SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DOREEN BARNARD,

Plaintiff,

-against-

501 WEST 45TH STREET LLC and JPJ REALTY CORP.,

Defendants.

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Index No.: 152880/14

Motion Seq. No.: 001

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury/negligence action, defendants 501 West 45th Street LLC and JPJ Realty Corp. ("defendants") move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's statutory and regulatory claims.[1] Plaintiff Doreen Barnard ("plaintiff") opposes the motion and cross-moves for leave to amend her Amended Verified Bill of Particulars ("Bill of Particulars")[2] to allege further statutory violations. Defendants oppose plaintiff's cross-motion.

BACKGROUND

Defendant 501 West 45th Street LLC ("501") is the owner and defendant JPJ Realty Corp. ("JPJ") is the managing agent of premises located at 501 West 45th Street, New York, New York (the "Building") (Notice of Motion, Exhibit "I" [Affidavit of Peter Giaimo, president of JPJ and member of 501, sworn to on July 31, 2015 ("Giaimo Affidavit")], ¶ 2). Plaintiff is a resident of

[1]At this juncture, defendants do not seek to dismiss plaintiff's common-law negligence claims, which defendants assert "will be litigated at trial" (Notice of Motion, Affirmation in Support, ¶ 4 fnt. 1)

[2]Plaintiff served a Verified Bill of Particulars and an Amended Verified Bill of Particulars on May 23, 2014 and June 9, 2014, respectively, both containing allegations of the same statutory violations (Notice of Cross-Motion, Exhibit "B"). Plaintiff now seeks to further amend her Bill of Particulars in the form attached as Exhibit "L" to plaintiff's Cross-Motion [Second Supplemental Verified Bill of Particulars].

apartment 2E in the Building (Notice of Motion, Exhibit "F" [Plaintiff's Deposition] at 4; Notice of Motion, Affirmation in Support, ¶ 3). Plaintiff alleges that on December 4, 2013, as she was ascending stairs from the Buildings' lobby to the second floor, she slipped and fell on the third or fourth step of the stairs (Notice of Motion, Exhibit "F" [Plaintiff's Deposition] at 59, 64).

At her deposition on August 7, 2014, plaintiff testified that there is no elevator in the Building, and that there is one stairwell from the Building's lobby to the upper floors (*Id.* at 24). Plaintiff testified that after the entrance at the front door of the Building, there are teracota tiles on the floor, mailboxes on the side and a "small set of stairs to a first landing with a handrail on the right-hand" (*Id.* at 28). Plaintiff also stated there were six or seven steps from the bottom floor to that first landing (*Id.* at 29). Plaintiff testified that on the day of the alleged accident, at approximately 2:00 - 2:30 a.m., she entered the Building's lobby and proceeded up the first flight of stairs to the landing. She testified

> "I started up the stairs with my right hand on the handrail and somewhere around the middle of the stairs, I slipped and I fell forward and to the left and I reached out to grab with my left hand and there was no handrail there and I slammed down onto the stairs" (*Id.* at 59).

Plaintiff testified that as she fell, her hand came off the right handrail and her body "went left" (*Id.* at 65-66). Plaintiff also stated that there was dirt, trash and debris on the stairs (*Id.* at 62-64).[3] Plaintiff additionally claimed that she had previously complained to "the office" approximately seven or eight times about the need to clean the stairs. Plaintiff claimed that she told "Peter" (JPJ's president, Peter Giaimo) that "he needed to do something about the stairs before someone got seriously injured" (*Id.* at 144-145).

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[3]Although plaintiff testified that she saw dirt on the stairs, she stated that she did not actually see her left foot step on the dirt (*Id.* at 65).

Defendants have presented the Giaimo Affidavit wherein Giaimo states that 501 has owned the Building since 2003, and that from 2003 through 2013, the Building underwent only routine maintenance, ordinary repairs and "very limited alterations" (Notice of Motion, Exhibit "I" [Giaimo Affidavit], ¶ 4). Giaimo avers that a fire in 2008 only caused damage to upper floors but that no significant alterations were made as a result thereof (*Id.*, ¶ 5). Giaimo states that the Building has been inspected on numerous occasions from 2003 to 2013, but that none of those inspections ever yielded any violations relating to the stairs, or any orders requiring that defendants apply for a certificate of occupancy ("C of O") for the Building (*Id.*, ¶¶ 7, 9).

Defendants have also presented an affidavit from appraiser Douglas Brooks ("Brooks Affidavit"), sworn to on July 31, 2015, who states that he inspected and appraised the Building twice, and asserts that its value was $3,445,000.00 as of September 22, 2009, and $7,225,000.00 as of December 26, 2014 (Notice of Motion, Exhibit "J" [Brooks Affidavit], ¶¶ 3-4).[4]

In addition, defendants proffer an expert's affidavit from engineer Peter Chen, MSME, PE ("Chen") (Notice of Motion, Exhibit "H" [Chen Affidavit]). Chen noted that the earliest record of inspection of the Building occurred on April 8, 1913.[5] Chen opines that (1) the incident

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[4]Giaimo testified that from 2003 through and including 2013, there had never been a 12-month period during which greater than $500,000.00 worth of improvements or alteration work was done on the Building, and as such, retroactive code compliance was not required. Under the 1968 Administrative Code of the City of New York [the "1968 Administrative Code"], §§ 27-115 and 27-116, retroactive compliance with such Code is not required unless the cost of making alterations in any twelve month period is at least thirty percent of the value of the Building (*Id.*, ¶¶ 6, 8).

[5]Chen examined occupancy records maintained at the time known as "I-cards". Chen states that "for buildings without a Certificate of Occupancy (which was not required until 1938), the "I-cards" have been accepted as the legal record of existing occupancy as of the last date indicated on the card" (*Id* at 2).

stairs predated the 1968 Administrative Code and that no subsequent retroactive codes were applicable; (2) the incident stairs were not "interior stairs" under the 1968 Administrative Code as the stairs were not a "means of egress exit door" (the means of egress was accomplished via an external fire escape); and (3) the incident stairs passed inspections by the New York City Division of Code Enforcement. Chen also found that the stairs and handrail were "substantially safe for use, and there was no evidence of any structural, maintenance, or construction defects" (*Id.* at 12).

In opposition to defendants' motion and in support of her cross-motion, plaintiff has submitted an expert's affidavit from engineer Stanley H. Fein, PE, sworn to on October 23, 2015 ("Fein")[6], who opines that the subject stairway was non-compliant with all applicable codes and laws dating back to 1901, which Fein contends "require handrails on both sides of the stairway for stairs of this stairway's width" (Notice of Cross-Motion, Exhibit "A" [Fein Affidavit], ¶ 9). Fein further opines that major alterations to the Building were performed in 1913, 1936, and 1938, and that the Building was required to conform to the Codes applicable at the time. Fein concedes, however, that it is "impossible to judge whether and how extensive [the alterations] were and whether, at some past point, the Building was or was required to be brought in conformity with the Codes applicable when the alterations were made" (*Id.*, ¶¶ 6-8).[7]

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[6]Defendants maintain that this Court should not consider the Fein Affidavit on grounds that plaintiff only identified Fein by name and title prior to the filing of the Note of Issue. Defendants state that plaintiff failed to provide any other information, including Fein's theories, opinions, findings and conclusions, the basis for his opinions, or the documents he reviewed (Reply to Plaintiff's Opposition to Motion for Summary Judgment at ¶ 5).

[7]Fein also opines that the subject stairway is non-complaint with the "2008 Building Code" (the "2008 Code") (*Id.*, ¶¶ 12, 14, 16). However, plaintiff has failed to allege violations of the 2008 Code in her Notice of Cross-Motion to amend her Bill of Particulars (Reply to

In addition, Fein opines that the subject stairs are "interior stairs", and as such, were required to have two handrails under the Tenement Act of 1901 and the 1916, 1938 and 1968 Codes (*Id.* at 17). Fein opines further that the stairs' slippery condition and lack of non-skid surfacing also rendered the building out of compliance with all the Codes (*Id* at ¶¶ 15-17). Fein avers that the more recent resurfacing of the stairs with tiles was governed by the 2008 Code and prior Codes.[8] Fein also states that his inspection of the stairs indicated that their condition violates codes including Section 27-2005(a) of the "Housing Maintenance Code", and section 28-301.1 of the "New York City Building Construction Code", which allegedly require owners to keep premises in good repair and requires buildings to be maintained in a safe condition, respectively (*Id* at ¶¶ 21-22). Fein concluded that plaintiff's accident was caused by defendants' negligent maintenance of the Building's stairs (*Id.)*.[9]

In her Bill of Particulars, plaintiff alleges that defendants violated 1) Administrative Code §§ 27-109, 27-127 and 27-128; 2) Building Construction Code §§ 27-375 (f) and 28-301; 3) Housing Maintenance Code of the City of New York § 27-2005 (a); 4) New York City Health

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Plaintiff's Opposition to Motion for Summary Judgment at fnt. 1) although plaintiff includes allegations of violations of the 2008 Code in her proposed Second Supplemental Verified Bill of Particulars (Notice of Cross-Motion, Exhibit "L").

[8]Fein refers to testimony of the superintendent Armando Gil ("Gil"), that the stairs were resurfaced approximately five years prior to the subject accident (*Id.* at 19; Notice of Cross-Motion, Exhibit "E" [Gil deposition] at 40-41).

[9]Plaintiff also proffers the deposition of Gil, an employee of JPJ as the superintendent of the Building. Gil testified that he was responsible for repair, maintenance and cleaning of the Building (Notice of Cross Motion, Exhibit "E" [Gil deposition] at 14-15). Gil acknowledged that the subject stairs where plaintiff fell had only one handrail on the right (*Id.* at 33-38). Gil denied having ever received any complaints about the stairs being slippery or dirty. (*Id.* at 58). Gil also testified he believed that an additional handrail could be installed on the other side of the stairs (*Id.* at 33-34).

Code § 135.17; and 5) Real Property Law §§ 235 and 235-b (*Id.*, Exhibit "B"). Defendants move to dismiss plaintiff's statutory and regulatory claims, and plaintiff cross-moves for leave to amend her Bill of Particulars seeking to add violations of provisions of (i) the Tenement House Act of 1901; (ii) the Building Code of 1916; and (iii) the Building Code of 1938.

DISCUSSION

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Ctr.*, 64 NY2d 851 [1985]). Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979].

Defendants' Motion to Dismiss Plaintiff's Statutory and Regulatory Claims

Plaintiff's statutory claims under the 1968 Administrative Code

Administrative Code § 27-109

Administrative Code § 27-109 provides in pertinent part that the provisions of the Administrative Code "cover[s] all matters affecting or relating to buildings...". Such provision is merely a "general section, dealing with the scope of the building code" (*Zapot v Samantha Deli Grocery Corp.*, 2014 NY Slip Op. 31354(U) *3 [Hon. Sharon A.M. Aarons, Bronx County 2014], and is therefore not an independent predicate of liability. In any event, plaintiff fails to proffer any arguments based on this statutory section, and as such, allegations of violations of Administrative Code § 27-109 are deemed abandoned.

Administrative Code § 27-127 and § 27-128

Administrative Code § 27-127 (maintenance requirements) and Administrative Code §

27-128 (owner responsibility) were repealed, effective July 1, 2008, prior to the date of plaintiff's accident (on December 4, 2013), and as such, cannot form the predicate of liability in this case.

Administrative Code § 28-301.1

Administrative Code § 28-301.1 replaced repealed sections 27-127 and 27-128 (*Cusumano v City of New York*, 15 NY3d 319, 323 [2010]; *Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531, 531 [1st Dept 2013]). Administrative Code § 28-301.1 is a "non-specific safety provision and is insufficient to impose liability on a defendant" (*New York City, N.Y., Code § 28-301.1, Case note "2"*; *see J-Line Inc. v Leggett Ave. & So. Blvd. Realty Corp.*, 134 AD3d 584, 585 [1st Dept 2015] [Administrative Code § 28-301.1 "may not serve as a predicate to impose tort liability upon defendant"]).

Administrative Code § 375[f]

Administrative Code § 375(f) provides the requirements for "guards and handrails" of "interior stairs". Defendants' expert Chen opines that

> "2. The incident stairs were not considered "Interior Stairs" under the 1968 Building Code of New York City, because the incident stairs were not 'required stairs' meaning that the incident stairs did not lead to a marked means of egress door.
> 3. The entrance door to 501 W. 45th Street was not a means of egress exit door. The entrance door was a locked access door and swung inwards as opposed to outwards as would be required if it were to be an exit door. Furthermore, the entrance door was not marked with lighted Exit signs to indicate the door was an Exit door.
> 4. The means of egress for 501 W. 45th Street was accomplished via the external fire escape" (Notice of Motion, Exhibit "H" [Chen Affidavit] at 12).

In opposition, the Affidavit of plaintiff's expert Fein is conclusory and fails to raise an issue of fact. Here the subject stairs were not "interior stairs", and as such, Section 375(f) is not implicated. Section 375(f) "applies to 'interior stairs,' which are defined as 'stair[s] within a

building, that serve[ ] as a required exit" (*Cusumano v City of New York*, 15 NY3d at 324). *See Gibbs v 3220 Netherland Owners Corp.*, 99 AD3d 621, 621 ["The court correctly held that the stairs on which plaintiff allegedly slipped and fell (leading from the first floor to the lobby) were not 'exit' stairs within the meaning of ...§ 27-375 of the 1968 Building Code of City of New York (Administrative Code of City of NY § 27-375"].

Administrative Code 27-2005(a)

Administrative Code 27-2005(a) provides that "the owner of a multiple dwelling shall keep the premises in good repair." Here there is no evidence in the record that the subject stairs themselves were cracked, that the hand railing broke or that the stairs were otherwise in structural disrepair. Defendants' expert Chen opines that the "stairs and handrail were...substantially safe for use, and there was no evidence of any structural, maintenance, or construction defects." Chen also states that "at some point in history, metal slip resistant nosings were added to the stairs, and the nosings were found to be in good functional condition, well maintained and free of defects" (Notice of Motion, Exhibit "H" [Chen Affidavit] at 12). Plaintiff's expert Fein and plaintiff's Affirmation in Support of her Cross-Motion merely parrots the language of Administrative Code 27-2005(a) without demonstrating how it is applicable to the subject incident (Notice of Cross-Motion, Exhibit "A" [Fein Affidavit], ¶ 21]; Notice of Cross-Motion, Affirmation in Support of Cross-Motion, ¶ 68).

Further Statutory Claims

Real Property Law § 235 and § 235-b

Real Property Law §§ 235(1) and (2) prohibit the willful or intentional failure of a lessor, agent, manager, superintendent or janitor of any building to provide "water, heat, light, power

elevator service, telephone service or other service... willfu[l] or intentiona[l] acts to prevent the delivery of fuel oil." Nowhere in plaintiff's pleadings, Bill of Particulars or motion papers does plaintiff allege that her accident was the result of defendants' intentional failure to provide such utility services.

Section 235-b governs claims for breach of the warranty of habitability. Here, plaintiff alleges that defendants' negligence resulted in the stairs remaining in an "old, worn, deteriorated, dilapidated, cracked, broken, raised, uneven [and] dirty [condition], and containing bent, damaged, raised, defective and trap-like [*sic*] causing plaintiff to fall (Notice of Motion, Exhibit "B" [Verified Complaint], ¶ 48). However, "[t]he measure of damages for breach of the warranty of habitability is limited to the difference between the rent reserved in the lease and the fair market rental value during the period of the breach" (*Elkman v. Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept. 1996]). "[P]ersonal injuries and pain and suffering are not recoverable under Real Property Law §235-b" (*Id.*). Here, plaintiff fails to seek a reduction in rent or rent abatement, and as such, Section §235-b is inapplicable to the case herein.

Health Code § 135.17

Health Code § 135.17 "define[d] particular requirements regarding constructing and maintaining floors" was repealed in 2009 before the subject accident, and in any event, applied only to commercial premises (*Miki v 335 Madison Ave., LLC*, 30 Misc3d 1214 (A) *2, *5 fnt. 2 [NY County 2011] *aff'd* 93 AD3d 407 [1st Dept 2012] *lv to appeal den* 19 NY3d 814 [2012]). As such, Health Code 135.17 cannot form a predicate for liability in the instant matter.[10]

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[10]In view of the foregoing, this Court need not consider defendants' argument that the 1968 Administrative Code does not apply to the subject Building in the first place, because the Building was constructed before the effective date of the Code and is therefore grandfathered.

