined in the Tenement House Law, is "any house or building, or portion thereof, which is either rented, leased, let, or hired out, to be occupied, or is occupied, in whole or in part, as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied." (*Altz v Leiberson*, 233 NY 16, 18 [1922], quoting 1922 THL § 2 [1].) In sum and substance, if a building qualifies as a tenement house, then its landlord was required to follow the Tenement House Law in its design, construction and maintenance, and would be subject to the Tenement House Department. Otherwise, in sum and substance, the building would be so regulated by the New York City Building Code. This dual system has undoubtedly created confusion for over a century—which is often exacerbated by the fact that the text of these codes are often not easily accessible to lawyers and judges. As such, this Court has reproduced the code provisions from both the Tenement House Law and the Building Code that each side alleges are applicable.

C. Municipal Code Provisions

1922 Building Code of the City of New York

The provisions of Article 1 General Provisions, §1 Scope, Subsection 2 Matter Covered, govern the scope of construction of buildings and structures. It states:

§1 Scope.

> **2. Matter Covered.** All matters concerning, affecting or relating to the construction, alteration or removal of buildings or structures, erected or to be erected in the city are presumptively provided for in this chapter, except in so far-as such provisions are contained in the Charter, the Tenement House Law, the Labor Law, or the rules promulgated in accordance with the provisions of this chapter by the superintendents of buildings of the several boroughs.

(1922 BCCNY §1[2].)

The provisions of Article 8 Exit Facilities, §151 Application of article, govern the applicable buildings and structures. It states:

> **§151. Application of article.** Unless otherwise specifically stated in this article, the Provisions thereof shall apply to buildings thereafter erected, except tenement houses coming under the provisions of the Tenement House Law, factories coming under the provisions of the Labor Law, motion picture theatres coming under the provisions of article 24 of this chapter, theatres and other places of amusement coming under the provisions of article 25 of this chapter, and residence buildings occupied exclusively by one or two families or having not more than fifteen sleeping rooms.

(1922 BCCNY §151).

The provisions of Article 8 Exit Facilities, §153(4) Treads and risers, govern the construction of treads and risers of required interior stairs. It states:

> **§ Interior stairs**
>
> **4. Treads and risers.** Except where winders are permitted the treads and risers of stairs shall be so proportioned that the product of the tread, exclusive of nosing, and the riser, in inches, shall not be less than seventy nor more than seventy-five, but risers shall not exceed seven and three-quarter inches in height, and treads, exclusive of nosing, shall not be less than nine and one-half inches wide. Treads, other than winding treads, and risers, shall be uniform width and height in any one flight. The use of winders is prohibited, except for stairs of an ornamental character, having a width of not less than five feet. The treads of winders, exclusive of the nosings, shall have a width of not less than seven inches at any point nor more than ten inches average width.

(1922 BCCNY §1 53[4].)

The provisions of Article 8 Exit Facilities, §153(6) Hand rails, govern the construction of handrails on both sides and certain intermediate handrails of required interior stairs. It states:

> **§ Interior stairs**
>
> **6. Hand rails.** Stairs shall have walls or well secured balustrades or guards on

> both sides, and shall have handrails on both sides. When the required width of a flight of stairs exceeds eighty-eight inches, an intermediate hand-rail, continuous between landings, substantially supported and terminating at the upper end in newels or standards at least six feet high, shall be provided.

(1922 BCCNY §153[6]).

The provisions of Article 8 Exit Facilities, §154 Exterior stairways, govern the construction of required exterior stairs, which shall also conform to the pertinent requirements of §153 Interior stairs. It states:

> **§154. Exterior stairways.** Required stairs, which may be permitted on the outside of a building shall be constructed of incombustible materials and shall conform in other respects, except as to enclosure, to the requirements of this article for interior stairs. Exterior stairs shall be connected to each story which they serve by means of self-closing fire doors. Doors and windows opening on such stairs shall be protected by approved self-closing fire doors or automatic fire windows. Metal mesh or other rigid guards at least six feet high shall be provided on each unenclosed side of such stairways throughout.

(1922 BCCNY §154).

