STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

JEANNINE PELLETIER,

Plaintiff,

-against-

DECISION and ORDER
RJI #45-1-2019-0925E
Index # 2019-765

BELMONT MANAGEMENT CO. INC. and MALTA LIMITED PARTNERSHIP,

Defendants.

APPEARANCES

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ANN C. CROWELL, J.

Defendants Belmont Management Co. Inc. and Malta Limited Partnership ("Belmont") request an order granting summary judgment dismissing the Complaint pursuant to CPLR § 3212. The plaintiff, Jeannine Pelletier ("Pelletier" or "plaintiff") opposes the motion and in her cross-motion requests permission to amend her Complaint to add a punitive damages claim.

Pelletier was a resident of Malta Meadows, an apartment building located in Ballston Lake, New York. On November 10, 2018 a storm caused an extended power outage. Malta Meadows was without power from 2:24 p.m. to 5:25 p.m. When Pelletier

leased her apartment, defendant provided her a handbook. Amongst other things, the handbook advised her to remain in her apartment during a power outage and that the building's emergency lights would remain on for about an hour.

The building elevator did not function during a power outage. Approximately three (3) hours after the power went out, plaintiff left her apartment to assist another tenant, Margo Beighey ("Beighey"). Beighey called Pelletier to request her assistance. Beighey needed Pelletier's help to carry her walker from the first floor to her second floor apartment. Beighey was in the community room on the first floor with a bathroom available nearby. There is no evidence Beighey was in danger or distress when she called Pelletier. Pelletier agreed to assist Beighey. She proceeded down the hallway to the stairwell. Plaintiff entered the stairwell. Pelletier testified that when the door closed behind her, the stairwell was completely dark. While trying to find a push light on the wall, Pelletier fell down the stairs.

Defendants installed an emergency lighting system in the stairwells. The battery powered emergency lightning system was designed to last at least ninety (90) minutes during a power outage. Defendants placed additional auxiliary lighting in the stairwells for use if the battery-operated system did not last long enough. The additional lighting consisted of: (1) "pop" lights powered by batteries and operated manually by pushing on them; and (2) flashlights placed one step down at the top of the stairs. Defendants' site manager, Vincent Giammusso ("Giammusso") testified that he informed all tenants of the pop lights and the flashlights. Pelletier explicitly testified that she did not know if there were push lights in the stairwell. She hoped there were because there were push lights in the hallways. Pelletier testified she did not know whether or not there was a flashlight in the stairway when she fell.

Defendant's expert witness, Richard W. Askew ("Askew") establishes that section 7.9.2.1 of the National Fire Protection Association's Life Safety Code; Section 1008.3.4 of the 2015 International Building Code; and Chapter 700 of the National Fire Protection Association's National Electric Code require that auxiliary lighting be provided in the defendants' building in the event of a power outage. The auxiliary lighting is to provide light for a minimum period of ninety (90) minutes. Askew also avers that providing ninety (90) minutes of auxiliary lighting in the event of a power outage is in accordance with the course and custom in the multi-family residential housing industry. Defendants' expert witness acknowledges that some of defendant's auxiliary lighting fixtures failed the ninety (90) minute testing requirements in 2018. Defendants' expert concludes that: "Defendants complied with the required 30-day and annual testing as required under the applicable codes."

Defendants complied with the annual testing requirement. It is undisputed that the defendants' auxiliary system failed the ninety (90) minute lighting test in March of 2018 and that defendants failed to repair or replace the system until sometime in 2019. Defendants did not offer any expert testimony regarding how long a brand-new battery would power the auxiliary lighting. Giammusso's generic testimony that a brand-new battery would last for two hours is insufficient to establish that as a fact. (Gaimmusso Deposition pg. 16). Giammusso and Belmont's upper management knew that the auxiliary lighting system failed its annual ninety (90) minute test in March of 2018. Michael Schneider, the property's maintenance person, was never informed that the auxiliary lights failed the ninety (90) minute test. The batteries in the auxiliary lights were not replaced after the system failed the ninety (90) minute test in March of 2018.

