SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Constance Zuniga,

Plaintiff,

-against-

226 East 54th Street Restaurant, Inc., and Majestic Realty Associates LLC,

Defendants.

Index No.: 150473/2017

DECISION/ORDER

Motion Sequence 001

PAUL A. GOETZ, J.S.C.:

Plaintiff Constance Zuniga commenced this action after she slipped and fell on the stairs at defendants' premises located at 226 East 54th Street (the "Premises"). Defendant 226 East 54th Street Restaurant, Inc., the commercial tenant of the Premises, and defendant Majestic Realty Associates LLC, the owner of the Premises, now move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

In support of their motion, defendants first argue that the complaint should be dismissed because plaintiff cannot identify the cause of her accident. It is well-established that a "plaintiff's failure to identify the defect that caused her injury and to attribute such a defect to defendants' negligence is fatal to her claims" (*Godfrey v. Mancini Safe Corp.*, 121 A.D.3d 413, 414 [1st Dep't 2014]). Here, defendants established their *prima facie* entitlement to summary judgment by demonstrating that the injured plaintiff was unable to identify the exact cause of her fall at her deposition. Affirmation of Lori F. Graybow dated May 31, 2018, Exh. I (Zuniga Dep. Tr. 35:2-13, 42:23-43:8, 43:24-44:2, 47:23-48:13). In opposition, however, the plaintiff raised triable issues of fact by tendering the affidavit of Patricia Jefferson, an eyewitness to the accident, who stated that plaintiff fell on a something wet on the stairs and that her pants were wet after the fall. Affirmation of John G. Papadopoulos dated July 27, 2018, Exh. B. Thus, the complaint cannot be dismissed on this basis (*See Stanojevic v. Scotto Bros. Rest. Enters., Inc.*, 16 A.D.3d 575 [2d Dep't 2005]).

Defendants next argue that they are entitled to summary judgment because they did not create the alleged hazardous condition or have actual or constructive notice thereof. A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of showing that it did not create the hazardous condition and did not have actual or constructive notice of that condition for a sufficient length of time to discovery and remedy it (*Giantomaso v. T.Weiss Realty Corp.*, 142 A.D.3d 950 [2d Dep't 2016]). To meet their burden on constructive notice, defendants are required to offer some evidence as to when the accident site was last cleaned or inspected prior to the incident (*Id).* Reference to general cleaning practices is insufficient to establish a lack of constructive notice (*Id).*

Here, defendants have failed to meet this initial burden. Although defendants' witness, Humberto Campoverde, the general manager of the restaurant, testified about the general cleaning practices at the restaurant, he did not state explicitly that these cleaning practices were followed on the night of the incident (Graybow Aff., Exh. K [Campoverde Dep. Tr. 25:21-26:15]). Nor did Mr. Campoverde know when the last time, prior to the accident, the stairs were inspected by one of his employees (Graybow Aff., Exh. K [Campoverde Dep. Tr. 38:7-18, 44:4-23, 49:13-21]). Defendants argue that the surveillance video they submitted in support of their motion shows one of the busboys inspecting the stairs where plaintiff fell approximately 20-30 minutes before the accident (Graybow Aff., Exh. J [defendants state that the video shows the porter going down the stairs at 9:00 p.m. and back up the stairs at 9:02 p.m.]). Although it appears from the video that this same individual came to mop the stairs after plaintiff's fall, there is otherwise nothing which identifies him as an employee of the restaurant and Mr. Campoverde testified that he did not observe any of his employees go down the stairs during this period (Graybow Aff., Exh. K [Campoverde Dep. Tr. 44:19-23]). It is also unclear whether this individual actually inspected the stairs or merely walked up and down to use the bathroom. Further, unlike the defendant in *Fellner v. Aeropastel, Inc.*, 150 A.D.3d 598, 599 (1st Dep't 2017), the defendants here failed to submit any testimony from an eyewitness about the condition of the stairs prior to plaintiff's accident. Since defendants have failed to meet their *prima facie* burden on the issue of constructive notice, there is no need to reach the sufficiency of plaintiff's opposition papers (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

