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

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FLAVIA CASTILLO,

Plaintiff,

-against-

AKDENIZ REALTY LLC and SOLAR REALTY MANAGEMENT CORP.,

Defendants.

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Index No.: 111416/07

Motion Seq. No. 005

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, defendants Akdeniz Realty LLC ("Akdeniz") and Solar Realty Management Corp. ("Solar") (collectively, "defendants") move pursuant to CPLR 3212 for an order granting summary judgment and dismissing plaintiff Flavia Castillo's ("plaintiff") negligence claim to the extent that it is premised upon violations of the following: Multiple Dwelling Law ("MDL") §§ 26, 35, 37, 52, and 78; §§ 27-371(g) and 27-371(h) of the 1968 New York City Building Code (the "1968 Code"); § 26-292 of the 1938 New York City Building Code (the "1938 Code"); §§ 153 and 155(4) of the 1917 New York City Building Code (the "1917 Code") and §§ 27-2037 and 27-2039 of the New York City Housing Maintenance Code ("HMC").

Plaintiff opposes the motion and cross-moves pursuant to CPLR 3042(b) and 3025(b) for leave to serve a supplemental bill of particulars *nunc pro tunc*.

Factual Background

Plaintiff commenced this action on August 21, 2007 for personal injuries she sustained on August 4, 2006, when she allegedly fell while exiting an apartment complex located at 559

West 164th Street in Manhattan (the "building"), owned by Akdeniz and managed by Solar.

If facing the front of the building, the front entrance doors are preceded by a three-step staircase (the "Staircase"); the third step is considerably deeper than the first two.[1] Past the landing is an additional step (the "top step"). The front entrance doors are located at the level of the top step, and the top step is completely enclosed in an alcove and is level with the building's interior lobby. There is no handrail on either side of the Staircase, nor is there one in its middle.

The Staircase area is lit by a 100 watt lightbulb installed in a fixture located directly over the building's front door (the "exterior bulb"), and operates *via* a sensor that automatically turns it on when it becomes dark. The building's interior contains additional lighting, comprised of a series of 4' - 5' long fluorescent lights that are on 24 hours a day. The closest interior light fixture to the front of the building is located directly above the front door to the building.

On the date of the incident, plaintiff was visiting her sister who lived at the building. At approximately 9:30 p.m., plaintiff intended to leave the building and return home.

According to plaintiff's deposition, she proceeded through the front entrance doorway and walked from the top step onto the landing. Thereafter, as she attempted to step from the landing onto the second step of the Staircase, plaintiff lost her balance, unsuccessfully tried to grab onto something, and fell to the sidewalk. Plaintiff stated that at the time of her fall, it was dark outside and the exterior bulb was burned out. Plaintiff testified that she did not know how she fell.

On or about January 2, 2008, plaintiff served her original bill of particulars, alleging negligence relating to, *inter alia*, the Staircase, railing, platform, landing, unsafe design of the

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[1] The top of the third step will hereinafter be referred to as the "landing."

platform, lack of illuminance and lighting. Plaintiff alleged violations of the following laws/ordinances: §§ 27-375 (interior stairs) and 27-292.17 (warnings) of the 1968 Code, and the Americans with Disabilities Act. Plaintiff also exchanged Robert Palermo ("Palermo") as an expert engineer. Palermo, who inspected the premises on April 3, 2007, concluded in his original report (also exchanged in January 2008) that the Staircase and surrounding area violated the sections cited in the original bill of particulars

In September 2010, defendants moved for summary judgment and dismissal of plaintiff's complaint. In opposition, plaintiff submitted an affidavit of Palermo (the "Palermo Affidavit"). In November 2010, the court granted defendants' motion in part and dismissed plaintiff's claims regarding §§ 27-375 and 27-292(17) of the 1968 Code, but denied the branch of the motion dismissing plaintiff's claim of common law negligence premised on insufficient lighting. The court did not modify its order upon reargument, and the First Department affirmed its decision.

On July 10, 2012, plaintiff served defendants with a purported "supplemental" Bill of Particulars, alleging violations of §§ 27-371(g) (exit door swing), 27-371(h) (exit door floors) of the 1968 Code and MDL§ 35 (lighting requirements). Defendants rejected this document, and plaintiff moved in August 2012 for leave to serve the "supplemental" Bill of Particulars based on the Palermo Affidavit. On September 13, 2012, the court granted plaintiff's motion "to amplify the Bill of Particulars" and deemed the "Amended Supplemental Bill of Particulars" annexed to the moving papers as served. Also, the court struck plaintiff's note of issue to allow defendants to conduct discovery on these issues.

On August 13, 2013, plaintiff served another "supplemental" bill of particulars, alleging violations of MDL §§ 26, 35, 37, 52, and 78; § 26-292 of the 1938 Code; §§ 153 and 155(4) of

the 1917 Code; and §§ 27-2037 and 27-2039 of the HMC and served the note of issue.[2] Plaintiff also served the expert witness exchange of William Marletta, Ph.D. ("Marletta"), an accident reconstruction specialist, who had inspected the building and concluded, *inter alia*, that it was subject to pre-1968 New York City Building Codes.

Defendants now move to dismiss the claims based on the codes alleged in the August 13, 2013 "supplemental" bill of particulars, as well as the previous claims based on §§ 27-371(g) and 27-371(h) of the 1968 Code and MDL § 35.

