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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 100614/2008
LANGER, BIANCA
vs
116 LEXINGTON AVENUE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/1/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-9

Cross-Motion: ☐ Yes ☒ No

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

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/10

JANE S. SOLOMON 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

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BIANCA LANGER and HARRY LANGER,

Plaintiffs,

-against-

116 LEXINGTON AVE, INC., LA PETITE AUBERGE, INC., MARCEL GUELAFF and RAYMOND AUFFRET,

Defendants.

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DECISION and ORDER

Index No.: 100614/08

JANE S. SOLOMON, J.:

Defendants move for summary judgment dismissing the complaint in this action to recover for personal injury. Defendant 116 Lexington Ave, Inc. (116 Lexington) owns the building where the accident occurred. Defendant La Petite Auberge, Inc. (LPB) is the tenant, and operates a restaurant at the premises. Defendants Marcel Guelaff (Guelaff) and Raymond Auffret (Auffret) are shareholders in 116 Lexington and LPB, and are LPB employees as well. Plaintiffs oppose the motion, which is decided as follows.

On November 10, 2007, plaintiff Biana Langer (Langer) was a patron at La Petite Auberge. She and her husband, plaintiff Harry Langer, were there to attend a private function in a banquet room on the second floor. To get there, they walked down a hallway toward a door that

opened into the banquet room, where there was a single step down. Both the hallway and banquet room have oak hardwood floors. At the entrance to the banquet room, the hallway floor is marked with four parallel strips of reflective tape, each a little longer than the one before it, with the longest strip of reflective tape close to (and paralleling) the edge of the step. Photographs of the location show a hand-written sign next to the banquet room entrance that says "Step Down", which faces anyone walking toward the banquet room. Auffret testified at his deposition that the sign was there on the day of the accident (Auffret EBT, Notice of Motion, Ex. F), and that restaurant employees always warned patrons verbally about the step. He claims that he gave plaintiffs directions to the banquet room just before the accident, and said "please be careful, there is a tiny step to the dining room" (*id.*, at 70-71).

Plaintiffs, who are husband and wife, were walking together down the hallway toward the banquet room. Langer noticed a bartender in the banquet room, and was looking toward him when she stepped into the room. She stumbled, fell, and suffered a serious injury. Plaintiffs do not remember being warned of the step, or seeing either the "Step Down" sign or the reflective tape.

The restaurant was built to its present configuration in 1979. Defendants claim that there has not been any other tripping accident over the step in question.

Defendants contend that the complaint should be dismissed because there is no evidence of a failure to exercise due care. They argue that the condition was open and obvious, and that Langer was warned of the potential hazard, both verbally and in writing.

In opposition, plaintiffs argue that a stair case comprised of just a single step is unreasonably hazardous, and is in violation of Title 27 of the Administrative Code of the City of New York (hereinafter referred to as the Building Code) section 27-375(d). Plaintiffs maintain that section 27-375(d) was in effect when the premises were renovated in 1979, so the owner and tenant were required to have built the banquet room entrance in accordance with it. Plaintiffs submit the affidavit of an engineering expert, who states that the single step condition is in violation of section 27-375(d), and also in violation of Building Code section 27-375(f), which mandates hand rails on certain interior stairs, and Building Code section 27-370, entitled "Exit Passageways", which states that changes in level in an exit requiring less than two risers shall be by ramp (Aff.

of Richard G. Berkenfeld, PE, 4). He further opines that placement of a single step is inherently dangerous and contrary to prevailing building standards, and that the placement of strips of reflective tape is not sufficient warning of a hazard (*id.*, at 6-7). Therefore, plaintiffs argue, summary judgment dismissing the complaint should be denied. Defendants submit the affidavit of their own expert, with predictably contrary opinions, including the opinion that the step was code compliant (Aff. of Jeffrey J. Schwalje).

DISCUSSION

A landowner has the duty to maintain its property in a reasonably safe condition, and to warn of latent hazards of which it is aware (*Basso v Miller*, 40 NY2d 233, 241 [1976]). In this case, defendants have shown that the condition plaintiffs' complain of was not a latent defect, and there was a warning.

Plaintiffs argue that courts have long held that a single step is an inherently dangerous condition, citing *Roux v Caiola*, 254 AD2d 182 (1st Dept 1998), and other decisions. Plaintiffs' reliance on these decisions is misplaced, because they do not hold that a single step is an

inherently dangerous condition. In *Roux*, the issue was whether plaintiff's expert had usurped the function of the trial court by referring to the Multiple Dwelling Law and Building Code in offering *his expert opinion* that a single step stair is inherently dangerous (254 AD2d at 183). The other decisions relied upon refer to a property owner's potential liability arising from an accident involving a single step stair, but in the context of whether the hazard was open and obvious, or if poor lighting or other factors caused the condition to be latent, thereby triggering a duty to warn (*see Roros v Oliva*, 54 AD3d 398 [2d Dept. 2008]. *Kempter v Horton*, 33 AD3d 868 [2d Dept 2006], and *Powers v St Bernadette's Roman Catholic Church*, 309 AD2d 1219 [4th Dept. 2003]).

Therefore, to avoid summary judgment, plaintiffs must establish that there is a triable issue of fact as to the existence of a latent defect, and if one exists, that defendants unreasonably failed to provide adequate warning. Plaintiffs cannot meet this burden because there is no evidence to rebut defendants' showing that the defect was not latent. There is evidence that lighting was adequate, and that the top of the step was clearly marked with strips of reflective tape to create a contrast with the floor below

the step. Moreover, defendants warned Langer of the hazard presented by the step. Even if there is a question of fact as to whether Auffret gave a verbal warning, there is no dispute that a written warning was posted on the wall next to the step, facing Langer as she walked toward down the hallway. That the offending condition existed for more than twenty-seven years, in continual use, and that defendants were not aware of any other accidents, is further evidence that the condition was open and obvious (*see, Burke v Canyon Road Restaurant*, 60 AD3d 558, 559 [1st Dept 2009]).

Where a plaintiff's injury is causally related to a violation of a specific code violation, the code violation is evidence of negligence, and summary judgment dismissing a negligence claim is not appropriate (*see, Elliot v City of NY*, 95 NY2d 730, 734 [2001]).

The opinion expressed by plaintiffs' expert that the presence of a single step riser is in violation of the Building Code is mistaken. Building Code section 27-375 is titled "Interior Stairs". Building Code section 27-232 defines "Interior Stairs" as "[a] stair within a building, that serves as a required exit"; "Required" is defined as "required by a provision of this code."

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Plaintiffs provide no evidence that the step in question was a required exit within the meaning of the Building Code (see, *Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010]). Not all indoor stairs are "Interior Stairs" within the meaning of the Building Code (*Id.*, and see *Schwartz v Hersh*, 50 AD3d 1011 [2d Dept 2008]). Likewise, the opinion from plaintiffs' expert that the lack of a hand rail on this "interior stair" was a violation of Building Code section 27-375(f) is without merit (*Remes, supra*). Plaintiffs also are mistaken in contending that Building Code section 27-370 applies, because there is no evidence that Langer fell in an "Exit Passageway", which is defined as "A horizontal extension of a vertical exit,[1] or a passage leading from a yard or court to an open exterior space" (Building Code section 27-232).

Finally, plaintiffs do not oppose that branch of the motion seeking dismissal of the complaint as against the individual defendants.

Accordingly, it hereby is

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[1] "Vertical Exit" is a stair, ramp or escalator serving as an exit from one or more floors above or below the street floor. (Building Code section 232).

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: August 3, 2010

ENTER:

J.S.C.

JANE A. SOLOMON

FILED

AUG 05 2010

NEW YORK
COUNTY CLERK'S OFFICE