KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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JENNY SAUL,

Plaintiff,

- v -

700 MILFORD HOLDINGS, LLC, STRUCTURE TONE, INC., EMPIRE ARCHITECTURAL METAL CORP.

Defendants.

INDEX NO. 154099/2014

MOTION DATE 02/28/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion to/for Summary Judgment.

HON. KELLY O'NEILL LEVY:

This is a personal injury action arising from a slip and fall on hotel lobby stairs.

Defendant Structure Tone, Inc. (hereinafter, Structure Tone) moves, pursuant to CPLR § 3212, for summary judgment in its favor, dismissal of the complaint and co-defendants' cross-claims and counter-claims. Plaintiff Jenny Saul and Empire Architectural Metal Corp. (hereinafter, Empire) oppose. Defendant 700 Milford Holdings, LLC (hereinafter, Milford) partially opposes.

BACKGROUND

On January 18, 2014 at around 5:30 pm, plaintiff Jenny Saul went to the Milford Plaza Hotel located at 700 8th Avenue in Manhattan (hereinafter, the hotel) to meet with friends and family for a birthday [Plaintiff tr. (ex. N to the Kenny aff.) at 10-11]. Plaintiff walked around the hotel looking for friends and family to no avail for approximately thirty minutes (*id.* at 13). Ultimately, a uniformed security officer offered to assist her (*id.* at 13-14). Plaintiff and the

security officer proceeded towards the hotel's grand staircase descending from the upper lobby to the lower lobby (*id.* at 16). As plaintiff descended the staircase, she had her cell phone in her left hand and her purse in her right hand (*id.* at 17; [Plaintiff tr. (ex. O to Kenny aff.) at 9-10]). As they descended, the security guard was to plaintiff's right side, next to a handrail [Plaintiff tr. (ex. N to Kenny aff.) at 20]. The handrail on plaintiff's left side was far from her position as she descended the stairs (*id.* at 21). When plaintiff reached the last step before a landing, she missed the step and fell to the ground [Plaintiff tr. (ex. O to Kenny aff.) at 17-18]. While descending the staircase, plaintiff was engaged in conversation with the security guard while periodically checking her cell phone up until and as she fell (*id.* at 11, 14, 27). Plaintiff was also wearing two and a half-inch heels at the time of the accident [Plaintiff tr. (ex. N to Kenny aff.) at 12]. At plaintiff's deposition, she was asked whether she had enough time to grab anything from the moment she felt herself falling up until she landed on the ground, and plaintiff responded that she did not have time to grab anything [Plaintiff tr. (ex. O to Kenny aff.) at 23]. Surveillance footage from the hotel captured plaintiff's fall on video and demonstrates that plaintiff did in fact overstep the last step before the landing [Surveillance Video Footage (ex. P to the Kenny aff.)].

Prior to the accident, the hotel lobby had undergone renovations, which included construction of the grand staircase where the accident occurred. Milford owns the hotel. Structure Tone was the general contractor for the lobby renovation. Empire was a subcontractor hired by Structure Tone to install the handrails, among other things, for the grand staircase. The renovation of the grand staircase was completed in June 2013, about seven months prior to the accident.

Plaintiff's expert, Robert L. Schwartzberg, a professional engineer, found that there was a violation of New York City Administrative Code § 27-375(f)(1), which in relevant part requires

that interior stairs more than eighty-eight inches wide have intermediate handrails [Robert L. Schwartzberg Expert Affidavit (ex. I to the Gioia aff.) at ¶ 5]. He asserted that the placement of the handrails on the grand staircase violated this building code, as the stairs were 91 ¼ inches wide between the handrails, thus requiring a third intermediate handrail (*id.* at ¶ 4-5). Empire's expert, Scott Cameron, an architect, concluded that had an intermediate handrail been installed, plaintiff would not have been able to grasp it because her left hand was holding her cell phone and she would not have been able to prevent her sudden over-turning motion by the mis-step [Scott Cameron Expert Affidavit (ex. A to the Bleecker aff.)].

DISCUSSION

On a summary judgment motion, 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 material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (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 factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Structure Tone argues that it did not owe a duty to any party, that it cannot be vicariously liable for Empire's work, and that Empire owes it contractual indemnity. Plaintiff asserts that issues of fact exist as to whether the shop drawings were defective. Empire contends that Structure Tone failed to demonstrate that it is without negligence regarding the alleged building

code violations, that Structure Tone cannot obtain indemnity if it was negligent, that Empire relied on the plans of the engineers and architects, that Empire cannot be liable to plaintiff under the *Espinal* line of cases, and that the proximate cause of the accident was plaintiff's use of her cell phone and not the lack of a central handrail. Milford claims that plaintiff was the sole proximate cause of the accident, that there is an issue of fact as to Structure Tone's negligence regarding the alleged building code violations, and that issues of fact remain regarding Structure Tone's indemnification from Empire.

"Evidence of negligence is not enough by itself to establish liability, for it also must be proved that the negligence was a proximate, or legal, cause of the event that produced the harm sustained by the plaintiff." *Hain v. Jamison*, 28 N.Y.3d 524, 528 (2016) (internal citation and quotation omitted). "Although foreseeability and proximate cause are generally questions for the factfinder, there are instances in which proximate cause can be determined as a matter of law because only one conclusion may be drawn from the established facts." *Id.* at 529 (internal citations and quotation omitted).

Here, despite the possibility of a building code violation, plaintiff was the sole proximate cause of her injuries due to her own negligence. Plaintiff's use of her cell phone while walking down the stairs, such that she was not paying attention to where she was walking was the cause of her accident. Surveillance footage from the hotel captured plaintiff's fall on video and shows plaintiff looking at her phone as she was walking down the stairs and as she overstepped the last step before the landing (Surveillance Video Footage). Moreover, plaintiff admitted she was looking at her phone as she was walking down the stairs [Plaintiff tr. (ex. O to Kenny aff.) at 27]. Even if there were a central handrail installed, alleviating any potential building code violation, this would not have prevented plaintiff's injuries, as plaintiff admitted she did not have time to

grab onto anything as she fell (*id.* at 23). Thus, as a matter of law, the lack of a central handrail was not a proximate cause of this accident. *Robinson v. 156 Broadway Assoc., LLC*, 99 A.D.3d 604, 605 (1st Dep't 2012) (where the plaintiff slipped and fell on an exterior staircase with handrails allegedly in violation of the building code and the plaintiff never attempted to find or hold the handrails, the court held that any violation of the building code was not a proximate cause of the plaintiff's fall); *Ridolfi v. Williams*, 49 A.D.3d 295, 296 (1st Dep't 2008) (regardless of the existence of any alleged building code violation in the configuration of the handrails, this was not a proximate cause of the plaintiff's fall). Also, at the time of the accident, plaintiff was holding her phone in her left hand and her purse in her right hand, and was engaged in conversation with the security guard, so she did not have a free hand to grab onto anything (*id.* at 9-10; Surveillance Video Footage). Since plaintiff's own negligence was the sole proximate cause of her accident and as there are no triable issues of fact, the court grants Structure Tone's motion for summary judgment in its favor and for dismissal of the complaint and co-defendants' cross-claims and counter-claims.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendant Structure Tone, Inc.'s motion, pursuant to CPLR § 3212, for summary judgment in its favor and dismissal of the complaint and co-defendants' cross-claims and counter-claims is granted; and it is further

ORDERED that the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

June 21, 2018
DATE

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

KELLY O'NEILL LEVY
JSC

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE