SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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MARIA ELIE-PIERRE,

Plaintiff,

- v -

2285 REALTY ASSOCIATES LLC, LORI ZEE CORP.,

Defendants.

INDEX NO. 159114/2014

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 62, 63, 64, 65, 66, 67, 68, 69

were read on this application to/for

In this personal injury action, defendants 2285 Realty Associates LLC (2285 Realty) and Lori Zee Corp. (Lori Zee) move for summary judgment, pursuant to CPLR 3212, dismissing the complaint filed against them by plaintiff Maria Elie-Pierre. Plaintiff opposes.

BACKGROUND

Plaintiff alleges that she sustained injuries on April 4, 2014, when while at work, she slipped and fell on carpeting covering the landing of a staircase while descending same in her capacity as key holder for the Talbots store located at 2289 Broadway in Manhattan (2289 Broadway). 2285 Realty was the out-of-possession landlord of 2289 Broadway, and Talbots was one of its tenants. Lori Zee was the managing agent for 2285 Realty. Plaintiff was an employee of Talbots.

Plaintiff's Deposition Testimony

At her examination before trial, Plaintiff testified that as part of her responsibilities as key holder for Talbots, she would go to an office in the store's basement to "close the [computer] system" (Elie-Pierre Tr. at 17, 38). She used the subject staircase, which included two sets of stairs separated by a carpeted landing, to access the basement (*Id.* 25, 29-31). Plaintiff testified that she slipped on carpeted landing while going down the stairs (*Id.* at 65). As she slipped, she physically "couldn't reach out" for anything, including the handrail, because of the way her body was moving (*Id.* at 66-67). When Plaintiff "looked back," she saw "the carpet was flipping up" (*Id.* at 65). Prior to the incident, she had not seen the carpet flipped up (*Id.*). Further, Plaintiff testified that the carpeting that was on the staircase on the day of the incident had been there since she began working at that Talbots location (*Id.* at 88).

Plaintiff also testified that on the day before the incident, some carpeting had been removed from the staircase, but she had not seen it actually being removed (*Id.* at 82-83, 85). While she observed construction workers constructing a staircase in the basement, she did not see "any of the [old] stairs being worked on" nor did she see "anybody replacing portions of the actual [old] stairs themselves" (*Id.* at 86, 87-88). She did testify, however, that the "stair" that she began to slip on was a stair that "was replaced" because she "saw the construction guy putting it together" (*Id.* at 89).

President of Lori Zee Stanley Zabar's Deposition Testimony

Stanley Zabar, President of Lori Zee and a part owner of 2285 Realty, testified at his examination before trial that Lori Zee had eight full-time employees, including property manager David Luft, whose duties included receiving complaints from tenants at 2289 Broadway, such as Talbots (Zabar Tr. at 19-21). He testified that Mr. Luft made monthly inspections and was responsible for inspections concerning any alteration that was being made by Talbots (*Id.* at 61-

62, 74-75). Mr. Zabar also testified that the term "alteration" under the lease agreement between 2285 Realty and Talbots, Inc. only applies to structural items and that Lori Zee would not be involved in the day-to-day operation of Talbots (*Id.* at 25-27, 85). When asked whether he considered the replacement of an entire staircase a day-to-day operation, he testified that he would not (*Id.* at 85-86).

Property Manager of Lori Zee David Luft's Deposition Testimony

At his examination before trial, Mr. Luft testified that Lori Zee is the managing agent for 2289 Broadway, and Lori Zee's responsibilities included visiting and checking the building and addressing "whatever comes up" (Luft Tr. at 59-60) He testified that Talbots would be required to contact Lori Zee regarding any construction or renovation, including the renovation of a staircase (*Id.* at 71-72, 84-85). Mr. Luft could not remember whether Talbots had notified him with respect to any staircase alteration or whether he had reviewed a work order for same (*Id.* at 87-88, 95).

Lease

Pursuant to the lease agreement between 2285 Realty and Talbots, Inc. dated January 25, 1993 (the Lease), which was in effect on the date of the incident:

> Owner or Owner's agents shall have the right (but shall not be obliged) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which tenant is obliged to perform under this lease, or for the purposes of complying with laws, regulations, and other directions of governmental authorities (Ex. J, Standard Form Of Store Lease, pg. 2).