1922 Tenement House Law

The Tenement House Law (THL) of the State of New York, with Amendments to January 1, 1922, in relation to the Tenement House Department of the City of New York, governs the minimum requirements for tenement housing, including stairs and handrails, but provides few specific details on construction, placement, and dimensions. It defines "tenement house" as follows:

> A “tenement house” is any house or building, or portion thereof, which is either rented, leased, let or hired out, to be occupied, or is occupied, in whole or in part, as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied.

(1922 THL §2 [1]).

The provisions of §21 Stairways and stairs, governs stairs, treads, risers, and the clear width of stairs. In part it requires:

> ... All stairs shall be constructed with a rise of not more than eight inches and with treads not less than ten inches wide and not less than three feet long in the clear; except that in three-family and four-family converted dwellings the existing height of risers and dimensions of treads of stairs shall be accepted by the department charged with enforcement of this chapter [Tenement House Department of the City of New York].

(1922 THL §21).

The provisions of §35 Stairways, governs handrails and the maintenance of handrails. It requires:

> In every tenement house all stairways shall be provided with proper banisters and railings and kept in good repair. In any tenement house any new stairs that may be hereafter constructed leading from the first story to the cellar or basement, shall be entirely inclosed with brick walls, and be provided with fireproof self-closing doors at both the top and the bottom. No public hall or stairs in a tenement house shall be reduced in width so as to be less than the minimum width prescribed in sections eighteen to twenty-three, inclusive, of this chapter.

(1922 THL §35).

Tenement House Law § 8 provides for building regulations:

"Except as herein otherwise specified, every tenement house shall be constructed and maintained in conformity with the existing law, but no ordinance, regulation or ruling of any municipal authority shall modify or dispense with any provision of this chapter."

(1922 THL § 8.)

D. Application

This Court will first discuss Plaintiff's application to amend her Bill of Particulars, and then Defendant's motion for summary judgment.

1. Plaintiff's Cross-Motion to Amend

"It is well settled that leave to amend or supplement pleadings should be freely granted ... unless prejudice and surprise directly result from the delay in seeking the amendment." (*Spiegel v. Gingrich*, 74 AD3d 425, 426 [1st Dept 2010].). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted].) "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Kocourek v. Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks and citation omitted].)

Plaintiff's cross-motion to supplement the Bill of Particulars is granted. Plaintiff's original Bill of Particulars alleges violations of, among other things, the 1968 Building Code. Plaintiff's supplemental Bill of Particulars, citing additional statutory violations, does not include additional factual allegations or new theories of liability, and Defendant has failed to demonstrate that he will be surprised or prejudiced by the additional allegations of statutory violations. (*See Scherrer v. Time Equities, Inc.*, 27 AD3d 208, 209 [1st Dept 2006]; *Walker v Metro-N. Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]; *Adams v Santa Fe Constr. Corp.*, 288 AD2d 11, 12 [1st Dept 2001].) Further, on the issue of prejudice, although not alleged in Plaintiff's Bill of Particulars, the violations based on the 1922 Building Code were alleged in Robbins' report. (Robbins at 2.) This report was exchanged on July 8, 2019. (Dolhon Report at 16.) Moreover, Dolhon reviewed Robbins' report and further analyzed the application of the 1922 Building Code. (Dolhon Report at 9-13.)

Accordingly, Plaintiff's cross-motion is granted, and this Court will treat Defendant's motion for summary judgment as if Plaintiff had amended her Bill of Particulars nunc pro tunc.

2. Defendant's Motion for Summary Judgment

The Court finds based upon the evidence submitted and applicable law that Defendant has failed to establish as a matter of law that the stairs at issue were fully compliant with the applicable codes and industry standards at the time of construction. In particular, the Court rejects Defendant's argument that the 1922 Building Code is inapplicable or that the correct standard is the THL and, rather, the Court finds that, in fact, the 1922 Building Code is the applicable standard in the instant case and not the THL. Contrary to Defendant's argument, the Certificate of Occupancy No. 16552, dated June 24, 1930, as submitted by Defendant states:

> "Unless specifically stated above, the building or any part thereof, if certified as a residence building, shall not be used as a tenement house as defined in the tenement house law; nor shall it be used as any form of residence building having more than 15 sleeping rooms; nor shall it be used as a lodging house within the meaning of Sec. 1305 of the Greater New York Charter."

(NYSCEF Doc No 61 at 4.)