Plaintiff opposes the motion and cross-moves for leave to serve the bill of particulars in accordance with the August 2013 proposed bill of particulars.

Arguments

Defendants' Motion

In their moving papers, defendants argue that while CPLR 3043(b) permits plaintiff to supplement the bill of particulars, without leave, such section is restricted to claims of "special damages" and expressly states that "no new cause of action may be alleged or new injury claimed." Further, CPLR 3042(b) permits a plaintiff to amend the bill of particulars only once as of right prior to the filing of the note of issue. Plaintiff's improperly titled "supplemental" bill of particulars served on August 13, 2013 does not pertain to continuing special damages contemplated by CPLR 3043(b), and alleges for the first time, new violations. The facts of the case have never changed since this action was commenced more than six years ago and since the completion of defendants' deposition four years ago. Thus, the August 13, 2013 "supplemental" bill of particulars constitutes an amendment, and as plaintiff already amended her bill of

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[2] See Defendants' moving papers, p. 4. Plaintiff filed said note of issue on August 22, 2013.

particulars in 2012, plaintiff no longer has the right to further amend without leave of court. Since plaintiff failed to obtain such leave pursuant to CPLR 3042(b)), the claims asserted in her August 13, 2013 "supplemental" bill of particulars are a nullity.

Defendants further contend that, the claims based on the alleged violations in the August 2013 and July 2012 bill of particulars should be dismissed, as they are either inapplicable or not a proximate cause of plaintiff's incident.

As to MDL § 26, entitled "Height, Bulk - Open Spaces," defendants contend that this section pertains to courtyards within multiple dwellings, and does not apply to the exterior Staircase in this action. Likewise, MDL § 37 pertains to lighting in interior public halls and stairs of a multiple dwelling, and not to lighting on the building's exterior. Thus, these sections are inapplicable, and there is no causal connection between plaintiff's accident and any alleged violation of these sections.

Defendants also contend that MDL § 52 sets forth requirements for the construction of balustrades and hand railings in certain staircases and requires handrails on the sides of the stairs. Since plaintiff stepped from the center of the landing and fell before reaching the first step of the staircase, and even assuming this section was violated through the absence of a handrail along the side of the Staircase, plaintiff was not near the side of the stairs, rendering this issue moot. Thus, there is no causal connection between plaintiff's fall and any alleged violation of this section.

MDL § 78 simply affixes the responsibility for the maintenance of a multiple dwelling upon its owner. The elements of a common law negligence claim must still be proven.

Defendants contend that they complied with HMC § 27-2037 which requires owners to

provide an maintain light fixtures to provide lighting for all public parts in a dwelling, including the means of egress. The undisputed evidence demonstrates that the building possessed light fixtures on the building's exterior. While plaintiff claims that the light bulb was not emitting light at the time of the accident, she attests that the light fixture did exist.

And, as to HMC § 27-2039, this section pertains to lighting in interior public halls and stairs of a multiple dwelling. Plaintiff's claim does not pertain to the adequacy of lighting within a public hall or interior stairs; it pertains to the adequacy of lighting on the building's exterior. Thus, this section is inapplicable, and there is no causal connection between plaintiff's accident and any alleged violation of this section.

As to the alleged violations of the 1917 and 1938 Codes, these codes are simply older versions of and embodied in § 27-375 of the 1968 Code, and the previous 1968 Code claims were already dismissed by the court. The law of the case is that the Staircase is not an interior staircase or an exit *in lieu* of an interior staircase, and plaintiff cannot circumvent such decision.

As to MDL § 35, which sets forth specific requirements for the level of illumination outside the front of a building, plaintiff exchanged no evidence pertaining to measurements taken outside the building on the date of the accident or exchanged expert evidence containing objective measurements that establish a violation of this section. As plaintiff cannot present any evidence concerning the precise measurements of illumination outside the building at the time of her accident, she cannot establish a *prima facie* violation of MDL § 35.

Section 27-371(g) of the 1968 Code, which pertains to the swing of exit doors located on the outside of a building, does not apply to the action, as plaintiff's accident did not occur in the vicinity of the front door, nor was it caused by anything relating to the swing of the door. As the

floor length under the overswing of the front door has no relation to the occurrence of the accident, there is no causal connection between plaintiff's fall and any alleged violation of this section. Likewise, section 27-371(h) of the 1968 Code, which pertains to doors leading out of a building is inapplicable. This section requires there to be no more than a 7.5 inch height differential between the level inside and the level outside, and contemplates the immediate drop off presented to individuals upon exiting a building. Here, the accident did not occur in the doorway, but rather on steps leading from the landing to the sidewalk. Hence, there is also no causal connection between plaintiff's fall and any alleged violation of this section.

Plaintiff's Cross-Motion and Opposition

In support of her cross-motion, plaintiff argues that she should be permitted to amend her bill of particulars as of right, because the July 2012 bill of particulars was not an "amended" pleading, as plaintiff did not assert new allegations therein. The court's prior order correctly refers to the July 2012 document as an "amplification." Thus, pursuant to CPLR 3042(b), plaintiff exercised her right to amend for the first time by the August 2013 bill of particulars.

Alternatively, plaintiff seeks leave to amend in accordance with a January 27, 2014 affidavit of Marletta (the "Marletta Affidavit"). Plaintiff argues that defendants cannot demonstrate any prejudice or unfair surprise resulting from the amendment, which was made prior to the re-filing of the note of issue. Also, defendants have not requested any additional discovery from plaintiff as to Marletta's findings. Additionally, plaintiff exchanged Marletta *via* CPLR 3101(d) before re-filing the note of issue.

