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SCANNED ON 10/21/2010

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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 112910/2007
MCCARTHY, CAROLE
VS.
GREAT JONES CURRENT
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

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

FILED

OCT 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 15, 2010

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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CAROLE McCARTHY,

Plaintiff,

-against-

Index No. 112910/2007

GREAT JONES CURRENT PROJECT, INC., MICHAEL CONNORS, and CAROLE FERRARA ASSOCIATES INC., d/b/a CFA MANAGEMENT,

Defendants.

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Joan A. Madden, J.:

Defendants Great Jones Current Project, Inc. and Carole Ferrara Associates Inc., d/b/a CFA Management (CFA), move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint and the cross claims asserted against them. Defendant Michael Connors cross-moves for an order granting summary judgment and dismissing all claims and cross claims asserted against him.

In this premises liability action, plaintiff Carole McCarthy alleges that she sustained personal injury on June 16, 2007, at approximately 1:00 a.m., while visiting defendant Michael Connors at his art gallery. The unit comprises the first floor and storage mezzanine of a seven-story mixed-use building located at 39 Great Jones Street in Manhattan. Connors is the owner of the cooperative shares appurtenant to the unit, pursuant to a proprietary lease with Great Jones, the cooperative corporation which owns the building. CFA had been hired in 2001 by Great Jones to manage the building.

McCarthy alleges that the accident occurred while she was on the mezzanine storage loft

overlooking the main floor of the unit, which had been converted by Connors into a sleeping loft approximately 11 years earlier. She alleges that the loft was dimly lit, and that she was kneeling next to a bed abutting an interior knee wall, 21 inches in height, with shutters installed on top. She further alleges that, believing the wall behind her to be solid to the ceiling, she leaned back, and then fell backwards, over the knee wall and through the shutters, down to the main floor, a distance of approximately 10 feet. Connors had previously installed louvered shutters opening out on the top of the knee wall. McCarthy alleges that, at the time of the accident, the shutters were closed, but not latched, and offered no protection from a fall.

McCarthy joined Connors, Great Jones, and CFA, on allegations that they negligently created, or permitted to continue to exist, a defective, dangerous, trap-like condition, and failed to provide a guardrail, handrail, or legal parapet wall that would have protected her from the fall. McCarthy also alleges the defendants' conduct constitutes violations of the statutes, ordinances, rules and regulations applicable to building and multiple dwellings in New York City.

Great Jones, CFA, and Connors now seek summary judgment dismissing the common-law negligence claims on the ground that the location where McCarthy fell presented an open and obvious, and not inherently dangerous, condition, as a matter of law.

In opposition, McCarthy contends that the undisputed record demonstrates that the accident would not have happened, but for Connors' illegal conversion of the legal storage mezzanine into an unprotected sleeping space, in violation of applicable statutes, Building Code sections, and the certificate of occupancy, and that Great Jones and CFA had actual or constructive notice of the hazard for 11 years prior to the accident.

The possessor or owner of real property bears a duty at common law to maintain the

property in a reasonably safe condition, and may be held liable for injuries caused by a dangerous condition on the property, if the owner or possessor created, or had actual or constructive notice of, the hazard (*Trujillo v Riverbay Corp.*, 153 AD2d 793, 795 [1st Dept 1989]). "A defendant seeking summary judgment dismissing the complaint based upon lack of notice must make a prima facie showing affirmatively establishing the absence of notice as a matter of law" (*Carrillo v PM Realty Group*, 16 AD3d 611, 612 [2d Dept 2005]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Plantamura v Penske Truck Leasing*, 246 AD2d 347, 347-348 [1st Dept 1998]).

The parties have raised numerous triable issues of fact regarding whether the 21-inch knee wall and shutters constitute a dangerous and defective condition and violate applicable statues, rules, and regulations. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends upon the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotations marks and citation omitted]; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]). Where genuine triable issues of material fact or triable issues requiring credibility determinations exist, summary judgment is not appropriate (*Andre v Pomeroy*, 35 NY2d 361, 364-365 [1974]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

The architectural plans for the building's conversion from commercial to joint living/working quarters for artists were prepared in 1983 by John Furth Peachy, a licensed

architect, and were approved by the Buildings Department on December 3, 1990. Peachy testified at deposition that the mezzanine area from which McCarthy fell is characterized on the plans as a storage loft, and is not designed for use as sleeping quarters because the ceiling height of that area is too low for such use (*see* John Furth Peachy Jan. 8, 2010 Dep Tr, at 21-22).