The Lease also states that with respect to "Alterations:"

> Tenant shall make no structural changes in or to the demised premises of any nature without Owner's prior written consent. Subject to the prior written consent of Owner, and to the provisions on this article, Tenant at Tenant's expense, may make alterations, installations, additions or improvements which are non-structural and which do not affect

utility services or plumbing and electrical lines, in or to the interior of the demised premises (Ex. J, Standard Form Of Store Lease, pg. 1).

The Lease defines "alteration" as follows: "any improvement, addition, change or installation of, in or to the demised premises, including, without limitation, any of such involving … stairways … whether or not the same are made in connection with the repair, replacement or addition to trade fixtures, machinery or equipment" (Ex. J, Rider Annexed To Lease Dated January 25, 1993 By And Between 2285 Realty Associates, As Landlord and The Talbots, Inc., As Tenant, Article 43 (xi), pg. 6).

ARGUMENTS

Defendants argue that they are entitled to summary judgment because there is no evidence that they (1) were contractually obligated to maintain or repair the carpet on the staircase or had any duty to maintain the subject staircase; (2) controlled the premises where the alleged incident occurred; (3) created any defective condition or had notice of said condition; or (4) violated any specific statute involving a structural defect. Plaintiff contends that Defendants' motion for summary judgment should be denied because 2285 Realty had a right of reentry, pursuant to the Lease, and liability in the instant case is based on a significant structural or design defect in violation of a specific statutory safety provision. Moreover, Plaintiff alleges that Defendants had a non-delegable duty to remedy several New York City Building Code violations.

The parties do not dispute that 2285 Realty was an out-of-possession landlord and that it had a right to reenter the premises; rather, they disagree as to the nature of the alleged defect and whether the subject staircase is an "access stair" or an "interior stair," the latter of which would be under the purview of New York City Building Code Section 153.

Defendants contend that Plaintiff's claim is based on Plaintiff having slipped on loose carpeting and that that does not qualify as a significant structural or design defect. Defendants

further contend that the subject staircase is an "access staircase," outside the scope of the New York City Building Code violations cited by Plaintiff and submit the affidavit of Stan Pitera, P. E., in support.

Plaintiff argues that the subject staircase underwent an alteration, of which Defendants would have been given notice and for which Defendants would have had to provide approval pursuant to the terms of the Lease, and that said alteration resulted in the dangerous condition that caused Plaintiff's slip and fall.

Plaintiff refers to the deposition testimony of Mr. Zabar and of Mr. Luft and to the Lease to contend that there is at least a question of fact as to whether Defendants had notice of the alteration to the subject staircase. Mr. Zabar testified that replacement of a staircase would have qualified as an alteration as defined by the Lease, and Mr. Luft testified that "usually" Lori Zee would be notified if Talbots wished to renovate the staircase, and he could not remember if he was notified regarding any construction concerning the subject staircase nor could he remember if he had seen a work request order (Zabar Tr. at 85-86; Luft Tr. at 84, 87-88, 92, 95). The Lease itself requires that the owner receive written consent prior to any alteration (Kazansky, Aff. in Supp., Ex. J, Standard Form Of Lease, pg. 1). Accordingly, Plaintiff argues, Defendants have not established a prima facie case that they did not have constructive notice of the condition resulting from the alteration.

Furthermore, Plaintiff submits the expert affidavit of Nicholas Bellizzi, P.E., in which he concludes the subject staircase is an "interior stair" under the purview of New York City Building Code Section 153. Mr. Bellizzi states that the staircase is an "interior stair" because the subject stairs are the main egress to the basement. Mr. Bellizzi further opines that consequently the subject stairs violate Sections 153 1(c) Tread Slipperiness, 153 (4) Treads and Risers, and 153 (6) Handrails for construction. Mr. Bellizzi concluded: "The subject stairway was required

to have two (2) handrails, treads shall be of a uniform height, and shall be constructed and maintained in such a manner as to prevent persons from slipping thereon. The subject stairway's carpet was slippery. The flipped up segment of carpet and the non-uniformity of carpeted and non-carpeted stairway segments resulted in non-uniform tread heights. The stairway lacked two (2) handrails." Mr. Bellizzi further concluded that Defendants did not maintain the subject stairway in a safe and code-compliant manner pursuant to New York City Building Code.