As to excuse for her delay in seeking leave to amend, plaintiff argues that she needed time to seek out Marletta, who was busy with expert testimony and travel throughout the country.

Plaintiff was waiting for Marletta's schedule to open up to conduct an inspection of the building and generate his report. This exchange was done after the original note of issue was stricken, without any prejudice to defendants. Regarding the requisite affidavit of merit, plaintiff submits the Marletta Affidavit in support of the proposed amendment.

In opposition to defendants' motion, plaintiff asserts that defendants failed to submit any expert affidavit in support of dismissal, and failed to establish *prima facie* that they complied with the subject provisions. Defendants also failed to meet their burden of refuting plaintiff's claim that the Staircase was in violation of applicable statutes and codes.

Furthermore, even assuming that defendants established entitlement to summary judgment, the Marletta Affidavit raises an issue of fact as to whether subject provisions apply and that the violations exist.

As to MDL § 26 (7-a),[3] this section requires that the owner install and maintain in every yard and court a light or lights of at least 40 watts of incandescent illumination (or its equivalent), which shall be kept burning during nighttime hours. Here, defendants offer no indication that this violation is inapplicable and/or any statutory interpretation that the terms "front yard" or "court" as contemplated by the statute are inapplicable. Mere speculation is insufficient to rebut the conclusions of plaintiff's expert that this section is applicable.

Regarding MDL § 37, Marletta identified "MDL Article 37 - Artificial Hall Lighting" as a deficiency.

As to MDL § 52, Marletta states that a properly designed handrail system is important, as

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[3] The court presumes that plaintiff is referring to MDL § 26 (7-a), which refers to the lighting requirements he cites, as there appears to be no subsection (c).

it will serve to prevent the occurrence of a slip or misstep as well as provide the means of recovery for the pedestrian once a fall has been initiated. Here, there were no handrails to prevent plaintiff's fall as she descended the staircase. And, even if the fall was precipitated by a misstep, there is an issue of fact as to whether the absence of handrails was a proximate cause of her injury.

Regarding MDL § 78, plaintiff states that section "generally deals with the owner's obligation that every multiple dwelling shall be kept in good repair."

As to HMC § 27-2037 and § 27-2039,[4] that the building possessed light fixtures on its exterior is insufficient to establish that these codes do not apply. The HMC has specific regulations with respect to placement and wattage. Defendants have not presented any evidence that plaintiff's allegations as to this code is inaccurate.

With respect to the 1917 and 1938 Codes, contrary to defendants' contentions, plaintiff is not estopped from claiming violations of these older code provisions related to handrails. The "law of the case" doctrine does not apply because at issue in the prior motions was the statutory interpretation of section 27-375 of the 1968 Code, which required an extensive analysis of the definition of "exit", "required exit", "interior", and "exterior" as set forth in the definitions of the 1968 Code. The court has not examined or ruled on the applicability of the 1917 and 1938 Codes. Such a ruling would require an analysis of the definitions, purpose and intent of the statute, which were different in each version of the code and there was no full and fair opportunity to litigate this issue in the prior motions. Further, the previous 1938 Code did not

[4] Plaintiff cites to HMC § 27-2040 for the first time in opposition, and provides no description or explanation of this section. As such, the Court does not address this section.

have the same detailed definitions as does the 1968 Code. In any event, defendants have not offered any evidence that the Stairs were in conformity with any standards.

As to MDL § 35, this section was cited by both Palermo and Marletta in their affidavits, and their findings were derived from their personal inspection of the building. Contrary to defendants' contention, it is not plaintiff's burden to set forth precise measurements, but defendants'. Furthermore, defendants offered no evidence or expert opinion that violations of this section do not exist, and therefore cannot make a *prima facie* case for summary judgment.

As to §§ 27-371 (g) and (h) of the 1968 Code, defendants failed to establish that the Staircase did not violate these sections. Palermo concluded that the front door "blocks the path of egress." In his original report, Palermo casually related this violation to the accident. Thus, an issue of fact exists as to whether the door opening and landing was a proximate cause of plaintiff's injury. The blank, conclusory allegations of defendants' counsel are insufficient to refute plaintiffs' experts' opinions. Moreover, there can be more than one proximate cause of an accident, and plaintiff is not required to exclude every other possible cause.

Defendants' Reply/Opposition

In reply, defendants reiterate that even if plaintiff could prove the violation of any of the statutory or code provision at issue, no such violation could serve as the proximate cause of her accident.

Defendants argue that the court must reject the Marletta Affidavit, as plaintiff failed to disclose the substance of Marletta's expected testimony in any manner whatsoever, much less with the "reasonable detail" required by CPLR 3101(d)(1)(i).

Substantively, Marletta's affidavit fails to raise an issue of fact as he fails to base his

opinions on competent evidence, thus rendering his conclusions speculative and without merit. Plaintiff produces no evidence that the Staircase was in the same condition or configuration as it was on the date of the accident, and Marletta does not make any comparison between the Staircase as depicted in the photographs and the Staircase he examined seven years after the accident. Further, Marletta has no personal knowledge of the exterior lighting quality, as he bases his opinion entirely on plaintiff's deposition testimony. When combined with plaintiff's testimony that she does not know what caused her to fall, no proper evidentiary basis exists on which to render an opinion as to whether defendants violated the subject provisions.