The Buildings Department issued the certificate of occupancy for the building on July 10, 1992, prior to Connors' purchase of the shares appurtenant to the first floor unit in October 1996. The certificate of occupancy specifies that the permissible use of the first floor is as an artist's studio. Connors contends that, after purchasing the unit, he made no structural changes to the knee wall over which McCarthy fell, and that he made certain merely cosmetic, decorative changes, including installing shutters directly above the knee wall sill, lattice work, and mirrors, and maintaining a custom designed bed in the loft (*see* Michael Connors Mar. 27, 2009 Dep Tr, at 44, 45, 49-51, 55, 58, 65, 66). From this evidence, the trier of fact may infer that, at the time of the accident, the knee wall complied with the applicable statutes and building codes.

However, the record also includes evidence that the knee wall violated applicable codes and the certificate of occupancy, and was inherently dangerous. McCarthy's expert witness, licensed architect Herbert E. Weber, Jr., after review of the plans and certificate of occupancy and inspection of Connors' unit, affirms that the legal storage mezzanine, accessible by a flat-tread ladder, had been illegally converted into a dangerous and unsafe sleeping loft accessed by an illegal staircase (*see* Herbert E. Weber Jr. May 7, 2010 Aff., ¶¶ 2-4, 6). He further affirms that these modifications are in violation of MDL § 277 (7) (d), New York City Department of Buildings Technical Policy and Procedure Notice number 9/93, Building Code § 27-558 (b), and the building certificate of occupancy (*see id.*, ¶¶ 2-4, 6). Weber also affirms that industry

standards require the installation of a 36- or 42-inch high safety railing or parapet wall in a raised living space, such as a sleeping loft, in order to prevent the type of accident that occurred here, and that the 21-inch knee wall over which McCarthy fell is a departure from these standards (*see id.*, ¶¶ 4, 7).

Contrary to defendants' contention, McCarthy's service of a notice identifying Weber as an expert witness after the filing of the note of issue and certificate of readiness, and use of the expert's affidavit in opposing the summary judgment motion are not barred by CPLR 3101 (d). The section was enacted to provide timely disclosure of expert witness information between the parties for the purpose of adequate and thorough trial preparation (*Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788, 788 [3d Dept 2002]; *see* CPLR 3101 [d]). The section "does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Cutsogeorge v Hertz Corp.*, 264 AD2d 752, 753-754 [2d Dept 1999] [internal quotation marks and citation omitted]; *Shopsin v Siben & Siben*, 289 AD2d 220, 221 [2d Dept 2001]; *see* CPLR 3101 [d]). There is no evidence in the record that suggests that McCarthy acted intentionally or willfully in failing to earlier disclose Weber as an expert, or that defendants would suffer undue prejudice by the court's consideration of Weber's affidavit at this juncture. Under these circumstances, the court will not preclude McCarthy from submitting the Weber affidavit.

The parties have also raised numerous triable issues sufficient to preclude summary judgment in favor of Great Jones, despite its status as an out-of-possession landlord. When an

out-of-possession landlord retains the right to enter, inspect, and repair, the landlord may be held liable for all defects which are in violation of a statutory obligation and for all defects of which the landlord has actual or constructive notice (*Federal Ins. Co. v Evans Constr. of N. Y. Corp.*, 257 AD2d 508, 509 [1st Dept 1999]).

The exemplar proprietary lease submitted by Great Jones in lieu of Connors' lease demonstrates that Great Jones retained a right of reentry sufficient to expose Great Jones to liability for McCarthy's accident, which occurred in Connors' unit. The lease expressly accords Great Jones and its agents the right of re-entry "to visit, examine, or enter the apartment and any storage space assigned to Lessee at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the building or to cure any default by Lessee and to remove such portions of the walls, floors and ceilings of the apartment and storage space as may be required for any such purpose" (Great Jones Proprietary Lease, Art. 25).