Summary judgment should be granted only in the absence of any material or triable issue of fact. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]. In order to succeed in obtaining summary judgment, the moving party must establish his or her cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor. CPLR § 3212(b). Once the movant has met this threshold burden, the opposing party must raise a triable issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

Defendants contend they did not owe a duty to plaintiff to provide lighting in the stairwell during an at large power outage, or in the alternative, defendants' breach was not a but-for cause of plaintiff's fall approximately three hours after the outage commenced. The Court agrees with defendant's contention that the defendant owed no common law duty of care to provide *continuous* illumination in the stairwell during an at large power outage. *Viera v Riverbay Corp.*, 44 AD3d 577 [1st Dept. 2007], citing *Peralta v Henriquez*, 100 NY2d 139, 145 [2003]; *see also, Kopsachilis v 130 East 18 Owners Corp.*, 11 NY3d 512 [2008]; *Parke v ST Owner LP*, 149 AD3d 597 [1st Dept. 2017] (emphasis added). Defendants appear to equate the term continuous lighting to mean no lighting at all during a power outage and no responsibility to provide a reasonably safe premises. It is unclear that is the intention of the cited cases. None of the cases are directly on point with the facts of this case.

The case of *Solan v Great Neck Union School*, 43 AD3d 1035 [2d Dept. 2007], is instructive. In that case, the plaintiff fell in an unlit parking area within in minutes of a power outage. The Court reasoned the condition created in the unlit parking lot was dangerous. The Court found that the defendant was not absolved of its duty to address the dangerous condition but the plaintiff would need to establish that defendant either

created the condition, or had actual or constructive notice of the condition and failed to correct the condition in a reasonable amount of time. The Court concluded that the defendant was absolved of liability because "defendant did not create the dangerous condition but did have notice of its existence" and that "there is no valid line of reasoning nor permissible inferences to be drawn from the evidence which could lead a rational person to the conclusion that the defendant had a reasonable amount of time to address the darkness in the parking lot in the matter of minutes between the power outage and the plaintiff's fall." The Court relied upon the duty of a property owner in its analysis.

A property owner has a duty to maintain a premises in a reasonably safe condition. *Bedell v Rocking Horse Ranch*, 94 AD3d 1389 [3d Dept. 2012]; *Cerkowski v Price Chopper*, 68 AD3d 1382 [3d Dept. 2009].

> "The scope of such duty is determined in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Taylor v. Lands End Realty Corp.*, 93 A.D.3d 1062, 1063, 941 N.Y.S.2d 293 [2012] [internal quotation marks and citation omitted]; *see Peralta v. Henriquez*, 100 N.Y.2d 139, 144, 760 N.Y.S.2d 741, 790 N.E.2d 1170 [2003]; *Basso v. Miller*, 40 N.Y.2d at 241, 386 N.Y.S.2d 564, 352 N.E.2d 868). Whether a particular duty exists and the extent thereof is a question of law to be determined by the court (*see 532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 288, 727 N.Y.S.2d 49, 750 N.E.2d 1097 [2001]; *Taylor v. Lands End Realty Corp.*, 93 A.D.3d at 1063, 941 N.Y.S.2d 293)." *Rossal-Daub v Walter*, 97 AD3d 1006, 1007 [3d Dept. 2012]

Clearly an unlight stairwell with no exterior windows or lighting creates an observable dangerous condition. Defendant's expert has established that several codes require that auxiliary lighting be provided in the defendants' building for a minimum period of ninety (90) minutes in the event of a power outage. The codes support actions to be taken by a landowner to provide a reasonably safe premises during a power outage. The violation of codes and ordinances is some evidence of negligence, but is not

negligence *per se*. *Elliot v City of New York*, 95 NY2d 730, 734 [2001]. Defendants' auxiliary lighting system failed the ninety (90) minute lighting test in March of 2018. Defendant did not remedy the failure until sometime in 2019. Neither party has conclusively established whether the lights in the stairwell where plaintiff fell failed the ninety (90) minute test or not. Nor has it been demonstrated that the flashlight and touch lights were operational or properly placed for their intended use. These unresolved questions create questions of fact as to whether or not the defendants breached their duty to provide a reasonably safe premises when they had knowledge of the lengthy outage and of the lack of functionality of its auxiliary lighting system that must be resolved by a jury.

