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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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CHARLOTTE DORSTY and RICHARD DORSTY,

INDEX NO.:014024/05

Plaintiff,

MOTION DATE:9-20-07
SUBMIT DATE:10-30-07
SEQ. NUMBER - 002

-against-

POLIMENI ORGANIZATION, LLC and SKYLINE MANAGEMENT CORP.,

Defendants

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The following papers have been read on this motion:

Notice of Motion, dated 8-30-07..... 1
Affirmation in Opposition, dated 10-16-07.....2
Reply Affirmation, dated 10-29-07.....3

This motion by the defendants pursuant to CPLR 3212 for summary judgment is granted to the extent that summary judgment is granted to defendant Polimeni Organization, LLC, and the complaint is dismissed insofar as asserted against it, and the motion is denied as to defendant Skyline Management Corp.

In this case the plaintiffs allege that on November 12, 2004 Charlotte Dorsey suffered personal injuries after she fell on a step at 600 Old Country Road, known as the Citicorp building, adjacent to the Roosevelt Field Shopping Mall in Garden City, New York. Plaintiffs' theory of causation, as stated in their bill of particulars and confirmed by the testimony of the injured plaintiff, is that as she was walking away from the building's west

side towards a parking lot, a change in elevation from the step to the level below was not properly marked, causing her to not see the step and her subsequent fall. On this motion the defendants Polimeni Organization, LLC ("Polimeni") and Skyline Management Corp. ("Skyline") assert that the step was not defective, and that the condition was open and obvious. They also assert that they had neither actual nor constructive notice of the condition. Finally, defendant Polimeni claims that it did not own, manage or control the area and owed no duty of care to the injured plaintiff.

At the outset, the plaintiffs do not oppose the motion as made on behalf of Polimeni, based upon the representation of the defendants and their attorneys that it was not the owner of the premises at issue. Accordingly, summary judgment shall be granted to this defendant. However, so much of the motion that is made on behalf of Skyline, the managing agent for the property, is opposed. References to "defendant" hereafter thus refer to Skyline alone.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66

NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

Applying these well-established standards to the case at bar, the Court finds that the defendant has made out a *prima facie* case for judgment in its favor as a matter of law. Deposition transcripts are annexed to the moving papers, with accompanying marked and identified photographs of the area taken by the plaintiff Richard Dorstry shortly after the accident. These demonstrate that there was nothing obviously defective about the step as it existed on that day, and as noted Charlotte Dorsty testified that she fell because she did not see the step, not because it was broken or otherwise in need of repair.

The examination of Paul J. Mullins, Skyline's president, revealed that he did not know who built the step, but it clearly was not this defendant. Mullins testified that to his knowledge the building was constructed in 1958, and the design of the subject area was unchanged since that time. Moreover, he stated that Skyline's responsibility as managing agent would have included repair, and he did not mention construction or design. Finally, the defendant was unaware of any other similar accidents in the area. This is sufficient to establish that the defendant did not have either constructive or actual knowledge of the defect, nor did it create it. *See, e.g., Gjonaj v Otis Elevator Co.,* 38 AD3d 384 (1st Dept. 2007); *Fischer v Westchester County,* 24 AD3d 498 (2d Dept. 2005); *Babbie v Boisvert,* 281 AD2d 845 (3d Dept. 2001). This is sufficient to shift the burden to the plaintiffs to demonstrate that issues of fact exist meriting a trial.

However, the plaintiffs have met their burden. The present the affidavit of William Marletta, Ph.D., a self-employed Certified Safety Professional of some 30 years' experience. He states that his credentials are recognized under the New York State Industrial Code. Among other things, he was the Chairman of the Standard F1637 of the American Society of Testing and Materials ("ASTM"), stated to be the authoritative national standard on single-riser steps, short-flight stairs and abrupt surface transitions. He is currently a member of contributing to Standard A1264.1 of the American National Standards Institute ("ANSI") , which is entitled "Stairs, Railings and Toeboards."

