SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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ANNA GALLO,

Plaintiff,

-against-

ANTONETTE'S OF EAST HILLS, LLC d/b/a "ANTONETTE'S OF EAST HILLS" and 290 GLEN COVE RD. LLC,

Defendants.

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TRIAL PART: 3

NASSAU COUNTY

INDEX NO: 605376/2017

MOTION SEQ #: 2, 3, 5, 6

SUBMIT DATE: 11/24/20

The following papers having been read on this motion:

Notice of Motion (290 Glen) 1
Opposition (Antonette's) 2
Reply 3
Reply 4
Sur-Reply (Plaintiff) 5
Notice of Motion (Antonette's) 6
Opposition (290 Glen) 7
Reply 8
Reply 9
Notice of Cross-Motion (Plaintiff) 10
Opposition to Cross-Motion (290 Glen) ... 11
Reply 12
Notice of Cross-Motion and Opposition (Plaintiff) 13
Opposition (Antonette's) 14
Reply 15

Defendant 290 Glen has moved this Court for an order, pursuant to CPLR 3212, seeking to dismiss the complaint and any cross-claims asserted against it in their entirety, as well as for summary judgment on its own cross-claim for indemnification against Defendant Antonette's. Defendant Antonette's has also moved for summary judgment, seeking dismissal of the complaint and the cross-claims asserted against it and has also sough judgment on its cross-claim sounding in indemnification against Defendant 290 Glen. Plaintiff has filed two separate cross-motions, seeking to amend its bill of particulars as to each Defendant, pursuant to CPLR §3025 and has also opposed the respective summary judgment motions. All motions have been fully

briefed at the time of submission, and this Court has accepted the sur-reply from Plaintiff for Defendant 290 Glen's summary judgment motion. Based upon the following, the two cross-motions by Plaintiff are hereby granted, over opposition; furthermore, in consideration of the respective amended bills of particular, the motion by Defendant 290 Glen for summary judgment is hereby granted and the action and any cross-claims dismissed against it, whereas the motion by Defendant Antonette's is hereby denied.

Pursuant to CPLR §3025(b) leave to amend a pleading should be freely given, and leave should be given where the amendment is neither palpably insufficient nor patently devoid of merit and the delay in seeking amendment does not prejudice or surprise the opposing party. Blanco Gomez v. Principe, 186 AD3d 466, 126 NYS3d 393 (Mem) (2nd Dept., 2020). Mere lateness is not a barrier to the amendment; rather, it must be coupled with significant prejudice to the other side. Cioffi v. SM Foods, Inc., 178 AD3d 1015, 116 NYS3d 68 (2nd Dept., 2019). Here, the respective proposed amended bill of particulars as to each Defendant seeks to specify the sections of the building code for which is has asserted the subject stair riser was defective. Plaintiff has not inserted a new theory of liability in the case, since her original respective bill of particulars already pled violations of the building code and other applicable regulations without specificity. Neither Defendant 290 Glen nor Defendant Antonette's have demonstrated significant prejudice for the amendments asserted beyond the lateness of the request. Therefore, in the absence of any such prejudice, both cross-motions to amend Plaintiff's bill of particulars is hereby granted; furthermore, in light of this amended pleading, the Court has considered same in reviewing the respective motions for summary judgment.

On January 29, 2017, Plaintiff was a client and co-host of a party being held at Defendant Antonette's restaurant within the building owned by Defendant 290 Glen . Pursuant to a lease agreement dated January 1, 2007, between Defendant 290 Glen and a non-party, Defendant Antonette's operated a restaurant with permission from Defendant 290 Glen as the subleasor of the building commencing sometime in 2014. The restaurant, complete with a party room on the second floor, required the entirety of the subject building. Defendant Antonette's used the party room to host events, such as that which Plaintiff was attending on the afternoon in question. The event, a bridal shower for her daughter, had commenced at approximately 1:00 p.m. in the afternoon that day and Plaintiff was able to traverse the staircase without issue upon her arrival.

