SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

PAULETTE REEVES,

Plaintiff,

- against -

GEORGIA PROPERTIES INC. and
RCR MANAGEMENT, LLC,

Defendants.

- x

Index No.: 821/12

Motion Date: 09/27/13

Motion No.: 111

Motion Seq. 3

GEORGIA PROPERTIES INC. and
RCR MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

ERENA BRAMOS,

Third-Party Defendant.

FILED
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 13 read on this motion by defendants/third-party plaintiffs, GEORGIA PROPERTIES INC. and RCR Management, LLC, for an order granting summary judgment in favor of said defendants and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo of Law	1 - 6
Plaintiff's Affirmation in Opposition	7 - 10
Reply Affirmation	11 - 13

In the main action, plaintiff, PAULETTE REEVES, commenced an action on September 17, 2011 to recover damages for personal injuries she sustained on August 9, 2011, when she allegedly tripped and fell on a radiator near the 88th Street entrance door to the premises located at 275 Central Park West. The building is owned by the defendant, GEORGIA PROPERTIES INC. and managed by defendant, RCR MANAGEMENT, LLC. In her bill of particulars the plaintiff alleges that the radiator was improperly placed and was in violation of certain sections of the New York City Building Construction Code. She alleges that the building owners were negligent in failing to maintain the premises in a reasonably safe condition. As a result of the accident plaintiff alleges that she sustained, inter alia, a fracture of her first vertebrae requiring surgery.

The owners of the building, brought a third-party action against Erena Bramos, the principal tenant of Unit #1W, alleging that the radiator was located in her apartment and that the accident was a result of her negligence.

Defendants GEORGIA PROPERTIES INC. and RCR MANAGEMENT, LLC now move for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint on the ground that the radiator that plaintiff tripped on was not an inherently dangerous condition. Defendants contend that the radiator was readily observable, as it was painted silver and was placed against a dark colored wall, was open and obvious, measuring 6½ inches wide and 24 inches off the floor, and should have been observed by the plaintiff as she entered the vestibule at the subject property. Counsel for defendants contends that the defendants had no duty to warn of a condition that the plaintiff should have readily observed by the reasonable use of her senses.

In support of the motion, the defendants submit a copy of the pleadings; copies of the transcripts of the examination before trial of the plaintiff, Paulette Reeves and the defendants by Ari Paul, the managing agent of RCR Management. Defendants also submit photographs of the radiator in question.

In her examination before trial, taken on April 9, 2013, Paulette Reeves, age 59, testified that she was involved in an accident on August 9, 2011, at approximately 11:00 a.m. in the vestibule of a doctor's office located at 275 Central Park West. At that time she had an appointment with a doctor related to a Worker's Compensation claim. The entrance to the doctor's office was located on 88th Street. When she arrived at the office the front door leading from the outside was closed but unlocked. She testified that she opened the door, walked into the vestibule

area and tripped on the radiator in the vestibule which was situated against the right hand wall. She stated that the front door opened into the building from right to left. She stated that she was looking forward as she entered the vestibule and walked two steps before her right foot came into contact with the radiator and she tripped. She testified that as she entered the building she was looking straight ahead towards a glass door and did not see the radiator. After her foot came into contact with the bottom leg of the radiator she fell, her left arm went through the glass door and her back twisted against the wall. The plaintiff testified that there was nothing that blocked her view of the radiator.

In his examination before trial, Ari Paul, the managing agent of defendant RCR Management, LLC, stated that among his duties are visiting the buildings, overseeing building staff, and fielding tenant complaints. He stated that 275 Central Park West is managed by RCR Management and owned by Georgia Properties, Inc. He testified that he never gave the superintendent or the handyman any specific instructions to walk through common areas to look for tripping hazards on a regular basis although he did state that if they see something that is not right they usually take appropriate action. He stated that 275 Central Park West has 6 or 7 non-residential units which are used for doctors' offices. With respect to Unit 1-W, where the accident occurred, he testified that the entrance to the unit is on the 88th Street side of the building. On the date of the accident the tenant of Unit 1-W was Erena Bramos who occupied the premises pursuant to a written lease. When describing the entrance to 1-W he stated, there is a door off to the sidewalk that leads into the vestibule of 1-W. Then there is a glass door ahead leading to a waiting room for the doctor's office. The floor of the vestibule area is made of tile. He stated that it was the tenant's responsibility to maintain the vestibule area. When asked who was required to maintain and repair and pay for maintenance of the radiator in the vestibule of Unit 1-W, Mr. Paul responded that he did not know. He also testified that he did not know if the landlord ever repaired the radiator. He stated that it is not the responsibility of the building staff to clean the vestibule as they do not consider the vestibule to be a common area.

