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

PRESENT: MARTIN SHULMAN ~~J.S.C.~~ Justice PART 1

Index Number : 114598/2007
CRESPO, SAMUEL
VS.
ALDEN OWNERS, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 114598/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-J	1, 2, 3
Answering Affidavits — Exhibits A-D	4
Replying Affidavits - Exhibits A-B	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 23, 2010

MARTIN SHULMAN J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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SAMUEL CRESPO,

Plaintiff,

-against- Index No. 114598/07

THE ALDEN OWNERS, INC.,

Defendant.

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MARTIN SHULMAN, J.:

This is a personal injury action in which defendant The Alden Owners, Inc. ("Alden Owners") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiff Samuel Crespo ("Crespo") opposes the motion, arguing that there are questions of fact as to defendant's negligence which preclude summary judgment.

Crespo commenced this action to recover damages for injuries he allegedly sustained on December 19, 2006, when he was caused to trip while exiting a residential apartment building owned by defendants and located at 225 Central Park West, New York, New York (the "site" or "building"). Following the parties' exchange of discovery, plaintiff filed the note of issue. Defendant then served its summary judgment motion seeking dismissal of the complaint on the ground that plaintiff's allegations do not support any theory under which it can be held liable for damages.

According to Crespo, at the time of his accident, he was employed by Dependable Transport and Messenger Service and had come to the building at around 1:00 p.m., to deliver a package. He entered the building through a hinged door held open by a doorman. Approximately seven minutes later, he exited through the main

entrance's revolving doors, stepping with his right foot onto the juncture of the building's flat, stone entrance slab (alternately referred to as "landing", "stoop" or "step"), and the sidewalk. At his deposition, Crespo testified that it was due to the one-and-a-quarter to one-and-a-half inch height differential between the slab and the sidewalk (Crespo Deposition, at 30), that he found himself off-balance, causing him to twist his ankle and leg, but not fall. He stated that his ankle started hurting right away, but that he continued with his deliveries until approximately 5:00 - 5:30 p.m., at which time he went by taxi to the Lenox Hill Hospital emergency room in Manhattan. There, he was treated and released, and although the x-ray did not reveal a fracture, he was given crutches and a prescription for ibuprofen to help with his pain and swelling, and he was instructed to stay off of his ankle. Crespo testified that his right knee also started to hurt the next day, that he was unable to work until January 2, 2007, and that by January 16, 2007, he was suffering from pain in his back, neck and shoulder areas which he attributes to his tripping incident. Since that time, he has received more intensive medical care for these injuries and has not returned to work.

Crespo's theory of liability is that defendant was negligent in its design, installation and/or maintenance of the stoop/step outside the building and that the stoop/step was not designed, installed or maintained in accordance with applicable statutes, rules or codes. More specifically, the bill of particulars alleges that the step/stoop was broken or defective, that there was inadequate lighting, a lack of proper handrails and that defendant permitted this defective, hazardous and dangerous trap-like condition to exist at its front entrance without taking any precautionary measures

whatsoever to avoid the happening of this accident. The bill of particulars does not identify which statutes, rules, regulations or codes defendant is charged with violating.

Alden Owners denies liability on the grounds that: it had no notice, actual or constructive, that the entrance landing was in a dangerous or hazardous condition; the entrance landing meets all code and regulatory requirements and is neither broken nor defective; and there were no lighting issues involved with plaintiff's accident.

It is undisputed that the edge of the stone landing is not level with the sidewalk directly in front of the building, and for the purpose of this motion, the parties also do not dispute the injuries plaintiff allegedly sustained. Instead, the parties dispute whether there is any theory under which defendant can be held liable for Crespo's injuries.

"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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Given the allegations of negligence involving the subject entrance, Alden Owners has the initial burden of showing that there was no dangerous condition and/or that it neither created nor had actual or constructive notice of the dangerous condition that purportedly caused plaintiff's accident (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Van Steenburg v Great Atl. & Pac. Tea Co., Inc.*, 235 AD2d 1001 [3rd Dept 1997]).

To meet this burden, Alden Owners submits the deposition transcripts of Crespo and its employees, Thomas Prendergast and Gregory Majcher (together with Majcher's

sworn affidavit); copies of photos marked "defendant's A, B, A1 and B1," depicting the building's entrance, the stone slab/step and sidewalk where the accident allegedly took place; the report of a civil engineer; and copies of the New York City codes and regulations referenced in the parties' arguments and submissions.

As part of Crespo's examination before trial, inked-marks were made on the photographs (A, B, A1 and B1) indicating the precise location where he tripped. Alden Owners points out aspects of Crespo's testimony in which he acknowledges that the sun was shining at the time of his accident, that he did not report his tripping incident to the building's doormen and that the landing was only about an inch and a quarter to an inch and a half higher than the sidewalk (Crespo Deposition, at 27 - 30).

Defendant also offers the deposition transcript and sworn affidavit of Majcher, who was scheduled to work from 7:00 a.m. to 3:00 p.m. on the day of the incident, and who has worked in the building as a doorman and desk clerk for 14 years. Majcher testified that the main entrance's stone landing has not changed during the time he has worked at the building, which includes an additional two years when he worked as an elevator operator. When asked, he could not recall a tripping or stumbling event by the front entrance either on December 19, 2006 or at any other time, and he had no independent recollection of Crespo.

Alden Owners' resident manager/building superintendent, Prendergast, was also produced for a deposition in this matter. Prendergast testified that he has worked at the building for approximately five years and that he is and was, at all relevant times, responsible for the day-to-day running and maintenance of the building. He stated, among other things, that the approximately 18-inch by 24-inch landing appears to be

made of granite and is original to the building, and that the drop between it and the sidewalk ranges from two to six inches, based on the slope of the sidewalk directly in front. He testified that he never received any complaints about the exterior entrance landing prior to plaintiff's accident and that he only learned of plaintiff's accident after the building manager received a letter concerning the incident some time later. He noted that the sidewalk in front of the building was replaced in 1994.

Finally, defendant submits the sworn affidavit of Cornelius Dennis ("Dennis"), a civil engineer who, on defendant's behalf, inspected the site and researched the building's history and related New York City codes. The affidavit lists Dennis's engineering experience and qualifications, including his years of employment with the New York City Department of Buildings from September 1960 through November 1989, holding, at different times, the positions of Plan Examiner, Director of Operations, Assistant Commissioner and Deputy Commissioner of the Department of Buildings. He states that, upon his inspection of 225 Central Park West and his review of computer records of the New York City Department of Buildings, copies of the New York City Building Code and the New York State Multiple Dwelling Law as they pertain to revolving doors and the difference in elevation of the abutting sidewalk and the floor adjacent to the revolving door, it is his professional opinion that neither the construction of the entrance and stone landing, nor the height differential between the landing and the sidewalk, violates any New York City code or regulation. Dennis describes 225 Central Park West as a 15-story, penthouse and cellar, multiple dwelling, which is under the jurisdiction of the New York City Landmarks Commission. Although the building's original (1926) certificate of occupancy referenced this building as a residence hotel, it

is currently a residential apartment building with a frontage of approximately 152 feet on Central Park West and 150 feet on West 82nd Street. According to Dennis, the stone landing is level, not defective, and extends 21¾ inches from the edge of the revolving door to the edge where it abuts the sidewalk, with a 3¼-inch drop. In relevant part, his affidavit also states:

> 16. A Heretofore Erected Existing Class A Hotel (apartment house) under section 67 of the New York State Multiple Dwelling Law. Section 3.11 of the Multiple Dwelling Law allows buildings erected prior to 1969 to be altered under the provisions of the New York City Building Code enacted 1968. Therefore, the provisions under [Section 27-371m] apply to this building . . .
>
> 17. Section 1002.1 of the new building code enacted in New York City, which took partial effect on July 1st, 2008, defines a stair as a change in elevation consisting of two or more risers. The doors leading outside of this building are not subject to this building code.
>
> 18. Additionally, I was informed that the building . . . replaced the sidewalk in front of the main entrance. However, this would not change the codes that are applicable to this building as previously indicated.
>
> 19. The step at the front entrance of 225 Central Park West is not defective and is in accordance with the building codes applicable to this building. It is my professional opinion that the condition at the revolving door, specifically the step down is both lawful and safe. Therefore, this building is not in violation of any codes, statutes, or provision of the New York City Building Code or the New York State Multiple Dwelling Law.

Defendant's submissions, as referenced above, establish its entitlement to judgment as a matter of law. The burden now shifts to plaintiff to demonstrate that Alden Owners created the dangerous condition which caused his accident or had actual or constructive notice of it (*Barretta v Trump Plaza Hotel & Casino*, 278 AD2d 262, 263 [2nd Dept 2000]).

In opposition, plaintiff submits his engineer's affidavit (Nicholas Bellizzi, P.E.), along with his own sworn affidavit, deposition transcript and photographs (taken by himself and Bellizzi) of the entrance landing to support his theory that safety defects at the entrance were significant contributing causes of his accident and resulting injuries. The photographs are offered to show that: (1) the height differential is closer to four inches than his prior guestimate of "an inch and a quarter to an inch and a half in height;" (2) there were no warning "watch your step" signs by the subject entrance indicating the presence of a step just outside the revolving doors; and (3) there were no handrails or yellow painted lines on the step to indicate the change in level. Bellizzi lists these conditions in his sworn affidavit and claims that they are evidence of specific code violations at or near the entrance to the building.

