SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN PART 36

Justice

Index Number : 107864/2011
LEGUIZAMON, ANDREA
vs.
PAN AM EQUITIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3

Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is denied, in accordance with the attached memorandum decision.

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/3/14

_____, J.S.C.
JUSTICE DORIS LING-COHAN

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 : PART 36

ANDREA LEGUIZAMON,
Plaintiff,

-against-

PAN AM EQUITIES, LLC and FARBOD REALTY CORP.,
Defendants,

INDEX NUMBER 107864/2011
Motion Sequence 001
DECISION & ORDER

DORIS LING-COHAN, J.:

In this personal injury action, defendants Pan Am Equities, LLC (Pan Am) and Farbod Realty Corp. (Farbod) move, pursuant CPLR 3212, for summary judgment dismissing the complaint in its entirety.

Factual Background

Plaintiff was allegedly injured on April 29, 2011, when she tripped and fell on a step between the living area and an outdoor patio in apartment 204 at 455 Park Avenue South, New York County, rented by Kevin Culp (Culp). The action commenced on July 8, 2011, asserting a claim of negligence against Farbod, owner of the building, and Pan Am, manager of the building.

Discussion

Plaintiff was deposed on June 4, 2012. Marks Affirmation, exhibit I (Leguizamon tr). She testified that, on April 29, 2011, she and Steve Cohen (Cohen), her boyfriend, had dinner with Culp and Alyssa Heyman (Heyman). Heyman was a friend of hers, but she had never met Culp previously. She said that she had one glass of sangria at a restaurant before Culp and Heyman arrived, and one more during dinner. *Id.* at 43-47. After they left the restaurant, all four (4) went to Culp's newly-occupied apartment.

Plalintiff stated that she followed Heyman towards the apartment's patio as soon as they entered, while Culp went to the bathroom and Cohen sat on the couch. Plaintiff could not say whether any of the others saw her fall. She recalled that there was a light on in the apartment, and that she had no difficulty seeing within the apartment. *Id.* at 65. However, the patio was unlit. *Id.* at 67.

The testimony and affidavits from various party and nonparty witnesses (including engineers engaged by both sides), and photographs, offer a verbal and graphic picture of the site, where a hinged glass door allowed access to the patio from the apartment's living room. The threshold within the living room was a concrete step, about eight-and-a-half inches above the living room floor, topped by a black granite slab, almost nine inches deep, described as "marble" by some deponents. Running along the granite slab, at the same height, was a silvery-colored, metal door saddle, four inches deep, where the door sat when closed. Slightly more than one inch below the door saddle, on the patio side of the threshold was a brick step, five inches deep. The patio floor, covered by green artificial turf, was about four inches below the brick step.[1]

Plaintiff testified that she lost her balance, because her "foot was bigger than the step" at the patio door. *Id.* at 69. With her left foot on the living room floor, she said that she

> "stepped over [the metal step] with my right foot, and when I landed [on the brick step] with my right foot it was lower than I anticipated it to be and that's when I lost my balance because my heel was on the step but my foot was hanging over the step, and that's when I fell."

Id. at 78-79. With her heel on the brick step, she found that "[t]he brick step was smaller than the length of my foot." *Id.* at 80. Her right foot did not reach the patio floor. *Id.* at 81. She had not observed how Heyman took the steps. Plaintiff explained that she did not step on the metal

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[1] A useful schematic of the site is contained in plaintiff's opposition affidavit, at paragraph 2.

step (the door saddle) first, "[b]ecause it looked smaller in the dark." *Id.* at 81-82. She also said that she did not know what was on the other side of the threshold. *Id.* at 83.