In support of the motion, counsel for the defendants contends that although a landowner who holds property open to the public has a duty to maintain the property in a reasonably safe condition to prevent injuries, the duty extends only to conditions that are not readily observable. Citing Gransbury v. K Mart Corp., 229 AD2d 891 [3rd Dept. 1996]), counsel contends that, "no duty exists to prevent or even warn of conditions which

can be readily perceived by the use of ones senses." Further, counsel cites several cases which hold that a land owner has no duty to protect or warn against an open and obvious condition that is not inherently dangerous (citing Matthew v A.J. Richard and Sons, 84 AD3d 1038 [2d Dept. 2011]; Weiss v Half Hollow Hills Central School District, 78 AD3d 932 [2d Dept. 2010]; Sclafani v Washington Mutual, 36 AD3d 682 [2d Dept. 2007]). Here, counsel claims that the radiator in the vestibule, as depicted in the pictures is not an inherently dangerous object, it was not hidden and was open and obvious.

In opposition to the motion, the plaintiff contends that there are questions of fact as to whether the exposed radiator in the vestibule was a dangerous condition and whether the radiator should be considered an open and obvious condition. Further, plaintiff argues that proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (citing Cupo v Karfunkel, 1 AD3d 48 [2d Dept. 2003]).

In further support of her opposition, plaintiff submits an affidavit from professional engineer, Stanley Fein, dated August 19, 2013. Mr. Fein states that in his opinion the defendants were negligent in creating a dangerous condition. Mr. Fein states that his investigation revealed the lower vestibule area is 52 inches in width by 43 inches in length. On the right rear of the vestibule is an exposed radiator. The radiator begins 19 inches in from the entrance door. He states that the radiator is not directly in the middle of the walking path to the interior door, however, "as the door opens inward it is possible that someone would walk toward their right and hit the radiator." He states that the radiator is definitely blocking the entrance passageway. He states that the owner/management was negligent in placing a steam radiator in the entrance vestibule which was in the direct passage from the outside, creating an extreme tripping hazard.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position

(see Zuckerman v City of New York, 49 NY2d 557[1980]).

While a landowner has a duty to maintain its premises in a reasonably safe manner (see Basso v Miller, 40 NY2d 233 [1976], Rivas-Chirino v Wildlife Conservation Socy., 64 AD3d 556[2d Dept. 2009], there is no duty on the part of a landowner to warn against, and a court is not precluded from granting summary judgment, where the condition complained of is an open and obvious condition that is readily observable by those employing the reasonable use of their senses and is not inherently dangerous (see Brande v City of White Plains, 107 AD3d 926 [2d Dept. 2013]; Boyd v New York City Hous. Auth., 105 AD3d 542 [1st Dept. 2013]; Buccino v City of New York, 84 AD3d 670[1st Dept. 2011]).

Here, defendants established, prima facie, that the radiator in the vestibule that allegedly caused plaintiff to injure herself was open and obvious, was not inherently dangerous, and did not present a foreseeable risk of harm. The testimony of the parties as well as the photographs submitted demonstrate that the radiator was "plainly observable and did not pose any danger to someone making reasonable use of his or her senses" (Rivera v City of New York, 57 AD3d 281 [1st Dept. 2008]; also see Stern v River Manor Care Ctr., Inc., 106 AD3d 990 [2d Dept. 2013]; Dapolito v Stop & Shop Supermarket, 90 AD3d 693[2d Dept. 2011]; Loiacono v Quattro Piu, Inc., 82 AD3d 940 [2d Dept. 2011]). The photographs clearly depict that the radiator in question was approximately six and a half inches wide, approximately two feet high, was set back 19 inches from the front door, and was not obscured or obstructed from view in any way. Although the radiator protrudes into the vestibule, it is situated off to the side up against the right hand wall, is not in the pathway leading into the premises, and is painted a silver color which contrasts from the dark wall and could not cause optical confusion (see Franchini v American Legion Post, 107 AD3d 432 [1st Dept. 2013]; Philips v Paco Lafayette LLC, 106 AD3d 631 [1st Dept. 2013]). The plaintiff testified that she did not see the radiator because she was looking ahead when she tripped.

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's reliance on the report of her expert is unavailing. The expert failed to identify any applicable code, regulation or industry standards that were violated. Although the expert stated that certain New York City Building Construction Codes do not permit piping within a stair enclosure there is no evidence that the stated codes were applicable as there were stairs in the vestibule area (see Boatwright v New York City Tr. Auth., 304 AD2d 421 [1st Dept 2003]). Moreover, the affidavit of

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the plaintiff's expert to the effect that the owner was negligent in placing a radiator in the vestibule was speculative and conclusory (see Toes v National Amusements, Inc., 94 AD3d 742 [2d Dept. 2012]; Iwelu v New York City Tr. Auth., 90 AD3d 712 [2d Dept. 2011]; Losciuto v City Univ. of N.Y., 80 AD3d 576 [2d Dept. 2011]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiff's complaint against defendants GEORGIA PROPERTIES INC. And RCR MANAGEMENT, LLC is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: October 28, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.