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SCANNED ON 4/6/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF Justice PART 8

0112536/2002

REED, SCOTT
VS
PIRAN REALTY

SEQ 2

SUMMARY JUDGMENT

X NO. ____

ION DATE 1/21/05

ION SEQ. NO. ____

ION CAL. NO. 92

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1–7
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

FILED
APR 06 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 04 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
----------X

SCOTT REED,

Plaintiff,

-against-

Index No. 112536/02
Mot. Seq. No. 002

PIRAN REALTY CORP., PIRAN REALTY CORP., d/b/a TIRAN REALTY and ELAN REALTY MANAGEMENT,

Defendants.

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DIANE A. LEBEDEFF, J.:

Defendants Piran Realty Corporation ("Piran") and Elan Realty Management, move for summary judgment (CPLR 3212) dismissing the complaint, and plaintiff cross-moves for partial summary judgment on the issue of liability based on a finding of negligence *per se*.

Factual Background

On December 24, 2000, after going out for a Christmas Eve steak dinner and attending a holiday party, plaintiff Scott Reed fell backwards down the staircase in his friend's building, a four-story walk-up located at 355 First Avenue in Manhattan. Plaintiff has no personal recollection of his fall (motion, exhibit H, pp. 107-08, 112), allegedly because of brain injury caused by the fall.

As shown in photographs and described by witnesses, the stairway is about 28 inches wide, with a single hand railing on the left side, in relation to a person ascending the

steps; a storage closet built in the lobby area abuts the railing between the sixth and tenth steps, leaving no clearance for fingers (Fein affidavit, paras. 3-4; cross-motion, exhibit 2; motion, exhibit L, Kelly deposition, pp. 11, 16-22, 70). There is also evidence that the seventh step lacked a metal bull nose protector, and appeared worn (*id.*, para. 5; Kelly deposition, p. 16).

Plaintiff's friend, Barbara Kelly, testified that at the time of the accident, she was walking ahead of plaintiff on the staircase, with her face turned toward the railing (Kelly deposition, pp. 46-48). She states she saw plaintiff holding the handrail and saw his hand hit the wall, where the closet protruded against the handrail, and then heard him fall immediately after (*id.*, 48-50, 52-54). She turned and saw him lying at the bottom of the staircase, curled in the fetal position and unconscious (*id.*, 55-7). She could not state specifically where Reed's right and left feet were as the accident occurred (*id.*, 53). She also testified that she had fallen at the same location on the stairway about two years earlier, and had complained to the building manager about the condition of the seventh step and the handrail (*id.*, 17-20, 27, 52, 72).

Piran's president and manager avers that there is no history of written complaints relating to the stairway and handrail, and testified that no one had complained to him. Defendants submit medical records and evidence showing that plaintiff had consumed alcohol during the evening, and that his blood alcohol level at the hospital was elevated.[1]

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[1] Defendants' references to the taking of a prescription drug, Klonopine, are not referenced to any documents in the record, and no evidence that plaintiff took that medication on the night of the accident is in the record.

They also rely on testimony of a neighbor who said she smelt a strong odor of alcohol on plaintiff's breath after the accident (motion, exhibit L, p. 26).

In support of the cross-motion, plaintiff submits the affidavit of an engineer, who opines that the condition of the stairway and handrail was dangerous and unsafe, and in violation of applicable New York City code provisions, in that the seventh step was missing a bull nose metal edge and the handrail did not allow sufficient finger clearance (Fein affidavit, paras. 7-10; NYC Building Code §§ 27-127, 27-128, 27-375; 9 NYCRR 765.4). Plaintiff also submits the affidavit of an expert on fall accidents, who opines that plaintiff's fall is consistent with the missing bull nose protection, deteriorated tread, and the unusual absence of a portion of the handrail grasp clearance, which created a dangerous condition (Rosen affidavit, paras. 5-7).