With respect to the alleged statutory violations, McCarthy relies on Administrative Code of the City of New York [Administrative Code] §§ 27-127, 27-128, and 27-558 (b) and Multiple Dwelling Law [MDL] §§ 277 (7) (d), cited in McCarthy's second amended bill of particulars, and MDL § 78.[1]

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[1]Contrary to defendants' contentions, McCarthy's admitted failure to specifically plead MDL § 78 in the bill of particulars does not bar McCarthy from pleading the section at this juncture. McCarthy has pleaded similar statutes, such as Administrative Code §§ 27-127, 27-128, and generally pleaded that defendants were negligent in "violating statutes, ordinances, rules and regulations applicable to buildings and multiple dwellings in the City and State of New York" (McCarthy Verified Bill of Particulars, ¶ 8). Therefore, defendants can suffer no undue prejudice by her pleading of the section now (*see Santiago v New York City Hous. Auth.*, 268 AD2d 203, 204 [1st Dept 2000]).

Former sections 27-127 and 27-128 of the Administrative Code, in effect on the date of the accident, "'which merely require that the owner of a building maintain and be responsible for its safe condition, do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code'" (*Hinton v City of New York*, 73 AD3d 407, 408 [1st Dept 2010], quoting *Plung v Cohen*, 250 AD2d 430, 431 [1st Dept 1998]). However, in this case, McCarthy alleges violations of MDL § 277 (7) (d) and Administrative Code § 27-558 (b), which may be applicable here, if it can be shown the storage loft had indeed been converted into living quarters, and that the accident was caused in whole or in part by the failure of the living quarters to comply with these sections. In addition, section 78 of the MDL imposes upon owners of multiple dwellings a duty to keep the premises in good repair (*Carcana v New York City Hous. Auth.*, 26 Misc 3d 1238[A], 2010 NY Slip Op 50460[U], *4 [Sup Ct, NY County 2010]). "The owner's liability under this statute is nondelegable, although the owner may in turn look to a party with whom it contracted for the maintenance of the premises" (*Bonifacio v 910-930 S. Blvd. LLC*, 295 AD2d 86, 88 [1st Dept 2002]; *Carlos v 395 E. 151st St., LLC*, 41 AD3d 193, 195 [1st Dept 2007]).

Weber affirms that the unprotected sleeping loft from where McCarthy fell could only have been legally used as storage mezzanine, with access by a removable ship's ladder, rolling stair, or disappearing stair, because it lacked the minimum headroom required for living areas in a joint living – work quarters for artists (*see* Weber Aff., ¶¶ 2-4, 6, citing MDL § 277 [7] [d] ["(n)o interior floor area enlargement shall be permitted except that a mezzanine with a minimum head-room of seven feet shall be allowed within individual dwelling units"]; Buildings Dept.

Technical Policy & Procedure Notice No. 9/93; Building Certificate of Occupancy). Weber further affirms that architecture industry standards require the installation of a 36- or 42-inch high safety railing or parapet wall in a raised living space, in order to prevent the type of accident that occurred here, and that the 21-inch knee wall over which McCarthy fell is a departure from these standards (*see id.*, ¶¶ 4, 7).

Weber also affirms that the unlatched louvered shutters atop the knee wall could not serve as a substitute for the railing or parapet mandated by Administrative Code § 27-558 (b) (*see* Weber Aff., ¶ 4; Administrative Code § 27-558 [b] [railings and parapets must "be designed to resist the simultaneous application of a lateral force of forty plf and a vertical load of fifty plf"]).

Great Jones and CFA next seek summary judgment in favor of CFA on the ground that the record conclusively demonstrates that it did not have complete and exclusive control over the premises.

In opposition, McCarthy contends that CFA may be held liable on the ground that, as managing agent, it had the unfettered right to repair any unsafe conditions at the premises.

