SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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JANE LENCE,

Plaintiff,

- v -

COLUMBIA PROPERTY TRUST, INC. and COLUMBIA REIT-229 W. 43RD STREET, LLC,

Defendants.

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INDEX NO. 154256/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT.

In this negligence action, defendants Columbia Property Trust Inc. ("Trust") and Columbia REIT-229 W. 43rd Street, LLC ("REIT") (collectively "defendants") move, pursuant to CPLR 3212, to dismiss the complaint. Plaintiff Jane Lence opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on January 15, 2020 in which plaintiff was allegedly injured when she tripped and fell on a step while exiting the premises located at 229 West 43rd Street in Manhattan ("the premises" or "the building"). Doc. 27. The premises consisted of a commercial condominium with common areas owned by REIT, which was an investment vehicle managed by Trust.

Plaintiff commenced the captioned action by filing a summons and complaint on June 12, 2020 and defendant joined issue by filing its answer on August 19, 2020. Docs. 1 and 4. On August 24, 2020, plaintiff filed an amended complaint alleging that she was injured when she tripped and fell at the premises on January 15, 2020. Doc. 5. She further alleged that the incident was caused by the negligent ownership, operation, management, control, and/or maintenance of the premises. Doc. 5. In their answer to the amended complaint, defendants denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 22.

In her bill of particulars, plaintiff alleged that she "was caused to fall while exiting the revolving/rotating door with a single step entrance/exit located at the defendants premises." Doc. 9. She further alleged that defendants created and/or had actual and/or constructive notice of the defect and that they violated the Americans With Disabilities Act ("the ADA") and the New York City Building Code ("the Code"). Doc. 9.

At her deposition, plaintiff testified that, on the day of the incident, she went to the premises to visit a friend who lived in the building. Doc. 29 at 16. After seeing her friend, plaintiff exited the building through a revolving door in the lobby, tripped on a step she "didn't know was there", and fell to the ground. Doc. 29 at 23-27. She estimated that the step was less than one foot from the edge of the revolving door. Doc. 29 at 24-25. Plaintiff said that there were no markings on the edge of "the unexpected step" and that no warning sign or handrail was present. Doc. 29 at 26-27.

Danielle Lombardo appeared for deposition on behalf of the defendants. Doc. 30. Lombardo testified that she was employed by Columbia Property Trust Services, Inc. ("Trust Services"), a property management division of Trust, and that Trust was a publicly traded real estate investment trust which owned, developed and managed properties. Doc. 30 at 6-8. As of

the time of her deposition in April 2021, she had been employed as the property manager of the premises, which were owned and managed by Trust and known as the New York Times Building, for about 3 ½ years. Doc. 30 at 10-13, 16. Trust provided janitorial services in all of the common areas of the building, as well as security in the lobby, and engineering, repairs and maintenance. Doc. 30 at 13-14.

The building had 4 entrances to the lobby area, all abutting West 43rd Street, and the easternmost and westernmost entrances had revolving doors. Doc. 30 at 20-21. The easternmost door east was at grade with the sidewalk. Doc. 30 at 21. The westernmost door was not at grade with the sidewalk but had a step up to account for the fact that the sidewalk was "sloped or pitched downward at [that] door", which is where plaintiff fell. Doc. 30 at 25. Lombardo estimated that the step was between 6 to 8 inches high. Doc. 30 at 26. There were no signs in the area warning of the step and the nosing of the step was not painted to alert pedestrians to an elevation differential. Doc. 30 at 35-37.

Following plaintiff's fall, Lombardo was advised by the head of security, Robert Moorehead, an employee of Mulligan Security, that an individual had fallen near the westernmost revolving door, injured her wrist, and was taken away by ambulance. Doc. 30 at 41-42. She asked Moorehead to prepare an incident report and obtain the relevant surveillance video and to provide her with the same. Doc. 30 at 42-43. Lombardo subsequently viewed the videotape of plaintiff falling on the step. Doc. 30 at 47, 61. She also reviewed an incident report reflecting that Security Officer Diane Morales witnessed the accident, although Lombardo did not recall speaking to Officer Morales about it. Doc. 30 at 50-51.

Lombardo, who was not aware of anyone else falling in the area where plaintiff fell prior to the incident, also identified a photo of the westernmost door and admitted that one side of the

step was lower than the other. Doc. 30 at 37, 51-56, 63-64.[1] She further testified that she never spoke to anyone about altering the step after the accident since she did not believe that it was a hazard. Doc. 30 at 63.

Plaintiff filed a note of issue and certificate of readiness on April 24, 2021. Doc. 19.

Defendants now move for the relief set forth above. Doc. 23. In support of their motion, they argue that the step did not constitute a defect and that, even if it did, the defect was trivial in nature and/or open and obvious. Doc. 25. Alternatively, they assert that they did not create or have actual or constructive notice of any defect. Doc. 25.

In support of the motion, defendants submit the affidavit and report of Rudi Sherbansky, P.E., F. NSPE, a licensed professional engineer, written after his inspection of the accident site. Doc. 31. Sherbansky concludes, within a reasonable degree of engineering certainty, that the step had no significant structural or design defect and that it did not violate the Code or the ADA. Doc. 31.

