SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JACK ALEXANDER and GRETCHEN ALEXANDER,

Plaintiffs,

- v -

S&M ENTERPRISES, a New York Partnership, STEPHEN PERLBINDER, individually and as Partner of S&M ENTERPRISES, et al.,

Defendants.

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INDEX NO. 162893/2015

MOTION DATE _____

MOTION SEQ. NO. 001, 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 58, 59, 60, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 94, 95, 96, 97, 102

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62, 88, 89, 91, 92, 93, 98, 99, 100, 101

were read on this motion for summary judgment.

Defendants Stephen Perlbinder, Barton Mark Perlbinder, Perlbinder Holdings LLC, and S&M Enterprises, and S&M Enterprises LLC (Perlbinder defendants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it and granting summary judgment on claims of contractual indemnification against defendant Décor Art Gallery #10. (Mot. seq. 1). Plaintiffs and Décor oppose. Plaintiffs cross-move for leave to amend their bill of particulars and an order deeming their proposed amended bill of particulars to have been served *nunc pro tunc*. Perlbinder defendants and Décor oppose.

Décor moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it. (Mot. seq. 2). Plaintiffs and Perlbinder defendants oppose.

I. BACKGROUND

By lease dated July 22, 2004, the parties agreed that Perlbinder defendants, the landlord of premises located at 555 Third Avenue in Manhattan, is responsible for structural repairs to the premises, and that the tenant, Décor, is responsible for all other repairs and maintenance. (NYSCEF 37).

On April 23, 2015, plaintiff Jack Alexander tripped and fell over the entrance ramp leading into the premises. Plaintiff testified at a deposition that as the sidewalk was crowded, he walked close to the building and had not seen the ramp before tripping on it. (NYSCEF 28).

The building's property manager, employed by Perlbinder defendants, testified at a deposition that Décor has been a tenant since 2004, and he denied having installed the ramp. Thus, he believes that Décor installed the ramp. (NYSCEF 36). Décor's owner testified at a deposition that upon taking possession of the premises, he renovated it, but does not remember whether the ramp was then in place, nor does he know who is responsible for maintaining it or who painted its sides yellow. (NYSCEF 38). In an affidavit, Décor's owner denies having repaired the ramp, and states that there had been no prior accidents involving it. (NYSCEF 52).

II. PLAINTIFFS' CROSS MOTION FOR LEAVE TO AMEND THEIR BILL OF PARTICULARS (NYSCEF 65-77, 102)

A. Contentions

Plaintiffs argue that they should be permitted to amend their bill of particulars to allege that the ramp violated an applicable provision of the 1968 New York City Building Code, and that the proposed amendment will not prejudice defendants as they have always alleged that the ramp constitutes a tripping hazard and the amendment does not change the theory of the case.

Perlbinder defendants assert that plaintiffs advance new factual allegations in the proposed amendment and raise a new theory of liability, resulting in significant prejudice to

them. (NYSCEF 91-93). Décor argues that as plaintiffs have filed their note of issue, they are precluded from amending their bill of particulars, and that the delay in moving to amend is unexcused. (NYSCEF 94-97).

In reply, plaintiffs deny that the filing of a note of issue precludes the proposed amendment and contend that their original bill of particulars includes numerous allegations regarding the ramp, thereby providing ample notice of their claims.

B. Analysis

After the filing of a note of issue, a party may not amend their bill of particulars without leave of court. (CPLR 3042[b]; *Romanello v Jason*, 303 AD2d 670, 670 [2d Dept 2003]). However, absent prejudice or surprise, leave should be freely given. (*Id.*; *Cherebin v. Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]).

Here, defendants fail to allege that they are prejudiced. Moreover, delay, absent prejudice, is insufficient to defeat a motion to amend. (*Id.*). Accordingly, plaintiffs' proposed amended bill of particulars is deemed served *nunc pro tunc*.

