SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

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OLIVER CARPENTER,

Plaintiff,

- v -

LAML, LLC,210 WEST 35 LLC,THE KASH GROUP, INC.,LIVINGSTON MANAGEMENT SERVICES, LLC,450 7TH AVE. ASSOCIATES LLC,EVEREST SCAFFOLDING, INC.,UNITED CONSTRUCTION WEATHERPROOFING CO., INC.,

Defendant.

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INDEX NO. 151484/2017

MOTION DATE 12/10/2021, 11/22/2021

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 290, 293, 300, 311, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 373, 376, 377, 387, 391

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 246, 247, 248, 249, 250, 251, 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, 280, 281, 282, 283, 284, 292, 294, 301, 312, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 374, 384

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

Plaintiff Oliver Carpenter ("Plaintiff") commenced this action seeking damages for alleged negligence arising out of an incident that occurred at John Sullivan's Public House ("John Sullivan's" or "the Bar"), located at 210 West 35th Street in Manhattan. The instant summary judgment motions, Mot. Seq. Nos. 006 and 007, were brought by the building owner, 210 West 35 LLC ("210 West 35") and the Bar owner, LAML, LLC ("LAML") respectively (collectively, "Defendants"). While the motions were pending, all of Plaintiff's claims, all crossclaims, and the third-party claims alleged in three third-party actions were voluntarily discontinued. 210 West 35 and LAML are the only defendants remaining, and they each assert

crossclaims against one another. Plaintiff opposes both motions, which are consolidated for disposition.

On October 1, 2016, Plaintiff, who was in his 20s at the time of the incident, met a group of friends to watch a college football game. The group convened at around 1:00 pm at a friend's apartment, and then spent the afternoon at two bars in Manhattan before arriving at John Sullivan's just after midnight on October 2, 2016 (NYSCEF Doc No. 153, Plaintiff's EBT at 62-64; NYSCEF Doc No. 155, Security Footage). It is undisputed that Plaintiff drank beer and liquor over the course of the day, however multiple third-party witnesses testified that he only drank water at John Sullivan's. He testified that he did not remember leaving the previous bar before arriving at John Sullivan's (Plaintiff's EBT at 47).

John Sullivan's is located in a four-story walk-up building on the south side of 35th Street, one building west of Seventh Avenue. Two pairs of windows span the front face of the building on the upper floors. A fire escape runs up the front of the building outside the eastern-most pair of windows and an ornamental metal "deck" with wooden flooring, also referred to in the papers as a terrace, balcony, or platform, surrounds the fire escape and spans the width of the building to encompass both pairs of windows (NYSCEF Doc No. 158). The Bar itself operates from the first and second floors, both of which are open to patrons and connected by an interior staircase at the rear of the Bar. On the second floor, the nearly floor-to-ceiling windows are approximately 14 inches from the floor and are six-feet one-inches tall and three-feet four-inches wide (NYSCEF Doc No. 272, Pfreundschuh aff. at ¶ 12). All four windows open inward like two sets of French doors, with hinges on the outer sides and a handle on the inner sides, providing access to the deck and fire escape (Security Footage; NYSCEF Doc No. 163; NYSCEF Doc No. 278). The ornamental deck is accessible directly from the western-most

window by turning the handle, opening the door inward, taking one step up, and walking out (*id.*). The parties characterize these openings differently, with Defendants referring to them as windows and Plaintiff and some of the non-party witnesses describing them as doors. As part of Local Law 11 façade work being done on the adjacent building on the corner of 35th Street and 7th Avenue, a sidewalk bridge was installed outside that building which also extended out in front of 210 West 35th Street approximately 4 1/2 feet above the deck.

Plaintiff prepared to leave the Bar just before 12:30 am on October 2, 2016. The group was on the first floor at the time. Plaintiff testified that he "vaguely" remembered being at the Bar and "being in the process of leaving John Sullivan's because I had a soccer match the next day. I remember sort of leaving, it's not a concrete memory" (Plaintiff's EBT at 47-48). As evidenced by the Bar's surveillance footage, Plaintiff said good-bye to his friends, walked to the stairs at the rear of the Bar, and went up to the second floor. Plaintiff then passed the second-floor bar where a bartender was serving several patrons and walked to the empty dining area in the front of the building. From there, he opened the window/door on the western-most or left side, which provides access to the deck, and exited. Plaintiff walked from left to right, navigated onto the fire escape, then onto the sidewalk bridge, walked back to the left to the edge of the sidewalk bridge, and fell onto the sidewalk below (*see* Security Footage). Plaintiff testified he did not remember any of those actions and only remembers waking up in a bed at Bellevue Hospital, where he was told that he had suffered a spinal cord injury and would never walk again (Plaintiff's EBT at 75-82, 86).

Brendan Creegan, a partner at LAML, testified that patrons were not permitted on the deck or fire escape (NYSCEF Doc No. 261, Creegan EBT at 57). He stated that he had never seen anyone outside of the windows/doors and no employee had ever told him about anyone

being outside of them (*id.* at 58-60). He had been onto the deck to tidy up leaves and debris from the sidewalk bridge (*id.* 58-60). He stated he never gave his employees instructions about what to do if patrons went onto the sidewalk bridge because he never saw anyone do it (*id.* at 62). Charles Reid, who is employed by the management company for the building doing the façade work, stated that at one point after the accident the contractor complained to him that the Bar was storing chairs on the sidewalk bridge (NYSCEF Doc No. 177, Reid EBT at 17-18). He never received any other complaints or reports about people or objects being on the sidewalk bridge (*id.* at 24-25).

Michelle Moffitt, who was working as a waitress at the Bar on the night of the incident, testified that she never saw anyone go out onto the fire escape (NYSCEF Doc No. 178, Moffitt EBT at 31-35). However, Sarah Pothier, a bartender and waitress at John Sullivan's who worked the following morning, testified that she observed patrons outside on the fire escape "[f]airly often," "[m]aybe once every one to two weeks," to smoke cigarettes or talk on the phone (Pothier EBT at 36-37, 59), but never saw anyone climb onto the sidewalk bridge (*id.* at 50). Ms. Pothier said stepping outside through the window/door was not permitted, and a Bar employee would admonish patrons and tell them to come back inside (*id.* at 37-39, 47-49), however, "when I worked up there and people were outside it was extremely busy. . . . I was doing my job which was to make drinks for customers" (*id.* at 57). The Security Footage of the incident shows another individual access the fire escape in the same manner as Plaintiff had while speaking on a cellphone minutes after Plaintiff's injury.

A friend of Plaintiff's who was present that evening, Benjamin Hadley, testified that he returned to the Bar later in the morning on the date of the incident, where he viewed the Security Footage and retraced Plaintiff's steps with the Bar manager (NYSCEF Doc No. 156, Hadley

EBT at 64). He stated he remembered seeing a green fire exit sign with white lettering, either on a pane of glass or to the right of it (*id.* at 65). Mr. Creegan testified that prior to October 2, 2016, signs were put on the windows that said "Do Not Open," "because no one should be out there in the first place. In case of an emergency I suppose" (Creegan EBT at 54-56). The signs were purchased at a hardware store, one for each set of windows (*id.* at 63). He could not recall whether they were removed prior to the date of the accident and did not know why they did not appear in a photograph of the windows that was shown to him (*id.* at 55, 64-65).

Shlomo Bakhash is a member of 210 West 35 and testified on its behalf. 210 West 35 purchased the building in 1999 and had replaced the second-floor windows prior to October 2016, but never made any alterations to the ornamental deck surrounding the fire escape (NYSCEF Doc No. 180, S. Bakhash EBT at 18, 26, 30-32). Prior to 2014, a bar occupied the ground floor and a stationery company rented the second floor. LAML rented the ground floor commercial space in 2014, and 210 West 35 and LAML agreed that LAML would undertake construction to expand onto the second floor, which included building an internal staircase, constructing a second-floor bar, and updating the electrical systems (*id.* at 46-48; Creegan EBT at 17-18). It is undisputed that there were no alarms on the second-floor windows, and Mr. Bakhash testified that he never had any discussions with any tenants about installing an alarm on the windows on the second floor (S. Bakhash EBT at 40). Mr. Creegan further stated that the landlord would come in "every now and again" to access the building's gas meters and electrical systems (Creegan EBT at 101).

The architect who prepared the plans for the Bar renovations, John Bohan, identified the second-floor windows as "full-height window[s]" (NYSCEF Doc No. 165, Bohan EBT at 75-76). Mr. Bohan testified that his plans and the construction on the project complied with all

Department of Buildings codes and regulations (*id.* at 119). He used the 1968 version of the New York City Building Code when preparing the application because "[y]ou can use any code after the building was built . . . [and] I just happened to be familiar with the '68 code" (*id.* at 68-69). The code was updated in 2008, and again in 2014 after the application for this project was filed (*id.* at 69-70).

The existing Certificate of Occupancy for the second floor was issued in 1925 and was for factory use for up to 28 people. Mr. Bohan applied to amend the Certificate of Occupancy to change the use to accommodate up to 74 people (*id.* at 106-107). He stated that no Public Assembly Permit was required because such permits are only required when the use accommodates 75 or more people (*id.* at 66-68). The Department of Buildings conducted a "C of O inspection" (*id.* at 99) and a temporary construction signoff was issued on August 8, 2014 (NYSCEF Doc No. 171). It is undisputed that a "final" Certificate of Occupancy has never been issued. Mr. Bohan had no explanation for why an amended Certificate of Occupancy had not been issued (*id.* at 125). He did not know whether the Bar could operate without an amended Certificate of Occupancy (*id.* at 46, 111). Mr. Creegan stated that his understanding from Mr. Bohan was that he could operate the Bar while there was an application pending for the Certificate of Occupancy (Creegan EBT at 25).

210 West 35 retained an engineering expert, Andrew R. Yarmus, P.E., F.NSPE, who inspected the second-floor windows, exterior platform, fire escape, and sidewalk bridge, and reviewed the 1925 Certificate of Occupancy, August 8, 2014 temporary construction sign off, Security Footage, photographs, and Bill of Particulars. He annexes a printout from the Department of Buildings website which reflects that an inspection occurred on August 8, 2014 and states "signoff temp c/o" under disposition (*id.* at Exhibit C). Mr. Yarmus states that the

temporary construction sign off, which he refers to as a Temporary Certificate of Occupancy, "indicates that the work, as completed, was accepted, but that certain procedural requirements were still pending completion before the 'final' Certificate of Occupancy could be issued" and that "there is no indication that the construction and configuration of the second floor of John Sullivan's bar was in violation of any building code at the time of this accident" (NYSCEF Doc No. 185, Yarmus aff. at ¶ 12-13). He further opines: "One of the pending items before finalizing the Certificate of Occupancy was likely to obtain a Place of Public Assembly Certificate of Operation" (*id.* at ¶ 12).

Mr. Yarmus found that the step up to the fire exit was approximately 14 inches and the handle to open it "only turned 90 degrees," which in his opinion differentiated it from a door (*id.* at 17). He stated that locking or obstructing a fire exit would violate New York City Fire Code § 1027.7[1] and that labeling it "Not An Exit" "might confuse patrons away from using the fire escape during an actual fire" (*id.* at 15-17). He annexes site photographs showing that there were red exit signs on the second floor directing patrons to the interior staircase in the back of the Bar (*see also* NYSCEF Doc No. 276).