In opposition to the motion, plaintiff argues that defendants failed to establish their prima facie entitlement to summary judgment as a matter of law. Doc. 40. Specifically, she asserts that they failed to establish that the step was not defective, that any defect it had was trivial, and that it was open and obvious. Doc. 40. Plaintiff further maintains that, even if defendants established that the step was open and obvious, the affidavit of their expert, James Pugh, Ph.D., P.E., a licensed professional engineer, submitted in opposition to the motion, raises an issue of fact on that point. Docs. 39, 40. Pugh also opines that, even if the step did not violate the Code, it still

[1] Lombardo was not asked whether she knew of any complaints made about the step prior to the accident, whether there was a place where complaints regarding the step, or incidents involving the step prior to the time she was assigned to the building, may have been kept.

presented a hazard due to a "lack of handrails and lack of color-coding of the nosing of the single step,"[2] which was 16 ½ inches away from the "sweep" of the revolving door. Doc. 39.

In reply, defendants argue that, although plaintiff relies on cases in which injuries occurred due to "optical confusion", plaintiff herein did not say she "was unable to make out the presence of the step" but rather that she "didn't know [the step] was there." Doc. 45 at 2, 3. Further, defendants maintain that plaintiff failed to establish that they had actual and/or constructive notice that the step presented a danger. Doc. 45.

LEGAL CONCLUSIONS

A party moving for summary judgment pursuant to CPLR 3212 "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 Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

It is well settled that landowners have a duty to maintain their property in a reasonably safe condition and to warn of any hazards of which they are aware (*see Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], *citing Basso v Miller*, 40 NY2d 233, 241 [1976]). A court is not "precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not

[2] Indeed, Pugh does not even cite to any specific sections of the Code which were violated.

inherently dangerous" (*Burke v Canyon Road*, 60 AD3d at 559, *quoting Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

Whether a condition is inherently dangerous is dependent on the totality of the facts of each case (*See Powers v 31 E 31 LLC,* 123 AD3d 421, 422 [1st Dept 2014] [citation omitted]). "Some hazards, although discernible, may be hazardous because of their nature and location" (*Farrugia v 1440 Broadway Assoc.*, 157 AD3d 565, 568 [1st Dept 2018] [*citation omitted*]). "[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Schreiber v. Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1st Dept 1966], *affd.*, 19 NY2d 786 [1967]). In cases involving a single step, such as this, courts have consistently granted summary judgment to defendants where a step was marked and other factors prevented the risk of optical confusion (*See, e.g., Varon v NYC Department of Education*, 123 AD3d 810, 810-811 [2d Dept 2014] [top of riser painted red and warning sign present]; *Langer v 116 Lexington Ave., Inc.,* 92 AD3d 597 [1st Dept 2012] [reflective tape and sign warned of presence of step]; *Saretsky v 85 Kenmare Realty Corp*., 85 AD3d 89 [1st Dept 2011] [defendants denied summary judgment where no handrails or warning signs in area of step]; *Weiss v Half Hollow Hills Central School District*, 70 AD3d 932, 933 [2d Dept 2010] [riser painted yellow]; *Broodie v Gibco Enterprises, Ltd.*, 67 AD3d 418 [1st Dept 2009] [step painted black and white and warning signs present]).

Here, defendants establish their prima facie entitlement to summary judgment by submitting the affidavit of their expert, Sherbansky, who opines, within a reasonable degree of engineering certainty, that the step had no significant structural or design defect and that it did

not violate the Code or the ADA. Doc. 31.[3] Sherbansky further maintains that the step was an "obvious building component" which was "large enough not to be an optical illusion", and that "plaintiff was able to see the subject step from inside the lobby through the clear glass revolving door." Doc. 31 at par 25. Defendants also submit the deposition testimony of Lombardo, who testified that she was not aware of any other accidents occurring in the area of the step, thereby establishing, prima facie, that they did not have actual or constructive notice of any danger presented by the step. Doc. 30.[4]

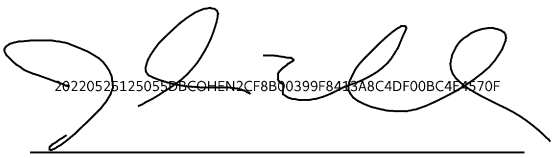
In opposition, plaintiff raises "an issue of fact of not only whether the condition was open and obvious, but also whether it was inherently dangerous" (*Farrugia v 1440 Broadway Assoc.*, 157 AD3d 565, 568 [1st Dept 2018] [citations omitted]). Despite Sherbansky's representation that plaintiff was able to see the step from the lobby[5], she actually testified at her deposition that she did not know that the step was there prior to her fall. Whether the step was less than a foot from the revolving door, as plaintiff testified, or it was 16 ½ inches away, as Pugh stated, it was very close to the revolving door and it is evident from plaintiff's testimony, and strikingly apparent from the lobby surveillance video showing the accident (Doc. 38), that one could exit through the revolving door without realizing that the step was present. Thus, plaintiff's theory of optical confusion, which arises from defendants' failure to install handrails or mark or otherwise distinguish the steps from the surrounding area, exacerbated by the proximity of the door to the step, is legally and factually sufficient to preclude summary judgment herein (See *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1st Dept 1988]). Plaintiff has clearly raised issues of fact regarding whether the step was open and obvious (i.e., readily observable by one

[3] Sherbansky does address whether he considered the step a trivial defect.
[4] Lombardo was not asked whether she or anyone else searched her company's records regarding incidents involving the step or complaints about the step predating her tenure as property manager.
[5] At her deposition, plaintiff was not asked whether she could see the step from the lobby.

employing the reasonable use of her senses) and inherently dangerous as a matter of law (*Pizzolo v Thyssenkrupp El. Corp*., 189 AD3d 560 [1st Dept 2020]; *Powers v 31 E 31 LLC* at 422).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants Columbia Property Trust Inc. and Columbia REIT-229 W. 43rd Street, LLC is denied.



5/25/2022
DATE

DAVID B. COHEN, J.S.C.

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