Cohen testified on October 2, 2012. Marks Affirmation, exhibit L (Cohen tr). He said that he and plaintiff each had one glass of sangria at the bar before Culp and Heyman arrived, and more at the dinner table. *Id.* at 14, 16. At Culp's apartment, Cohen said that Culp went to his bedroom or bathroom at or about the time the women headed to the patio. *Id.* at 25. Cohen stayed in the living room, standing by the couch. *Id.* at 26. He saw plaintiff walking behind Heyman, but did not see her fall. *Id.* at 31. He testified that Culp did not see her fall either. *Id.* at 40. Cohen said that he trailed the women onto the patio, unaware that anything had happened. *Id.* at 31. However, he quickly saw plaintiff on the patio floor, just beyond the threshold. *Id.*

Culp testified on October 26, 2011. Marks Affirmation, exhibit E (Culp tr). He said that he had only been living in his apartment two weeks at the time of the incident. He said that the light was on in his living room. *Id.* at 39, 61. His patio had a light, but it was not working at the time of the incident. *Id.* at 58. He later learned that only bulbs needed replacing. *Id.* at 14. He said that "it was dark outside," although he could see. *Id.* at 46. He remembered that Heyman and plaintiff went right into his apartment, headed for the patio and that plaintiff fell.

Culp testified that Heyman led the way out to the patio; she was the only one of the other three who had ever been to the apartment before. Culp described the site as having "a step up and out the threshold." *Id.* at 43. Plaintiff, as he recalled, "went up and over the step," rather than taking each step individually. *Id.* at 44. Culp said that plaintiff "didn't actually fall. She crumbled under taking a non step. I actually watched it happen." *Id.* at 45. This conflicts with plaintiff's testimony that Culp had headed towards the bathroom as they entered the apartment, and that no one in the group saw her fall, as Cohen testified. Culp, however, confirmed

plaintiff's testimony that she was holding onto the door frame as she crossed the threshold to the patio. *Id.* at 56.

Heyman testified on October 26, 2011. Marks Affirmation, exhibit F (Heyman tr). She said that the interior of the apartment was lit. The patio light was not working, but "it wasn't like it was pitch black in there, outside. There were lights from other terraces." *Id.* at 30. In the few days that Culp resided in the apartment, Heyman said that they "had been outside [on the patio] to smoke a cigarette maybe. There was nothing out there. There was no furniture." *Id.* at 31.

In accord with Culp and plaintiff, Heyman said that she did not see the incident, because she was in front of plaintiff going out to the patio. *Id.* at 19. She testified that Culp and Cohen sat down on the couch. "Kevin [Culp] saw her fall. Steve [Cohen] didn't because of the way they were angled." *Id.* at 24.

Andres Reynoso, a property manager for Pan Am, testified on June 26, 2012. Marks affirmation, exhibit J (Reynoso tr). He testified that he never received any complaints or warnings about the arrangement of the area between the living room and the patio in apartment 204. *Id.* at 50. He had no recollection of any repairs to that area in the more than 10 years that he had served as property manager for the building. *Id.* at 52. He repeated this assertion in a sworn affidavit submitted by defendants. Marks Affirmation, exhibit P. He added that he never received any complaint about the door at issue, that the apartment had never been modified, and that, in the 22 years total that he has been employed by Pan Am, "no violations for the subject premises or the door at issue had ever been issued." *Id.*, ¶ 10.

Plaintiff submits a sworn affidavit by Peter Pomerantz (Pomerantz), a licensed professional engineer, who personally visited the premises at issue. Hepner Affirmation, exhibit A; *see also* Pomerantz's letter to plaintiff's counsel, dated August 9, 2011, Marks Affirmation,

exhibit R. Pomerantz provides relevant measurements, with photographic confirmation,[2] as summarized above. He contends that there are several violations of the New York City Administrative Code (Building Code) present in the area between the living room and the patio. The two little steps down from the door saddle to the brick step to the patio level allegedly violate Building Code § 27-371 (h), which provides that the "floor on both sides of all exit and corridor doors shall be essentially level and at the same elevation." There is an allowance for "doors lead[ing] out of a building the floor level inside may be seven and one-half inches higher than the level outside." *Id.* He also claims that the uneven heights between the door saddle and the brick step and the brick step and the patio floor, as interior stairs, violate Building Code § 27-375 (e) (2), requiring that "[r]iser height and tread width shall be constant in any flight of stairs from story to story."

