At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 1st day of December, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

CASEY SOULES,

Plaintiff,

-vs-

WEST SHORE APARTMENTS, LLC, ROBERT E. TERRY, Individually and as Property Manager,

Defendants.

DECISION AND ORDER

Index No. 2016-0070
RJI No.: 2017-0169-J

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion for Summary Judgment filed by Defendants West Shore Apartments, LLC ("West Shore Apartments") and Robert E. Terry ("Terry"). For the reasons set forth below, the motion is DENIED.

BACKGROUND FACTS

On July 31, 2015, Plaintiff Casey Soules ("Soules") sustained injuries from a fall down an embankment while exiting the laundry area on the property where she was a tenant. The property is owned and operated by West Shore Apartments, a limited liability company set up by Terry for his residential real estate activities. The three partners in the business are Robert Terry, his wife, Linda Terry, and daughter, Karla Terry. The laundry area was located at the back of the building, which is on a hill overlooking Cayuga Lake. A set of outside stairs leads from the side of the building down to a walkway that extended across the back of the building to the laundry room. The walkway also continues to a second set of stairs leading down the hill to a dock at the lake. Soules had been to the dock five or six times prior to the fall, and had gone swimming in the lake a couple of times, so she was at least somewhat familiar with the path. The walkway behind the building was located along a steep embankment and/or cliff that went to the shores of the lake. It is undisputed that there was no railing, guardrail or fence along the walkway, and an outside light above the laundry room door was not working.

Soules had lived at the apartment for approximately two months and had used the laundry room three or four times previously. On this particular occasion, she had taken laundry down to the wash in the daylight, prior to a friend coming over to her apartment. She and her friend then had dinner and alcoholic drinks. Sometime after 9:30 pm, Soules went back to get the laundry. She put the clean items in the laundry basket, turned off the light in the laundry room, and began to go back to her apartment. After taking a couple of steps on the walkway, she "couldn't see

very well. And there was a stick or something in the path that [she] didn't see because [her] arms were full, and it was dark, that [she] tripped on" and fell. She went over the bank to the shore below, where she was removed by boat. She had not noticed the stick prior to her fall, even when she had just walked down to retrieve the clean laundry. The evidence also shows that Soules had been drinking alcohol prior to the fall. Her blood alcohol content (BAC) measured at the hospital was .22 percent.

Plaintiff commenced this action against Defendants on February 3, 2016 sounding in negligence. The Complaint alleges many acts or omissions that Soules claims created a dangerous pathway to the laundry area, including failure to provide adequate lighting, or a safe pathway and/or guardrail to prevent falls over the embankment, and a failure to warn. Defendants interposed an Answer and discovery proceeded. Depositions were obtained from Soules, Robert Terry and Karla Terry.

Defendants filed this motion for Summary Judgment and claimed: they had no notice of a specific dangerous condition; they did not create or have notice of whatever caused Soules to fall; they did not create the lack of lighting situation or have notice of the lack of lightning; they did not have a duty to warn of a condition that was open and obvious; Soules' actions were the sole cause of her fall and injuries; her intoxication should preclude any recovery, and lack of proximate cause. Soules' opposed the motion, and submitted an affidavit from Fredric Rosoff, a purported expert licensed home inspector. Rosoff opined there were numerous building code and safety standard violations, most notably the failure to install a guardrail along the walkway to the laundry, and lack of lighting. Defendants submitted a reply, arguing any evidence of building code violations should not be considered, as Plaintiff failed to establish if this building was constructed before or after the building code was enacted, or any other exception that would make the building code applicable to this situation. Both parties appeared before the Court for oral argument on the motion.