Legal Discussion

It is well-established that to obtain summary judgment under CPLR 3212 (b), the movant must make a "tender of evidentiary proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [movant's] favor" (*Friends of Animals v. Assoc. Fur Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]). The party "opposing summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Defendants argue that they are entitled to summary judgment because plaintiff has no memory of the accident, and because his intoxication was the sole cause of his accident. They rely on factually similar cases, in which defendants were granted summary judgment

because the plaintiffs' lack of memory prevented them from establishing a non-speculative basis for concluding that the defendants' negligence proximately caused the injuries (*see Kane v. Estia Greek Restaurant, Inc.*, 4 A.D.3d 189 [1st Dept. 2004], dismissing claim of plaintiff, an intoxicated wine consultant with impaired memory, because "[e]ven if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate"; *Lynn v. Lynn*, 216 A.D.2d 194 [1st Dept. 1995], plaintiff's "failure to come forward with prima facie evidence of decedent's negligence, even though she allegedly has no memory of the facts surrounding the accident, requires that summary judgment be granted to appellant"). These cases are inapplicable here, however, because the eyewitness testimony of plaintiff's friend provides a non-speculative evidentiary basis for demonstrating a causal connection between the condition of the stair and the handrail and plaintiff's fall.

Defendants' further contention that plaintiff's intoxication was the sole cause of his fall, also is insufficient to warrant a grant of summary judgment. As a factual matter, defendants offer no evidence concerning the significance of the blood alcohol level recorded in plaintiff's medical records. In any event, the evidence of plaintiff's intoxication does not preclude a finding that the alleged defective condition of the stairway in defendants' building proximately caused plaintiff's accident, but raises issues of fact as to comparative negligence which require a trial (*see Butler v. Seitelman*, 90 N.Y.2d 987, 989 [1997], plaintiff decedent's alleged intoxication and poor judgment in taking row boat out on lake when he could not swim, "even if true, do not constitute the kind of

unforeseeable or reckless conduct that would be deemed, as a matter of law, to interrupt the causal connection between the negligence ascribed to defendants and the decedent's injury"; *Canela v. Audobon Gardens Realty Corp.*, 304 A.D.2d 702 [2d Dept. 2003], *lv. dismissed* 2 N.Y.3d 759 [2004], conduct of plaintiff tenant, in sitting on low parapet wall surrounding stair while intoxicated, was not so extraordinary or unforeseeable as to constitute a superseding cause of his accident, but was an element of comparative negligence).

Finally, defendants' claim that they lacked actual notice of the condition is factually disputed by Kelly's testimony. Moreover, defendant landlord is not entitled to summary judgment when plaintiff presents evidence of a violation of a specific statutory requirement pertaining to handrails, and defendant had a right of entry for the purposes of inspection and maintenance or repair (*Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559 [1987]; *Lopez v. 1372 Shakespeare Ave. Housing Development Fund Corp.*, 299 A.D.2d 230 [1st Dept. 2002]; *Cortes v. 1515 Williamsbridge Associates, LLC*, 295 A.D.2d 188 [1st Dept. 2002]). The instant case does not involve a transient condition, and defendants do not refute plaintiff's showing that the handrail condition was in violation of the applicable building code provision (*compare Jenkins v. New York City Housing Authority*, 11 A.D.3d 358 [1st Dept. 2004], dismissing claim absent showing of notice of transient condition, and where handrail regulation was not shown to be applicable). Accordingly, defendants' motion for summary judgment is denied.

Plaintiff's cross-motion is also denied, as evidence of a violation of the New York City Building Code is some evidence of negligence, but is not sufficient to establish

negligence *per se* (*Elliott v. City of New York*, 95 N.Y.2d 730 [2001]; *Brigandi v. Piechowicz*, 13 A.D.3d 1105 [4th Dept. 2004]).

This decision constitutes the order of the court.

Dated: April 4, 2005

J.S.C.