LAML also retained an engineering expert, George H. Pfreundschuh, P.E. as part of this litigation. In an affidavit annexed to LAML's moving papers, Mr. Freundschuh also determined after reviewing the documents on the New York City Department of Buildings Building Information System that a Temporary Certificate of Occupancy was issued for the project on August 8, 2014 (Pfreundschuh aff. at ¶ 10). That record, annexed as an exhibit to Mr. Pfreundschuh's affidavit, is titled "Certificate of Occupancy," includes an issue date of August 8,

[1] The New York City Fire Code was amended in 2022, as part of which the sections relevant to this decision were renumbered. The sections cited herein refer to the 2022 version of the Code, however the parties' papers refer to the 2014 version. The substance of the sections did not change.

2014, and states "Disposition: SIGNOFF TEMP C/O; Completion Date: 08/08/2014" (NYSCEF Doc No. 274). Mr. Pfreundschuh also inspected the second floor and documented the presence of Exit signs (Pfreundschuh aff.at ¶ 11).

Plaintiff also retained several experts in connection with this action. Ronny A. Livian is a New York City building code expert. He reviewed the Department of Buildings records for the property and opined that the two applications filed, one for demolition and one for construction, "have not been signed off and no Certificate of Occupancy or Temporary Certificate of Occupancy were issued" for the Bar as of October 2, 2016 (NYSCEF Doc No. 349, Livian aff., at ¶ 6). Section 28-118.3.1 of the 2014 Building Code states that no building in which the occupancy is being changed "shall be occupied or used unless and until the commissioner has issued a certificate of occupancy" (*id.* at ¶ 7). Mr. Livian further states that a Place of Assembly permit was also required as the proposed occupancy of the entire bar exceeded 75 (*see id.* at ¶ 10-12).

Stanley Fein is a professional engineer hired by Plaintiff. He reviewed the discovery produced during this litigation and opined: "It is clear that patrons used the window as a door and even the owner of the bar referred to it as a door. This is precisely the type of confusion that is addressed in the New York City Building Code" § 27-387, entitled "False Exits," and § 1027.8 of the New York City Fire Code, entitled "Nonexit door identification" (NYSCEF Doc No. 350, Fein aff., at ¶ 12). He stated that "an alarm or panic bar should have been placed on the door (window). It is apparent that admonishing people was ineffective and therefore in addition to placing graphics on the window, something more was needed to prevent people from going outside. This is a very typical and standard method in the field of building operations of alerting someone that they are about go out the wrong door" (*id.* at ¶ 13). He further opines that the plans

were misleading in depicting double-hung windows and that the Department of Buildings would have required signage if the windows were accurately represented (*id.* at ¶15).

Finally, Plaintiff hired Howard Cannon, who describes himself as an expert in "restaurant and bar industry operations, risk management, training, safety, security, policies, procedures, standards, standards of care, best practices, safety rules, hazard awareness, and management oversight" (NYSCEF Doc No. 351, Cannon aff., at ¶ 1). He concludes that LAML "departed from the industry standard of care and the reasonable and customary accepted industry standards, policies, procedures, operating practices, and safety systems" at the Bar (*id.* at ¶ 6). In his opinion, it should have been foreseeable that someone under the influence of alcohol would use the exterior deck "like a customer accessible terrace and would access that subject platform by mistakenly using the subject window like a door to go out onto the subject platform" and then be at risk of falling (*id.* at ¶ 7).

Plaintiff commenced this negligence action seeking damages for his injuries, which include suffering from paraplegia and requiring, among other things, hospitalization for nearly six months and the permanent use of a wheelchair (NYSCEF Doc No. 152, Verified Bill of Particulars, 5-6; Plaintiff EBT at 117-118). Plaintiff alleges, *inter alia*, that Defendants were negligent in permitting the second-floor windows to function as doors and in failing to install alarms or otherwise prevent patrons from accessing the deck in non-emergency situations (*id.*, Amended Verified Bill of Particulars, at ¶ 3). Plaintiff further alleges that Defendants violated New York City Building Code § 27-387 ("False Exits"), §§ 28-117.1 and 28-118.3 by operating without a Public Assembly Permit, and § 28-118.3.1 for operating without the appropriate Certificate of Occupancy (*id.* at ¶ 5). 210 West 35 and LAML each now move for summary judgment dismissing the Complaint and all crossclaims.

The proponent of a motion for summary judgment 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]). Should the movant make this showing, the burden shifts to the opponent who must then produce admissible evidentiary proof establishing that material issues of fact exist (*id.*). A court's function on summary judgment is issue finding rather than issue determination (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]). "Statutory interpretation is a question of law that should be decided by the Court" (*DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]).

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). This duty is premised on the owner's exercise of control of the property, as the person in possession and control is best able to identify and prevent harm to others (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019] [internal quotations omitted]). For that reason, an out-of-possession landlord is generally not liable for negligence with respect to the condition of property unless it is "either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structure or design defect that is contrary to a specific statutory safety provision" (*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527 [1st Dept 2017], quoting *Johnson v Urena*

Serv. Ctr., 227 AD2d 325, 326 [1st Dept 1996]). "In such case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord" (*Velazquez v Tyler Graphics*, 214 AD2d 489 [1st Dept 1995] [citations omitted]).

210 West 35 concedes it is an out-of-possession landlord with a right of reentry (NYSCEF Doc No. 149, Statement of Material Facts, ¶ 19; NYSCEF Doc No. 150, Memorandum of Law, 8) and contends that it is entitled to dismissal because Plaintiff's injury is not based on any statutory safety provision that would give rise to any liability on its part. In its moving papers, and in Plaintiff's opposition, each party relies on its expert affidavits, which come to divergent conclusions as to whether Defendants have violated building code by not posting "Not an Exit" signs on the second-floor windows/doors, and by operating without an amended Certificate of Occupancy and Public Assembly Permit. Plaintiff also argues that 210 West 35 created the dangerous condition because it installed the doors that led to Plaintiff's injury.

New York City Administrative Code § 27-387, entitled "False Exits," is contained within the "Means of Egress" subchapter of the Building Code. It provides:

> Any door, passageway, stair, or other means of communication that is not an exit or that is not a way to an exit, but is so located as to be mistaken for an exit, shall be identified with a sign reading "NOT AN EXIT", shall be identified by a sign indicating its use or purpose or shall be provided with a directional exit sign.

The section parallels § 1027.8 of the New York City Fire Code, entitled "Nonexit door identification," which states:

> Any door that is not an exit or otherwise part of the means of egress from a building, structure or premises, but which, by reason of its proximity or construction, can be confused with an exit door or other door that is part of the means of egress, shall be identified

> with an approved sign that reads "Not An Exit" and identifies the room into which the nonexit door provides access.

Taken together and in context of the Administrative Code as a whole, the Court finds that the purpose of these provisions is to facilitate a safe egress from a building during an emergency. Placing a "Not an Exit" sign on a fire exit might itself be contrary to the Codes' objectives. Accordingly, Defendants did not violate this section of the Administrative Code.

Regarding Certificates of Occupancy, New York City Administrative Code § 28-118.3.1 provides:

> No building . . . or portion thereof hereafter altered so as to change from one occupancy group to another, . . . either in whole or in part, shall be occupied or used unless and until the commissioner has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed substantially in accordance with the approved construction documents and the provisions of this code and other applicable laws and rules for the new occupancy or use.

The Department of Buildings records annexed to Defendants' papers indicate that a Temporary Certificate of Occupancy was issued on August 8, 2014 (NYSCEF Doc No. 274; Yarmus aff. at ¶ 12, Exhibit C; Pfreundschuh aff. at ¶ 10). The Court finds that the issuance of a temporary certificate of occupancy satisfies the requirements of § 28-118.3.1. The statement of Plaintiff's building code expert that "no Certificate of Occupancy or Temporary Certificate of Occupancy were issued" for the premises as of the date of the accident is unsupported by any building record, and the expert does not reconcile that conclusion with the records presented by Defendants (*see* Livian aff. at ¶ 6). Accordingly, Plaintiff fails to raise an issue regarding whether a temporary certificate of occupancy was issued.

The Court further notes that the failure to abide by a certificate of occupancy "does not establish negligence as a matter of law (*Singh v Kolcaj Realty Corp.*, 283 AD2d 350 [1st Dept 2001], *citing Shinshine Corp. v Kinney Sys.*, 173 AD2d 293, 294 [1st Dept 1991]). The same

rationale applies to the purported failure to obtain a Public Assembly Permit. Whether these purported violations were the proximate cause of Plaintiff's injuries or whether they were sufficiently remote is a question of law for the Court (*Singh*, 283 AD2d at 351 [citations omitted]). An extraordinary event that is wholly independent or far removed from a defendant's conduct, as opposed to being a natural and foreseeable consequence of a circumstance created by the defendant, may break the causal nexus for purposes of attributing liability to that defendant (*Floricic v City of New York*, 212 AD3d 434 [1st Dept 2023], citing *Hain v Jamison*, 28 NY3d 524, 529 [2016]; *Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). It is undisputed that the injury was not caused by the number of people present on the second floor of the Bar, or from any safety issue relating to capacity or overcrowding. The Court finds that the circumstances leading to Plaintiff's injuries are not a natural and foreseeable consequence of the Defendants' purported failure to obtain an amended Certificate of Occupancy and Public Assembly Permit. Therefore, even if the Court were to find that Defendants were negligent because LAML operated the Bar without these certifications, that negligence cannot be said to be the proximate cause of Plaintiff's injuries.

Finally, Plaintiff argues that 210 West 35 created the dangerous condition by installing "windows that look like doors." The existence of a dangerous condition is "a legal question for the courts to determine by analyzing the relationship of the parties, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks" (*Powers*, 24 NY3d at 94). As set forth in 210 West 35's expert affidavit, the windows, which serve as emergency exits insofar as they provide access to the fire escape, need to be well maintained and kept clear in order to comply with the New York City Fire Code. Plaintiff has not raised a code violation or other issue of fact as to whether the windows and their

signage in and of themselves are deficient in any way. Therefore, the Court finds that 210 West 35 did not create a dangerous condition by installing the windows prior to the Bar taking possession of the second floor.

For the foregoing reasons, Defendants have made a prima facie showing, and Plaintiff has failed to raise a material issue of fact, on the question of whether liability could be based on a significant structural or design defect that is contrary to a specific statutory safety provision. As that is the sole basis for attributing liability to 210 West 35, its motion for summary judgment dismissing the Complaint and LAML's crossclaims against it is granted.

As to LAML, a defendant who is in possession of a premises moving for summary judgment has the initial burden of showing that it did not create a dangerous or defective condition or did not have actual or constructive knowledge of the condition (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012]). "The existence and scope of this duty is, in the first instance, a legal question for the courts to determine by analyzing the relationship of the parties, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks" (*Powers*, 24 NY3d at 94; *see also Tagle v Jakob*, 97 NY2d 165, 168 [2001]["The scope of any such duty of care varies with the foreseeability of the possible harm"]).

LAML argues that it is not "foreseeable to LAML that a patron would mistake a window for an exit door, that he would then duck under the fire escape and hoist himself up onto the exterior sidewalk bridge and then walk back and forth and fall from that sidewalk bridge." It argues that even if LAML knew or should have known that patrons occasionally went out onto the exterior deck using the windows/doors, the subsequent acts taken by Plaintiff were unprecedented and unforeseeable. In *Powers v 31 E 31 LLC*, 24 NY3d 84 (2014), the issue

before the Court was whether it was foreseeable that a building's tenants and their guests would expose themselves to a dangerous condition, specifically an airshaft with no guard rail, located on a setback roof accessible by a hallway window, where no permission had been obtained for its use, and where the landlord denied prior knowledge of its use. The Court held that "reasonable minds could differ as to whether plaintiff's use of the roof and his resulting fall were foreseeable, thereby precluding the grant of summary judgment to defendants on that ground" (*id.* at 95).

Here, as in *Powers*, Plaintiff used a window to access an area outside of the Bar, where there was no permission to go, and where the landlord denied prior knowledge of its use. Likewise, no barrier was in place to impede access to the sidewalk bridge from the fire escape. Additionally, while the Plaintiff in *Powers* stepped through a 31-inch tall 17 1/2-inch wide window onto a roof, here Plaintiff walked through a 73-inch tall 40-inch wide fire exit that opened like a door onto a structure that party and non-party witnesses refer to as a deck, platform, balcony, or terrace. Despite some evidence that employees were aware of patrons accessing the deck and testimony that they were prohibited from doing so, Plaintiff did this in full view of an LAML employee who did not stop him from exiting. Consequently, the Court finds that reasonable minds could differ as to whether the resulting fall was reasonably foreseeable, precluding summary judgment as to LAML on this basis.

LAML further argues that Plaintiff's act of traversing the deck, navigating onto the fire escape, and then onto the sidewalk bridge was the sole proximate cause of the accident. "To establish that a plaintiff's conduct was the sole proximate cause of his or her injuries, a defendant must show that the plaintiff engaged in reckless, unforeseeable or extraordinary conduct, i.e. that the plaintiff recognized the danger and chose to disregard it" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 424 [1st Dept 2014], citing *Alvarez v Colgate Scaffolding & Equip. Corp.*, 68 AD3d 583,

584-585 [1st Dept 2009], *Brown v Metropolitan Tr. Auth.*, 281 AD2d 159 [1st Dept 2001]). The fact that Plaintiff was intoxicated does not render his actions a superseding cause (*Powers*, 123 AD3d at 423). A determination regarding proximate cause is generally an issue for the trier of fact (*Turturro v City of New York*, 28 NY3d 469, 483-484 [2016], citing *Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 315 [1980]). "With respect to questions of fact, 'the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper'" (*Singh*, 283 AD2d at 351, quoting *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 148 [1976]).

The material issues of fact bearing on the issue of foreseeability also go to the question of proximate cause. The Bar's owner and one employee, Ms. Moffitt, testified they never saw patrons exit the windows/doors, while another employee, Ms. Pothier, said she saw it happen "fairly often," and the Security Footage shows another customer exiting onto the deck to talk on the phone minutes after Plaintiff fell. Ms. Pothier further stated that customers who went outside would be admonished, but also that a busy bar would prevent her from being able to tell people to come back in. Based on the Security Footage, neither Plaintiff nor the second patron who went outside were told to come in even though the second-floor bar was not busy at the time. The Bar's owner had placed signs on the exits before October 2016, but they were not there on the night of the accident, and no other steps had been taken, such has installing alarms, to prevent patrons from exiting onto the deck. Moreover, Mr. Reid testified that Bar stored chairs outside, which might contribute to confusion as to whether the deck was usable bar space. These issues of fact require denial of LAML's motion.

Accordingly for the reasons set forth herein it is hereby:

ORDERED that the motion for summary judgment of defendant 210 West 35 LLC is granted and the complaint is dismissed against it; and it is further

ORDERED that the crossclaims against said defendant by defendant LAML, LLC are dismissed; and it is further

ORDERED that the motion for summary judgment of defendant LAML, LLC is denied and the claims and crossclaims against said defendant are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant 210 West 35 LLC dismissing the claims and crossclaims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

3/15/2023
DATE

LORI S. SATTLER, J.S.C.

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