The Court has reviewed the certificates of occupancy and finds no such specific statement, and Defendant has failed to point to any such statement. (*Cf.* Defendant's Opposition to Cross Motion and Reply Affirm ¶ 16 n 1, NYSCEF Doc No 96.)

Further, a tenement house as defined in the Tenement House Law is "any house or building, or portion thereof, which is either rented, leased, let, or hired out, to be occupied, or is occupied, in whole or in part, as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied." (*Altz v Leiberson*, 233 NY 16, 18 [1922], quoting Tenement House Law of 1922 § 2 [1].)

The Court notes that the 1929 Certificate of Occupancy No. 15438 references "apartments" and "furnished rooms" in the basement through the third floor. However, the Court lacks sufficient information as to the nature of these units and cannot assume that these units would qualify the building as a tenement house as defined by the Tenement House Law, particularly in light of the lack of a specific mention that the building would be used as such—which again the certificates of occupancy require. The Court further notes that this certificate from 1929 has a different block and lot number and a different address than those of the 1930 (No. 16552) and the 2001 certificates. Further, the 1395 Lexington Avenue address—which is the area where Plaintiff fell—corresponds with the 1930 Certificate of Occupancy, and the only residential uses mentioned therein are for "dormitories" which clearly would not qualify the building as a tenement house pursuant to the Tenement House Law.

Regarding the applicability of the building code and whether there was a departure from industry standards at the time of construction, the Court notes that the 1930 Certificate of Occupancy states that the building "conforms to… the requirements of the building code and all other laws and ordinances and to the rules and regulations of the board of standards and appeals, applicable to a building of its class and kind[.]" (Certificate of Occupancy dated June 24, 1930, NYSCEF Doc No 61 at 3; Defendant's Opposition to Cross Motion and Reply Affirm ¶ 16 n 1, NYSCEF Doc No 96; *see* also *Suero v Academy*, 2019 WL 1003193 [NY Sup Ct, Bronx County 2019], *affd*, 2019 NY Slip Op. 08774 [1st Dept 2019]; *cf. Viselli v Riverbay Corp.*, 32 NY3d 980 [2018].) However, Plaintiff, for example, has put forth evidence that the subject stairs may not have complied with section 153(4) of the 1922 Building Code[9]: the product of the subject riser height and tread depth was 31 inches greater than allowed under that provision. At the same time, neither side has put forward evidence as to whether the subject stairs were "[r]equired stairs" for purposes of section 154 of the 1922 Building Code. As such this Court cannot say as a matter of law whether or not the subject stairs violated the building code and constituted a departure from industry standards at the time that the building was constructed.

Nonetheless, the Court finds that Defendant is entitled to summary judgment because the video of the accident incontrovertibly shows that the sole proximate cause of the accident was Plaintiff's own misstep. (*Alvarado v Grocery*, 183 AD3d 447 [1st Dept 2020].) For example, even assuming the applicability and the violation of the 1922 Building Code § 153(4), the Court finds that this "not significant structural defect" was not a proximate cause of Plaintiff's accident, as the video clearly shows that Plaintiff's accident was caused by her failure to properly place her foot on the top landing without any other contributing factor. (*Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept 2014]; *see also Evans v New York City Tr. Auth.*, 2016 WL 3646991 [NY Sup Ct, New York County 2016] [Stallman, J.] [finding that the video evidence established as a matter of law that the plaintiff was the sole proximate cause of the accident].) The report of Plaintiff's retained opinion witness, Richard Robbins ("Robbins"), a New York-based architect, states that the "excessive depth of the treads and inconsistent height of the risers" was a "proximate cause" of Plaintiff's fall. (Robbins Report ¶¶ 33, 40.) However, this conclusory assertion is inconsistent with the aforementioned video that clearly shows Plaintiff stepping with her right foot on the first step without any difficulty, then moving to the second step also without any difficulty, and further moving onto the top step/landing where the incident happened—also without any difficulty—and then falling when she missteps while reaching for the door that

[9] *See supra* page 11.

appears to have been held open for her by the individual who entered immediately before her. The video also shows numerous other individuals climbing and descending the stairs without incident; and the testimony by Lam suggests that there is no record of any other similar accidents, and no evidence has been put forward contradicting Lam's testimony.