The cross-motion should be denied because plaintiff provides no excuse for waiting until August 13, 2013 to serve her second amended bill of particulars. By serving this document at the same time she re-filed the note of issue, plaintiff has unreasonably prejudiced defendants. The court should take note that this is plaintiff's second motion for leave to amend her bill of particulars; like her previous application, it follows a motion to dismiss made by defendants.

Plaintiff's contention that she need not seek leave of the court to assert her August 2013 amendments is meritless. Plaintiff previously moved for leave to amend, and the court's September 2012 was clear that the July 2012 document constituted an amended bill of particulars.

Moreover, plaintiff failed to provide the court with a competent affidavit of merit in support of her cross-motion for leave to amend. The Palermo Affidavit is as insufficient as it was when it was submitted in opposition to defendants' prior summary judgment motion in that Palermo fails to establish a causal connection between any alleged violation and plaintiff's accident. Also, even if the court were to consider the Marletta Affidavit, Marletta, like Palermo,

failed to establish a causal connection between any perceived violation and plaintiff's accident. Marletta's opinion is incompetent as his conclusions are based upon an examination conducted nearly seven years later, photographs that do not depict the building on August 4, 2006, and deposition testimony that purportedly describes the lighting in vague and non-descriptive terms.

As to MDL § 26, plaintiff completely ignores the fact that the statute pertains to courtyards and outdoor spaces, and not to entranceways to covered dwellings at issue herein.

Regarding MDL § 37, plaintiff does not address the fact that this provision pertains to lighting in the interior areas of a multiple dwelling.

As to MDL § 52, the presence of a side handrail along the Staircase has no relation to plaintiff's accident, as it is undisputed that plaintiff stepped from the center of the landing and fell before reaching the first step of the Staircase. Moreover, plaintiff's opposition on this issue derives from the Marletta affidavit, which, as detailed above, should be rejected by the court.

As to the alleged violations of the HMC, section 27-2039 pertains to a building owner's duty to provide electric lighting equipment within and about its dwelling. Plaintiff fails to rebut defendants' showing of these sections' patent inapplicability herein.

As to the 1917 and 1938 Codes, plaintiff should be estopped from contending that any version other than the 1968 Code is applicable. Plaintiff's first motion for leave to amend never indicated that an older version of the code applied; instead, plaintiff maintained that only the 1968 Code was applicable. And, after extensive motion practice concerning sections 27-375 and 27-376 of the 1968 Code, it was found that the Staircase does not violate either of those provisions. In any event, plaintiff's only evidentiary basis in support of the older sections is the Marletta Affidavit, in which he simply states, without offering any basis, that the premises are

subject to the 1938 Code. Plaintiff should not be permitted to subvert the findings by this court and the First Department by belatedly claiming that the 1917 and 1938 Codes apply.

Defendants also argue that Marletta's opinion as to MDL § 35 should be disregarded and fails to raise an issue of fact, as he bases his opinion on plaintiff's testimony that it was "dark" and not on any personal observations or measurements of the level of illumination present on the night of the incident. Moreover, the Palermo Affidavit contains a conclusory opinion that the provision was violated, and makes no reference to the provision, nor contains any measurements or objective observations upon which such an opinion can be credibly asserted. And, plaintiff misunderstands defendants' argument as to §§ 27-371 (g) and (h) of the 1968 Code, which is that the exit door swing has nothing to do with the alleged incident that occurred on the Staircase located on the other side of the landing. Likewise, the height differential between the inside and outside levels of the front entrance doorway has no relation to the alleged incident.

Discussion

Plaintiff's Cross-Motion to Amend the Bill of Particulars

As to CPLR 3042(b), on which plaintiff relies to introduce her bill of particulars served in 2013, this section provides, in relevant part, that "a party may amend the bill of particulars once as of course prior to the filing of a note of issue."

CPLR 3025(b), on which plaintiff also relies, provides, in relevant part that "A party may *amend* his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . [which] shall be freely given upon such terms as may be just . . . ."

To the extent plaintiff argues that the July 2012 bill of particulars was a "supplemental"

bill of particulars, which thereby permits her to amend her bill of particulars as of right pursuant to CPLR 3042 (b), such claim lacks merit. Contrary to plaintiff's contention, the July 2012 bill of particulars was not a mere "supplemental" bill of particulars, which would permit her to amend her bill of particulars as of right. The difference between an amended and supplemental pleading is hornbook law: "An amendment is something that makes any change at all in a pleading, including the addition of facts and claims that were even in existence at the time of the original pleading. A "supplement" seeks to add to the pleading a claim or matter that only came into being, or into the pleader's knowledge, after the original pleading was served" (Connors, McKinney's Practice Commentaries, C3025:9. Supplemental Pleading).

The July 2012 bill of particulars alleged the previously asserted improper lighting claim as a violation of MDL§ 35, but also, added to the already existing improper lighting claim (in the original bill of particulars), *new claims* under MDL 27-371(g) and (h), which pertain to the swing of exit doors. Inasmuch as the July 2012 bill of particulars added new theories of liability pertaining to exit door swing regulations, such bill of particulars constituted an amendment to the original bill of particulars (*Bauch v. Verrilli*, 176 A.D.2d 1116, 575 N.Y.S.2d 416 [3d Dept 1991] (finding that a pleading denominated a "supplemental" bill of particulars was properly treated as an amended bill of particulars, where its purpose was to add a new claim); *see e.g.*, *Kolb v. Beechwood Sedgewick LLC*, 78 A.D.3d 481, 910 N.Y.S.2d 437 [1st Dept 2010] (stating that reliance upon a supplemental bill of particulars was unavailing, "since that is a device to amplify existing claims *rather than add new theories of liability*"); *Danne v. Otis Elevator Corp.*, 276 A.D.2d 581, 714 N.Y.S.2d 316 [2d Dept 2000] (plaintiff's "self-labeled second supplemental bill of particulars'" was an amended bill of particulars, "as it sought to add new

injuries and a new category of damages"); *see* Connors, Practice Commentaries McKinney's CPLR Rule 3042 C3042:4. Amendment to Bill of Particulars ("If a party seeks to add a new theory in a bill of particulars prior to the filing of the note of issue, she may do so as of right in an amended bill of particulars, assuming it is the first amendment. CPLR 3042(b). If . . . the party has already amended the bill once as of right, she should promptly seek court leave to amend the bill to add the additional theory)). Notably, and, consistent therewith, the court's September 2012 order granted plaintiff's motion to include new theories of liability, and stated that the *amended* supplemental bill of particulars annexed to plaintiff's then moving papers was deemed served as of the date of the order.

As such, the August 13, 2013 bill of particulars, served without leave of the court, is a nullity, and leave must be obtained to introduce the August 13, 2013 bill of particulars.

For the same reasons, plaintiff's specific request for leave to serve such "supplemental" bill of particulars is deemed a cross-motion for leave to *amend* the bill of particulars previously served on July 10, 2012 (see CPLR 3025).

Courts have discretion to evaluate a party's motion to amend its bill of particulars (*see Hernandez v. Aldus III Associates, LP*, 115 AD3d 529, 981 NYS2d 727 [1st Dept 2014]). And, leave to amend a bill of particulars, even following the filing of the note of issue, is ordinarily freely given absent surprise or prejudice to the defendants (*see* CPLR 3042(b); CPLR 3043(b); *Henchy v. VAS Exp. Corp.*, 981 N.Y.S.2d 418, 2014 N.Y. Slip Op. 01545 [1st Dept 2014] *citing Kassis v. Teachers Ins. & Annuity Assn.*, 258 A.D.2d 271, 272, 685 N.Y.S.2d 44 [1st Dept 1999]; Siegel, N.Y. Prac. § 240 at 418 [5th ed. 2011]; *Torres v. New York City Transit Auth.*, 78 A.D.3d 419, 913 N.Y.S.2d 653 [1st Dept 2010] (grant of leave to amend was not an abuse of discretion,

even where plaintiff waited until after the note of issue was filed to move to amend the bill of particulars, and failed to provide a reasonable excuse for the delay "given the lack of prejudice to defendant and the fact that plaintiff's initial bill of particulars provided notice of the theory of decedent's accident that plaintiff seeks to add")).

However, even in the absence of prejudice or surprise, and a reasonable excuse for the delay, where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied (*see Henchy*, 981 NYS2d at 421 (denying leave to amend the bill of particulars, even where "there is no showing of prejudice and the record arguably shows a reasonable excuse for delay, [as] plaintiff failed to demonstrate the merits of the proposed claims"); *Katechis v. Our Lady of Mercy Medical Ctr.*, 36 AD3d 514, 828 NYS2d 58 [1st Dept 2007] ("[w]here there is 'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion'"); *Gibbs v. 3220 Netherland Owners Corp.*, 99 A.D.3d 621, 953 N.Y.S.2d 34 [1st Dept 2012] (upholding denial of leave to amend the bill of particulars, "as the proposed amendment failed to state a cause of action")).

Here, the delay between the first amended bill of particulars (deemed served on September 13, 2012 by the court's order) and the instant application is significant. Thus, plaintiff must demonstrate a reasonable excuse for the delay (*see Henchy*, *supra*).

Plaintiff's excuse that she "needed time" to seek out Marletta as an expert witness is unreasonable. Even assuming plaintiff was waiting for Marletta's schedule to "open up" to conduct an inspection due to his "very busy" schedule, plaintiff does not explain why Marletta, in particular (as opposed to any other accident reconstruction expert), was necessary to provide an

opinion as to plaintiff's proposed amendments, or why it took over seven years for Marletta's schedule to "open up." Plaintiff cites no authority indicating that her excuse is reasonable.

Notwithstanding, defendants must show that they would be prejudiced by the amendment. The record indicates that the amendment was made and Marletta expert exchange was served after the original note of issue was stricken and before the re-filing of the note of issue, and that defendants have not requested any additional discovery from plaintiff as to Marletta's findings. Further, there is no indication that defendants were prejudiced due to the concurrent service of the amended bill of particulars and re-filing[5] of note of issue, or that they were deprived of performing any meaningful discovery into their substance or merit, as argued. Leave to amend a bill of particulars, even following the filing of the note of issue, is ordinarily freely given, and is therefore not inherently prejudicial, as defendants implicitly argue (*see Henchy, supra*). Nor do defendants articulate how discovery as to Marletta was foreclosed by the re-filing of the note of issue. Additionally, the instant motion practice commenced in mid-December of 2013. Defendants could have submitted an expert affidavit challenging the assertions in the August 2013 bill of particulars, but did not do so. Defendants do not argue that plaintiff's action deprived them of an opportunity to submit an expert affidavit in support of their motion for summary judgment, or in opposition to plaintiff's cross-motion to amend. In sum, defendants' claim of prejudice is unavailing.

