

**Ellard v 281 Scarsdale Corp.**

2020 NY Slip Op 34822(U)

May 29, 2020

Supreme Court, Westchester County

Docket Number: Index No. 54559/2018

Judge: Janet C. Malone

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
GLADYS M. ELLARD and PHILIP ELLARD,  
Plaintiffs,

-against-

281 SCARSDALE CORP. and CORE ALLIANCE  
REAL ESTATE CORP. d/b/a GARTHCHESTER REALTY,  
Defendants.

-----X  
MALONE, J.S.C.

DECISION AND ORDER

Index No.: 54559/2018  
Motion Seq.: 1

The following papers numbered 1-3 were read and considered in deciding Defendants' motion for summary judgment pursuant to CPLR R 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affirmation of Jeffrey D. Fippinger, Esq./Exhibits A-L	1
Affirmation of Thomas A. Culhane, Esq. <sup>1</sup> /A-H	2
Reply Affirmation of Jeffrey D. Fippinger, Esq.	3

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law by proffering sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issue of fact. *See, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 (1986). Therefore, to the extent issues of fact exist in the instant action, Defendants' motion for summary judgment is denied as set forth herein.

\_\_\_\_\_  
1 Although this document is titled "Affidavit in Opposition to Summary Judgment", it is not sworn to before a Notary Public.

This personal injury action arises from Plaintiff Gladys Ellard's ("Plaintiff") fall on February 7, 2017 at approximately 3:00 p.m. in the staircase of 281 Garth Road, Scarsdale, New York (the "Premises") where Plaintiff and her husband, Plaintiff Philip Ellard, are shareholders and tenants of a cooperative apartment located on the fifth floor of the six-story Premises. Defendant 281 Scarsdale Corp. is the owner of the building, and Defendant Core Alliance Real Estate Corp. d/b/a Garthchester Realty serves as its managing agent.

At the time of the incident, an elevator upgrade project was in progress; therefore, Plaintiffs were required to traverse a series of staircases (Exhibit G) up to their fifth-floor apartment, which required taking the stairway from the 3<sup>rd</sup> floor to the 4<sup>th</sup> floor, which is comprised of two sections. To reach the 4<sup>th</sup> floor, Plaintiffs had to go up the first set of steps to a mid-landing, make a right turn, and take another set of steps to the 4<sup>th</sup> floor. *See*, Affirmation of Jeffrey D. Fippinger, Esq. at paragraph 5 and Plaintiff Gladys Ellard's Examination Before Trial at pages 39-41 as Exhibit I.

According to Plaintiff as she was approaching the fourth floor, she reached from the end of one handrail over an approximately ten-inch section of missing handrail to the end of the next available handrail, and while reaching she lost her balance and fell to the ground striking her left shoulder. *See*, Supplemental Bill of Particulars at paragraphs 2 and 3 as Exhibit F and Plaintiff Gladys Ellard's Examination Before Trial at pages 81-82 as Exhibit I.

Now, with issue joined with the Answer dated September 5, 2018 (Exhibit C) and the Note of Issue filed on November 1, 2019 (Exhibit D), Defendants by way of Counsel have filed the instant motion for summary judgment requesting dismissal of Plaintiffs' complaint. *See*, CPLR R 3212.

[INTENTIONALLY LEFT BLANK]

Counsel contends that summary judgment is warranted since Plaintiff did not fall at the mid-landing, therefore, any alleged hazardous condition posed by the handrail configuration at the mid-landing was not the proximate cause of Plaintiff's injury. In support, Counsel argues that in Plaintiff's deposition testimony she stated that she tripped on a step in the first staircase section while holding the railing with her right hand, before reaching the mid-landing and/or proceeding to the second stairway section. And, that Mr. Ellard likewise testified that his wife fell on the top step within the first staircase section while her right hand was grasped onto the railing thereon. *See*, Affirmation of Jeffrey D. Fippinger, Esq. at paragraphs 4, 6, 19 and 30-31 *see also*, Plaintiff Philip Ellard's Examination Before Trial at page 16, line 2 to page 17, line 23 and page 28, line 9-23 as Exhibit J.

Counsel further argues that since Plaintiff did not fall at the mid-landing, any alleged hazardous condition posed by the handrail configuration at the mid-landing was not the proximate cause of Plaintiff's injury. *See*, Affirmation of Jeffrey D. Fippinger, Esq. at paragraph 6 and 36-45.

To demonstrate *prima facie* entitlement to judgment as a matter of law in a premises liability case, a defendant must establish that it did not create the hazardous condition that allegedly caused the fall or have actual or constructive notice of that condition (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

Plaintiff's Counsel contends that there was a ten-inch gap between the railings at the first and second staircase sections, thus causing Plaintiff to strain to reach the next railing as she attempted to ascend the staircases, and that the missing handrail caused Plaintiff to strain to reach the next railing, at which time she lost her balance and fell to the ground causing injury.

