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

PRESENT: HON. PAUL WOOTEN Justice PART 7

EFRAIN SOTO and DELIA SOTO,

Plaintiffs,

- against-

FALCON RESTORATION LIMITED PARTNERSHIP,

Defendant.

INDEX NO. 116590/07

MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion by defendant Falcon Restoration Limited Partnership for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4, 5

Cross-Motion: ☐ Yes ■ No

This is a personal injury action brought by Efrain Soto (Soto) and his wife Delia Soto (collectively, plaintiffs) against Falcon Restoration Limited Partnership (defendant) to recover damages for injuries Soto allegedly sustained when he tripped and fell on the raised portion of a cellar hatch on the sidewalk along 120th Street, which is parallel to the front staircase located at 400 East 120th Street, New York, New York (the premises). Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that: (1) the configuration of the raised cellar door hatch is in compliance with the applicable codes and standards; and (2) Soto's trip and fall on the raised cellar door hatch was not due to a defective condition. Plaintiffs have responded in opposition to the motion, and defendant has filed a reply. The parties have completed discovery and the Note of Issue has been filed.

BACKGROUND

Defendant is the owner of the premises, and El Barrios Operation Fightback (El Barrios), a non-party to this action, was the not-for-profit management and development corporation that managed the premises. According to defendant, in 1992 a partnership was

formed between defendant, The City of New York, Enterprise Community Partners, and The Department of Housing Preservation and Development (HPD) to develop, among other locations, the premises for the purpose of providing low income housing under the rules of Section 8 of the New York Housing Authority. The development of the premises, according to defendant, included an interior gut and renovation and limited minor restoration to its facade, which included a new door and a repair of the front staircase steps. The facade of the premises' building exterior and its appurtenances, including the raised cellar hatch, were to remain in their original configuration.

On April 19, 2007 at about 4:00 p.m., Soto purportedly tripped and fell over raised exterior cellar doors as he was walking on the sidewalk of 120th Street, in front of the premises, between Pleasant Avenue and First Avenue, allegedly resulting in physical injuries. Soto was shown photographs at his deposition depicting the vicinity where the accident occurred and he identified the raised basement doors that he tripped on. He testified that as he was walking along the sidewalk on 120th Street and when he heard someone calling out to him saying "Pss, pss", he stopped walking and turned his upper body and his right leg to look in the direction of the person calling out (Notice of Motion, Plaintiff's EBT, exhibit C at 34-35, 43-44, 53). When Soto stopped he was standing next to the basement doors that he allegedly tripped on (*id.* at 50). Once Soto turned back around to continue walking, his right foot hit the raised area of the cellar doors, which after that, he states, "I just flew ... [and] I land[ed] right on top of the basement door with my foot " (*id.* at 54, 55). He testified that he tripped on the bottom portion of the raised cellar doors (*id.* at 56). Subsequently, on or about December 11, 2007 plaintiffs instituted this action asserting causes of action for negligence, violations of the New York City Administrative Code, and loss of consortium. Issue was joined on or about May 2, 2008 when defendant interposed its answer.

In support of its summary judgment motion, defendant submits, *inter alia*, depositions of

Soto and John Arenes (Mr. Arenes), the Executive Deputy Director in charge of operations for El Barrios; photographs of the accident location; its expert witness disclosure; and an affidavit of Michael J. Drerup, P.E. (Mr. Drerup), a professional engineer retained by defendant. Plaintiff submits in opposition, *inter alia*, an affidavit of William Marletta, Ph.D., CSP (Dr. Marletta), a safety consultant, as well as Dr. Marletta's CV.

Mr. Arenes testified at his deposition that he was in charge of receiving and resolving any building violations for the premises, and that there was never a violation issued regarding the exterior facade of the building, including the raised cellar hatch (Notice of Motion at ¶ 19; exhibit D at p. 9). Mr. Drerup opines in his affidavit that the platform front entrance staircase and cellar hatch located at the premises is not in violation of any applicable code or standard, contrary to the allegations made in plaintiffs' bill of particulars or by their expert Dr. Marletta (exhibit H). Mr. Drerup further concludes, after reviewing New York City Building Code (NYCBC) Article 3 § C26-102.1, 27-111, that the renovated premises did not meet any criteria to trigger any section or subsection of the New York City Building Code Article 3 (*id.* at ¶ 6, 7). Mr. Drereup asserts after a review of the 1935 Certificate of Occupancy, in conjunction with the then existing building codes during the1992 renovation project of the premises, that the raised cellar hatch configuration was designed and constructed in accordance with the then existing building codes and standards (*id.* at ¶ 20; exhibit H). Further, pursuant to 27-111 of the NYCBC[1], Mr. Drereup opines that the building was grandfathered and allowed to continue to remain in compliance with the NYCBC in existence at the time the building was constructed, and the building codes in effect after December 1968 are not applicable.

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[1] Section 27-111 of the NYCBC states, "[t]he lawful occupancy and use of any building, including the use of any service equipment therein, existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements, as provided in section 27-105 of article one of this subchapter may be continued unless a retroactive change is specifically required by the provisions of this code."

In opposition, plaintiffs aver that this motion should be denied as defendant has failed to meet its burden pursuant to CPLR 3212, as triable issues of fact exist that preclude summary judgment. Specifically, plaintiffs point to the deposition of Mr. Arenes wherein he describes the 1992 renovation of the premises, which is a five story walk-up consisting of about ten residential apartments, as a mostly interior "full gut rehab" (Opposition ¶ 22; Notice of Motion, exhibit D at 14- 15). He also testifies that the "facade was sort of restored" which included restoring the entranceway, the basement entrances, the stairs leading into the entrance, windows, a new entrance door and the basic look of the exterior (*id.* at 15-17). Plaintiffs proffer that this restoration triggered sections 27-118(a)[2] and 27-115[3] of the NYCBC, Article 3, which would require defendant to comply with the specifications of the Building Code that were in effect at the time of the accident, not the building codes in effect in 1935. Plaintiffs also maintain that no evidence was put forth by defendant that the 1992 renovations did not exceed 60% of the building's value. Further, Dr. Marletta opines in his affidavit that the raised cellar doors failed to comply with the applicable code requirements and that they represented a tripping hazard. It is the conflicting opinions of each respective expert, plaintiffs maintain, that raises a triable issue of fact as to whether the 1992 renovation of the building triggered section 27-115 of the NYCBC.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect*

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[2] Section 27-118(a) of the NYCBC states "[e]xcept as otherwise provided for in this section, if the alteration of a building or space therein results in a change in the occupancy group classification of the building under the provisions of subchapter three, then the entire building shall be made to comply with the requirements of this code."

[3] Section 27-115 of the NYCBC states, "[i]f the cost of making altercations in any twleve-month period shall exceed sixty percent of the value of the building, the entire building shall be made to comply with the requirements of this code, except as provided in section 27-120 of this article."

Hosp., 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, "the burden is on defendant/owner as the proponent of a motion for summary judgment to make out a prima facie defense by submitting proof in admissible form eliminating any issue as to the applicability of the Code to the building in question" (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 140 [1st Dept 2000]; *see Sarmiento v C & E Assoc.*, 40 AD3d 524 [1st Dept 2007] [burden on defendant in summary judgment to demonstrate the inapplicability of the present Administrative Code]). Upon considering the relevant factors, the Court finds that defendant is not entitled to summary judgment as a matter of law as it has

failed to establish that the 1968 Building Code does not apply, and that the raised cellar hatch was, pursuant to Section 27-111 of the NYCBC, grandfathered under the codes in existence at the time of the building's construction. Plaintiffs have submitted evidence indicating that significant and lengthy altercations were made to the building, resulting in the change of in the occupancy group classification, causing the 1968 code to apply. However, defendant is in a better position than plaintiffs to obtain documentation concerning the repairs and renovation, their cost and the value of the building (*see Pappalardo,* 279 AD2d at 140), yet defendant remains silent and does not proffer documentation, in the form of expert testimony or otherwise, which address with specificity these points. As such, defendant's motion must be denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant Falcon Restoration Limited Partnership's motion for summary judgment is denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order, with Notice of Entry, upon defendant.

This constitutes the Decision and Order of the Court.

Dated: 7-13-12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**