Robbins' contention that the varying stair risers' height created an unbalanced condition is without merit. Robbins further stated that he measured the height of the risers of the subject steps and found that the stair risers were not uniform in height, and became higher with each step. Robbins stated that from the bottom, the risers were 6.5, 7, and 7.125 inches respectively. (Robbins Report ¶ 24, NYSCEF Doc No 71; Dolhon Report at 11 & 17 [finding that the risers varied from 6.125, 7, and 7 inches, NYSCEF Doc No 51.) Robbins' measurements of the stair risers revealed that the top riser differed only by 1/8 of an inch from the previous riser. Robbins failed to explain that this minor variance on the subject steps created an unbalanced condition. Additionally, Robbins failed to explain how such a minor height differential could create a dangerous condition and, in this case, how such a minor height differential brought about the incident. In addition, the video does not show nor did the Plaintiff testify that the height had any effect on her accident (*See Suero v Academy*, 2019 WL 1003193 [NY Sup Ct, Bronx County 2019], *affd*, 2019 NY Slip Op. 08774 [1st Dept 2019]; *Zamor v Dirtbusters Laundromat*, Inc., 138 AD3d 1114, 1115 [2d Dept 2016] ["Expert opinions which are speculative, conclusory, and unsubstantiated are insufficient to defeat a motion for summary judgment."].) To the extent Robbins stated that Plaintiff "had difficulty ascending the stairs due to the excessive depth of the treads and inconsistent height of the risers," this statement is inconsistent with what is depicted in the video. Further, Plaintiff herself testified in her EBT that the subject steps were not high, indicating that height differentials were not contributing factors to the subject incident. ([Plaintiff EBT at 41:06-18]; *see also Witkowski v Is. Trees Pub. Lib*., 125 AD3d 768, 770 [2d Dept 2015] [noting that "both the infant plaintiff and the mother testified that there was nothing wrong with the condition of the sidewalk itself"].) Further, Robbins stated that all of the tread depths were uniformly consistent with 15 inches—leaving the only variance a measure of riser height, which, as indicated, Plaintiff stated had no bearing on the fall. (Robbins Report ¶ 24; *see also* Dolhon Report at 11.)

Likewise, it is entirely speculative that having an additional handrail in the center of the subject staircase would have prevented Plaintiff's fall, as notably, based on the video tape, Plaintiff did not make use of either handrail that was available to her. (*See Ridolfi v Williams*, 49 AD3d 295, 296 [1st Dept 2008]; *Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984, 987 [2d Dept 2003], *affd*, 3 NY3d 743 [2004].)

Plaintiff's attorney's argument that, according to Robbins, using the existing handrails "would have been futile" is both specious and without merit, and contrary to the current state of the law regarding handrails. (NYSCEF Doc No 64 ¶ 76.)

Contrary to Plaintiff's counsel's assertion that Plaintiff reached out for a handrail that was not present when she fell, Plaintiff never testified to such and the video does not show her doing such. Rather, Plaintiff testified that she reached out for the door handle as she fell and that is what the video shows.

In sum and substance, there is no "evidentiary route" by which a reasonable jury could conclude that Plaintiff's accident was proximately caused by any of the aforesaid alleged departures from 1929 industry standards. (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 40 [1st Dept 2011].)

The Court has considered the parties' other arguments and finds them unavailing.

CONCLUSION

Accordingly, and for the reasons so stated, it is hereby,

ORDERED that the motion by Defendant The Young Men's and Young Women's Hebrew Association d/b/a 92nd Street Y ("Defendant") for an order pursuant to CPLR 3212, granting summary judgment as to Defendant and dismissing the Complaint by Plaintiff Kay Carmel ("Plaintiff") in its entirety is GRANTED; and it is further,

ORDERED that the Cross-Motion by Plaintiff for an order granting leave to supplement her bill of particulars to assert certain regulations that were allegedly violated is GRANTED; and it is further,

ORDERED that counsel serve a copy of this order with notice of entry upon all parties within 20 days of the filing of this order; and it is further,

ORDERED that the clerk shall enter judgment accordingly, upon being served with a copy of the decision and order with notice of entry.

The foregoing constitutes the decision and order of the Court.

12/07/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE