SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice

PART 12

Index Number : 114058/2007
ECHEVERRY, SANDRA
vs.
EDUCATIONAL CONSTRUCTION FUND
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 49-59

Answering Affidavits — Exhibits _____ | No(s). 86-90

Replying Affidavits _____ | No(s). 93-94

Upon the foregoing papers, it is ordered that this motion is

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

Dated: 9/3/13

BJ
_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

SANDRA ECHEVERRY,

Plaintiff,

- against -

THE NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, 3 PARK AVENUE BUILDING COMPANY, L.P., and STARBUCKS COFFEE COMPANY,

Defendants.

----------x

Index No. 114058/07

Mot. seq. nos. 006, 007

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
James L. Forde, Esq.
Rappaport, Glass, *et al.*
909 Third Ave.
New York, NY 10022

For 3 Park:
Maureen E. Peknic, Esq.
Hoey, King, Epstein, *et al.*
55 Water St.
New York, NY 10041

For Starbucks:
Shelly L. Baldwin, Esq.
Wilson Elser Moskowitz, *et al.*
150 E.42nd St.
New York, NY 10017

Defendants 3 Park Avenue Building Company (3 Park) and Starbucks Coffee Company (Starbucks) each move pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes both motions.

I. BACKGROUND

On the morning of July 26, 2006, plaintiff was allegedly injured when she slipped and fell on a stairway descending to the public sidewalk at 3 Park Avenue in Manhattan after exiting premises owned by 3 Park and leased by Starbucks at East 34th Street and Park Avenue. (NYSCEF 49).

On or about October 17, 2007, plaintiff commenced this action by serving defendants with a summons and complaint, alleging that she fell because the stairs were defective and

slippery. (NYSCEF 2).

By letter dated December 4, 2007, 3 Park's expert engineer opined that the stairway was safe, that the stairs' surfaces were slip-resistant and provided traction when wet, and that there were no defects in the design or maintenance of the stairs. (NYSCEF 58).

In 2008, plaintiff served a verified bill of particulars, in which she alleged that the stairs were defective, uneven, irregular, unlevel, slippery, dangerous and/or hazardous. (NYSCEF 52).

At an examination before trial (EBT) conducted on April 17, 2012, plaintiff testified that she fell because the stairs were excessively steep and slippery, that it had been raining earlier that morning but at the time of her accident, it was lightly drizzling, and that she was not using an umbrella. She explained that as she walked down the stairs, she grabbed onto the left handrail because the steps felt awkward and then slipped on one of the steps. She observed that there was a pool of clear water in the center of each step. She felt that the stairs were slippery and steep and she was unbalanced and unstable as she walked on them. (NYSCEF 55).

On April 19, 2012, Kenneth Key testified at an EBT on behalf of 3 Park's management company, as pertinent here, that 3 Park employees were responsible for sweeping and cleaning the steps outside Starbucks, but they would not deal with any wet conditions caused by rain. He had no knowledge of any accidents on or complaints about the stairs before plaintiff's accident. (NYSCEF 57).

At an EBT held the same day, Thomas Masseria, a facilities services manager employed by Starbucks, testified that he was unaware of any prior accidents on the stairs and did not make any search or inquiry as to prior accidents, and that he did not believe it was Starbucks's responsibility to maintain the stairs. He had never done any repairs on them, nor had he

maintained them before plaintiff's accident. (NYSCEF 56).

On or about July 12, 2012, plaintiff filed with the court a note of issue and certificate of readiness. On or about September 6, 2012, plaintiff served a supplemental bill of particulars identifying defendants' numerous violations of the New York State Uniform Fire Prevention and Building Code (Building Code) and the Administrative Code of the City of New York (Administrative Code). (NYSCEF 52).

By affidavit dated October 11, 2012, plaintiff's expert, a professional engineer, stated that he inspected the stairs on September 19, 2006, and found that:

> the step surfaces were worn and discolored . . . [the] stone treads were found to be slippery and slick when dry, and particularly treacherous when the steps were tested by applying water at the subject stair run . . . the steps would retain water on the surface where pedestrians would step, creating a slipping hazard. The steps had no grooves to redirect or drain water, or non-slip surfacing material to provide sure footing for pedestrians.
>
> [Moreover], placement of a torpedo level on the steps revealed that the steps sloped forward in the direction of descent, a condition that would cause a pedestrian to be off-balance and experience the sensation of leaning forward while walking down . . . Tread widths of the steps varied by more than six (6) times what is permitted by the building code, a condition creating unsure footing and a tendency to be off-balance . . . The riser heights varied by more than twelve (12) times what is permitted by the building code . . .

The expert thus opined that the defects and conditions of the stairs violated the Building Code and the Administrative Code, as well as industry standards and good and accepted practices regarding the maintenance of similarly-situated pedestrian staircases. (NYSCEF 88).

II. ANALYSIS

"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 Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

In order to prevail on a motion for summary judgment dismissing a claim for negligence arising from the failure to remedy a dangerous condition, a premises owner must show, *prima facie*, that it neither created nor had notice of a dangerous condition on the premises. (*See Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011] *lv denied*, 17 NY3d 708 [2011]; *Gjonaj v Otis El. Co.*, 38 AD3d 384 [1st Dept 2007]). A premises owner satisfies its burden of showing that it lacked notice of the dangerous condition by offering in evidence admissible statements based on personal knowledge. (*De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010]).

A. 3 Park's motion

1. Contentions

3 Park argues that it may not be held liable as plaintiff offers no evidence of a defective or dangerous condition that caused her accident and as it had no notice of the alleged condition. It seeks to supplement its motion for summary judgment as plaintiff served her supplemental bill of

particulars late. 3 Park also adopts Starbucks's argument that the storm-in-progress defense bars its liability here. (NYSCEF 49; 80).

In opposition, plaintiff argues that 3 Park has not met its burden on the motion, asserting that having caused the defective condition, a lack of notice is irrelevant, and that in any event, it has not shown an absence of notice. She also maintains that 3 Park's defense based on a storm in progress may not be considered as it is raised only in its affidavit in opposition to Starbucks's motion, and is otherwise inapplicable. Plaintiff also requests that the court grant her partial summary judgment based on her expert's affidavit. (NYSCEF 86).

In reply, 3 Park argues that plaintiff's affidavit in opposition cannot supersede claims she made at her deposition, and that her request for partial summary judgment is improper absent a motion for such relief. (NYSCEF 93).

2. Alleged defective or dangerous condition

Absent any evidence or statement based on personal knowledge, 3 Park has not proved that the alleged defective or dangerous condition did not exist. Rather, it improperly attempts to shift the burden to plaintiff to establish the existence of the condition. (*See Sawicki v GameStop Corp.*, 106 AD3d 979 [2d Dept 2013] [defendant's burden in slip and fall case cannot be satisfied by pointing to gaps in plaintiff's case]; *Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011] [defendant in slip and fall case cannot merely point to gaps in plaintiff's proof but must submit evidence of when area was last cleaned and inspected before accident]).

Moreover, even if 3 Park expert's opinion is sufficient to establish that the stairs were not defective or dangerous (*but see Accardo v Metro-North R.R.*, 103 AD3d 589 [1st Dept 2013] [expert report was unsworn and thus inadmissible on summary judgment motion]; *Currie v*

Wilhouski, 93 AD3d 816 [2d Dept 2012] [expert's letter, which was unsworn and failed to specify expert's qualifications, inadmissible and without probative value]), plaintiff's expert's opinion that the stairs were dangerous and defective conflicts with it, and the issue thus cannot be determined summarily (*see Batts v City of New York*, 93 AD3d 425 [1st Dept 2012] [conflicting expert opinions cannot be resolved on motion for summary judgment]; *Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006] [same]).

Additionally, the code violations identified in plaintiff's supplemental bill of particulars do not constitute new legal theories, but amplify plaintiff's earlier allegations where she stated, in her complaint and at her EBT, that she fell because the stairs were steep and wet, and her supplemental bill of particulars merely identifies the Code violations regarding the stairs. (*See Foley v City of New* York, 43 AD3d 702, 704 [1st Dept 2007] ["belated identification of several sections of the Administrative Code entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant"]; *Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001]).

Given plaintiff's earlier testimony, 3 Park has not demonstrated that it is prejudiced by her supplemental bill of particulars. (*See Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 [1st Dept 2011] [defendant not prejudiced by third supplemental bill of particulars as it raised no new facts or legal theories]; *Costabile v Damon G. Douglas Co.*, 66 AD3d 436 [1st Dept 2009] [supplemental bill of particulars which specified Industrial Code sections on which Labor Law claims were based not prejudicial to defendants as it did not change theory of liability]).

3. Creation or notice of the condition

Again, absent any evidence in support of its motion based on personal knowledge, 3 Park

has not proved that it neither created nor had no notice of the alleged dangerous or defective condition. (*See Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [defendant moving for summary judgment in slip-and-fall action must establish *prima facie* that it neither created nor had notice of alleged dangerous condition]; *compare Decker v Schildt*, 100 AD3d 1339 [3d Dept 2012] [defendant met burden of showing that it neither created nor had notice of dangerous condition based on defendant's testimony that he repeatedly walked on stairs during months before accident and did not find them to be slippery, and he was not aware of anyone having fallen on steps, nor had he received complaints about steps]; *Cintron v New York Tr. Auth.*, 77 AD3d 410 [1st Dept 2010] [defendant submitted proof that no complaints were received or violations or citations issued as to the staircase and its witness testified that he inspected stairs on weekly basis and never noticed defect or dangerous condition]).

4. Storm-in-progress defense

3 Park's sole reliance on plaintiff's testimony to establish that there was a storm in progress at the time of her accident is insufficient as she testified that it was drizzling and no longer raining, and she had no need for an umbrella. (*See Weller v Paul*, 91 AD3d 945 [2d Dept 2012] [defendants presented no meteorological data showing there was storm in progress, and plaintiff's testimony that it was snowing lightly earlier in day but had stopped by time of accident was not concession that there was storm in progress]; *Verleni v City of Jamestown*, 66 AD3d 1359 [4th Dept 2009] [defendant's testimony that there was light snowfall at time of plaintiff's fall insufficient to show as matter of law that fall occurred during storm in progress]; *Lavergne v Dist. Three IUE Troy Hills Hous. Corp.*, 275 AD2d 545 [3d Dept 2000] [defendant submitted no evidence that accident occurred during ongoing storm absent meteorological data, and plaintiff

testified that it was raining on and off at time of accident]).

Moreover, when the alleged storm consists of rain alone, the viability of the defense is questionable. (*See Hilsman v Sarwil Assocs., L.P.*, 13 AD3d 692 [3d Dept 2004] [court observing that it was unaware of any case where defense had been applied to storm where only precipitation was rain]).

5. Plaintiff's request for summary judgment

The conflicting expert opinions preclude summary judgment for either party. (*See Pinto v Putman Hosp. Ctr., Inc.*, 107 AD3d 869 [2d Dept 2013] [where parties offer conflicting expert opinions, issues of credibility are raised requiring jury resolution]; *Pisani v First Class Car and Limousine Svce. Corp.*, 82 AD3d 596 [1st Dept 2011] [same]).

B. Starbucks's motion

1. Contentions

Starbucks denies any duty to maintain the area where plaintiff allegedly fell, and argues that, in any event, it cannot be held liable for the accident given the rain. (NYSCEF 61).

Plaintiff argues that because the rain was not the sole cause of her fall, and as Starbucks has a duty to provide a safe means of ingress and egress to its patrons, Starbucks remains liable. (NYSCEF 86). In reply, Starbucks contends that, pursuant to its lease with 3 Park, it had no duty to maintain the stairs. (NYSCEF 95).

2. Starbucks's duty

Given 3 Park's concession, through the testimony of an employee of its management company, that it assumed responsibility for maintaining and repairing the stairs on which plaintiff fell, there is no basis upon which to hold Starbucks liable. (*See Perez v City of New York*, 18

AD3d 358 [1st Dept 2005] [dismissing complaint against lessee in hospital premises as plaintiff fell outside hospital entrance and in area which, according to hospital's grounds manager, was responsibility of hospital to maintain]; *Soto v Michael's New York, Inc.*, 282 AD2d 300 [1st Dept 2001] [as tenant had no duty to maintain stairwell, it could not be held liable for plaintiff's injuries from fall on stairs]).

Moreover, there is no evidence that Starbucks had a contractual responsibility to maintain or repair the stairs, that the stairs were within the premises leased to it, or that it made or had exclusive use of the stairs. (*See DeCourcey v Briarcliff Congregational Church*, 104 AD3d 799 [2d Dept 2013] [tenant not liable for plaintiff's injuries sustained from falling on exterior stairs while trying to enter tenant's business as tenant lacked exclusive right to possession of stairs, had no duty to repair them, and did not create condition that caused fall or make special use of stairs]; *Hamelin v Town of Chateaugay*, 100 AD3d 1330 [3d Dept 2012] [tenant not liable for plaintiff's injury on steps as steps were used by several tenants and general public and landlord did not ask tenant to maintain or repair steps]; *Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431 [1st Dept 2008] [Starbucks as tenant not liable as stairs were not part of premises leased to it and were not for its exclusive benefit, and it had no contractual responsibility to maintain them]; *see also* 85 NY Jur 2d, Premises Liability § 39 [2013] [owner of building has duty to provide safe means of ingress and egress into building]).

In light of this result, there is no need to consider Starbucks's storm-in-progress defense.

III. CONCLUSION

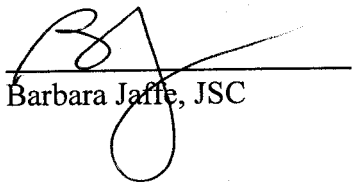
Accordingly, it is hereby

ORDERED, that defendant Three Park Avenue Building Co., L.P.'s motion for summary

judgment is denied; and it is further

ORDERED, that defendant Starbucks Corporation d/b/a Starbucks Coffee Company's motion for summary judgment is granted and the complaint and cross claims against it are severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: September 3, 2013
New York, New York