Bellizzi also notes the non-uniform height of the "riser," and states that the age of the building (which he dates back to 1910) makes it subject to the 1896 New York City Building Code ("NYCBC"), which required that handrails be placed on both sides of a stairway. Bellizzi also states that, due to the 1994 sidewalk reconstruction, the building also became subject to the requirements of the1968 NYCBC, and references specific sections of the building code which he alleges to have been violated: sections 27-127, 27-128, 27-369, 27-370 (d), 27-375 (f), and 27-377. Bellizzi concludes that the subject single step down did not conform to the NYCBC minimum safety requirements, and that:

> [t]he failure to provide "Watch Your Step" signs or warnings at the single riser step down and the failure to paint the nosing of the subject step a cautionary yellow or to provide a step orientation strip or striping, the lack of handrails or any form of visual cues to identify the unexpected and unwarned of height differential made the step unsafe, dangerous, and

> hazardous and in non-compliance with good and commonly accepted safe engineering, construction, and maintenance practices in the industry.

Putting aside the fact that plaintiff did not allege any code or regulation violations in his complaint or bill of particulars, the quoted regulatory language set forth in Bellizzi's affidavit does not pertain to the building and/or entrance at issue. Rather, the quoted language is from the New York City Consolidation Act, 1892, at section 500, which pertains only to "Theatres, construction of."

Sections 27-127 and 27-128 of the 1968 NYCBC require owners to maintain buildings in a safe condition. However, the remaining 1968 NYCBC code regulations Bellizzi cites do not pertain to the location of plaintiff's accident. Section 27-375 (f) mandates handrails on one or both sides depending on the width of the stairs involved; section 27-370 (d) pertains to exit passageways and provides that changes in levels of less than two risers require a ramp in compliance with section 27-377; and section 27-369 pertains to corridors and likewise provides that changes in level of less than two risers requires use of a ramp in compliance with section 27-377.

However, upon review of the above-referenced codes and the parties' submissions, especially Crespo's own deposition, sworn affidavit and photographs, there is no basis for referring to the stone landing as a step or riser, rendering the cited sections irrelevant. These sections provide regulatory guidelines for steps with risers ranging between 7 and 8¼ inches (NYCBC § 27-375, as referenced in sections 27-369, 370 and 377). Despite plaintiff's attempt to depict the entrance with a height differential between the landing and the sidewalk as a poorly designed staircase or step (with a riser) in order to bring it within the purview of the building code sections cited, it is not.

Regardless of whether the actual height differential is closer to the four inches measured by Bellizzi than the inch-and-a-quarter to an inch-and-a-half measurement suggested by Crespo at his deposition, the relatively minor change in level between the entrance landing and the sidewalk does not rise to that contemplated under the cited guidelines for stairs, handrails or the use of ramps. Therefore, because there is an absence of regulatory violation, liability can only be premised on the existence of a dangerous or defective condition of which defendant had actual or constructive notice.

Having testified at his deposition that neither the lighting (sunny) nor the weather (no rain or snow) were factors in his accident, plaintiff asserts that defendant should not be relieved from liability because the stone landing was defective and unlevel. However, plaintiff's own photographs reveal a flat, stone landing, which is level with the building's entrance and which directly abuts the sidewalk. His deposition testimony does not describe it as otherwise and his attempt, in his affidavit in response to the motion, to show that it was somehow defective because it was made level with the building instead of sloping along with the topography of the sidewalk, and suffers from erosion, is meritless and appears to be tailored to refute defendant's evidence.

The photographs are consistent in their depiction of a landing constructed of flat stone abutting a sidewalk in accordance with the gradual sloped topography along the building frontage. It is well settled that "[n]ot every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). There is no evidence that the minor height differential between the building entrance and the sidewalk constitutes a trap (*see Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996]) or that a reasonable individual would anticipate

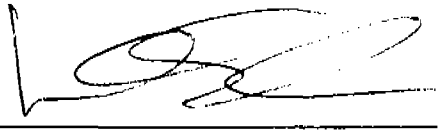
that it would cause danger to pedestrians (*Fleming v Fifth Ave. Coach Lines, Inc.*, 23 AD2d 726 [1st Dept], *app. den.* 16 NY2d 485 [1965]).

Finally, to the extent that plaintiff reads Majcher's testimony as acknowledging prior slip and fall accidents involving the subject entrance, plaintiff is mistaken. Plaintiff offers selected portions of doorman Majcher's testimony. However, the full text of his examination before trial confirms that Majcher was able to recall people, chiefly elderly tenants, tripping inside the lobby, and that he had no recollection of anyone tripping at the entrance either coming in or going out. In the absence of proof of a statutory violation, actual or constructive notice of a defective condition, or even the existence of a defective and dangerous condition, plaintiff has failed to raise a question of fact sufficient to overcome defendant's entitlement to summary judgment dismissing the complaint. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 23, 2010



Martin Shulman, J.S.C.