SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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NANCY CARDINALE,

Plaintiff,

- v -

AVALON WEST CHELSEA, LLC, JUDY PAINTING CORP., Z & Z'S INC.

Defendant.

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INDEX NO. 150399/2016

MOTION DATE 10/28/2020, 10/28/2020

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 407, 408, 410

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 409

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents:

Motion sequences 006 and 007 are consolidated for decision.

This is a personal injury action arising out of an accident that occurred on August 15, 2015. The accident occurred in the basement laundry room of the plaintiff's residence, located at 525 West 28th Street, New York, New York. The plaintiff claims she fell when she stepped from the basement hallway into the laundry room. The building is owned and maintained by the defendant Avalon West Chelsea LLC ("Avalon").

Prior to the plaintiff's accident, there was an electrical power outage which necessitated the installation of new temporary wiring on the basement floor. Avalon hired defendant Judy Painting Corp. ("Judy") to construct a platform over the exposed wires (*see* NYSCEF Doc. No. 346, Mihalyi Tr at 36). Judy subcontracted the platform construction work to defendant Z&Z Inc. ("Z&Z") (Id at 37). As a result of the installation of the platform, there was an elevation or height differential between the basement hallway and the floor of the laundry room of approximately three and one-half inches (*see* NYSCEF Doc. No 254, Plaintiff's Affirmation in Support of Cross-Motion, page 4). The plaintiff claims this height differential caused her to fall and sustain injuries to her right ankle.

Approximately two days prior to her accident, the plaintiff had entered the subject laundry room accompanied by a leasing agent employed by Avalon (*see* NYSCEF Doc. No. 323 Cardinale Tr at 51). The subject platform had already been installed at that time (*Id*. at 53-54). The plaintiff observed the height differential between the platform and the laundry room floor and commented to the leasing agent that the decline was "really steep" (*Id*. at 55). There is no evidence of any prior complaints or incidents involving the temporary platform.

In motion sequence 006, Avalon moves for summary judgment. The plaintiff cross-moves for an order, pursuant to CPLR § 3126, striking Avalon's answer due to alleged spoliation of evidence, and for summary judgment. In motion sequence 007, defendants Judy Painting and Z&Z move for summary judgment and a dismissal of the complaint and all cross-claims asserted against them.

The defendants argue that they are entitled to summary judgment because the plaintiff cannot demonstrate that the subject platform was in a dangerous or defective condition or, in the alternative, any alleged defect in the platform was open and obvious and not inherently

dangerous. In cases such as these, where the plaintiff alleges that she sustained personal injuries as the result of a dangerous or defective condition, a defendant may make a *prima facie* showing of entitlement to summary judgment by demonstrating that it owed no duty to warn of or otherwise protect the plaintiff from a condition that posed no reasonably foreseeable hazard (*see Jones v Presbyterian Hospital*, 3 AD3d 225, 226 [1st Dept 2004]; *Schurr v Port Auth of New York and New Jersey*, 307 AD2d 837, 838 [1st Dept 2003]). Alternatively, even if the court finds evidence of a defect, a defendant can still obtain summary judgment if it can establish as a matter of law that the alleged defective condition was open and obvious and not inherently dangerous (*see e.g., Kirk v Staples the Off. Superstore E., Inc.,* 123 AD3d 889, 890 [2d Dept 2014]; *Schulman v Old Navy/The Gap, Inc.,* 45 AD3d 475, 476 [1st Dept 2007]).

In this case, the defendants have established a *prima facie* entitlement to summary judgment. In her deposition, the plaintiff conceded that she was aware of the height differential and acknowledged that she again observed the differential just prior to her fall. The plaintiff's deposition testimony also evidenced that the cause of her accident was not attributable to any hidden defect or dangerous condition on or near the subject platform. When asked about the cause of her fall, the plaintiff responded that the drop was "lower than I imagined."

In response, the plaintiff has failed to raise a triable issue of fact. There is no claim that the platform was structurally unsafe or that there was any debris, moisture or other hazardous condition that caused the plaintiff to fall (*see Jones*, 3 AD3d at 226). Nor does the plaintiff complain that the lighting was inadequate (*id.*). Most significantly, she admits that she was aware of the height differential and does not claim that it was hidden or even that she forgot about it. There is no evidence that the platform was a hidden defect and the plaintiff does not

dispute that the platform was painted yellow at the edge and that the drop was visible to anyone attempting to enter the laundry room.

This case is legally indistinguishable from cases such as *Jones* and *Schurr* wherein the plaintiff allegedly tripped and fell while descending stairs. In those cases, as well as the instant case, the plaintiff was completely aware of the height differential at the time of the accident and offered no probative evidence to suggest that the platform or stairs were inherently dangerous or constituted a defective or dangerous condition. The defendants simply had no duty to warn of or otherwise protect the plaintiff from a condition that posed no reasonably foreseeable hazard (*see Jones*, 3 AD3d at 226; *Borra v Walden Books, Inc.*, 298 AD2d 542 [2d Dept 2002]).

In opposition, the plaintiff did not offer any expert testimony which suggests that the platform was structurally deficient in any manner or that it violated any applicable building or statutory code. The plaintiff's counsel posits that the fact that the edge of the platform was not visible until the plaintiff opened the laundry room door may have caused the plaintiff to momentarily forget about the drop. Counsel also implies that the plaintiff may have been distracted by the amount of laundry she was carrying and/or prone to forgetfulness because of her age. The problem is that the plaintiff did not offer any such testimony during her deposition but rather indicated that she simply misjudged the height of the drop. Any argument to a jury that the platform constituted a hidden defect or trap because of the plaintiff's distraction or forgetfulness would be purely speculative and not permissible (*see Vazquez v Yonkers Racing Corporation*, 171 AD3d 418 [1st Dept 2019]; *Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984, 986-987 [2d Dept 2003], *affd* 3 NY3d 743 [2004]).

Alternatively, the Court agrees with the defendants that the height differential was an open and obvious condition that was not inherently dangerous as a matter of law (*see Vazquez*,

171 AD3d at 418; *Schulman*, 45 AD3d at 476). As such, the plaintiff cannot recover for any personal injuries sustained because of the height differential and the defendants are entitled to summary judgment and a dismissal of the complaint. Accordingly, the defendants' motions for summary judgment dismissing the complaint are granted.

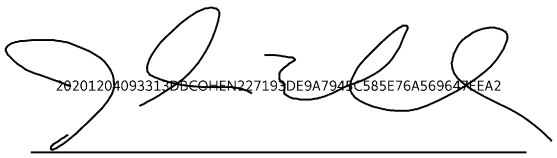
Th plaintiff's CPLR § 3126 motion to strike Avalon's answer due to alleged spoliation of evidence is denied. The plaintiff contends that key-fob records – which would show who entered the laundry room before, during, and after the defendant's fall – are missing. In response to the plaintiff's demand for key-fob records, Avalon objected to the demand and indicated that, without waiving the objections, a search for materials responsive to the demand was ongoing (*see* NYSCEF Doc. No. 278, Plaintiff's Exh. X, Response to Notice to Produce). "The striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2d Dept 2012]). The Plaintiff has failed to demonstrate that loss or destruction of key-fob records – which were not demanded until August of 2019, four years after the plaintiff's accident – was willful and contumacious. Furthermore, the plaintiff did not meet her burden of showing that she could not establish her cause of action without the key-fob records (*see Varone v Middle Country Cent. School Dist.*, 125 AD3d 847 [2d Dept 2015]). Accordingly, the plaintiff's motion to strike Avalon's answer is denied.

For the reasons set forth herein above, it is hereby

ORDERED that defendant Avalon's motion for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that defendants Judy Painting Corp. and Z & Z'S Inc. motion for summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that the plaintiff's motion is denied.



12/4/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

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