III. PERLBINDER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (NYSCEF 26-38, 91-93)

A. Contentions

Perlbinder defendants assert that, as an out-of-possession landlord, they cannot be held liable to plaintiffs, and rely on the lease which assigns to Décor the duty of non-structural repairs, such as building the ramp. Moreover, as they did not build, renovate, repair, or maintain the ramp, they argue that they cannot be held liable for plaintiff Jack Alexander's accident. Even if the ramp constitutes a structural element of the premises, Perlbinder defendants deny any notice of the alleged dangerous condition and observe that in the 12 years since the ramp was built, there have been no incidents involving it.

To the extent that they may be held liable for the accident, Perlbinder defendants claim that Décor must indemnify them, without any need to prove liability.

Décor opposes Perlbinder defendants' motion to the extent that they seek indemnification from it, arguing that the lease provides that they are responsible for structural repairs, and that the ramp constitutes a structural element. Moreover, it asserts, absent proof that Perlbinder defendants were not negligent, the motion for indemnification is premature. (NYSCEF 63-64).

Plaintiffs oppose Perlbinder defendants' motion on the ground that issues of fact exist as to whether Perlbinder defendants are liable for creating the dangerous condition and as to who built the ramp, and offer a permit reflecting that the ramp was installed by Perlbinder defendants in 2007. (NYSCEF 85). They assert that the ramp was not reasonably safe, given its high rise, sharply angled slope, steepness, extension onto the sidewalk, and inconspicuousness, and allege that it was built in violation of the pertinent building code as it lacks handrails and is too steep. Plaintiffs argue that Perlbinder defendants had notice of the condition, as all parties acknowledge that the ramp had been there for many years, and contend that the ramp constitutes a structural element, thereby rendering Perlbinder defendants liable. In support, they offer the affidavit of an engineer who therein states that the ramp was constructed in 2007, as evidenced by the DOB permit, and that it constitutes a violation of the pertinent building code given its steepness and lack of handrails. (NYSCEF 85). Plaintiffs also offer photographs of the ramp (NYSCEF 80) and a screenshot of the DOB's website showing defendant S&M Enterprises as the owner of the property (NYSCEF 86). (NYSCEF 78-87).

Perlbinder defendants argue that plaintiffs' expert affidavit should be rejected as untimely, as the expert was disclosed by plaintiffs after they filed the note of issue. They offer the affidavit of the building's superintendent who "confirm[s]" that Décor built the ramp and

opines that the DOB permit references a handicap ramp on the side of the building. Attached to the affidavit are photographs of the handicap ramp. (NYSCEF 91-93).

2. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues that require a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In evaluating the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

To be held liable for a dangerous condition on property, the defendant must have occupied, owned, controlled, or specially used it. (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005]; *Pantazis v City of New York*, 211 AD2d 427, 427 [1st Dept 1995]). The non-delegable duty to repair and maintain roadways and sidewalks generally lies with the municipality (*Stiuso v City of New York*, 87 NY2d 889, 891 [1995]; *Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007]), but in New York City, it is the duty of the owner of real property abutting a sidewalk to maintain the sidewalk in a reasonably safe condition (Admin. Code § 7-210; *Fernandez v Highbridge Realty Assocs.*, 49 AD3d 318, 319 [1st Dept 2008]).

An out-of-possession landlord, such as Perlbinder defendants, is liable with respect to a

dangerous condition on the property if the landlord is contractually obligated to repair and maintain the premises. (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325 [1st Dept 1996], *lv denied* 88 N.Y.2d 814 [1996]). Here, the lease assigns to Perlbinder defendants liability for structural repairs and Perlbinder defendants offer no evidence demonstrating that the ramp is not structural. Thus, they fail to establish that, as a matter of law, they cannot be held liable for plaintiff's accident. (*See Brignoni v 601 W. 162 Assocs., L.P.*, 93 AD3d 417, 417 [1st Dept 2012], citing *Bernardo v 444 Route 111, LLC*, 83 AD3d 753, 754 [2d Dept 2011] [summary judgment denied where defendant failed to show defect not structural]).