And, although plaintiff's expert exchange fails to provide the "reasonable detail" called

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[5] The court notes that pursuant to the allegations in defendant's moving papers and plaintiff's cross-motion, the note of issue was re-served on the same day as the amended bill of particulars and Marletta were exchanged. The note of issue was re-filed approximately nine days later.

for by CPLR 3101(d)(1)(i),[6] CPLR 3101(d) does not mandate that a party be precluded from offering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose, and a showing of prejudice by the opposing party (*see Banks v. City of New York*, 92 A.D.3d 591, 939 N.Y.S.2d 39 [1st Dept 2012]); *Joseph v. M.D. Carlisle Const. Corp., Inc.*, 2012 WL 1577952 [Sup Ct New York Cty 2012]; *Sieger v. Zak*, 2010 WL 4383416 [Sup Ct Nassau Cty 2010] (plaintiffs' motion to preclude expert testimony on grounds that expert disclosure did not explain in reasonable detail the substance of the proposed expert's opinion denied, as the statute does not mandate that a party be precluded from offering expert testimony merely because of noncompliance with the statute)). Here, plaintiff's failure does not rise to the level of an intentional or willful failure to disclose. Nor is there a sufficient showing of prejudice.

Turning to the merits of the proposed amendments, the record, including the Marletta Affidavit, is insufficient to support the claims under MDL § 26, MDL § 37, HMC § 27-2039, the 1917 Code (§§153, 155(4), and the 1938 (§26-292) Code.

Although MDL § 26 "regulates" yards and courts, it also includes "other open spaces of such dwellings . . . , and 7-a, upon which plaintiff specifically relies, provides:

> Lights in rear yards, side yards, front yards and courts. The owner of every dwelling shall install and maintain in every rear yard, side yard, front yard and court a light or lights of at least forty watts of incandescent illumination . . . .

Thus, the lighting requirements found in 7-a specifically apply to rear, side and front yards, and courts. Plaintiff's submissions, including Marletta's attestation that the "absence of

[6] The expert exchange states that Marletta will "give testimony in the areas of stair safety, accident reconstruction, and is expected to testify and render an opinion concerning an incident that occurred on August 4, 2006, the subject of this lawsuit."

the light" violates the section, without more, is insufficient to show that the Staircase area in which plaintiff's accident occurred qualifies as any type of yard or court.

As to MDL § 37, entitled "artificial *hall* lighting," this section on its face pertains to "vestibules" and "entrance halls" "in every public hall." Nothing in the record, including in the Marletta Affidavit, indicates that this section applies to exterior Staircase area at issue (*Flanagan v. Rosoff,* 260 A.D. 776, 23 N.Y.S.2d 980 [1st Dept 1940] ("The purpose of the foregoing section it to enforce illumination of specific *interior* portions of a multiple dwelling") (emphasis added))

As to HMC § 27-2039, "Lighting to be provided at night; owner's responsibility" this section provides, *inter alia*, that a building owner shall turn and keep on lights "in every *public* hall and *stair*" between dusk and dawn, and shall keep required lights burning continuously *in fire escapes, enclosed public halls*, and in areas in which laundry equipment is provided for building residents (emphasis added). This section appears to apply to "common-area lighting" *inside* of a building (*see Santiago v. New York City Housing Authority*, 268 A.D.2d 203, 701 N.Y.S.2d 31 [1st Dept 2000] (stating, where plaintiff testified that "the stairwell on which she fell was dark," that " . . . Administrative Code section (§ 27–2039[b] and [e]) places the burden upon the property owner to establish its lack of knowledge that common-area lighting was not functioning")). Plaintiff provided no caselaw to the contrary. Therefore, this section does not apply to the exterior Staircase area at issue.

As to the 1917 Code (§§153, 155(4)), section 153, entitled "Interior Stairs," sets forth various requirements for interior stairways. Section 155,[7] entitled "Fire Towers," sets forth requirements relating to interior stairways that function as fire escapes. As the record

[7] The 1917 Code is actually an amended version of the 1916 New York City Building Code.

demonstrates, and as the court previously determined, the alleged accident does not concern an interior staircase; nor does the alleged accident involve a fire escape).[8] Nor does Marletta reference the 1917 Code in his affidavit. Thus, the proposed amendment as to 1917 Codes (§153, 155(4)), is patently meritless.

With respect to the 1938 (§26-292) Code, entitled "Interior Required Stairs, plaintiff's contention that she is not estopped from asserting this section because the 1938 Code did not have the same definitions as the 1968 Code, is unavailing. The 1938 Code's "Definitions" section (which was provided in plaintiff moving papers), and relevant case law do not lead the court to alter its prior finding that the Staircase is an "exterior staircase" not subject to Code provisions relating to interior stairways (*Montesimos v. Daly*, 2009 WL 994790 [Sup Ct New York Cty 2009] ("[p]laintiff has also mis-cited Building Code provisions. These are exterior stairs, not interior stairs or even exterior stairs 'used as exits *in lieu of* interior stairs.' Accordingly, . . . the 1938 Building Code §§ 6.4.1.4 [Dimensions of Treads and Risers for Required Means of Egress] and 6.4.1.12 [Hand-rails in Required Stairways], do not apply")). Further, Marletta's mere statement that the 1938 Code "applies to this building", without further

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[8] It is noted that section 153(6) ("Hand Rails") is essentially identical to Section 27-375 of the 1968 Code. Section 153 of the 1917 Code provides that "stairs shall have walls or well secured balustrades or guards on both sides, and shall have hand-rails on both sides. When the required width of a flight of stairs exceeds 88 inches, an intermediate hand-rail, continuous between landings...shall be provided." As noted in the court's November 2010 decision, Section 27-375(f)(1) requires interior staircases to have handrails, as well as intermediate handrails when stairs are more than 88 inches wide.

