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SHORT FORM ORDER

INDEX No. 10-1161
CAL. No. 12-00277OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-19-12
ADJ. DATE 11-26-12
Mot. Seq. # 004 - MG; CDISP

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MARY ANN NAVARRE,

Plaintiff,

- against -

MARIE C. KETCHAM, TRUSTEE and GARY C. KETCHAM, TRUSTEE, trustees to the MARIE K. KETCHAM TRUST, dated February 2, 1995, having an address at 567 Washington Avenue, Lindenhurst, New York,

Defendants.

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KUJAWSKI & KUJAWSKI
Attorney for Plaintiff
1637 Deer Park Avenue
Deer Park, New York 11729-0661

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Defendants
99 North Broadway
Hicksville, New York 11801

Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 34; Replying Affidavits and supporting papers 35 - 36; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it

ORDERED that this motion (#004) by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted and the complaint is dismissed.

This is an action to recover damages for injuries allegedly sustained by plaintiff on September 5, 2008 at approximately 7 p.m. when she slipped on the top step of an interior staircase she was descending and fell to the bottom of the stairs at premises located at 10 Colt Avenue, Babylon, New York. At the time of the accident, plaintiff was renting the premises from defendant trustees, Gary and Marie Ketcham. Plaintiff alleges that defendants were negligent in, among other things, failing to install proper handrails on the stairway and that defendant had notice of said

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defective and dangerous condition. By her amended/supplemental bill of particulars, plaintiff alleges that defendants violated the New York Uniform Fire Prevention and Building Code, Subchapter B (Building Construction) 9 NYCRR § 713.1 (a), (b)(1), (b)(4), (c)(2), (f)(1), (h), and § 1031.1, New York Uniform Fire Prevention and Building Code, Subchapter F, Housing Maintenance, 19 NYCRR §§ 1240.1, 1240.2, 1245.1 and 1242.7 (c), and the Property Maintenance Code of the State of New York (2002) §§ 101.2, 102.1 and 102.2.

Defendants now move for summary judgment dismissing the complaint on the grounds that defendants did not cause or create a dangerous condition or have notice of any dangerous condition on the staircase; plaintiff does not know what caused her to fall and thus cannot establish that her accident was proximately caused by the lack of a handrail; the staircase was readily observable by plaintiff such that there was no duty to warn; the premises had a certificate of occupancy such that plaintiff cannot establish a violation of any building codes; and defendants never performed any construction, alterations or renovations to the premises or the staircase. Defendants' submissions in support of the motion include the summons and complaint, defendants' answer, plaintiff's bills of particulars, the deposition transcripts of plaintiff and defendant trustee Gary Ketcham, color photographs of the subject staircase taken by plaintiff and identified by her at her deposition, the rental agreement between plaintiff and her boyfriend and defendant trustees Gary and Marie Ketcham, and the affidavit of Gary Ketcham.

Plaintiff's deposition testimony on April 20, 2011 reveals that plaintiff had been living at the premises four or five years at the time of the accident. She described the subject staircase as being steep with approximately ten carpeted steps and a railing or bannister that ran from the bottom to halfway up the left side of the staircase, when looking downward. There is a horizontal ledge located on each side of the staircase, running parallel to the top of the staircase. Plaintiff explained that at the time of the accident, she was wearing flip-flops on her feet as she was walking down the staircase, her foot slipped on the first step near the top landing, she began to fall to the right and tried to break her fall with her right arm, which contacted the stairs, and she fell to the bottom of the staircase. Plaintiff testified that she did not know what it was that she slipped on and that she is not sure which foot slipped. Just prior to her fall she was looking down and she was not carrying anything. In describing the fall, she stated, "I was going down the stairs, slipped, fell down, tried to break my fall with my arm, came down the stairs, and my arm was obviously broken. ..." When the answer was read back, the plaintiff added, "There was no railing to grab onto, so..." (EBT, p 33). She further explained that after she slipped, her body moved to the right side and forward, and she may have grazed the wall on her right side. She did not attempt to hold or grab onto the horizontal ledge located to her right. While she mentioned that "there was no railing there" (EBT, p 37), she repeated her actions as "I remember going down trying to break my fall with my arm" (EBT, p 41; *see also* pp 42 and 44). She did not state that she reached out instinctively to grab a handrail, but only in an attempt to brake her fall. Plaintiff also testified that after the accident she did not notify

Gary and Marie Ketcham of her fall and that she never complained to them about the condition of the staircase prior to her fall.

Gary Ketcham testified at his deposition on November 17, 2011 that the premises is owned by the Marie K. Ketcham Trust and that he and his wife Marie are the trustees, that the premises contains a two-family house, that a certificate of occupancy for the house was issued in 1974, and that he began renting the house in 1982. In addition, Mr. Ketcham testified that he was renting one of the units in the house to plaintiff on September 5, 2008, that he had a rental housing permit from the Village of Babylon for said house, and that the Village performed annual inspections of the house. He explained that plaintiff's unit was a two-story containing the second and third floors. Mr. Ketcham identified the lease he drafted that he and his wife entered into with plaintiff and her boyfriend indicating the original occupancy date of May 1, 2006 and explained that the lease was month-to-month with no termination date and that it was still in effect at the time of plaintiff's accident. He stated that there were handrails adjacent to the lower steps of the staircase and paneled half-walls with ledges adjacent to the steps on the upper portion of the staircase. Mr. Ketcham noted that there was never any handrail installed in the upper portion of the staircase from the time he bought the house in 1982 up to the date of plaintiff's accident, and that the building inspector walked up and down said staircase annually and never told him to install a handrail. He first learned of plaintiff's accident when he received a letter from an attorney one year after its occurrence.

By affidavit dated June 11, 2012, Mr. Ketcham avers that from the time that he purchased the subject house in 1982 until the time of plaintiff's accident, he never performed any construction, alterations or renovations of the property and never performed any work on the interior staircase located in the second floor apartment prior to plaintiff's accident. In addition, he states that he was never notified by the Village of Babylon or anyone else prior to plaintiff's accident that a handrail should be installed on the interior staircase nor did he receive any complaints from plaintiff or her boyfriend regarding the condition of the staircase. Mr. Ketcham further states that he performed a search of his own files as well as the building file maintained by the Village of Babylon concerning the subject premises and attaches the results of his search. The attachments include a letter dated February 16, 1982 from the then-Building Inspector of the Village indicating that the subject premises is a non-conforming two-family dwelling built prior to the date that the Building Zone Ordinance was adopted, April 30, 1931, the housing rental permits for the year 2008, and the annual Rental Housing Inspection reports dated February 29, 2008 and February 26, 2009 from the Village indicating that the premises passed inspection. The Court notes that said inspection reports include "stairs/banister" as a listed item of the building interior to be inspected.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68

NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, *supra*, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, *supra*).

The owner or possessor of property has a duty to maintain his or her property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976] [internal quotation marks omitted]). The scope of a landowner's duty varies with the foreseeability of the possible harm (*see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Kimen v False Alarm, Ltd.***, 69 AD3d 579, 893 NYS2d 158 [2d Dept 2010]). Irrespective of the absence of a statutory obligation, the owner and possessor of the property have a continuing common-law duty to maintain their premises so that it is safe from foreseeable harm (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Jacqueline S. v City of New York***, 81 NY2d 288, 598 NYS2d 160 [1993]; ***Kimen v False Alarm, Ltd.***, 69 AD3d 579, *supra*).

Defendants, as the movants for summary judgment, have the burden of refuting plaintiff's contention that the staircase where plaintiff fell was in violation of certain statutory and code provisions (*see* ***Velez v 955 Tenants Stockholders, Inc.***, 66 AD3d 1005, 887 NYS2d 646 [2d Dept 2009]; ***Viscusi v Fenner***, 10 AD3d 361, 781 NYS2d 121 [2d Dept 2004]). Here, defendants did establish that the subject premises was not under the purview of the New York Uniform Fire Prevention and Building Code and the Property Maintenance Code of the State of New York as it was built prior to the enactment of the said Code provisions (*see* ***Sebastiano v New York City Tr. Auth.***, 86 AD3d 432, 926 NYS2d 506 [1st Dept 2011], *lv denied* 18 NY3d 810, 944 NYS2d 481 [2012]; ***Swerdlow v WSK Properties Corp.***, 5 AD3d 587, 772 NYS2d 864 [2d Dept 2004]; ***Lester v Waterman***, 242 AD2d 683, 664 NYS2d 927 [2d Dept 1997]).

Moreover, "[i]n a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (***Capasso v Capasso***, 84 AD3d 997, 998, 923 NYS2d 199 [2d Dept 2011]; *see* ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]; ***Smith v Maloney***, 91 AD3d 1259, 936 NYS2d 791 [3d Dept 2012]), and a defendant can establish its prima facie entitlement to judgment as a mater of law by showing that the plaintiff cannot identify the cause of the accident (*see* ***Califano v Maple Lanes***, 91 AD3d 896, 938 NYS2d

140 [2d Dept 2012]; ***Rajwan v 109-23 Owners Corp.***, 82 AD3d 1199, 919 NYS2d 385 [2d Dept 2011]; ***Patrick v Costco Wholesale Corp.***, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; *cf* ***Jackson v Fenton***, 38 AD3d 495, 831 NYS2d 260 [2d Dept 2007] [plaintiff clearly identified the cause of her fall as the worn tread cover and the absence of a handrail on the right side of the subject winding staircase at her deposition]). Here, at her deposition, plaintiff could not identify what caused her to slip and, as noted above, defendants established the inapplicability of the asserted building codes.

Caselaw concerning the absence of a handrail on a staircase can be difficult to follow. In cases where a defendant does not establish, as a matter of law, that the premises are exempt from the applicable building codes, summary judgment will be denied, since the absence of the rail, if required by law, could be a proximate cause of the accident (*see* ***Viscusi v Fenner***, 10 AD3d 361, 781 NYS2d 121 [2d Dept 2004]). As explained in ***Viscusi***, *supra*, "In fact, '[e]ven if the fall was precipitated by a misstep, "if a hand-rail had been furnished, the [plaintiff] might have held on to it as he descended the stairs, and could have avoided falling. Therefore, the absence of the rail, *if required by law*, would seem to be a proximate cause of the accident"' (***Lattimore v Falcone***, 35 AD2d 1069, 316 NYS2d 363 [4th Dept 1970], *quoting* ***Courtney v Abro Hardware Corp.***, 286 App Div 261, 262, 142 NYS2d 790 [1955], *affd* 1 NY2d 717, 151 NYS2d 930 [1956] ... [*italics added*]." Caselaw in the Second Department echos the "*if required by law*" language from ***Lattimore***, *supra*, (*see* ***Hotzoglou v Hotzoglou***, 221 AD2d 594, 634 NYS2d 501 [2d Dept 1995]; ***Palmer v Prima Properties, Inc.***, 101 AD3d 1094, 956 NYS2d 537 [2d Dept 2012]; ***Wajdzik v YMCA of Greater New York***, 65 AD3d 586, 883 NYS2d 718 [2d Dept 2009]; ***Christian v Railroad Deli Grocery***, 57 AD3d 599, 869 NYS2d 213 [2d Dept 2008]; *see also* ***Kanarvogel v Tops Appliance City, Inc.***, 271 AD2d 409, 705 NYS2d 644 [2d Dept 2000]; ***Hoberg v Shree Granesh, LLC***, 85 AD3d 965, 926 NYS2d 578 [2d Dept 2011]; ***Cruz v Lomet Hous. Dev. Fund Corp.***, 7 AD3d 660, 776 NYS2d 842 [2d Dept 2004]).

Even where the exact language is not utilized, the failure to demonstrate that a ramp or staircase need not have been equipped with a handrail pursuant to applicable building code ordinances will preclude the granting of summary judgment dismissing the action (*see* ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 710, 940 NYS2d 144 [2d Dept 2012]; ***Wininger v Congregation Nechlas Meharim***, 83 AD3d 827, 920 NYS2d 423 [2d Dept 2011]; ***Brice v Vermeulen***, 74 AD3d 858, 901 NYS2d 853 [2d Dept 2010]; ***Velez v 955 Tenants Stockholders, Inc.***, 66 AD3d 1005, 887 NYS2d 646 [2d Dept 2009]; ***Spallina v St. Camillus Church***, 53 AD3d 650, 862 NYS2d 552 [2d Dept 2008]).

In ***Asaro v Montalvo***, 26 AD3d 306, 812 NYS2d 558 (2d Dept 2006), the defendant did not establish, as a matter of law, that the premises were exempt from the applicable building code ordinance with regard to an absent handrail. However, the defendant did contend that the failure of the plaintiff to identify the cause of her fall was fatal to her case. The Second Department rejected

the claim, by quoting language from its prior ***Kanarvogel***, *supra*, holding, which is similar to the above-cited language from ***Lattimore***, *supra*, without reference to the phrase "*if required by law.*" However, as noted, a question of fact existed in that case as to the applicability of the building code provision (*see* ***Boudreau-Grillo v Ramirez***, 74 AD3d 1265, 904 NYS2d 485 [2d Dept 2010]; *see also* ***Trosa v DiCristo***, 91 AD3d 944, 937 NYS2d 623 [2d Dept 2012]).

Such holdings focus on the applicability of building code provisions since a violation of a code constitutes only some evidence of negligence; it does not constitute negligence per se (*see* ***Brigandi v Piechowicz***, 13 AD3d 1105, 787 NYS2d 790 [4th Dept 2004]). As noted above, such is independent of the common law duty imposed upon an owner of land (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 872, *supra*).

In recognition thereof, in a case that did not involve the failure of the plaintiff to identify the cause of her fall, the Second Department held that the fact that the premises did not fall under the purview of the New York State Fire Prevention and Building Code, only absolved defendants of the mandatory duty that the Code provisions might otherwise impose (*see* ***Swerdlow v WSK Properties Corp.***, 5 AD3d 587, 772 NYS2d 864 [2d Dept 2004]) and the defendants nevertheless had continuing duties as the owners of the premises to maintain it in a reasonably safe manner (*see id.*, *at* 588). There, aside from the absence of handrails, the plaintiff alleged that inadequate lighting and steps of unequal heights created a dangerous condition, all of which were alleged to have contributed to plaintiff's accident.

Thereafter, in actions that involved particularly hazardous conditions, even if building code provisions were not violated, the common-law duty raised an issue of fact as to whether the premises were maintained in a reasonably safe condition (*see* ***Kimen v False Alarm, Ltd.***, 69 AD3d 579, 893 NYS2d 158 [2d Dept 2010]; *see also* ***Zebzda v Hudson Street, LLC***, 72 AD3d 679, 897 NYS2d 727 [2d Dept 2010] [staircase without a handrail was wet in a building being converted from commercial space into condominiums]). Some cases have followed the above-described language from the decision in ***Asaro***, *supra*, without explanation as to whether an issue existed as to whether the absence of a handrail violated a building code (*see* ***Palmer v 165 E. 72nd Apt. Corp.***, 32 AD3d 382, 382, 819 NYS2d 105 [2d Dept 2006]; ***Antonia v Srour***, 69 AD3d 666, 893 NYS2d 186 [2d Dept 2010]).

Here, the defendants made a prima facie showing (1) that the premises was not under the purview of the alleged code provisions and (2) that the plaintiff could not identify the cause of her fall. Additionally, with regard to any common law claim, defendants offered annual rental inspections of the house, which included "stairs/banister" as a listed item and the lack of prior notice from anyone, including the plaintiff, as to the need for a handrail. While the submitted photographs demonstrate that the segment of the staircase where plaintiff began her descent did not have a handrail and that the existing handrail did not extend the full length of the stairway, plaintiff's testimony was

that she was falling to the right, away from the portion of the stairway where the handrail would have been. Moreover, she testified that she tried to break her fall by putting her hand down toward the stairs, unlike the cases where a plaintiff testifies that he or she reached out to grab a handrail that was absent (*see* ***Trosa v DiCristo***, 91 AD3d 944, *supra*; ***Antonia v Srour***, 69 AD3d 666, *supra*).

Based upon all of the above, the Court finds that the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they maintained their property in a reasonably safe condition. In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 562, *supra*). The affidavit from the engineer discussed various code deficiencies, but offered no proof from which it could be inferred that the provisions relied upon were in effect when the building was constructed (*see* ***Hyman v Queens County Bancorp, Inc.***, 307 AD2d 984, 763 NYS2d 669 [2d Dept 2003]; *see also* ***Prisco v Long Is. Univ.***, 258 AD2d 451, 684 NYS2d 604 [2d Dept 1999]). No evidence was offered that alterations or repairs occurred so as to bring the premises within the coverage of the alleged code provisions (*see* ***Lester v Waterman***, 242 AD2d 683, 664 NYS2d 927 [2d Dept 1997]; ***King v JNV Limited***, 275 AD2d 733, 713 NYS2d 225 [2d Dept 2000]) or connecting the alleged violations to plaintiff's fall (*see* ***Rajwan v 109-23 Owners Corp.***, 82 AD3d 1199, *supra*).

While an expert affidavit can raise issues with regard to common-law negligence, here, the evidence fails to establish that the subject first step of the staircase was inherently dangerous or that it constituted a "hidden trap" (*see* ***Burke v Canyon Rd. Rest.***, 60 AD3d 558, 876 NYS2d 25 [1st Dept 2009]; *see also* ***Nunez-Wilson v Carmo Realty***, 85 AD3d 888, 925 NYS2d 342 [21d Dept 2011]). The discussion of riser heights and tread widths on the staircase fail to raise an issue of fact as to a proximate cause of this particular accident. Plaintiff has failed to demonstrate the existence of a triable issue of fact as to whether the defendants were negligent (*see* ***Ford v Benevolent & Protective Order of Elks***, 70 AD3d 630, 892 NYS2d 898 [2d Dept 2010]; *cf* ***Yefet v Shalmoni***, 81 AD3d 637, 915 NYS2d 866 [2d Dept 2011]; ***Grayson v Hall***, 31 AD3d 606, 817 NYS2d 904 [2d Dept 2006]; ***Ocasio v Board of Educ. of the City of New York***, 35 AD3d 825, 827 NYS2d 265 [2d Dept 2006]).

Accordingly, the instant motion is granted and the complaint is dismissed.

Dated: 3/5/13

THOMAS F. WHELAN, J.S.C.