STANDARD

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

It is a well-established principle that a property owner has a duty to maintain its property in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others, the seriousness of potential injury, and the burden of avoiding the risk. *Zuk v. Great Atl. & Pac. Tea Co.*, 21 A.D.3d 275 (1st Dep't 2005); *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). When a property owner moves for summary judgment in a premises liability action, it bears the initial burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition. *Sheehan v. J.J. Stevens & Co.*, 39 A.D.3d 622 (2d Dep't 2007).

The court may find actual notice where the defendant either created the defective condition or was aware of its existence prior to the accident. *Atashi v. Fred-Doug 117 LLC*, 87 A.D.3d 455, 456 (1st Dep't 2011). To constitute constructive notice, the defective condition must be both visible and apparent and it must exist for a sufficient length of time prior to the accident to allow a property owner to discover and remedy it. *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836, 837 (1986).

However, notwithstanding the foregoing, when an out of possession landlord transfers possession and control of its property to a tenant, the landlord is not liable for negligence with respect to a condition of the demised premises unless the landlord under the terms of the lease is either (1) required to make repairs or maintain the premises or (2) has reserved a right to reenter for the purpose of inspection and maintenance or to make needed repairs at the tenant's expense **and** defendant's liability is based on a significant structural or design defect that violates a specific statutory safety provision. *See, e.g., Malloy v. Friedland*, 77 A.D.3d 583. 583 (1st Dep't 2010); *Babich v. R.G.T. Restaurant Corp.*, 75 A.D.3d 439 [1st Dep't 2010]); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325 (1st Dep't 1996); *Quinones v. 27 Third City King Rest.*, 198 A.D.2d 23, 24 (1st Dep't 1993) (Out of possession landlord not liable for injuries caused by ruts, pitting and holes in the plastic covering on steps inside the premises because such defect in the plastic covering was not a significant structural defect); *Manning v. New York Tel. Co.*, 157 A.D.2d 264, 266-269 (1st Dep't 1990). Additionally, the First Department has held that this rule for an out of possession landlord applies regardless of whether the landlord had actual knowledge of the defective condition prior to plaintiff's accident. *See Devlin v. Blaggards III Restaurant Corp.*, 80 A.D.3d 497 (1st Dep't 2011) (Plaintiff slipped on a wet floor caused by a leaking air conditioner vent which owner had previously inspected and the Court found that under the general rule applicable to out of possession landlords, no liability attached because the defective condition

was not a significant structural or design defect in contravention of a specific statutory provision and this "conclusion is not affected by whether or not [the owner] had knowledge of the defective condition prior to the accident or retained a right to reenter the premises to inspect and repair under the lease").

ANALYSIS

As an out-of-possession landlord, 2285 Realty is liable for a dangerous condition if it had a right to reenter and liability is based on a significant structural or design defect that violates a specific statutory safety provision. Assuming here that the staircase underwent an alteration, that alteration does not rise to the level of a significant structural or design defect in violation of a specific statutory safety provision.

What constitutes a structural alteration is often a case-by-case determination. *112 W. 34th St. Assocs., LLC v. 112-1400 Trade Properties LLC*, 95 A.D.3d 529, 534 (1st Dep't 2012) ("what will constitute a structural alteration necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself"). Nevertheless, New York courts have held the following as non-structural installations: air-conditioning units; automatic-teller machines; bathroom appliances and fixtures; exhaust systems; floor coverings; kitchen appliances and fixtures; lighting fixtures; mirrored room divider and mirrors on apartment walls; signs; spiral staircases; and tile plates. *See, e.g.,* G N.Y. Prac, Landlord and Tenant Practice in New York § 13:47 Examples of "substantial obligations"—Covenant restricting alterations—"Structural" versus "non-structural" alterations—Examples of "non-structural" modifications. Notably, the First Department has determined that an installation of a spiral stairway is a non-structural alteration. *Harar Realty Corp. v. Michlin & Hill, Inc.,* 86 A.D.2d 182, 189 (1st Dep't 1982) *appeal dismissed* 57 N.Y.2d 607, 836 (1982); *see also Li v. 37-65 LLC*, 2012 WL 5230641 (Sup. Ct.,

N.Y. County 2012) ("Although the landlord retained a right to reenter, inspect and make repairs, there is no triable issue of fact as to whether the allegedly defective condition of the spiral staircase involved a significant structural or design defect contrary to specific statutory safety provision"). Thus, according to precedent, even a replacement of the staircase on which Plaintiff slipped would be insufficient to be considered a significant structural alteration.

Furthermore, at issue herein is whether the subject staircase was an "interior stair" or "access stair" under the New York City Building Code and "[s]tatutory interpretation is a question of law that should be decided by the court." *DeRosa v. City of New York,* 30 AD3d 323, 326 (1st Dep't 2006). The New York City Building Code § 27–232 "Definitions" provides the following: "INTERIOR STAIR" is "a stair within a building, that serves as a required exit." "ACCESS STAIR" is a stair between two floors, which does not serve as a required exit. "EXIT" is a "means of egress from the interior of a building to an open exterior space which is provided by the use of the following, either singly or in combination: exterior door openings, vertical exits, exit passageways, horizontal exits, interior stairs, exterior stairs, fire towers or fire escapes; but not including access stairs, aisles, corridor doors or corridors."

Per the affidavit of Mr. Bellizzi, Plaintiff contends that the subject staircase is an "interior stair" because it is the main egress to the basement and the staircase does not comport with the Code as described above. However, in the instant case, the staircase leading to the basement is not an "interior stair" but rather an "access stair." *See Cusumano v. City of New York,* 15 N.Y.3d 319, 322 (2010) ("stairs that ran from the first floor to the basement of a building" were not "interior stairs" within the meaning of the Code); *Walker v. 127 W. 22nd St. Assocs.*, 281 A.D.2d 539, 540 (2d Dep't 2001) (determining that notwithstanding "expert testimony attempting to prove that the staircase violated Administrative Code of the City of New York § 27–375, which pertains to interior stairs," a staircase which "provided access between the first floor and the

basement levels of the building did not constitute "**interior stairs as that term is defined in Administrative Code** of the City of New York § 27–232, and thus the Code regulations governing interior staircases did not apply") (emphasis in original); *see also Maksuti v. Best Italian Pizza*, 27 A.D.3d 300, 300–01 (1st Dep't 2006); *Gaston v. New York City Hous. Auth.*, 258 A.D.2d 220 (1st Dep't 1999); *Martin v. DNA Rest. Corp.*, 34 Misc. 3d 1236(A), 950 N.Y.S.2d 609 (Sup. Ct., Bronx County 2012), *adhered to,* (N.Y. Sup. Ct. July 23, 2012), and *aff'd,* 103 A.D.3d 575, 961 N.Y.S.2d 47 (2013) (explaining that "[c]ourts hold that stairs to and from a first floor to a basement are not deemed 'interior stairs', but are 'access stairs'—which, by definition, are stairs between two floors which do *not* serve as a required exit) (emphasis in original).

Moreover, the New York City Building Code violations Plaintiff raised either do not constitute significant structural or design defects or were not a proximate cause of Plaintiff's injury. That the staircase does not comport with the tread and riser regulations does not constitute a significant structural or design defect. *See Kittay v. Moskowitz*, 95 A.D.3d 451, 452 (1st Dep't 2012) ("Non-compliance with regulations that govern tread width and depth and lighting does not constitute a significant structural or design defect"). Further, as Plaintiff testified that she physically could not reach out and touch anything as she fell because of the way her body was moving, it cannot be argued that the lack of a second handrail was the proximate cause of Plaintiff's slip and fall. *See Bethea v. Weston House Housing Development Fund Co., Inc.*, 70 A.D.3d 470, 471 (1st Dep't 2010)

CONCLUSION AND ORDER

Defendants have met their prima facie burden of showing that they are not liable because the defect in the subject staircase was not a significant structural or design defect contrary to a

specific statutory safety provision. The burden then shifted to Plaintiff to raise a triable issue of fact, which Plaintiff failed to do. For the forgoing reasons, it is hereby

ORDERED that defendants 2285 Realty Associates LLC and Lori Zee Corp.'s motion for summary judgment dismissing plaintiff Maria Elie-Pierre's complaint is granted.

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

10-16-17
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
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