SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK

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BILMA BRITO,

Plaintiff,

-against-

163 BROADWAY ASSOCIATES, LLC, and
SDG MANAGEMENT CORP.

Defendants.

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Index No. 153536/14
Motion Sequence 001

DECISION AND ORDER

HON. SHERRY KLEIN HEITLER

In this personal injury action, defendants 163 Broadway Associates, LLC and SDG Management Corp. (collectively, Defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety. As more fully set forth below, Defendants' motion is denied.

Plaintiff Bilma Brito (Plaintiff or Ms. Brito) commenced this action by filing a summons and verified complaint on April 22, 2014. According to the complaint, on June 17, 2013 Plaintiff slipped and fell while attempting to close the exterior door of a residential building located at 601 West 163rd Street in Manhattan. The building is owned by defendant 163 Broadway Associates, LLC and managed by defendant SDG Management Corp. Plaintiff alleges that the configuration of the door, the length of the door landing, and the riser between the steps leading up to the landing are not in compliance with New York City's 1916 and 1938 Building Codes[1] and violate New York's Multiple Dwelling Law.

[1] https://www1.nyc.gov/site/buildings/codes/1938-construction-codes.page

Plaintiff was deposed on May 11, 2015.[2] She testified that she frequented the property in question because she was employed as a home health aide for someone who lived there. Before the accident Plaintiff had worked there four days each week for more than one year (Deposition pp. 10-12). On the date of the incident she entered the property using the exterior steps and front door around 10:00AM.[3] She left with her client around 2:00PM and returned around 5:00PM. She assisted her client up the steps, went back down to retrieve her client's walker, and brought the walker through the front door into the property (*id.* at 33-35). She then attempted to close the door by grabbing a metal push-bar attached to the door with her left hand. However, her hand slipped and she fell forward to the ground (*id.* at 35, 38-39):

Q. In your own words, tell me how your accident happened.

A. Well, when we arrived from the appointment, I pressed the intercom. Her daughter was there, but she didn't hear it. Somebody that was coming inside opened the door. I held the door with my back so that I could bring her up. Then after we were up, oh, the door was left open. Okay. So then I brought her three steps inside of the building, and I pulled her to grab herself from one of the rails on the right-hand side. Then I returned to pick up the walker that was left down. I went back again to close the door. Then when I was closing, I stood on the first step from inside to the outside. I pulled the door with my left hand, my right foot slipped and I fell like this with my hand like this (indicating).

* * * *

Q. What do you grab with your left hand?

A. The door handle, a long thing like this, it's something for you to push.

Q. And the thing that you're talking about that you pushed, is that what you grabbed with your left hand?

A. That's what I grabbed and it slipped and that's when I fell.

Q. When you say slipped, did your hand slip or something else?

A. Since my hand slipped, my foot slipped as well and then I just went (indicating).

Q. You were standing on the top step at the time of your accident?

A. Yes, on the top step. You know, it's two. The first one for you to go to the street, from the tallest one, that one, that's where I fell from.

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[2] A copy of her deposition transcript is submitted as Defendants' exhibit F (Deposition).

[3] Photographs of the steps, landing, and door are submitted as Defendants' exhibit G.

* * * *

Q. So your left hand slipped; is that correct?

A. It slipped.

An ambulance took Plaintiff to the hospital where she was diagnosed with a fractured right wrist. She later had surgery to repair the damage.[4]

Luis Altramiranda is 601 West 163rd Street's property manager. According to Mr. Altramiranda, Defendants did not receive any complaints regarding the building's exterior door or the steps leading up to the door during his tenure as property manager, which began approximately two years prior to Plaintiff's accident.[5]

Defendants retained Dr. Angela DiDomenico to conduct a site inspection and to prepare a biomechanical analysis of the accident.[6] Based upon her review of the property and Plaintiff's deposition testimony, Dr. DiDomenico concluded that Plaintiff's fall was caused by a loss of balance having nothing to do with the alleged building code violations (DiDomenico Affidavit, ¶¶ 20-21):

> When Ms. Brito leaned forward to reach for the push bar on the door, her lower extremities were stationary and her body's center of mass moved forward of her feet and beyond its base of support to an extent that it compromised the body's dynamic equilibrium, similar to the kinematics of a trip.
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> Ms. Brito had intended to grab the push bar on the door with her left hand, which would have established a third point of contact for her base of support and re-established her dynamic equilibrium, but her left hand slipped. When her left hand slipped, the momentum of her body's center of mass continued to progress forward, causing Ms. Brito to fall forward onto the ground.

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[4] See Plaintiff's Bill of Particulars, submitted as Defendants' exhibit C, p. 3.

[5] Mr. Altramiranda's affidavit, sworn to August 7, 2017, is submitted as Defendants' exhibit I. Mr. Altramiranda was actually deposed on July 12, 2017, although a copy of his deposition transcript was not available when Defendants filed this motion. Plaintiff does not contest Mr. Altramiranda's claims.