Pomerantz additionally charges that these interior stairs violate Building Code § 27-375 (e) (1) on the dimensions of the risers and treads; and Building Code § 27-375 (f), in that a handrail on one side is needed. Finally, he claims that the landlord is responsible for the safe condition of the building's means of egress, pursuant to Building Code § 27-127, and safe maintenance of the building generally, pursuant to Building Code § 27-128, without noting that both sections were actually repealed, effective July 1, 2008.

Defendants submit the affidavit of Henry R. Naughton (Naughton), a licensed professional engineer, who also visited the premises. While his measurements closely approximate Pomerantz's, they agree on nothing else. Naughton claims that the door to the patio does not serve as a means of egress, that is, an exit to a street or public space, so Building Code §

[2] Color photographs of the site are attached to Pomerantz's affidavit; black and white copies of these photographs are attached to the copy of Pomerantz's submitted letter.

27-371, on the difference in height on either side of the threshold, does not apply here. Similarly, he reads Building Code § 27-375 to be inapplicable to "[t]his rear door threshold structure[, because it] does not serve a required exit." Naughton Affidavit, ¶ 11. Further, Naughton observed that the door, threshold and patio were maintained in good order, that there was no "evidence of dangerous wear or decay," and that, in his opinion, Building Code §§ 27-127 and 27-128 were complied with. *Id.*, ¶ 14.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In "determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dept 1992), *citing Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

To establish a prima facie case of negligence, "a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence." *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st

Dept), *affd* 64 NY2d 670 (1984). "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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

The parties' experts offer opposing opinions on the legal character of the apartment's threshold. Pomerantz, for plaintiff, maintains that there were several violations of the Building Code, while Naughton, for defendants, contends that none of the referenced provisions of the Building Code were applicable to the site. Even if legal authority stood consistently with one of these positions, the issue of liability would not be resolved. "[V]iolation of a municipal ordinance constitutes only evidence of negligence," not negligence per se. *Elliott v City of New York*, 95 NY2d 730, 734 (2001).

Pomerantz concluded that "[w]ith a reasonable degree of engineering certainty it is my opinion that the combination of narrow landing, variable depth steps and variable height risers creates an unsafe condition and a tripping hazard for anyone attempting to walk from the living room of apartment 204 to the outside terrace." Pomerantz letter, August 9, 2011 at 2. Aside from references to the Building Code, Pomerantz does not explain how he came to this conclusion. Naughton addresses only the statutory issues, without commenting on the inherent safety of the threshold's design.

Plaintiff's bill of particulars claims, *inter alia*, that defendants are liable "in negligently designing the aforestated step; in negligently constructing the aforestated step; in failing to have proper lighting; [and] in failing to repair the lighting." Marks affirmation, exhibit D. In her testimony, her central contention was that "my foot was bigger than the step," referring to the five-inch deep brick step. Leguizamon tr at 69. She stated that she stepped over, not on, the

nearly one-foot deep step made up of the granite slab and the door saddle, when her foot made contact with the narrower brick step. She admitted that she did not know what was on the other side of the threshold, but she claimed that that resulted from the absence of light on the patio.

The questions presented here to determine defendants' liability are whether the threshold in Culp's apartment presented a hazard considering the horizontal and vertical dimensions of its structure, and the adequacy of, and the responsibility for, the lighting in the living room and the patio in illuminating the scene. Defendants maintain that they owed no duty to plaintiff, and that they breached no such duty. However, "[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk." *Boderick v R.Y. Mgt. Co.*, 71 AD3d 144, 147 (1st Dept 2009). Disputed issues of material fact exist regarding defendants' purported liability, which precludes the granting of summary judgment in defendants' favor. Thus, defendants' summary judgment motion is denied.

Accordingly, it is

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

DATED: **March 3, 2014**

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Leguizamon v Pan Am alan gotthelf.wpd