Unlike the 1968 Code, however, the 1917 Code does not define "interior stairs." As such, the definition contained in the 1968 Code must be used (*see Maksuti v. Best Italian Pizza*, 27 AD3d 300, 811 NYS2d 375 [1st Dept 2006]) (in considering plaintiff's expert's contention that the stairs in question failed to comply with requirements pertaining to treads, risers and handrails contained in article 153, "Interior Stairs," of the Building Code, the court, absent a definition of interior stairs in the 1916 Code, properly considered the definition thereof in the current Code -- section 27–232 of the 1968 Code). In the November 2010 decision, the court ruled on the Staircase in the context of sections 27-232 and 27-375 of the 1968 Code, and found that such provisions are inapplicable to the case at bar.

explanation, and without any explanation that such violation was a proximate cause of plaintiff's accident, is insufficient to support plaintiff's request to add this claim.

Thus, as to these sections: MDL §§ 26 and 37, HMC § 27-2039, the 1917 Code (§§153, 155(4), and the 1938 (§26-292) Code, plaintiff's submissions fail to demonstrate: (a) how the facts of this case provide for a violation of the cited provisions; and/or (b) how any such violation was a proximate cause of plaintiff's accident. Because the proposed August 2013 bill of particulars is patently meritless as to these claims, the branches of the cross-motion as to such claims are denied accordingly, and the August 2013 document is deemed a nullity to the extent provided herein (*see Thompson v. 793-97 Garden Street Housing Development Fund Corp.*, 101 A.D.3d 642, 955 N.Y.S.2d 870 [1st Dept 2012] (affirming denial of leave to amend bill of particulars where proposed amendment seeking to allege that defendant made special use of the sidewalk "is unsupported by evidence")). Accordingly, defendants' motion for summary judgment is granted as to the violations discussed above and alleged for the first time in the August 2013 document.

However, the branch of plaintiff's cross-motion for leave to amend as to HMC § 27-2037, and MDL §§ 52 and 78 is granted.

HMC § 27-2037 provides that a building owner shall provide *and maintain* light fixtures to provide lighting *for all public parts* in a dwelling. The deposition testimony and parties' submissions indicate that plaintiff fell on the Staircase due, in part, to inadequate lighting above the Staircase. Because the Staircase is located at a "public part" of the building, the inclusion of this purported violation is permitted, as the claim is not patently meritless (*see Henchy, supra*).

As to MDL § 52, which provides that " . . . every exterior stair in connection with any dwelling altered or erected after January 1, 1951, shall be provided with proper balustrades or railings . . . ." To the degree this section requires handrails on the exterior stair, and plaintiff testified at her deposition that she attempted to reach out for something as she allegedly fell, and it is undisputed that no handrails existed at or on the Staircase, it cannot be said that the alleged violation of this section patently meritless (*see*, *Henchy*, *supra*).

MDL § 78 imposes a "general duty of care" and requires that "[e]very multiple dwelling . . . and every part thereof . . . shall be kept in good repair" (*Aviles v. Crystal Management, Inc.*, 253 A.D.2d 607, 677 N.Y.S.2d 330 [1st Dept 1998]; *Juarez by Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 672 N.E.2d 135 [1996] ("This statute thus imposes upon a landlord "a duty to persons on its premises to maintain them in a reasonably safe condition")). Defendant's (solely) argue, the elements of a common law negligence claim must still be proven under MDL § 78 (*Juarez by Juarez, supra*, "Breach of a landlord's general statutory duty to maintain leased premises in a safe condition, moreover, does not impose liability without fault, but requires a showing of those elements comprising common-law negligence")). And, Marletta attests that this section "applies to this building." Therefore, to the degree plaintiff's submissions alleges a negligence claim against defendants, MDL § 78, which mirrors the negligence standard, is permitted.

As to defendants request under CPLR 3212 for summary dismissal of the claims under HMC § 27-2037, MDL §§ 52 and 78, and the remaining provisions which were previously alleged in the June 2012 bill of particulars, namely, MDL § 35, and §§ 27-371(g) and (h) of the

1968 Code, it is well established that 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" (*Santiago v. Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v. Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557, 562), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]; *Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]).

Defendants fail to meet their burden as to HMC § 27-2037. Plaintiff testified that she fell as a result of inadequate lighting above and/or near the Staircase, which is a public part of the building. As such, questions of fact exist as to whether defendants properly maintained such lighting, and if not, whether such violation was a proximate cause of the accident.

Defendants also fail to meet their burden as to MDL § 52. Although defendants contend that the presence of a side handrail or lack thereof is not relevant since plaintiff allegedly fell at the center of the Staircase, defendants fail to provide any evidence in support of this claim besides counsel's speculative conclusion (*see Sarmiento v. C & E Associates*, 2006 WL 6103160 [Sup Ct New York Cty 2006]).

And, as to MDL § 78, defendants' mere claim that plaintiff must establish the elements of common law negligence is insufficient to warrant dismissal of this claim.