[6] Dr. DiDomenico's affidavit, sworn to August 7, 2017, is submitted as Defendants' exhibit J (DiDomenico Affidavit). The court rejects Plaintiff's contention that her affidavit is inadmissible simply because it was notarized in New Jersey and lacks a certificate of conformity. *See Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 (1st Dept 2009); CPLR 2001.

Based upon Plaintiff's testimony and Dr. DiDomenico's report, Defendants argue that Plaintiff's injuries were caused by an accident outside of Defendants' control, not a defective condition.

In opposition to Defendant's motion, Plaintiff argues that the door and entranceway were negligently configured because the door swung open over the exterior steps, creating a foreseeable risk of injury. Annexed to Plaintiff's motion papers is an affidavit from Professional Engineer Fred De Filippis, who, like Dr. DiDomenico, conducted a site inspection, took measurements, and reviewed the testimony in this action.[7] According to his affidavit Mr. De Filippis found that the 40-inch wide door swung outward over the 11.75 inch-long landing and that the 11.5 inch-long step was located 8 inches below the landing. Mr. De Filippis opines that while the subject building was initially governed by the 1916 Building Code – having been first awarded a certificate of occupancy in 1922 – it thereafter fell under the 1938 Building Code upon being issued superseding certificates of occupancy in 1942 and 1987. He then concludes that the configuration of the front door and stairs was constructed and permitted to exist in an unsafe condition (De Filippis Affidavit, ¶¶ 6, 9):

Specifically, Mr. De Filippis refers to sections C26-284.0(b)-(c) and C26-292.0(f)(2) of the 1938 Building Code, which respectively provide that:

> b. Doors serving as required means of egress, except as may otherwise be provided for in this title, shall open outwardly and shall be so hung and arranged that when opening or opened such doors shall not reduce the widths of the hallways or passageways or the required widths of stairs or stair landings or other means of egress. In structures used exclusively for school purposes, doors of rooms for instruction may swing in either direction. The maximum projection beyond the building line for doors opening directly on the street shall be eighteen inches.
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> c. It shall be unlawful to allow the swing of a door opening on a stairway to overlap the top step.
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> * * * *
>
> (2) The distance between risers on landings, or platforms, in straight runs of stairs, shall be forty-eight inches or more, except that when stairs are permitted to be three feet wide

[7] Mr. De Filippis' affidavit, sworn to October 17, 2017, is annexed to Plaintiff's papers as exhibit 1 (De Filippis Affidavit).

> in accordance with subdivision b of section C26-292.0, such distance shall be forty-two inches or more.

According to Mr. De Filippis, Defendants violated these provisions because the landing was only 11.75 inches long as opposed to the required 48 inches. This led to a situation where the door overlapped the front step when opened, depriving Plaintiff of safe footing while trying to close the door. Mr. De Filippis also explained that the building's 8-inch lower riser violated C26-292.0(d) of the 1938 Code, which prohibits risers that exceed 7.75 inches in height, and that the lack of handrails violated C26-292.0(1)(1), which requires handrails on both sides of a stairway. Mr. De Filippis alleges that these same conditions violate Multiple Dwellings Law §§ 52(1), (3), and (7) (*id.* at ¶ 21).[8] Like the 1938 Code, the building purportedly failed to comply with the 1916 Code, which required, among other things, that landings such as the one in question measure at least 44 inches long to prevent doors from hanging over the steps, that the exterior stairway risers be uniform and no taller than 7.75 inches, and that handrails be installed on both sides of the stairway (De Filippis Affidavit, ¶¶ 19-20).[9]

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[8] Multiple Dwelling Law § 52(1) provides that, "[i]n every multiple dwelling erected after April eighteenth, nineteen hundred twenty-nine, every interior stair, fire-stair and fire-tower and every exterior stair in connection with any dwelling altered or erected after January first, nineteen hundred fifty-one, shall be provided with proper balustrades or railings and all such interior and exterior stairs shall be kept in good repair and free from any encumbrance. Every such stair, fire-stair and fire-tower more than three feet eight inches wide shall be provided with a handrail on each side."

Multiple Dwelling Law § 52(3) provides that "[t]he treads and risers of every stair, fire-stair and fire-tower constructed after April eighteenth, nineteen hundred twenty-nine, in any multiple dwelling shall be of uniform height and width in any one flight. Each tread, exclusive of nosing, shall be not less than nine and one-half inches wide; each riser shall not exceed seven and three-quarters inches in height; and the product of the number of inches in the width of the tread and the number of inches in the height of the riser shall be at least seventy and at most seventy-five."

Multiple Dwelling Law § 52(7) provides that "[i]n every multiple dwelling erected under plans filed with the department after January first, nineteen hundred sixty, on every story above the entrance story every door opening into such stair shall be so hung and arranged that in opening and when opened it shall at no point reduce the clear and unobstructed required width of the stair or stair landing."

[9] See 1916 NYC Building Code §§ 153, 154, 158, and 159. The court notes that Plaintiff did not provide the court with copies of the relevant 1916 code provisions.

Mr. De Filippis disagrees with Dr. DiDomenico that Defendants' alleged building code violations had nothing to do with this accident, opining that Plaintiff would not have lost her balance if not for the configuration of the staircase (De Filippis Affidavit, ¶¶ 24-25):

> As [Dr.] DiDomenico herself acknowledges, it is undisputed that Plaintiff fell while attempting to close the exterior door . . . and that "[w]hen Ms. Brito leaned forward to reach for the push bar on the door her lower extremities were stationary and her body's center of mass moved forward of her feet and beyond its base of support to an extent that it compromised the body's dynamic equilibrium, similar to the kinematics of a trip" . . . . This is precisely why it is dangerous and unsafe to have a door swing open over stairs, and why the applicable Building Code sections, cited above, expressly prohibit such a configuration.
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> In this respect, [Dr.] DiDomenico's further statement that "there was sufficient depth to the top stair treat for Plaintiff's feet to be fully on the tread" . . . is irrelevant and did not alleviate the hazards posed by the outward swinging door located over the stairs. This is because it is eminently foreseeable that someone reaching for the door would overbalance, just as Plaintiff did here. Because the landing extended over the stairs, the landing was too narrow to provide safe footing.

In light of Mr. De Fillipis' report, Plaintiff argues that the door and entranceway were not constructed in accordance with accepted engineering and construction practices, and that these construction defects caused Plaintiff's injuries.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

Landowners have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). This duty must be viewed in light 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. *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). A violation of applicable building code may be evidence of negligence, but does not constitute negligence per se. *See Elliott v City of New York*, 95 NY2d 730, 762 (2001). Similarly, a building's owner's compliance with applicable building codes does not require dismissal of a claim if there is a triable issue whether the defendant was negligent under the common law. *See Kellman v 45 Tiemann Assocs.*, 87 NY2d 871, 872 (1995); *Roberts v United Health Servs. Hosps., Inc.*, 128 AD3d 1210, 1211 (3d Dept 2015); *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1532 (4th Dept 2012); *Maldonado v 1992 Fulton Realty Corp.*, 23 AD3d 177, 177 (1st Dept 2005).

In a premises liability case, a defendant moving for summary judgment "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." *Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006); *see also Keita v City of New York*, 129 AD3d 409, 410 (1st Dept 2015). Actual notice may be found where a defendant was aware of a condition's existence before the accident. *Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011). By contrast, constructive notice may be found where a defect is visible and apparent and has existed for a sufficient length of time before the accident to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008).

Here, there is no evidence that Defendants had actual notice of the alleged defective condition. As set forth in Mr. Altramiranda's affidavit, Defendants did not receive any complaints in the two years before Plaintiff's accident about the condition or configuration of the entranceway. However, there is no evidence that it was altered after the building was first awarded a certificate of occupancy in 1922. As a result, Defendants (or their predecessors) either created the condition or at the very least had constructive notice of it. *See Burton v State*, 90 AD2d 585, 586 (3d Dept 1982); *see also Smith v New York Enter. Am., Inc.*, 2008 US Dist. LEXIS 55059, *17 (SDNY July 21, 2008); *DeVeau v United States*, 833 F. Supp. 139, 144 (NDNY Sept. 16, 1993).

Turning to the merits, sometimes an accident is, as Defendants contends, just an accident. But neither Plaintiff's deposition testimony nor Dr. DiDomenico's report shows that this incident was solely the result of an accident and that the alleged building code violations do not have a sufficient nexus to Plaintiff's injury. While Plaintiff testified that she fell only after her hand slipped away from the push bar, this testimony does not exclude the possibility that the door landing was defective, and, more important, that such defect or defects contributed to or exacerbated Plaintiff's injuries. Indeed, the parties do not dispute that the door in question swung outward over the exterior stairs, that the landing is less than a foot long, and that the staircase has no handrails. The confluence of these three factors is enough to raise a triable issue of fact whether Defendants permitted a dangerous condition to exist on their premises. *See Burton*, 90 AD2d at 586; *see also Acton v 1906 Rest. Corp.*, 147 AD3d 1277, 1279 (3d Dept 2017); *Ortiz v New York City Hous. Auth.*, 85 AD3d 573, 574 (1st Dept 2011); *Griffin v Sadauskas*, 14 AD3d 930, 930 (3d Dept 2005); *Hanley v Affronti*, 278 AD2d 868, 869 (4th Dept 2000).

The court recognizes that the above-referenced cases are somewhat distinct from the case at bar. In those cases, unlike this one, the plaintiffs were injured solely on account of a door swinging outward over steps, whereas here Plaintiff admittedly fell after her hand slipped from the door's

push bar. New York law is nonetheless clear that there can be more than one proximate cause of an accident. *See Cox v Nunez*, 23 AD3d 427, 427 (2d Dept 2005). Thus, that Plaintiff's hand slipped does not preclude a finding that Defendants' alleged negligence contributed to her accident as well. In other words, a jury could determine, despite Plaintiff's testimony that her hand slipped, that she would not have been injured in the manner and extent to which she did were it not for the configuration of the entranceway.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied. Counsel for the parties are directed to appear in Part 30 for a pre-trial conference on March 5, 2017 at 10:00AM.

This constitutes the decision and order of the court.

DATED: 1-16-18

SHERRY KLEIN HEITLER, J.S.C.