McCarthy's claims against CFA rest solely on its capacity as the building managing agent hired by Great Jones. There is no contract between CFA and McCarthy. Generally, a contractual obligation, without more, does not operate to impose a tort duty of care in favor of a third-party, such as McCarthy (*Stiver v Good & & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]). However, where the contracting party has entirely displaced the owner's duty to maintain the premises in a safe condition, the party may be found liable (*Church v Callanan Indus., Inc.*, 99 NY2d 104, 112 [2002]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

A managing agent is liable for injuries resulting from its failure to undertake repairs that are within the scope of its automatic authority and its contractual obligations (*Tushaj v Elm Mgt. Assoc., Inc.*, 293 AD2d 44, 47 [1st Dept 2002]). Here, the managing agent agreement between CFA and Great Jones provides, in relevant part, that CFA may make ordinary repairs or alterations involving an expenditure of less than $1,000 and accords CFA the broad authority to make emergency repairs "necessary for the preservation or safety of the building or for the safety of the unit owners, tenant-shareholders, or other persons . . . irrespective of the cost thereof, without prior approval of the Owner" (Great Jones/CFA May 15, 2001 Managing Agent Agr. ¶ Second [b]). The agreement further authorizes CFA, "for the Owner's account and on its behalf, to perform any act or do anything necessary or desirable to carry out [CFA's] agreements contained in Article SECOND hereof" (*id.*, ¶ Third [emphasis in original]). Thus, in clear and unambiguous terms, the managing agent agreement accords CFA the authority and obligation to cure the alleged hazard.

Next, the parties have raised triable issues regarding whether Great Jones and CFA had notice, either actual or constructive, of Connors' modification of the loft into living quarters and the hazard allegedly posed by the knee wall.

As discussed above, the loft, bordered by the knee wall, was originally designed for storage, and both the loft and knee wall complied with the applicable Building Code sections, as demonstrated by the Buildings Department's issuance of the certificate of occupancy. There is no dispute that, at all times, the loft area was legally accessible by individuals, regardless of whether it had been converted into sleeping quarters or remained a storage space. Connors acknowledges that, in connection with the 1996 modifications, he did not give formal notice, nor did he seek or

obtain formal approval, from Great Jones (*see* Connors Dep Tr, at 43). However, he also testified that he was a Great Jones board member and vice president, and that "I was the co-op. I mean, we were all co-op members and as I said, when this discussion started – this questioning started, other co-op members were coming through watching the progress and complimenting me on what I was able to do to the loft" (*id.* at 148). Connors testified that "I believe all three board members came down at various times and complimented me on what I was doing" (*id.* at 47).

The record also includes evidence that representatives of Great Jones and CFA had been in the unit on numerous occasions during the 1996 conversion and in the 11 years after its completion, until the date of the accident. Connors testified that all unit owners were "constantly coming in and out" for receptions, to retrieve packages, and to access the rear garden (*id.* at 79-80). He further testified that all board members and officers inspected his unit in 2005, following a flood that caused substantial damage to his unit, including damage to the ceiling of the loft area (*see id.* at 101).

He testified that Carole Ferrara, a non voting Great Jones second vice-president and CFA's president, observed the flood damage and that "she was probably up in my loft more than anyone else," following the flood (*see id.* at 102, 158). Connors testified that Loring McAlpin, Great Jones' vice president, inspected the unit, following the flood (*see id.* at 101). Whether an out-of-possession landlord had constructive notice of a dangerous condition as the result of the presence of the landlord's representatives near the condition on numerous occasions presents triable issues of fact for the jury (*Davis v HHS Props. Corp.*, 257 AD2d 500, 501-502 [1st Dept 1999]; *Webb v Audi*, 208 AD2d 1122, 1123 [3d Dept 1994]). Triable issues exist regarding whether the presence of the shutters is sufficient to place Great Jones and CFA on notice that

there was any risk of harm posed by the shutters or the opening.

Accordingly, it is

ORDERED that the motion and cross motion are denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on November 4, 2010 at 3:00 pm, in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: October 15, 2010

ENTER:

J.S.C.