Further, MDL § 35 provides the following, in pertinent part:

> The owner of every multiple dwelling shall install and maintain a light or lights at or near the outside of the front entrance-way of the building which shall in the aggregate provide not less than fifty watts incandescent illumination for a building with a frontage up to twenty-two feet and one hundred watts incandescent illumination for a building with a frontage in excess of twenty-two feet, or equivalent illumination and shall be kept burning from sunset every day to sunrise on the day following.

Defendants claim that because plaintiff has not exchanged evidence pertaining to objective measurements that would establish a violation of this section, plaintiff is unable to establish a *prima facie* violation of this section. However, this argument improperly shifts the burden of proof on a summary judgment motion from defendants, the movants, to plaintiff in opposition. Thus, the claim that *plaintiff* cannot establish *prima facie* a violation of section 35 is insufficient. Further, defendants do not include an expert affidavit establishing that there was no violation of this section, or any lack of proximate cause assuming a violation occurred (*see Sarmiento v. C & E Associates*, 2006 WL 6103160 [Sup Ct New York Cty 2006]). Likewise, the memorandum of law itself fails to establish these points, and therefore defendants fail to meet their burden as to this claim.

Section 27-371(g) of the 1968 Code provides, *inter alia*, that "[e]xit doors...shall swing in the direction of exit travel. And, section 27-371(h) provides the following:

> The floor on both sides of all exit and corridor doors shall be essentially level and at the same elevation for a distance, perpendicular to the door opening, at least equal to the width of the

> door leaf, except that where doors lead out of a building the floor level inside may be seven and one-half inches higher than the level outside.

Although defendants submit no expert opinion, defendants established, through plaintiff's deposition testimony, that any violations of sections 27-371(g) and (h) were not proximate causes of plaintiff's alleged accident. Plaintiff's testimony establishes that she had passed through the building's front door and proceeded to the landing without any problem before the alleged accident, which occurred when she attempted to step from the landing to the second step. Plaintiff testified that she "didn't know" how she fell, and she does not mention anything about the swing of the doors or the lack of any space on the landing created by the swing of the door. In opposition, plaintiff failed to raise an issue of fact this regard. As no reasonable reading of the transcript can include an inference that the front door swing or level of the interior lobby compared to the landing contributed to the alleged incident, summary dismissal of sections 27-371(g) and (h) is warranted (*see Sanders v. Aqua Chlor Enterprises, Inc.*, 90 AD3d 521, 934 NYS2d 406 [1st Dept 2011] (defendant made *prima facie* showing of entitlement to judgment as a matter of law by submitting plaintiff's deposition testimony); *Smith v. 125th Street Gateway Ventures, LLC,* 75 A.D.3d 425, 903 N.Y.S.2d 231 [1st Dept 2010]).

Plaintiff fails to raise a triable issue of fact in opposition. The Palermo Affidavit provides that there was "improper door swing in violation of NYC Building Code 37-371 [sic]"; and, he further states:

> "As a person's path of travel leads him through the exit door at the top of the stair run, he is standing on a narrow portion of the remaining landing *without adequate space or time...to adjust to the first step down*...this hazardous condition becomes even more dangerous because of the omission of the required side wall and center guardrails for this

stair." (Opposition, Ex "9").

However, plaintiff's testimony makes no reference to inadequate space, the door swing, or floor levels.

Moreover, counsel's claim that Palermo causally related violations of 27-371(g) and/or (h) to the accident in paragraph F6 of his original report is unavailing. That paragraph supported Palermo's conclusion that section *27-375* (which was previously dismissed by the court) had been violated, and did not pertain to section *27-371*. Nothing else in plaintiff's opposition raises a triable issue of fact as to such section, and counsel's (and Palermo's) speculative conclusions in opposition are ineffective to defeat summary judgment (*see Smith, supra*).

Accordingly, defendants' motion as to dismissal of sections 27-371(g) and (h) is granted, and plaintiff's claims based on those sections are dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 3212 for summary judgment dismissing plaintiff's negligence claim to the extent that it is premised upon violations of the following: Multiple Dwelling Law §§ 26, 35, 37, 52, and 78; §§ 27-371(g) and 27-371(h) of the 1968 New York City Building Code (the "1968 Code"); § 26-292 of the 1938 New York City Building Code (the "1938 Code"); §§ 153 and 155(4) of the 1917 New York City Building Code (the "1917 Code") and §§ 27-2037 and 27-2039 of the New York City Housing Maintenance Code ("HMC") is **granted** as to MDL §§ 26 and 37, the 1968 Code (§§ 27-371(g) and 27-371(h)), HMC § 27-2039, the 1917 Code (§§153, 155(4)), and the 1938 (§26-292) Code, and

denied as to MDL §§ 35, 52, and 78, and HMC § 27-2037; and the claims under MDL §§ 26 and 37, the 1968 Code (§§ 27-371(g) and 27-371(h)), HMC § 27-2039, the 1917 Code (§§153, 155(4)), and the 1938 (§26-292) Code, are hereby severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3042(b) and 3025(b) for leave to serve a supplemental bill of particulars *nunc pro tunc* is **granted** as to MDL §§ 52 and 78, and HMC § 27-2037, and **denied** as to MDL §§ 26 and 37, HMC § 27-2039, the 1917 Code (§§153, 155(4)), and the 1938 (§26-292) Code; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 9, 2014

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

HON. CAROL EDMEAD