Rodriguez v Union S. LLC
2017 NY Slip Op 30517(U)
March 16, 2017
Supreme Court, Kings County
Docket Number: 508136/14
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of March, 2017.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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CARMEN RODRIGUEZ,

Plaintiff,

- against -

UNION SOUTH LLC,

Defendant.

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UNION SOUTH LLC,

Third-Party Plaintiff,

- against -

VALENZA CONTRACTORS, INC.,

Third-Party Defendant.

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DECISION / ORDER

Index No. 508136/14
Mot. Seq. # 3

The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant, Union South LLC moves for an order, pursuant to CPLR 3212, seeking summary judgment dismissing plaintiff Carmen Rodriguez's complaint. For the reasons which follow, the motion is denied.

Background

This action arises out of an accident which occurred on May 30, 2014, between 11:00 a.m. and noon. Plaintiff was intending to visit her niece, Maribel Rodriguez, who resided at 333 Union Avenue in Brooklyn. However, she mistakenly rang the buzzer and attempted to enter the building located at 335 Union Avenue, an adjacent property owned by the defendant. When no one responded to the buzzer, plaintiff called her niece to tell her that the door would not open. Plaintiff's niece came out of the neighboring property, 333 Union Avenue, and informed plaintiff that she was at the wrong building. Plaintiff then turned to leave 335 Union Avenue and, as she was walking, she fell to the ground because there was a raised platform (landing) at the building's entrance, with a step down to the sidewalk, which she did not see. The "step" was approximately six inches high. The plaintiff testified that the weather was "good" and that it was not raining at the time of her accident. She testified that her fall occurred because the step was the same color as the sidewalk.

On or about September 5, 2014, plaintiff instituted an action against defendant by filing a summons and complaint. Defendant served an answer on or about November 19, 2014. Plaintiff served a bill of particulars on or about December 12, 2014, which alleged that the step constituted a trap and that defendant failed to post warnings or visible demarcations about the existence of the "sudden step" and failed to provide a handrail or banister. Plaintiff served a supplemental bill of particulars on or about June 22, 2015, which, taken together with the initial bill of particulars, alleged violations of, *inter alia*, New York Real Property Law §§ 235 and 235-b, New York City Health Code § 135.17, New York City Administrative Code §§ 27-107, 27-127, 27-128, 27-217, 27-232, 27-370, 27-370 (d), 27-375 (f) and 28-301, and New York City Building and Construction Code §§ 1008.1.4, 1008.1.6 and 1009.11.

On April 27, 2016, plaintiff filed a note of issue, and on May 2, 2016, defendant commenced a third-party action against Valenza Contractors, Inc., the entity that installed the step (or "landing") at issue.

Defendant's Motion

Defendant moves for summary judgment dismissing plaintiff's complaint. Defendant argues that plaintiff did not fall as a result of any dangerous or defective condition and that there was no violation of any applicable statutes, regulations or codes and, thus, there can be no liability imposed upon defendant for this occurrence. In support of the motion, defendant submits an expert affidavit from Paul Morris, a licensed professional engineer. In rendering his expert affidavit, Mr. Morris inspected the step and the surrounding area on December 4, 2014. In addition, he reviewed the deposition testimony as well as an affidavit and report prepared by plaintiff's expert, Mr. Stanley Fein, P.E.

Mr. Morris states that his inspection of the property revealed that the area was in good condition with no cracks, chips, spalls, loose or excessively worn areas. He opines that: the single step at the east side of the landing did not violate any provisions of the 1968 New York City Building Code, which was the applicable Building Code as the landing was installed in 2006; a handrail was not required pursuant to the 1968 Building Code; nor were visual warning cues required by the 1968 Building Code. Nonetheless, he notes that the handrail located on the north side of the landing was a visual cue of the elevation change at the east side of the landing, where plaintiff fell. Moreover, he states that the 1968 Building Code did not require that a single step have different colors or patterns or colored tape on its edge, nor were there any restrictions in the 1968 Building Code against using a platform such as this at a means of egress from a building.

Next, Mr. Morris addresses the other statutes plaintiff alleged were violated. He notes that New York City Administrative Code §§ 27-127 and 27-128 were repealed prior to the

date of plaintiff's accident and are therefore not applicable. Next, he opines that Administrative Code § 28-301.1 was not violated, as the concrete landing, the step on its east side, and the sidewalk within 4 feet of the step were all maintained in a safe condition. He states that Administrative Code § 27-217 relates to changes in occupancy and use of a building and is not relevant, and § 27-232 is a definitions section; thus neither is relevant in the instant matter. Next, he opines that Building Code § 27-375 (1) is inapplicable as it applies to "Interior Stairs," which were not involved in this incident. Mr. Morris further opines that Administrative Code §§ 27-370 and 27-370 (d) are also inapplicable. He notes that §27-370 applies to an "exit passageway," which is defined as "a horizontal extension of a vertical exit, or a passage leading from a yard or court to an open exterior space." He contends that § 27-370, based on a reading of the entire section, applies to passageways located inside a building that are separated from the rest of the building by "fire-rated enclosures" and, thus, the exterior landing where plaintiff fell does not qualify as an "exit passageway."

Mr. Morris points out that plaintiff's expert, Mr. Fein, alleges in his affidavit that several Building Code sections were violated, including §§1008.1.4, 1008.1.6 and 1009.11. Mr. Morris states that these sections are contained in the 2008 Building Code, which is not applicable in the instant case. He notes, however, that a "stair" is defined in that Code as "a change in elevation, consisting of two or more risers." As such, the single step here did not constitute a stair, and thus, § 1009.11 could not apply. Further, he opines that §§ 1108.1.4 and 1008.1.6 do not apply to the facts of the instant case.

Next, Mr. Morris discusses American Society of Testing Materials Code (ASTM) F1637-95 § 6.2, which plaintiff's expert, Mr. Fein, also alleges was violated. At the outset, Mr. Morris notes that this is a voluntary standard, which has not been adopted as law or code in New York City, New York State or any other jurisdiction, and therefore is not applicable.

The court notes that it is error to present ASTM standards to a jury as standards they should consider. *Gonzalez v City of NY*, 109 AD3d 510 (2d Dept 2013). Mr. Morris acknowledges that ASTM standards state that a short flight of stairs should be avoided and, that, where it cannot be avoided, visual cues should be provided to facilitate step identification. He maintains that here the single step could not be avoided. He contends that

> "[i]n order to have placed a ramp at the exterior of the building, a ramp slightly over 15 feet long would be necessary in order for it to comply with the applicable 1:12 maximum slope requirements. A ramp that long would not fit on the sidewalk and even if it did, it would interfere with normal sidewalk traffic. In addition, despite the fact that this is a voluntary standard, the handrail on the north side of the step and landing was a visual cue. Therefore, this section of ASTM F1637-95 was not violated."

Finally, Mr. Morris opines that the loose handrail, cited in Mr. Fein's report, was not relevant as there was no testimony that plaintiff had either used or attempted to use the handrail when she reportedly fell. Thus, Mr. Morris opines that, to a reasonable degree of engineering certainty, the step, the landing and sidewalk did not violate any provisions of the applicable 1968 New York City Building Code, the inapplicable 2008 New York City Building Code, the New York City Administrative Code or ASTM FI637-95.

Defendant next argues that the step was open and obvious and not inherently dangerous and that plaintiff's contentions to the contrary are belied by Mr. Morris' expert opinion. Defendant asserts that there were visual clues relative to the elevation change on both sides of the step, as there was a fence on the right-hand side and a handrail on the left side. Moreover, defendant argues that plaintiff's claim that she did not see the step because it was the same color as the sidewalk below fails because she had ascended that same step just moments before her fall when she entered the building. Defendant thus contends that plaintiff cannot claim that there was optical confusion.

Plaintiff's Opposition

Plaintiff opposes defendant's motion and argues that the step was inherently dangerous, constituted a hazardous condition, and that her fall was the result of optical confusion. Thus, she maintains that even if it was open and obvious, defendant can still be found liable for her accident. Moreover, she contends that the step violated various codes and regulations. In support of her opposition, plaintiff submits an affidavit and report from her expert, Mr. Fein, P.E. and points to various court decisions which address the concept of optical confusion.

In preparation of his affidavit and report, Mr. Fein, a professional and licensed engineer in the State of New York, inspected the premises on November 20, 2014. At that time, Mr. Fein took various measurements and photographs. In addition, he reviewed plaintiff's and defendant's deposition transcripts as well as the Administrative and Building Codes of the City of New York.

Mr. Fein opines, with a reasonable degree of engineering certainty, that the accident and injuries sustained by plaintiff were caused by the negligence of the defendant in providing and allowing an exit that was dangerous and hazardous. Specifically, he opines that a single step is extremely dangerous in that it is out of the line of sight of someone approaching the step, especially when walking down and results in an unexpected trap. He notes that the ASTM Code F1637-95 §6.2 states that a short flight of stairs (three or fewer risers) shall be avoided where possible and if it cannot be avoided, obvious visual cues should be provided such as handrails, delineated nosing edges, tactile cues, warning signs, contrast in surface colors, and accent lighting. Mr. Fein contends that there were no warning cues and that the concrete of the platform and the concrete of the sidewalk blended together, causing the single step to not be visible from plaintiff's perspective.

Mr. Fein maintains that § 1009.11 of the Building Construction Code was violated as it requires that stairways shall have handrails on each side and that, here, the subject step contained no usable handrail. Next, he contends that defendant violated §§ 1008.1.4[1] and 1008.1.6 of the Building Construction Code. In addition, Mr. Fein opines that defendant violated Real Property Law §§ 235 and 235-b, New York City Health Code § 135.17 and New York City Administrative Code § 27-127, 27-128, 27-217, 27-232, 28-301, 27-370 and 27-370 (d). However, the court notes that he offers no basis for his opinion that these sections were violated.

In further support of her opposition to the motion, plaintiff points to several court decisions which address the concept of optical confusion. Plaintiff contends that *Saretskv v 85 Kenmare Realty Corp.* (85 AD3d 89, 92-93 [1st Dept 2011]) is comparable to the instant case. In *Saretsky*, the First Department determined that the plaintiff's testimony, in particular, that she did not see the five-inch step, along with her expert's affidavit which stated that the concrete on the sidewalk and on the walkway were similar shades of gray, and that there were no warning signs, handrails or barricades to indicate a change in elevation, was sufficient to raise a triable question of fact precluding summary judgment.

Plaintiff also cites several other cases which refer to optical confusion. For instance, *Roros v Oliva*, (54 AD3d 398, 400 [2d Dept 2008]) which involved a plaintiff who was injured when, on a visit to the defendant homeowners' house for the first time, she fell on a step separating the foyer from the great room. The floor of the foyer and the great room, as well as the nosing of the step, consisted of the same wood material, and the plaintiff claimed that she did not notice the existence of the step prior to the accident.

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[1]Mr. Fein's report refers to § 1008.*14*, rather than § 1008.*1.4*, but this undoubtedly is a typographical error. Indeed, he next discusses § 1008.1.6, the next section, and defendant's engineering expert, Mr. Morris, only addresses § 1008.1.4. In addition, plaintiff's bills of particulars collectively do not reference § 1008.14, and the initial bill of particulars only references § 1008.1.4. The reply affirmation from defendant's counsel also contains the same mistake in paragraph 18 therein, but paragraph 21 rectifies this error by correctly referring to § 1008.1.4.

The homeowners asserted that the step was an open and obvious condition. However, the Second Department held that "there is an issue regarding whether, under the circumstances, a person who was unfamiliar with the premises could reasonably perceive the existence of a change in elevation between the foyer and the great room and/or whether the subject area created 'optical confusion'. . ."
(internal citations omitted).

In *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1st Dept 1988], the First Department held that "the failure to mark or otherwise distinguish the steps in any meaningful fashion, exacerbated by the proximity of the entrance doors to the steps, is both legally sufficient and adequately supported by the record to preclude summary judgment." In *Scher v Stropoli* (7 AD3d 777, 777 [2d Dept 2004]) the Second Department affirmed the denial of defendants' summary judgment motion where plaintiff alleged that she fell in a restaurant "after failing to notice an elevation difference caused by a single-step riser separating the private dining area and the main dining area . . ." That failure to detect the elevation difference occurred, she alleged, because the single-step riser "consisted of identical tiles, and because the restaurant was dimly lit" (*id.*). The Second Department agreed with the ruling that defendants "failed to establish as a matter of law that they maintained their property in a reasonably safe manner" (*id.* [internal citations omitted]).

Most recently, the Second Department addressed the issue of optical confusion in *Matheis v Hunt Country Furniture. Inc.*, 140 AD3d 713 [2016] holding that the defendant's submissions failed to eliminate all issues of fact as to whether, under the circumstances, the plaintiff, who was unfamiliar with the premises, could reasonably perceive the existence of a change in elevation between the wooden single-step riser and the wooden platform below it, and whether the subject area created optical confusion.

Plaintiff further argues that the cases cited by defendant in support of its summary judgment motion are distinguishable or inapplicable to the facts of the instant case. In addition, plaintiff maintains that defendant's contention that plaintiff had some familiarity with the step since she had just stepped up on it right before her accident is unavailing, inasmuch as she had never gone down this step before her fall. She points to her testimony in this regard:

> Q: Right before your accident occurred, did you know that there was a step that you needed to go down in order to reach the sidewalk.
> A: No (Carmen Rodriguez tr at 29-30, lines 23-3).
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> * * * *
>
> Q: Did you forget about that step?
> A: No, because I didn't know it was there (*id.* at 57, lines 21-23).

In support of her contention that her fall resulted from optical confusion, she points to the following testimony:

> Q: So what caused you to fall?
> A: Maybe the confusion that the step was the same as the sidewalk.
> Q: That's a maybe. Is that a maybe?
> A: No. For sure.
> Q: Why did you say maybe?
> A: No, for sure. They are the same color (*id.* at 31, lines 7-14).
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> * * * *
>
> Q: Did anything else, other than the steps being the same color, contribute to your accident?
> A: No (*id.* at 31-32, lines 23-2).

Finally, plaintiff opposes defendant's motion on the ground that summary judgment is not appropriate here, as the stairway was in violation of various statutes, regulations and codes. Specifically, she contends that defendant violated Real Property Law §§ 235 and 235-b, New York City Health Code § 135.17 and New York City Administrative

Code §§ 27-127, 27-128, 27-217, 27-232, 27-370, 27-370 (d), § 27-375 (f) and 28-301. In addition, she maintains that §§ 1008;1.4, 1008.1.6 and 1009.11 of the Building Code were violated due to the failure to have a handrail on both sides of the step.

Plaintiff points out that Administrative Code § 27-127 states that all buildings and all parts thereof shall be maintained in a safe condition and that § 27-128 provides that the owner shall be responsible at all times for the safe maintenance of the building and its facilities. Next, she points to § 27-370, which requires that exit passageways shall be maintained free of obstructions at all times. Specifically, she contends that "Section 27-370(d) clearly indicates that changes in level requiring less than two risers in an exit passageway shall be by a ramp . . ." (bold emphasis omitted).[2]

Plaintiff argues that defendant has failed to make a prima facie case that the step at issue does not violate § 27-370 (d). In support of this proposition, she cites to *Elbadawi v Mvrna & Mark Pizzeria, Inc.* (70 AD3d 627, 628 [2d Dept 2010]). In *Elbadawi*, plaintiff fell on a single step while exiting through a doorway of a pizzeria. The court held that there were triable issues of fact as to the claimed violations of Administrative Code § 27-370 (d) which could serve as a predicate for liability. Similarly, plaintiff maintains that the single step that she fell on was a horizontal extension of a vertical exit, which was required to have more than two risers.

Finally, plaintiff argues that defendant has failed to establish that § 1009.11 of the Building Code was not violated, noting that it requires that "[s]tairways shall have handrail[s] on each side. Handrails shall be adequate in strength and attachment."[3] Here, she contends that there was only a handrail present on one side. In addition, she points to her testimony that as she was falling she tried to hold on but was unable to find something

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[2]*See* ¶ 38 of Affirmation of Narciso Garcia, Esq., dated November 30, 2016, submitted in opposition to defendant's summary judgment motion (Garcia affirmation).

[3]*See* Garcia affirmation ¶ 43.

to grab. She contends that the Second Department has consistently denied summary judgment motions in similar cases, pointing to *Viscusi v Fenner* (10 AD3d 361, 362 [2d Dept 2004]) where the court held "[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 [hand] rail, if required by law, would seem to be a proximate cause of the accident'" (quoting *Lattimore v Falcone*, 35 AD2d 1069,1069 [4th Dept 1970]). Moreover, plaintiff contends that although there was a single handrail at the other side of the step, a missing handrail on the side of the step she was walking on goes to the defendant's comparative negligence and therefore precludes a finding by the court as a matter of law. Plaintiff further opposes the motion contending that defendant violated §§ 1009.11 and 1607.7.1 of the Building Code, which also relate to handrails.

Thus, plaintiff concludes that defendant's motion should be denied, as the Appellate Division case law, her testimony and the affidavit of her expert create numerous issues of fact regarding both the issue of optical confusion and the violation of numerous code sections.

Defendant's Reply

In reply, defendant maintains that the step was open and obvious and readily visible and that there were sufficient visual cues to alert plaintiff to the change in elevation, and the fact that the platform, step and sidewalk were of the same color does not alone create an issue of fact. Defendant cites to several cases in support of this proposition. However, the court notes that the facts of the cases cited are distinguishable from those in the instant case. Defendant also argues that the step was not in violation of any applicable statute, regulations or code. Defendant notes that plaintiff's opposition papers do not oppose defendant's arguments concerning Real Property Law §§ 235 and

235-b (which involve the interference with quiet enjoyment and the warranty of habitability, respectively) or Administrative Code § 28-301 (which places limitations on the area of buildings). Thus, defendant contends that it is clear that these provisions are inapplicable. In addition, defendant notes that since plaintiff does not allege that she fell on an"interior stair," § 27-375 (f) is inapplicable and because § 27- 217 applies to changes in use, it is similarly inapplicable.

Defendant reiterates that §§ 27-127 and 27-128 are general safety provisions which cannot be used to support a finding of liability and, more importantly, these provisions were repealed prior to the plaintiff's accident. In addition, defendant notes that the Building Code provisions cited by the plaintiff and her expert are all contained in the 2008 Building Code; thus they are not applicable in the instant matter. Moreover, defendant maintains that even if the 2008 Code applied, the provisions cited have not been violated in the instant case.

Discussion

Under New York common law, a landowner "has a duty to maintain his or her premises in a reasonably safe condition" (*Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2d Dept 2010]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]; *see also Peralta v Henriquez*, 100 NY2d 139, 143-144 [2003]), taking into account all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*see Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *Peralta*, 100 NY2d at 144; *Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *Basso*, 40 NY2d at 241). However "a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (*Mossberg v Crow's Nest Mar. of Oceanside*, 129 AD3d 683, 683-684 [2d Dept 2015] quoting *Groom v Village of Sea Cliff*, 50 AD3d

1094[2d Dept 2008]; *see Progressive Northeastern Ins. Co. v Town of Oyster Bay*, 40 AD3d 612, 613 [2d Dept 2007]; *Stanton v Town of Oyster Bay*, 2 AD3d 835, 836 [2d Dept 2003], *lv denied* 3 NY3d 604 [2004]). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Surujnaraine v Valley Stream Cent. High School Dist.*, 88 AD3d 866, 867 [2d Dept 2011] quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; *see Cassone v State of New York*, 85 AD3d 837, 838-839 [2d Dept 2011]; *Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892, 892-893 [2d Dept 2011]; *Shah v Mercy Med. Ctr.*, 71 AD3d 1120, 1120 [2d Dept 2010]; *Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 618 [2d Dept 2010]).

A condition that is visible to one "reasonably using his or her senses" is not inherently dangerous (*Tagle*, 97 NY2d at 170). However, sometimes "visible hazards do not necessarily qualify as open and obvious" because of "the nature or location of some hazards, while they are technically visible, make them likely to be overlooked" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004] citing *Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071 [3d Dept 1992]. In fact, a step may be dangerous where the conditions create "optical confusion"--the illusion of a flat surface, visually obscuring the step (*Brooks v Bergdorf-Goodman Co.*, 5 AD2d 162, 163 [1st Dept 1958]; *see Buonchristiano v Fordham Univ.*, 146 AD3d 711, 712 [1st Dept 2017]; *Matheis*, 140 AD3d at 714; *Roros*, 54 AD3d at 400). In cases involving the concept of optical confusion,"findings of liability have typically turned on factors such as an inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], *lv*

denied 24 NY3d 907 [2014], quoting *Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1st Dept 1966], *affd*, 19 NY2d 786 [1967]; *see Surujnaraine v Valley Stream Cent. High School Dist.*, 88 AD3d at 867; *Gubitosi v Pulte Homes of N.Y.,LLC*, 81AD3d 690, 691 [2d Dept 2011]; *Saretsky*, 85 AD3d at 92; *Chafoulias*, 141 AD2d at 211).

Here, plaintiff contends that she fell due to optical confusion as a result of the single step being of the same color as the adjacent sidewalk. Specifically, plaintiff testified that at the time of her fall, she was looking forward and she did not see the step before she fell because it was the same color as the sidewalk. When questioned whether she had forgotten about the step she responded: "No. because I didn't know that it was there" (Carmen Rodriguez tr at 57, lines 21-23). She further testified that: "After I was on the floor and I saw it [the step], that it was tall and it's not so much the tallness but the color. I thought it was the same sidewalk." (*id.* at 58, lines 4-7). In addition, Mr. Fein opined that there was a hazardous single step which was out of the line of sight of someone approaching the step, especially when walking down. He states that "the line of sight is from the horizontal to 18 degrees below the horizontal and when walking straight out of the subject building, the single step would create a dangerous and unexpected trap in that it was located outside of the line of sight."

The court finds that defendant has failed to establish prima facie that the step which allegedly caused plaintiff to fall and sustain injuries was open and obvious. Moreover, an open and obvious condition only goes to the issue of the plaintiff's comparative fault and cannot be the sole basis for summary judgment.

If a condition is open and obvious, it goes to the issue of the plaintiff's comparative negligence and the defendant's duty to warn and does not end the inquiry as to the property owner's negligence. Here, viewing the evidence submitted in support of the defendants' motion for summary judgment in the light most favorable to the plaintiff

(see *Hantz v Fishman*, 155 AD2d 415, 416 [1989]), the defendants have failed to make a prima facie showing of its entitlement to judgment as a matter of law by establishing that it both maintained the premises in a reasonably safe condition and that the step plaintiff claims she failed to see was open and obvious. Until about ten years ago, some courts dismissed all negligence claims where the hazard was considered to be "open and obvious", broadly holding that " '[l]iability under . . . common-law negligence will not attach when the dangerous condition complained of was open and obvious' "(see e.g. *Sandler v Patel*, 288 AD2d 459, 459, [2d Dept 2001], lv denied 99 NY2d 509 [2003], quoting *Panetta v Paramount Communications*, 255 AD2d 568, [1998] lv denied 93 NY2d 806 [1999]; Patrie v Gorton, 267 AD2d 582, 699 NYS2d 218 [3d Dept 1999], lv denied 94 NY2d 761 [2000]). However, the Second Department and the Third Department have specifically repudiated their prior holdings, such as those in *Sandler v Patel* and *Patrie v Gorton*, holding instead that "proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (see *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; see also *MacDonald v City of Schenectady*, 308 AD2d 125 [3d Dept 2003]). In fact, the broad application of the open and obvious doctrine as defendants urge this court to adopt has been rejected in all four Departments. In *Cohen v Shopwell Inc., 309 AD2d 560, 562* (1st Dept 2003) the court holds "[T]he duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn, and that liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn." See also *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 (1st Dept 2004). Finally, in the Fourth Department, see *Holl v Holl*, 270 AD2d 864 (4th Dept 2000).

Even if defendant had made out a prima facie case, the plaintiff has raised triable issues of fact through her testimony, her expert's affidavit and photographs that she claims demonstrate that the color and position of the step created optical confusion, i.e., "the illusion of a flat surface, visually obscuring . . . [the] step[]" (*Saretsky*, 85 AD3d at 92; *see Matheis*, 140 AD3d at 714; *Roros*, 54 AD3d at 400; *Thornhill*, 183 AD2d at 1073). Based upon the foregoing, the court finds that there is a triable issue of fact regarding whether plaintiff fell as a result of optical confusion. As such, the court finds that a determination regarding the applicability of the cited statutes and ordinances would be superfluous at this point. Accordingly, it is

ORDERED that defendant's motion is denied in its entirety.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court