Defendant alleges that even if it's failure to remedy the malfunctioning auxiliary lighting breached a duty, that breach is not the "but-for" cause of plaintiff's fall approximately three (3) hours after the power outage began. "It is well established in our law that 'but for' causation, or causation in fact, is '[t]he cause without which the event could not have occurred.'" *Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321-322 [2017]. "The term refers to a link in the chain leading to an outcome, and in the abstract does no more than state the obvious, that '[a]ny given event, including an injury, is always the result of many causes.'" *Id.* Defendant contends that the alleged breach (not maintaining an auxiliary lighting system capable of providing ninety (90) minutes of auxiliary lighting) could not have been a but-for cause of plaintiff's fall approximately three (3) hours after the power outage commenced. The code provisions require auxiliary lighting for **at least** ninety (90) minutes. Defendant did not submit any expert testimony that its particular auxiliary lighting in place at the time of plaintiff's fall was not capable of lasting three (3) hours. Defendant did not submit any expert testimony regarding how

long the auxiliary lighting would last with new batteries installed. In the absence of such evidence, the defendant has failed to make a *prima facie* case establishing that the lights would have been out when the plaintiff fell, if the defendant had properly maintained the auxiliary lighting. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegard v New York Univ. Med. Center*, 64 NY2d 851 [1985].

Defendant's counsel repeatedly asserts that the batteries in the auxiliary lighting would have been depleted after three (3) hours of use. Defendant's counsel also asserts that the batteries would have been depleted after ninety minutes. There is no competent evidence in the record to establish how long the auxiliary lighting would have lasted if they had new batteries and/or had passed the annual ninety (90) minute test. The Court finds it highly unlikely that a battery system designed to be compliant with the code requirement of at least ninety (90) minutes of auxiliary lighting would stop working at the ninety (90) minute mark. Defendant's motion for summary judgment dismissing the Compliant is denied without costs.

The handbook provided to all new tenants warned the building occupants not to go in the stairwells after one hour of being without power. The condition of the pitch black stairwell was readily observable. The plaintiff chose to enter that stairwell without any personal light source and reach for a touch light that she merely assumed was present since such lights were in the hallway. This case is not a failure to warn case. The jury will be asked to determine whether or not the building was reasonably safe and will have the opportunity to assess plaintiff's comparative negligence at that time. *See, Sisson v Metromedia Steakhouses, Inc.*, 17 AD3d 855 [3d Dept. 2005].

Plaintiff cross-moves to amend her Compliant to add a claim for punitive damages. It is well settled that leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit. *Edwards & Zuck, P.C. v Cappelli Enterprises, Inc.*, 124 AD3d 181 [3d Dept. 2014]; *Carey v Schwab*, 122 AD3d 1142 [3d Dept. 2014]; *Ciarelli v Lynch*, 46 AD3d 1039, 1039-1040 [3d Dept 2007]. In the absence of an abuse of discretion, a court's decision as to whether to grant leave to amend a pleading shall remain undisturbed. *Pagan v Quinn*, 51 AD3d 1299, 1300 [3d Dept 2008].

Punitive damages may be awarded when a defendant's conduct is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others. *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196 [1990]; *Rahn v Carkner*, 241 AD2d 585, 586 [3d Dept. 1997]. Discovery is complete and a Note of Issue has been filed. Plaintiff failed to promptly repair or replace the failing auxiliary lighting system. While such failure can be viewed as negligent, it does not rise to the level of a conscious disregard of the rights of others. Particularly where defendants had placed touch lights and flashlights in stairwells as a back-up system. Plaintiff's motion to amend is denied based the lack of merit of a punitive damages claim based upon the facts and circumstances of this case.

Defendant's motion for summary judgment dismissing the complaint is denied. Plaintiff's cross-motion to amend the Complaint is denied. Any relief not specifically granted is denied. No costs are awarded to any party. This Decision shall constitute the

Order of the Court. The original Decision and Order is being electronically filed. The prevailing party must provide notice of entry.

Dated: December 29, 2020
Ballston Spa, New York

ANN C. CROWELL, J.S.C.

Papers Received and Considered:

Notice of Motion, dated September 8, 2020

Affirmation of Phillip A. Oswald, Esq., dated September 8, 2020, with Exhibits A-L

Affidavit of Richard W. Askew, sworn to September 4, 2020

Memorandum of Law, dated September 8, 2020

Notice of Cross Motion, dated November 4, 2020

Affirmation of David Iversen, Esq., dated November 4, 2020, with Exhibits A-N

Memorandum of Law, dated November 4, 2020

Affirmation of Phillip A. Oswald, Esq., dated November 20, 2020, with Exhibit A

Memorandum of Law, dated November 20, 2020

Entered Saratoga County Clerk

12/30/2020