However, at approximately 5:00 p.m. as the party was ending, Plaintiff again attempted to traverse a one-step riser to reach the landing at the bottom of the same staircase, without success. Plaintiff alleges that as she approached the one-step riser, but before she actually ascended it, she tripped and fell, resulting in injuries to her left arm and cervical spine. As part of this allegation, Plaintiff specifies in her bill of particulars that inadequate lighting in the area, improper construction, and improper maintenance were the cause of her fall and the negligence she attributes to Defendants.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie 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. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

It is well settled that a landowner owes a duty of care to maintain his or her property in a reasonably safe condition. Baek v. Red Cap Services, 129 AD3d 752, 10 NYS3d 599 (2nd Dept. 2015). To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it. Dennehy-Murphy v. Nor-Topia Service Center, Inc., 61 AD3d 629, 876 NYS2d 512 (2nd Dept., 2009). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case. Richardson v. JAL Diversified Management, 73 AD3d 1012, 901 NYS2d 676 (2nd Dept., 2010).

In support of the motion, Defendant 290 Glen has submitted an expert report from an engineer who conducted a site inspection two years after the alleged incident. While the engineer's affidavit adequately explains the area was not defective in any way as far as it was constructed, and the evidence before the Court indicates that Defendant 290 Glen did not perform any construction on the subject staircase at any time between Plaintiff's injury and the site inspection by this expert, this affidavit is insufficient to explain whether or not this landing area was adequately maintained and properly illuminated at the time of Plaintiff's trip and fall.

When evaluating these claims by Plaintiff, the deposition transcripts of Plaintiff, Defendant Antonette's principal, and its own principal, that have also been submitted with the motion, sufficiently establish that Defendant 290 Glen, as an out of possession landlord, was not responsible for the maintenance of the subject landing, including the necessary lighting in the area. Defendant 290 Glen has also submitted a copy of the subject lease agreement, which confirms that they could not be liable for injuries that occurred such as that which befell Plaintiff. *See* Grimaldi v. 221 Arlington Realty, LLC, 107 AD3d 670, 966 NYS2d 489 (2nd Dept., 2013).

Thus, Defendant 290 Glen has satisfied its burden, and the burden is shifted to Plaintiff and Defendant Antonette's to demonstrate a triable issue of fact still exists as to their respective claims and cross-claims. The opposition papers before the Court provide little, if any, additional evidence outside what has already been provided in Defendant 290 Glen's moving papers, and after a thorough review of all submissions before the Court, no such triable issue can be found. Accordingly, the motion by Defendant's 290 Glen is hereby granted in full, and all claims and cross-claims asserted against them are dismissed forthwith.

Turning now to the motion by Defendant Antonette's, this Court finds that it has not satisfied its burden on the issue of negligent maintenance and inadequate lighting asserted by Plaintiff. In addition to deposition transcripts from each party, Defendant Antonette's has also submitted photographs used during Plaintiff's deposition; however, given the testimony by Plaintiff, this Court finds that the photographs have not been properly authenticated, as they were not taken at or around the time of the incident and Plaintiff clearly indicated such differences between the photographs and the condition of the landing at the time of her incident. *See* Davis v. County of Nassau, 166 AD2d 498, 560 NYS2d 696 (2nd Dept., 1990). More importantly, the expert affidavit, based upon two site inspections completed a few years after the incident, lacks limited probative value as to the lighting and maintenance of the subject landing at the time of the incident. Gestetner v. Teitelbaum, 52 AD3d 778, 860 NYS2d 208 (2nd Dept., 2008). Given that Defendant Antonette's has failed to satisfy its burden, the Court need not review the papers in opposition to the motion further. Therefore, the motion by Defendant Antonette's is hereby denied in all respects. *See* Streit v. DTUT, 302 AD2d 450, 753 NYS2d 749 (Mem) (2nd Dept., 2003).

Defendant 290 Glen shall file and serve a copy of the within order with notice of entry upon Plaintiff and Defendant Antonette's within thirty (30) days from the date of this order.

Thereafter, Plaintiff and Defendant Antonette's shall appear in the DCM Trial Part of Supreme Court, Nassau County, on April 26, 2021, at 9:30 a.m.

Finally, in light of the dismissal against Defendant 290 Glen as stated above, the caption is hereby amended to read as follows: "ANNA GALLO, Plaintiff, against ANTONETTE'S OF EAST HILLS, LLC d/b/a ANTONETTE'S OF EAST HILLS, Defendant."

This hereby constitutes the decision and order of this Court.

ENTER

DATED: January 13, 2021

HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED
Jan 26 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE