SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32
Justice
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INDEX NO. 158285/2016

FLORENCE NAMM,

Plaintiff,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 004

EAST 77TH REALTY LLC, GLENWOOD MANAGEMENT CORP., DIANA LEVY, TODD LEVY

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61
were read on this motion by Levy Defendants for SUMMARY JUDGMENT

The motion by defendants Diana Levy and Todd Levy (the "Levys") for summary judgment dismissing plaintiff's complaint and all cross-claims against them is granted.

Background

This action arises out of plaintiff's fall at the Levys' apartment on April 26, 2016. Defendant Diana Levy is plaintiff's granddaughter. At the time of the accident, plaintiff and her daughter, Barbara, were visiting the home and were with the Levys' one year old son/plaintiff's great-grandson. Only the three of them were in the apartment; the Levy defendants were not there.

Plaintiff decided to go out to the balcony—to get there, plaintiff opened a single glass door that opened towards the balcony. There is a single step down to get from inside the

apartment to the balcony. At her deposition, plaintiff testified that she had not been on the balcony prior to the date of the accident but that there was nothing obscuring her view through the glass door (plaintiff's tr at 47). Plaintiff claimed that she pushed the door all the way open and that the door stayed in place (*id.* at 51-52). Plaintiff did not recall that there was anything broken or defective with the door on the day of the accident (*id.* at 52). After opening the door, plaintiff stepped out and fell (*id.* at 53). When asked what happened, plaintiff testified that "I don't know. I just fell" (*id.*). Plaintiff added that she did not trip or slip on anything before falling onto the balcony floor (*id.* at 54). Plaintiff acknowledged that she did not look down at the threshold between the living room and balcony (*id.* at 55). Plaintiff insists that instead she was looking at the floor of the balcony and that she was not aware that there was a step down to the balcony before her accident (*id.* at 56).

The Levys claim that plaintiff's complaint should be dismissed because the condition (the step) was open and obvious, there was no duty to warn and the alleged defective condition was safe. The Levys insist that there is a stark contrast between the shiny aluminum step and the grey concrete of the balcony floor. The Levys also claim that as tenants of the apartment they had no duty to warn plaintiff and they also point out that the lease forbade them from making any changes to the apartment.

In opposition, plaintiff contends that an optical confusion caused her to fall. Plaintiff insists that there were no visual cues signaling that there was a step down and that the coloring of the saddle and the balcony floor led her to miss the step. Plaintiff maintains that the step was an unsafe condition and that the Levys, at the very least, should have warned plaintiff about this dangerous step. Plaintiff argues that the Levys were in control of the location and therefore had a duty to keep the premises safe.

The remaining defendants, East 77th Realty LLC and Glenwood Management Corp., also submit opposition but only with respect to the cross-claims between them and the Levys. The remaining defendants do not move for summary judgment dismissing the complaint.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee.*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The central issue in this motion is if plaintiff has raised a genuine issue of fact regarding whether the step caused optical confusion and, therefore, a dangerous condition. "Optical

confusion occurs when conditions in an area create the illusion of a flat surface, visually obscuring any steps. Findings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lower areas, or some other distraction or similar dangerous condition" (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 n, 924 NYS2d 32 [1st Dept 2011]).

A review of the key photographs reveals that plaintiff failed to raise an issue of fact. The photos show that there is an aluminum step[1] protruding from the living room and a grey concrete floor on the balcony. While the colors of the aluminum step and the balcony floor are both shades of grey, they are not remotely close enough to constitute an issue of fact with respect to the optical confusion issue. The aluminum step is metal, reflects light and has a shiny finish; the grey concrete floor does not reflect light and is much darker. The contrast is obvious to anyone who looks down. There is no illusion of a flat surface especially given the fact that the door leading out to the balcony is glass—this gives a person entering the balcony a visual cue that balcony's floor is at a lower elevation.

The Court also observes that plaintiff *did not* testify at her deposition that she fell because she could not see the step due to the similar colors of the aluminum and the balcony floor. Instead, plaintiff admitted to not looking at the threshold and instead only looking ahead at the balcony floor. This leads to a straightforward conclusion: that plaintiff was simply not looking where she was going and fell because she did not see the step. The fact that plaintiff was looking elsewhere does not create optical confusion and a dangerous condition. The circumstances and plaintiff's deposition testimony simply do not support plaintiff's claim that there was optical confusion that caused plaintiff to fall.

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[1]It is actually a concrete step with an aluminum-covered top.

The Court also finds that the step itself was not a dangerous condition despite the affidavit of plaintiff's expert (*see* NYSCEF Doc. No. 58). While this expert suggests ways in which the step might be altered to be safer (*id.*), that does not establish that the step constituted a dangerous condition. It was a step about 6-7 inches above the concrete floor. There was no duty to warn about this step.

Accordingly, it is hereby

ORDERED that the motion by defendants Diana and Todd Levy for summary judgment is granted and plaintiff's complaint and all-cross claims against them are dismissed; and it is further

ORDERED that the claims against the remaining defendants are severed and the balance of this action shall continue;

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Diana Levy and Todd Levy dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

9/28/18
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

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