LEGAL ANALYSIS AND DISCUSSION

"On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept. 2014) [*citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Walton v. Albany Community Dev. Agency*, 279 AD2d 93, 94-95 (3rd Dept. 2001)]. If the movant fails to make this showing, the motion must be denied. *Alvarez, supra*. Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980); CPLR 3212(b). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

In a premises liability action, recovery "is predicated on 'ownership, occupancy, control or special use of [a] property' where a dangerous or defective condition exists." *Martuscello v. Jensen*, 134 AD3d 4, 8 (3rd Dept. 2015) *quoting Seymour v. David W. Mapes, Inc.*, 22 AD3d 1012, 1013 (3rd Dept. 2005); *Semzock v. State of New York*, 97 AD3d 1012 (3rd Dept. 2012). "To prevail on its motion for summary judgment, defendant was required to show that it maintained the premises in a reasonably safe condition and that it did not create or have notice of any allegedly dangerous condition." *Barley v. Robert J. Wilkins, Inc.*, 122 AD3d 1116, 1117 (3rd Dept. 2014) (*citing Carter v. State of New York*, 119 AD3d 1198, 1199 [3rd Dept. 2014]; *Jankite v. Scoresby Hose Co.*, 119 AD3d 1189, 1189-1190 [3rd Dept. 2014]; *Timmins v. Benjamin*, 77 AD3d 1254, 1254 [3rd Dept. 2010]). The burden is on the Defendant, and Plaintiff is accorded all reasonable inferences. "[T]he issue of whether a dangerous or defective condition exists 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury." *Guerrieri v. Summa*, 193 AD3d 647, 647 (2nd Dept. 1993), *quoting Schechtman v. Lappin*, 161 AD2d 118, 121 (1st Dept. 1990); *Moons v. Wade Lupe Constr. Co., Inc.*, 24 AD3d 1005, 1006 (3rd Dept. 2005); *see also Carter v. State of New York*, 119 AD3d 1198 (placement of

a handrail presents a question of fact as to whether the placement constitutes a dangerous condition).

The Court concludes that Defendants have not made a prima facie showing of entitlement to Summary Judgment. In the alternative, the Court concludes that even if Defendants have made a prima facie showing, Plaintiff has raised triable issues of fact precluding Defendants' Summary Judgment motion.

The evidence shows that Defendants had no actual notice of prior falls or complaints. Soules had lived in the apartment for a couple of months and had used the laundry room three or four time prior to the date of her accident (Soules deposition at p. 32). She testified that she was not aware of any other people having fallen on the walkway to the laundry room, and that she did not notify the Defendants of any defects or problems prior to her accident. (Soules deposition at p. 49). Defendant Robert Terry also testified that he had not received any complaints that the laundry area or walkway were unsafe. (Robert Terry deposition at pp.75-76). Karla Terry, the apartment manager, also testified that no complaints or safety concerns were reported to her. (Karla Terry deposition at p.26). Thus, the evidence establishes a lack of actual notice of a defective condition.

However, Defendants have failed to meet their prima facie burden that they maintained the premises in a reasonably safe condition. They did not submit any expert opinion or evidence to address any aspect of what would constitute a reasonably safe condition for this laundry room or walkway. Defendants did not submit any evidence as to the applicability of any state or local building codes covering laundry facilities, guardrails or fencing along a residential pathway, or lighting requirements for apartment buildings, pathways or laundry facilities. Notwithstanding any building codes, Defendants have also not provided any evidence as to whether this walkway to the laundry facility was safe and comported with accepted standards at the time it was built or thereafter. *See e.g. Carter v. State of New York*, 119 AD3d 1198. Defendants have only submitted lay testimony of Robert Terry and Karla Terry, that they did not have reports of injuries or a dangerous condition, and that a light around the corner of the building shined some

light on the pathway. That is inadequate to meet Defendants' prima facie burden that the premises were reasonably safe.