Counsel also states that Defendants were on notice of the alleged hazardous condition posed by the 'railing gap' submitting transcribed minutes from the cooperative's board of directors' meetings from February 1, 2016 through January 19, 2017 (Exhibit C) and Plaintiff Gladys Ellard's testimony related to the elevator upgrade plan. Plaintiff testified that the Ellards previously notified the board of the need for either a chairlift or, at the very least, the installation of additional handrails at the mid-landing points. Plaintiffs provided the board's president with a sample "small handle", which they believe was presented to the board on three occasions to no avail. *See*, Affirmation of Thomas A. Culhane, Esq. at paragraphs 5, 8, 40, 42 and 44 and Plaintiff Gladys Ellard's Examination Before Trial at page 21, line 2 to page 24, line 17 as Exhibit D.

Plaintiffs also proffered that expert Affidavit of Nicholas Bellizzi, P.E. (Exhibit B), a duly licensed professional engineer within the State of New York, who opined that the handrail configuration violates the applicable state building codes as they were not continuous (Exhibit B at ¶ 11). Specifically, he stated that the subject handrail violates RCNYS<sup>2</sup> Section R311.5.6 which provides that "[h]andrails must be continuous from a point above the top riser to a point above the lowest riser of each flight of steps" (Exhibit B at ¶ 10.) He further stated that the subject handrail violates prior New York State Building Codes insofar as Section 735.3(a)(12) entitled "Stairways" provides that: "[h]andrails shall be started at the first tread both top and

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<sup>2</sup> Residential Code of New York State.

bottom, shall have no obstruction on or above them tending to break a handhold, and the ends of the handrails shall be returned to the wall or newel post.” (Exhibit B at ¶ 12.)

Contrary to Defendants’ Counsel’s contention that Plaintiff fell on the top stair while holding an adequate railing, Plaintiff Gladys Ellard testified that the incident occurred on the top stair on the first staircase section as she attempted to ascend up to the “mid-landing” stair to proceed to the second staircase section. She testified that there was a gap in the railing between those two staircases, which required her to reach beyond the “mid-landing” stair to the next handrail, however; she was unable to extend her reach beyond the mid-landing to the next handrail, causing her to lose her balance and fall. *See*, Plaintiff Gladys Ellard’s Examination Before Trial at pages 39-43 as Exhibit D.

Notably, this matter is factually distinguishable from the cases relied upon by Defendants’ Counsel insofar as Plaintiff testified that the cause of her fall was the gap in handrail between the first and second staircase sections as she attempted to ascend from the first to the second staircase. Her testimony is in stark contrast to that provided in *Plowden v. Stevens Partners, LLC*, 45 AD3d 659, 660 [2d Dept. 2007](plaintiff failed to identify the cause of the fall, having failed to testify to the lack of handrails contributed to the accident); *Bardales v. VAM Realty Corp.*, 124 AD3d 707 [2d Dept 2015](plaintiff failed to identify the cause of the fall, having testified to not using the handrail at the time of the fall); and *Hymman v. Queens County Bancorp., Inc.*, 307 AD2d 984, 986-7 [2d Dept. 2003], *aff’d*, 3 NY3d 743 [2004] (plaintiff testified to not using the single handrail at the time of the fall).

Plaintiffs also proffered photographs depicting the alleged hazardous condition posed by the handrail configuration, and the expert affidavit of licensed engineer Mr. Bellizzi stating that the lack of a continuous rail in the depicted area violated applicable building codes and safety

standards. Accordingly, Plaintiff's testimony coupled with the site photographs and expert affidavit collectively raise issues of fact related to the existence of a hazardous condition and proximate cause, thus warranting denial of Defendants' motion. *See, Prima v. Prima Properties, Inc.*, 101 A.D.3d 1094, [2d Dept. 2012]; *Asaro v. Montalvo*, 26 A.D.3d 306 [2d Dept. 2006]; *Antonia v Srouf*, 69 A.D.3d 666 [2d Dept. 2010]; *Palmer v. 165 East 72<sup>nd</sup> Apartment Corp.*, 32 A.D.3d 382 [2d Dept. 2006].

In sum, as the motion record raises issues of fact related to the existence of a hazardous condition and causation, thus precluding summary judgment dismissing Plaintiffs' complaint, Defendants' motion for summary judgment is **denied**.

**Therefore, this matter is referred to the Settlement Conference Part and a conference will be scheduled at a later date.**

The foregoing constitutes the Decision and Order of this Court.

Dated: May 29, 2020  
White Plains, New York

ENTERED:

*Janet C. Malone*

APPROVED  
Janet C. Malone, 5/29/2020, 9:48:37 AM

HONORABLE JANET C. MALONE,  
Justice of the Supreme Court

To: Decision and Order uploaded to NYSCEF