Defendants next argue that the claims against defendant Majestic Realty Associates LLC, should be dismissed because it is an out-of-possession landlord. It is well-established that "[a]n out-of-possession landlord is generally not liable for negligence with respect to the condition of property unless it is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Sapp v. S.J.C. Lenox Ave. Family L.P.*, 150 A.D.3d 525, 527 [1st Dep't 2017] [internal quotations and citations omitted]). Here, defendant Majestic has met its initial burden of demonstrating that, with respect to the staircase where plaintiff slipped, there was a "transfer of possession and control" from defendant Majestic, the landlord, to defendant 226 East 54th Street, the commercial tenant as the lease between the defendants provides that the tenant shall be responsible for taking care of the premises at its sole cost and expense and must make all non-structural repairs thereto (Graybow Aff., Exh. M, ¶ 4; *see also* Exh. M, ¶¶ 42, 43 [renovations and repairs shall be tenant's responsibility], ¶ 54 [duty of tenant to maintain and keep a clean and orderly place of business]).

Defendant Majestic also satisfied its *prima facie* burden of demonstrating that neither of the exceptions to the out-of-possession landlord doctrine apply. First, the lease provisions cited by Majestic clearly establish that it did not have a contractual obligation to maintain the premises. Second, whether or not defendant Majestic had a right to reenter the leased premises, defendant Majestic has demonstrated, through the affidavit of its expert witness, that the accident was not caused by a structural or design defect that violated a specific statutory provision (*Sapp*, 150 A.D.3d at 528). In her bill of particulars, plaintiff alleges that defendants violated, in pertinent part, the Multiple Dwelling Law and sections 153 and 27-375 of the Building Code of the City of New York (Graybow Aff., Exh. D, ¶¶ 31-32). However, these allegations are rebutted by the affidavit from defendants' engineering expert, Scott E. Derector, P.E. (Graybow Aff., Exh. L). In his affidavit, Mr. Derector first states that the Multiple Dwelling Law is not applicable to the subject premises because it is a commercial establishment (Graybow Aff., Exh. L, ¶ 26; *see also* Multiple Dwelling Law, § 4 [defining "dwelling"]). Mr. Derector also states that there can be no

violation of section 27-375 of the New York City Administrative Code, which applies to "Interior Stairs." Section 27-232 of the Code defines an "Interior Stair" as a "stair within a building, that serves as a required exit." Here, the subject staircase led to the basement for purposes of accessing the bathrooms and did not serve as a required exit. Section 153 of the Building Code is also inapplicable as this refers to the 1915 building code, which is not applicable to the subject premises. Finally, Mr. Derector found that the light test performed at the premises yielded a light level of 3.0 foot-candles, which exceeds the building code's requirement. Thus defendant Majestic has established its *prima facie* burden of showing that the accident was not caused by a violation of a specific statutory provision. In her opposition, plaintiff fails to submit an affidavit from her own expert or otherwise raise an issue of fact and thus defendant Majestic is entitled to summary judgment dismissal of the complaint.

Finally, defendants ask the court to make numerous factual findings pursuant to CPLR 3212(g), which they argue are supported by the motion papers and certain admissions in plaintiff's deposition testimony. CPLR 3212(g) permits the court, in its discretion, to limit issues of fact for trial by specifying which facts are not in dispute (*Garcia v. Tri-County Ambulette Service, Inc.*, 282 A.D.2d 206, 206 [1st Dep't 2001]). Although the court declines to sift through the panoply of factual issues which defendants contend are incontrovertible, as discussed above, defendants have established in their motion papers that the accident could not have been caused by a violation of the Multiple Dwelling Law or sections 153 and 27-375 of the New York City Administrative Code. Thus, these factual issues are deemed resolved.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing the complaint as against defendant Majestic Realty Associates LLC and is otherwise denied; and it is further

ORDERED that the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that pursuant to CPLR 3212(g), it is hereby determined that the accident was not caused by a violation of the Multiple Dwelling Law or §§ 153 and 27-375 of the New York City Administrative Code.

Dated: November 15, 2018

HON. PAUL A. GOETZ