That the ramp may have been built in compliance with applicable rules and regulations is not dispositive as to whether the ramp was reasonably safe. (*See Kellman v 45 Tiemann Assocs., Inc.*, 87 NY2d 871, 872 [1995]; *Cook v Indian Brook Vill., Inc.*, 100 AD3d 1247, 1248 [3d Dept 2012] ["whether the step complied with the building code is not dispositive of plaintiff's claim, which is premised on common-law negligence principles"]). Thus, Perlbinder defendants fail to demonstrate that the ramp was reasonably safe. Nor do they demonstrate who built it or when it was built. The DOB permit, issued July 23, 2007, and "filed at 200 East 37th Street," however, references a handicap ramp on the side of the building.

For all of these reasons, Perlbinder defendants fail to meet their *prima facie* burden, and the sufficiency of plaintiffs' opposition, including the timeliness of the submission of plaintiffs' expert, need not be addressed. (*See William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [movant's failure to meet *prima facie* burden requires denial of motion, regardless of sufficiency of opposition]).

IV. DÉCOR'S MOTION FOR SUMMARY JUDGMENT (NYSCEF 40-55, 61-62, 98-101)

A. Contentions

Décor argues that there is no evidence that a dangerous or defective condition existed, and that the accident occurred because plaintiff "was not paying attention to his surroundings." (NYSCEF 41). Moreover, as the condition was open and obvious, and not inherently dangerous, it disclaims liability, offering in support the expert affidavit of an engineer who opines that the ramp does not constitute a substantial defect under the Administrative Code (NYSCEF 54).

Perlbinder defendants do not oppose Décor's motion as it pertains to plaintiffs but oppose it to the extent that Décor seeks dismissal of the cross-claims based on its alleged failure to address their cross-claims. (NYSCEF 57).

Plaintiffs oppose Décor's motion and deny that the ramp was open and obvious as the yellow warning paint had worn away, rendering the ramp particularly inconspicuous as it is now the same color as the surrounding sidewalk, observing that the yellow paint evidences the need for making the ramp conspicuous. Plaintiffs also contend that given the many pedestrians, plaintiff was only able to see five feet ahead of where he was walking. Moreover, that a condition is open and obvious, they assert, does not alone render Décor free from negligence absent the condition being inherently dangerous. (NYSCEF 88-89).

B. Analysis

When a dangerous condition is open and obvious, and not inherently dangerous, there is no duty to warn. (*Stadler v Lord & Taylor LLC*, 165 AD3d 500, 500 [1st Dept 2018]). Whether a condition is open and obvious depends not only on the condition itself, but on surrounding circumstances such as lighting and weather (*Mauriello v Port Auth. of New York & New Jersey*, 8 AD3d 200, 200 [1st Dept 2004]), and it generally raises a factual issue (*Juoniene v H.R.H.*

Const. Corp., 6 AD3d 199, 200 [1st Dept 2004]).

Here, absent the yellow paint that had served to render conspicuous the ordinarily inconspicuous ramp, Décor fails to show, *prima facie*, that the alleged dangerous condition was open and obvious. In any event, plaintiffs raise an issue of fact as whether the presence of numerous pedestrians had obscured the ability to see the now inconspicuous ramp.

In addition, even if the condition had been open and obvious, Décor fails to show that the condition was not inherently dangerous, as the presence of an inconspicuous structure jutting into a sidewalk cannot be said to be, as a matter of law, not inherently dangerous. (*See Farrugia v 1440 Broadway Assocs.*, 163 AD3d 452, 455 [1st Dept 2018] [circumstances of plaintiff's accident presented issue of fact as to whether condition inherently dangerous]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motions for summary judgment are denied (motion seqs. 1 and 2); it is further

ORDERED, that plaintiffs' cross-motion for leave to amend their bill of particulars is granted and the proposed amended bill of particulars is deemed served *nunc pro tunc*; and it is further

ORDERED, that the clerk of the Trial Support Office is directed to place this matter on the trial calendar upon service of a copy of it this order with notice of entry.

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1/31/2019
DATE

BARBARA JAFFE, J.S.C.

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