Marletta states that he performed an evaluation of the subject area, which included a review of building plans, photographs of the walkway, the depositions of the plaintiffs and of Paul Mullins, and a personal inspection of the accident site.

On his inspection he observed a 25' wide concrete walkway out of the building's west side, which extends approximately 34'9" to a single riser step that descends approximately 6 1/4" to a lower level which extends another 20'4" to a curb bordering a parking lot. He noted that both levels of the concrete look similar in color and texture, and it is difficult to visualize/differentiate between the two. He further noted that the nose at the edge of the top landing and the riser itself are now painted safety yellow, but were not at the time of the accident, as stated by Mullins at his deposition. [1] He also saw no handrails at that location.

Upon his review, he states with a reasonable degree of certainty as a certified safety professional that good and accepted design and construction practice is to avoid the use of single riser steps, as they are difficult to recognize because of the brief transition from one level to another. He explains that "the ability of the human to detect walking surface change in levels is hindered or limited by the top-view perspective of the walker, which provides a compressed view of the surfaces and, in turn, directly reduces one's ability to differentiate surfaces." He also states that the use of a single-step riser departs from applicable standards and codes, citing a section of the New York State Building Code Applicable to General Building Construction.

Perhaps most applicable to a managing agent that did not design the structure at issue, but was responsible for safe maintenance, Marletta asserts as certified safety professional that although the design itself is to be avoided, the potential hazard described above could be reduced "by the use of a combination of visual cues such as providing direct lighting sources

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[1] Defendant attacks any reference to a post-accident repair as inadmissible, but the yellow paint is mentioned here solely to clarify that it did not exist at the time of the accident, and for no other purpose.

with high illumination, handrails, contrast in surface colors, warning markings and/or adequate warning signs." He points to the absence of these additions, which can provide a strong visual clue to the change in elevation. Finally, he contends from a review of the building plans dating from 1956 that there are no plans on file indicating municipal approval for the single-step design. He concludes, in effect, that failing to address the hazard caused by the lack of visual cues constituted a violation of applicable codes and described ASTM and ANSI standards, and was a proximate cause of the accident.

The Court finds that the foregoing affidavit, which is specific in content and is based upon the expert's experience with the very type of structure at issue and upon a sufficient review of relevant factors – combined with the plaintiffs' description of how the accident occurred – is sufficient to create an issue of fact as to the presence of a dangerous condition and that it was the proximate cause of the accident. *See, Longo v Woodlawn Veterans Mut. Hous. Co.,* 225 AD2d 458 (1st Dept. 1996); *cf., Pirie v Krasinski,* 18 AD3d 848 (2d Dept. 2005). This is consistent with the general proposition that summary judgment is generally precluded where an expert establishes that the plaintiff's injuries were caused by a deviation from general industry standards. *Catapano v Long Island R.R.,* 24 AD3d 491 (2d Dept. 2005); *Connolly v Toys-R-Us,* 250 AD2d 721 (2d Dept. 1998).

Deviation from industry standards, it should be noted, does not necessarily involve a violation of any municipal or state code, as *Catapano* and *Connolly* indicate, rendering defendant's attack on alleged building code violations without sufficient force to overcome the expert's statement. Nor does the Court agree that the expert merely stated conclusions and that the affidavit should be disregarded for that reason. The affidavit also takes the case

out of those relied upon by defendant for the proposition that a defendant cannot be held liable for an injury where the condition complained of was not inherently dangerous and was open and obvious (*Cupo v Karfunkel,* 1 AD3d 48 [2d Dept. 2003]), because the expert has put in issue both parts of that exculpatory formula. Accordingly, as there is no dispute that prior to the accident the step area where the plaintiff fell was unchanged for the entire time the defendant Skyline was the managing agent of the premises, an issue is presented as to its constructive knowledge of a dangerous condition, precluding summary judgment in its favor.

This shall constitute the Decision and Order of this Court

ENTER

DATED: November 15, 2007

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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