Moreover, even though Defendants have shown a lack of actual notice, "constructive notice may be established by showing that the condition was apparent, visible and existed for a sufficient time prior to the accident so as to allow [the] defendant to discover and remedy the problem. *Ennis-Short v. Ostapeck*, 68 AD3d 1399, 1400 (3rd Dept. 2009); *Carter v. State of New York*, 119 AD3d at 1199. Mr. Terry bought this property in the mid 1960s, and according his testimony the laundry room was not always there, but had been in its present location for several years.[1] There was a light fixture above the laundry room door, but that had never been working. Mr. Terry did not even remember it was there, and did not know where the switch was to turn it on. (Robert Terry deposition at p.63). There is a light on the side of the building which automatically comes on at night, and Defendants claim that this illuminated the walkway. The light from inside the laundry room can also shine through the window onto the walkway, but the switch for that light is located in the laundry room and if it is turned off, it affords no illumination to the walkway. It is clear that there was no functioning outside light on that side of the building. It is also undisputed that the drop off on the side of the walkway is significant, and there is no guardrail between the walkway and the embankment.

Considering that Terry owned and operated this apartment building for more than 50 years, and the drop off at the edge of the walkway was certainly not a latent defect, and the fact that there was not a working light on that side of the building, the Court concludes that Defendants have not made a prima facie showing of lack of constructive notice. Even if the Court were to find that Defendants had made a prima facie showing, the Court concludes there is a question of fact as to whether Defendants had constructive notice of an allegedly dangerous

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[1]Mr. Terry testified that there were no washers and dryers in the building when he bought the property, but they were installed some time later (Robert Terry deposition at pp. 54, 67-68). Karla Terry's testimony on that point was different, inasmuch as she testified that the laundry room had been there as long as they owned the property; but that they had done some renovations over the years. The discrepancy does not bear on the Court's resolution of constructive notice, because, based on the evidence, the laundry room was there for at least "several years."

condition with the walkway. *See e.g. Ennis-Short v. Ostapeck, supra; Carter v. State of New York, supra; Timmins v. Benjamin, supra.*

In *Ennis-Short*, plaintiff fell down a staircase owned by defendant, and plaintiff claimed that the staircase and handrail created a dangerous condition. The staircase had existed in the same configuration for the entire 20 years that defendant owned the building. The Third Department found that summary judgment was properly denied as there was a question of fact as to whether the defendant had constructive notice. Similarly, in *Carter v. State of New York*, 119 AD3d 1198, the Third Department held that defendant had not met its prima facie burden in a slip and fall case where the evidence established that the alleged dangerous handrail had existed in its condition for an "extensive period of time", and therefore there was a question of whether defendant was on notice of the alleged dangerous condition. In *Barley v. Robert J. Wilkins*, 122 AD3d 1116, the plaintiff sued for injuries from a fall on a single step riser that did not have a handrail. The plaintiff in that case alleged actual notice as well as constructive notice. The Third Department concluded there was a question of fact on actual notice "or whether the nature of the step, which was readily apparent and existed for a sufficient amount of time to allow defendant to remedy the defect, provided defendant with constructive notice." *Barley*, 122 AD3d at 1118 (citations omitted). In all three of the cases just discussed, the fact that the condition was open and obvious, and had extended for a period of time, presented a question of fact on constructive notice. In the case at bar, the topography has always been present and the building's proximity to the drop off has also been there since it was built. Terry has owned it for over 50 years, and by his own admission, the laundry facility had been there for at least several years. There was never a working outdoor light on that side of the building. These are all things that are readily observable, and had existed for a long enough time that there is a question of fact concerning constructive notice.

Defendants also failed to meet their prima facie burden that they did not create the allegedly dangerous condition. Again, as noted above, Defendants offered no affirmative evidence that they did not create the condition. In fact, based on the testimony of Robert Terry, the laundry facilities were installed after he bought the building. By placing the laundry at the

back of the building and closest to the walkway and embankment, Defendants may have created a dangerous condition. Instead of the walkway being used primarily to access the steps to the dock and lake, which would generally be during daylight hours, the installation of the laundry room makes it much more likely that the walkway will be used at other times of day, including in the dark. That may make the walkway and its proximity to the embankment, and the lack of lighting, a dangerous condition that was not present before. At the very least, a question of fact is presented as to whether placement of the laundry room created a dangerous condition.

