

Pezzello v Pierre Congress Apts., LLC
2017 NY Slip Op 31715(U)
August 16, 2017
Supreme Court, New York County
Docket Number: 160023/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
DIANA PEZZELLO,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 160023/2014

Mot. Seq. 002

PIERRE CONGRESS APARTMENTS, LLC, and
URBAN ASSOCIATES, LLC,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendants, Pierre Congress Apartments, LLC, and Urban Associated, LLC (“Defendants”) now move pursuant to CPLR 3212 for summary dismissal of plaintiff, Diana Pezzello’s (“Plaintiff”) amended complaint (“Complaint”).

Factual Background

According to the Complaint and Supplemental Bill of Particulars (“Bill of Particulars”), Plaintiff was injured when she fell while descending a stairway going from the first floor of the apartment building where she resided (the “Building”) to the basement. At the time of Plaintiff’s accident the Building was owned by defendant Pierre Congress Apartments, LLC and managed by defendant Urban Associates, LLC.

Plaintiff filed the Complaint, alleging, among other things, that the subject stairway was improperly and negligently constructed and maintained and was not in compliance with the applicable statutes, laws, codes, ordinances and administrative regulations (Compl., ¶¶12-13; Bill of Particulars, ¶¶3, 16). Specifically, Plaintiff alleges that the steps were not constructed in

compliance with the Building Code (Administrative Code of City of N.Y.) (“Building Code”) § 27-375(e)(2). Plaintiff further alleges that the handrail Plaintiff was holding on to at the time of her accident failed to comply with Building Code §§ 27-375(f), (f)(2) and (f)(3). Moreover, Plaintiff alleges that the subject stairway violated the Fire Code (Administrative Code of City of N.Y.) (“Fire Code”) §§ 1027.1 and 1027.3. Plaintiff also alleged common law negligence claims (Compl., ¶¶11-17).

Defendants’ Motion

In support of their motion to dismiss, Defendants first argue that the configuration of the subject stairway was not the cause of Plaintiff’s accident, as Plaintiff concedes that she was holding on to the handrail at the time of her accident. Moreover, since the configuration of the handrail was not the cause of Plaintiff’s accident, her statutory claims fail.

Further, while Plaintiff, in her Bill of Particulars, alleges that the subject steps contained “inconsistent tread and riser dimension[s],” Plaintiff’s testimony fails to indicate that the tread and riser dimensions caused her accident. Additionally, Defendants submit the affidavit of their expert, Stanley Fein, P.E. (“Fein”), a professional engineer licensed in the State of New York, indicating that he inspected the subject stairway on April 28, 2015 and January 12, 2016 (Flipping Aff., Ex. M, Fein Aff., ¶1). Fein affirmed that the subject steps were worn, which was caused by normal use. Fein also conducted coefficient of friction measurements of the subject steps, which indicated that both steps measured 0.91. Fein’s affidavit affirms that coefficient measurements were taken on the front edge of the tread on the third and fourth steps where Plaintiff’s feet were placed before her accident (*id.*, ¶18). Fein further affirmed that the

third and fourth steps were thirty-six inches wide, had riser heights of seven inches, and tread depths of ten inches (*id.*, ¶11).

As to the handrails, Fein affirmed that there were handrails on both sides of the subject stairway (Fein Aff., ¶24). Additionally, Fein affirmed that the handrails on both sides covered the top thirteen steps, and that the handrails did not cover the bottom two steps (*id.*)

Moreover, Defendants argue that the Building and Fire Codes cited by Plaintiff are not applicable, since the subject stairway was not an “interior stair” under Administrative Code § 27-232. Defendants also argue that the worn edge of the subject step on which Plaintiff allegedly slipped is not an actionable defect.

As to notice, Defendants argue that they did not have notice of the alleged defective condition of the subject step, since there were no prior accidents or complaints about the condition of the subject stairway. Defendants submit the deposition testimony of Nikola Cubi (“Cubi”), the superintendent of the Building at the time of Plaintiff’s accident. Cubi testified that he inspected the stairs on a daily basis for slipping hazards and to make sure they are in acceptable condition (Fippinger Aff., Ex. J-1, Deposition Trans. of Cubi, January 6, 2016). Cubi testified that the subject stairway was in good condition (*id.* at Ex. K-1, Deposition Trans. of Cubi, January 14, 2016).

Defendants also submitted the testimony of Miguel Escalante (“Escalante”), a porter employed at the Building (*id.* at L-1, Deposition Trans. of Escalante 18:12-13). Escalante testified that no one has ever fallen on the subject stairway or complained about the condition of the stairway in the twenty years he has been employed at the Building. Escalante further testified

that immediately after Plaintiff's accident he inspected the subject stairway and found that the stairway was not slippery (*id.*, 190:13-15).

Plaintiff's Opposition

In opposition, Plaintiff argues that the treads of the third and fourth steps and handrails located in the subject stairway were in violation of several statutory provisions. In support of her argument, Plaintiff submits the affidavit of Andrew Yarmus ("Yarmus"), a professional engineer licensed in the State of New York (Maniatis Opp., Ex. A). Yarmus indicates that the subject steps were in violation of Building Code § 27-375(e)(2), requiring that riser height and tread width be consistent in any flight of stairs from story to story. Yarmus affirms that the riser height of the third and fourth steps varied from the other steps on the stairway and varied across the width of the steps themselves. The fourth step from the bottom varies .75 inches: the riser height was 7 ½ inches toward the right side of the step looking downwards, then shortens to 7 ⅛ inches, then 6 ¾ inches at the middle of the step, and 7 ½ inches on the left side of the step. He further indicated that the riser height of the third step varied by 0.75 inches: the riser height is 7 ½ inches towards the right and left sides of the step and 6 ¾ inches towards the middle of the step (*id.*, ¶18). Yarmus further affirmed that the varying riser heights on the individual steps "created a dip and angling towards the middle of the steps," which created "uneven walking surface and a significant risk of loss of footing and balance, which is especially dangerous when descending a flight of steps" (*id.*, ¶20).

Yarmus also indicated that the nosings of the subject steps were angled and sloped downwards by 30 degrees and 40 degrees, respectively. Additionally, Yarmus stated that

coefficient measurements in this case are irrelevant, since Plaintiff has not alleged that she fell because of a slippery surface.

Next, Plaintiff argues that the handrails in the subject stairway violated Building Code §§ 27-375(f), (f)(2), and (f)(3), and were a dangerous condition. First, Yarmus affirmed that neither of the handrails in the subject stairway extended for the “full run of the steps,” in violation of Building Code § 27-375(f), as the handrail Plaintiff was holding on to at the time of her accident terminated at the fourth step from the bottom (Yarmus Aff., ¶28). Second, the subject handrail was in violation of Building Code § 27-375(f)(2), requiring that the handrail be at least 30 inches above the nosing of the step. And third, the end of the handrail did not “return” to the wall, “prevent[ing] plaintiff from feeling that the handrail was about to terminate,” in violation of Building Code § 27-375(f)(3) (*id.*, ¶¶28-29). Further, the wear and tear of the subject steps violated the Fire Code §§ 1027.1 and 1027.3 and (Bill of Particulars ¶3).

Additionally, Plaintiff argues that Building Code § 27-375 is applicable, since the subject stairway connected the lobby of the Building to the basement. Moreover, the basement was “occupied and habitable,” since it contained a laundry room, gym, and bike room for the tenants, a changing room for the Building’s maintenance staff, a garbage room and shop area used by the superintendent and maintenance (Opp., ¶55). Moreover, Plaintiff notes that Defendants’ expert’s affidavit is silent as to whether the subject stairway constitutes “interior stairs.”

Additionally, Plaintiff asserts that Defendants had notice of the worn steps, as the “extensive wear and tear” of the subject steps “took years to develop” (Opp. Aff., Ex. A, ¶35). Moreover, Cubi admits that he was “aware of and noticed the condition of the steps and the

handrails in September 2014” and that the condition of the steps and configuration of the handrail remained the same since 2007 (*id.*, ¶¶36-37).

Moreover, Plaintiff avers that she established that the condition of the subject treads and absence of the appropriate handrails on the subject stairway was the cause of her accident. Specifically, Plaintiff alleges that the subject steps were curved, uneven and dipped, and that as she stepped from the fourth step to the third, her ankles were “caused to slip and roll downwards off the steps,” causing her to fall (Opp. Aff., ¶41).

Defendants' Reply

In reply, Defendants first argue that the sections of the Building Code cited by Plaintiff are inapplicable because Plaintiff's accident did not take place on “interior stairs.” Specifically, the subject stairway does not serve as a required exit, as the stairway leads from the lobby to the basement. Moreover, Plaintiff's argument that the subject stairway is properly identified as “interior stairs” fails, since they fail to cite to supporting caselaw.

Further, the allegation that the depression in the step caused her ankle to twist causing her to fall is unsupported by her deposition testimony. Instead, Defendants argue that Plaintiff's testimony affirms that her accident was caused by slipping on the subject steps. Moreover, Plaintiff fails to refute Defendants' expert's coefficient of friction measurements establishing that the surface of the subject steps were slip-resistant.

Additionally, Defendants argue that Plaintiff failed to present evidence connecting the allegedly defective handrail to her fall. Specifically, Defendants note that Plaintiff did not testify that she reached out for the handrail before or during her fall. Moreover, Defendants contend that Plaintiff did not testify that the lack of handrail contributed to her accident. Instead, Plaintiff's

testimony indicates that she was holding onto the handrail when she was transitioning from the fourth step to the third step.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Madeline D ‘Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607, 957 N.Y.S.2d 88, 91 [1st Dept 2012], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky*, 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493 [1st Dept 2013]). 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 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 480 N.E.2d 740 [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 N.Y.2d 223, 231, 413 N.Y.S.2d 141, 385 N.E.2d 1068 [1978]).

It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of

avoiding the risk (*Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [1976]; *Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 141-42, 718 N.Y.S.2d 287 [2000]). A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it did not cause the condition and that it did not have actual or constructive notice of the hazardous condition which precipitated the injury (*Sabalza v. Salgado*, 85 A.D.3d 436, 924 N.Y.S.2d 373, 375 [1st Dept 2011]; see *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493 [1994]).

Plaintiff's Statutory Claims

“[T]he applicability of the Building Code is a purely legal question for the court to determine” (*Reyes v. Morton Williams Associated Supermarkets, Inc.*, 50 A.D.3d 496, 497, 858 N.Y.S.2d 107, 109 [1st Dept 2008]). “Interior stair[s]” are defined as “stair[s] within a building, that serve[] as a required exit” (Building Code § 27–232). “Exit” is defined as “[a] means of egress from the interior of a building to an open exterior space” (*id.*; see *Cusumano v. City of New York*, 15 NY3d 319, 324 [2010] [“the stairs from where plaintiff fell did not serve as an exit as defined by the Administrative Code, but rather as a means of walking from the first floor to the basement”]; see also *Gibbs v. 3220 Netherland Owners Corp.*, 99 A.D.3d 621 [1st Dept 2012] [holding that stairs leading from first floor to lobby were not “exit” stairs within the meaning of section Building Code § 27–375]; *Remes v. 513 W. 26th Realty, LLC*, 73 A.D.3d 665, 666 [1st Dept 2010] [finding that two steps leading from building’s mailroom to lobby were not “interior stairs” under Building Code § 27–232]; *Walker v. 127 W. 22nd St. Assocs.*, 281 A.D.2d 539, 540, 722 N.Y.S.2d 250, 250 [1st Dept 2001]).

Here, Defendants have met their burden of demonstrating the absence of any triable issue

of fact as to whether the subject stairway served as “interior stairs” by submitting Fein’s affirmation, which establishes that the subject stairway led from the lobby to the basement of the Building. Plaintiff’s Bill of Particulars likewise acknowledges that her accident took place on the steps providing access from the first floor of the Building to the basement (Bill of Particulars, ¶3). Thus, Building Code § 27-375 is inapplicable to the subject stairway.

Plaintiff’s argument that the Building Code applies to the subject stairway, since the basement was “occupied and habitable” is irrelevant, since the stairway was not a means of egress to an open space under Building Code § 27-232. Moreover, Plaintiff fails to address the caselaw cited in Defendants’ moving papers. Even if the Building Code cited by Plaintiff did apply, dismissal of the Complaint, as discussed below, is premised on other grounds.¹

Finally, Plaintiff’s argument that the subject steps were in violation of the Fire Codes fails. Fire Code § 1027.3 states that “[a]ll required means of egress . . . shall be continuously maintained free from obstructions and impediments to immediate use” Here, Plaintiff fails to present evidence that the condition of the subject steps were an obstruction or impediment that prevented the use of the subject stairway. Additionally, Fire Code § 1027.1 is inapplicable as the stairway is not an “interior stairway” under the Building Code. Moreover, as discussed in the foregoing section, the alleged uneven subject steps were too trivial to be actionable.

Plaintiff’s Common Law Claims

¹ Plaintiff’s argument that the condition of the subject stairway was in violation of Multiple Dwelling Law §78—asserted for the first time in her opposition and does not appear in the Complaint or Bill of Particulars—likewise fails for the reasons discussed in the foregoing section.

With regard to Plaintiff's claim that the third and fourth steps were in a defective condition at the time of her accident, Defendants meet their prima facie burden demonstrating that the subject steps were too trivial to be actionable.

Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*see Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489 [1997]; *Platkin v. Cty. of Nassau*, 121 A.D.3d 879, 879, 994 N.Y.S.2d 636, 637 [2d Dept 2014]). There is no "minimal dimension test or per se rule" that the condition must be of a certain height or depth to be actionable (*Trincere*, 90 N.Y.2d at 977; *see Green v. N. Y. City Hous. Auth.*, 137 A.D.3d 748, 748, 26 N.Y.S.3d 560, 561 [2d Dept 2016]). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere*, 90 N.Y.2d at 978, quoting *Caldwell v. Village of Is. Park*, 304 N.Y. 268, 274 [1952]). A step characterized by a gradual and shallow depression is generally regarded as trivial (*Santiago v. United Artists Commc'ns, Inc.*, 263 A.D.2d 407, 408, 693 N.Y.S.2d 44, 45 [1st Dept 1999]; *see Figueroa v. Haven Plaza Hous. Dev. Fund Co.*, 247 A.D.2d 210, 210 [1st Dept 1998] ["The shallow, gradual character of the depression, measured by plaintiff to be an inch and one-half" was too trivial to be actionable]).

Here, Plaintiff testified that her accident was caused by the uneven treads of the third and fourth steps. Plaintiff indicated that her left foot was placed on the third step from the bottom of the stairway and her right foot was on the fourth step from the bottom (Fippinger Aff., Ex. H, Plaintiff's Deposition Trans. 33:6-34:9). Further, her left foot twisted when she put her "foot on the stair," and that both feet twisted at the same time (*id.* at 36:6-19). When asked what her feet

slipped on, Plaintiff testified that she slipped on the “uneven” and “non-level stair[s]” (*id.* at 38:8-13)². Plaintiff further stated that the uneven stairs that caused her to fall were “curved” and that “[t]here was a dip in it[the subject treads]” (*id.* at 43:13-14). She further stated that she noticed “a dip towards the middle portions” of the subject steps (*id.* at 42:16-43:22).

Additionally, when Plaintiff described to the triage nurse how she became injured, she stated that her ankles rolled because the stairs were not level (*id.* at 49:22-24). Plaintiff further testified that she did not observe liquid or debris on the subject stairway at the time of her accident (*id.* at 37:24-38:7). Additionally, Plaintiff agreed that the unevenness of the third step was “in the same nature and form” as it was on the fourth step (*id.* at 43:18-22).

Further, Defendants’ submitted the photograph identified as “Defendant’s Exhibit C” at Plaintiff’s deposition (“Photograph C”), which depicts a gradual and slight depression in the third step (Maniatis Aff., Ex. I, Color Photographs-Exhibits to Plaintiff’s Deposition). Photograph C, together with Plaintiff’s testimony that the alleged defect was the same in the third and fourth steps suggests that the depression in the tread of the fourth step was likewise gradual and shallow. Moreover, Photograph C depicts the middle of fourth step, where her right foot was placed at the time of her accident (40:12-41:8), which appears to show only a slight depression.

In opposition, Plaintiff fails to raise a triable issue of fact as to the dangerous condition of the third and fourth steps. Specifically, the measurements taken by Yarmus affirmed that the height of the subject treads varied less than one inch and that the treads gradually depressed from the sides of the thirty-six-inch-wide tread to its centre. Moreover, the photographs submitted by

² While Plaintiff adopts the term “slipped” in her deposition testimony to define her accident, her description of how her accident took place indicates that her feet and ankles twisted, not that she slipped on the subject steps, and therefore, the coefficient measurements submitted by Fein are irrelevant.

Defendants' depict a gradual and shallow depression of the subject treads toward the centre of the steps (Maniatis Aff., Ex. C, Photos taken by Yarmus, Photos 27-28, 45-56, 57-64).

With respect to the subject handrails, Defendants demonstrate the absence of any triable issues of fact as to whether the configuration of the subject handrails was a proximate cause of Plaintiff's accident. Plaintiff testified that immediately after her accident she went to the hospital.

While there, the triage nurse asked how her accident happened, to which Plaintiff stated:

"I fell, that I slipped down the stairs and rolled - - my ankles rolled when I stepped on the stair because the stairs were not level, and they were too narrow and there was nothing for me to grab onto, and . . . I fell"

(Plaintiff's Deposition Trans., 49:22-24).

However, nowhere in her testimony, or in her pleadings, does Plaintiff claim that she reached for either of the handrails as she fell (*Plowden v. Stevens Partners, LLC*, 45 A.D.3d 659, 660, 846 N.Y.S.2d 238, 239 [2d Dept 2007] [finding that the absence of handrails did not contribute to her fall, as "plaintiff did not allege that she reached out for a handrail either before or during her fall and did not testify at her deposition that the lack of handrails contributed to her accident"]; *Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 824 N.Y.S.2d 3 [1st Dept 2006] [granting summary dismissal of plaintiff's complaint where plaintiff's expert failed to allege that a "handrail or a warning as to its absence or the existence of worn treads would have prevented plaintiff's accident. Merely demonstrating the lack of handrails will not stave off summary judgment"]; see e.g. *Pancella v. County of Suffolk*, 16 A.D.3d 566, 790 N.Y.S.2d 876 [2d Dept 2005]; *Hyman v. Queens County Bancorp, Inc.*, 307 A.D.2d 984, 986-87, 763 N.Y.S.2d 669 [2d Dept 2003], *aff'd*, 3 N.Y.3d 743, 787 N.Y.S.2d 215, 820 N.E.2d 859 [2004] [finding

summary dismissal appropriate where plaintiff failed to present any evidence to connect the absence of a handrail to her fall]; *Jefferson v. Temco Services Industries*, 272 A.D.2d 196, 708 N.Y.S.2d 21 [1st Dept 2000] [granting defendants' motion for summary dismissal where plaintiff offered no non-speculative support for theory that he would have recovered footing if handrail had projected an additional quarter-inch from wall]).

Moreover, even if Plaintiff's testimony were to be construed that she reached for a handrail but that there was none there, that alone would still fail to raise an issue of fact to defeat Defendants' prima facie showing, since the codes cited by Plaintiff are inapplicable to the subject stairway (*see Alvia v Mutual Redevelopment Houses, Inc.*, 56 A.D.3d 311, 312 [1st Dept 2008] [holding that plaintiff raised a triable issue of fact where she demonstrated the absence of a right-sided handrail and "plaintiff's expert's unchallenged statement that the absence of a handrail on the stairway's right wall was a significant and dangerous departure from accepted standards and the applicable building code"]; *see also Gold v. 35 E. Assocs. LLC*, 136 A.D.3d 453, 453 [1st Dept 2016] [finding a triable issue of fact where Plaintiff indicated that she tried to reach for a handrail as she fell, but there was none there, and the statement of her expert that the absence of a handrail on the right side of the stairway was a departure from accepted safety standards]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Defendants' motion for summary judgment is granted and Plaintiff's amended complaint is dismissed, with costs and disbursements to defendants; it is further;

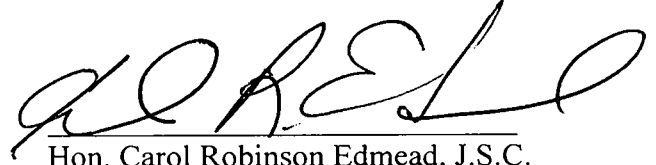
ORDERED that the Clerk is to enter judgment accordingly; it is further

ORDERED that counsel for Defendants, Pierre Congress Apartments, LLC and

Urban Associates, LLC, shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 16, 2017



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDM EAD
J.S.C.