Plaintiff's Cross-Motion to Amend her Bill of Particulars

Plaintiff cross-moves for leave to amend her Bill of Particulars seeking to add violations of provisions of (i) the Tenement House Act of 1901 (the "Tenement Act"); (ii) the Building Code of 1916 (the "1916 Code"); and (iii) the Building Code of 1938 (the "1938 Code'). Plaintiff argues that such proposed amendment alleges no new facts, and there would be no surprise or prejudice to defendants. In opposition, defendants argue that they would clearly be prejudiced as defendants were not given an opportunity to oppose the theories of plaintiff's expert based on violations of these earlier codes which were never set forth during discovery. "An amendment at this juncture would permit plaintiff's office to oppose the defendants' motion for summary judgment on issues unexplored during the discovery process (Affirmation in Opposition to Plaintiff's Cross-Motion for Leave to Amend, ¶ 7).[11] Defendants also assert that the proposed amendments lack merit on grounds that (1) the 1916 and 1938 Codes do not apply to buildings, such as the subject Building, constructed prior to such Codes' effective dates; and (2) the Tenement Act required bannisters and railings to be kept in good repair, and there is no allegation that the subject handrail was defective.

"It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay." However, "leave to amend will be denied where

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Defendants also contend that none of the exceptions to the grandfathering provisions of the Code apply, as any alterations conducted on the Building after the Code was enacted failed to exceed thirty per cent of the Buildings' value in any 12-month period (*See* Administrative Code §§ 27-111, 115, 116; *Powers v 31 E 31 LLC*, 24 NY2d 84, 92 (fnt. 1) [2014]; *Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 416 [1st Dept 2007]).

[11]Defendants also argue that there was incomplete expert disclosure as plaintiff's expert was only identified by name and title before filing of the Note of Issue (Affirmation in Opposition to Plaintiff's Cross-Motion for Leave to Amend, ¶ 8).

the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law" (*Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001] [internal citations omitted]). Here, in the instant matter, defendants have sufficiently demonstrated prejudice. This action was commenced in 2014, plaintiff filed her Note of Issue on June 1, 2015 and only five months later, on November 4, 2015, filed her cross-motion to amend the Bill of Particulars (*see Del Rosario v 114 Fifth Ave. Assoc.*, 266 AD2d 162, 163 [1st Dept 1999] ["Plaintiff's request to amend his bill of particulars three years after commencement of the action, and five months after he filed a note of issue, so as to allege various statutory violations...was properly rejected as untimely and prejudicial"]. As to the merits, plaintiff alleges that all the codes required the subject stairwell to have handrails on both sides of the stairway. However, plaintiff fails to make any showing regarding how the subsequently enacted 1916 and 1938 would retroactively apply to the Building constructed on or before 1913. Further, as admitted by plaintiff's expert, Section § 36 of the Tenement Act only requires that all stairways be provided with bannisters and railings kept in good repair, and that it was only until the 1916 Code, that there allegedly was a requirement that stairways have two handrails (Notice of Cross-Motion, Exhibit "A", ¶ 10).

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by defendants 501 West 45th Street LLC and JPJ Realty Corp. for summary judgment pursuant to CPLR 3212 dismissing plaintiff's statutory and regulatory claims is granted; and it is further

ORDERED, that the cross-motion by plaintiff Doreen Barnard to amend her Bill of Particulars pursuant to CPLR 3025 (b) is denied; and it is further

ORDERED, that the action alleging common-law negligence shall continue.

Dated: February 24, 2017

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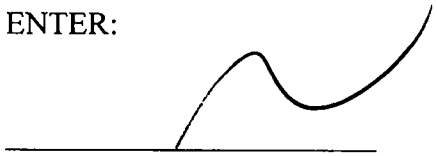

J.S.C.

SHLOMO HAGLER
J.S.C.