Defendants also argue that they had no duty to warn of an open and obvious danger, such as the steep embankment on the other side of the walkway. *Tarricone v. State of New York*, 175 AD2d 308 (3rd Dept. 1991) (State not required to post warning signs or erect high walls or fencing to prevent public from falling from cliff at scenic overlook). "However, a landowner has a duty to warn against even known or obvious dangers where he or she 'has reason to expect or anticipate that a person's attention may be distracted, so that he or she will not discover what is obvious, or will forget what he or she has discovered, or fail to protect himself or herself against it.'" *Jankite v. Scoresby Hose Co.*, 119 AD3d 1189, 1191, *quoting Jones v. Shamrock of Ithaca, Inc.*, 78 AD3d 1299, 1300 (3rd Dept. 2010), *other citations omitted.* Here, it is reasonable to assume that a person coming from the laundry room may have a clothes basket, or laundry items in their hands, and may be distracted or unable to see the hazard presented by the embankment, even though the person would know the hazard was still there. That fact, coupled with the alleged inadequate lighting, prevents Defendants from establishing as a matter of law that this walkway did not present a dangerous condition, or that Defendants were absolved of any obligation to warn or protect.

Further, the fact that Soules had used the walkway before and was aware of the embankment does not warrant Summary Judgment for Defendants. Even if Soules may have been aware of a potential hazard, "this does not defeat her claim, but the jury may consider her knowledge of the condition when determining any comparative negligence." *Timmins v. Benjamin*, 77 AD3d at 1255.

Defendants also contend that they did not create, or have notice of, the "stick or something" that Plaintiff allegedly stepped on that caused her to trip. Whether there was a stick or something else on the path is not the predicate to Defendants' duty or potential liability. The duty is to maintain the premises in a reasonably safe condition. The existence of a stick, or anything else on the path, goes more to determining what steps or safeguards would create a reasonably safe condition. Even if Soules' fall was precipitated by a misstep or trip, there is an issue of fact as to whether the absence of a guardrail or fence was a proximate cause of her injuries. *See e.g. Carter v. State of New York*, 119 AD3d 1198.

The Court agrees with Plaintiff that the question of Soules' possible intoxication also presents an issue of comparative fault, which is for the jury to assess. Defendants have simply pointed to evidence of Soules' BAC at the hospital, but not provided any evidence that her BAC or alleged intoxication was even a contributory factor in the injuries. Soules' testimony references other factors she blames for her fall, including: the fact she was carrying laundry; the poor lighting; the lack of guardrails along the walkway. Defendant provided no evidence, either lay testimony, or expert evidence, that could provide a basis for concluding that alcohol played any role in the accident. Certainly, Defendants evidence does not establish that Soules' intoxication was the sole cause of her injuries. Since comparative fault is a factual question, that should be left to a jury. For the same reason, Defendants have failed to establish that Soules' alleged intoxication precludes her lawsuit as a matter of public policy.

As a final note, in opposition to the motion for Summary Judgment, Soules presented an expert who opined that the apartment building had several building code violations. Defendants object to the use of such evidence since this building was constructed before the building code was adopted. Plaintiff's counsel argued before the Court that this is a common law negligence claim, and that the Defendants' motion should be denied even without consideration of the expert's opinion, and the Court agrees. Whether the building code applies is not dispositive of the claim, which is based on common law negligence. *See e.g. Barley*, 122 AD3d 1116. The Court's conclusions above were drawn without consideration of the expert's opinion, and the Court need not address the expert's report any further, at this juncture..

CONCLUSION

Based upon all the foregoing, the Court finds that Defendants' motion for Summary Judgment is DENIED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: February 22, 2018
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice