

**Shahar v 1681 49th St., LLC**

2018 NY Slip Op 32736(U)

September 5, 2018

Supreme Court, Kings County

Docket Number: 504940/2013

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 504940/2013

MOT-SEP # 002 & 003

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

MALKA SHAHAR,

Plaintiff,

against

1681 49<sup>TH</sup> STREET, LLC,

Defendant.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed...	<u>          </u>
Answering Affidavits.....	<u>2, 3</u>
Replying Affidavits.....	<u>          </u>
Exhibits.....	<u>          </u>
Other.....	<u>          </u>

Upon review of the foregoing documents, plaintiff's motion and defendant's cross-motion for summary judgment are decided as follows:

**Factual Contentions**

On November 8, 2012, plaintiff, a home health aide, was descending stairs leading from the entrance of defendant's building. The building is "mixed use", with both commercial and residential units. There appears to be no dispute that the stairs have a single handrail on the left side of the staircase (if looking at the building from the street) that does not extend to the last step of the staircase.

As plaintiff described at her deposition, at the time of the accident she was helping a patient of hers down the stairs from the building. The patient held on to plaintiff's left arm. As they were walking down, the patient lost her balance and began to fall into plaintiff. Plaintiff reacted by twisting her body and reaching for the handrail, but the handrail did not extend to her location on the stairs. Plaintiff alleges that she suffered injuries as a result, and asserts claims for negligence and negligence per se, based on purported violations of the New York City ("NYC")

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Building Code, New York State (“NYS”) Building or Residential Code, NYS Multiple Dwelling Law (“MDL”), and Americans with Disabilities Act (“ADA”).

### Analysis

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

### Negligence Per Se

To succeed on her claim of negligence per se, plaintiff must prove the violation of a state statute, and that the violation was a proximate cause of the accident (*Dance v Town of Southampton*, 95 AD2d 442, 445 [2d Dept 1983]). In contrast, violation of a municipal ordinance is only evidence of negligence (*Elliott v City of New York*, 95 NY2d 730, 734 [2001]). Where, as here, plaintiff asserts that defendant violated building code provisions, plaintiff must show that the code provisions apply to property (*see Swerdlow v WSK Properties Corp.*, 5 AD3d 587 [2d Dept 2004]). Likewise, a defendant moving for summary judgment on a negligence per se claim must demonstrate the inapplicability of the relevant provisions (*see Herrera v Persaud*, 276 AD2d 304, 305 [1st Dept 2000]; *Wyckoff v Jujamcyn Theaters, Inc.*, 11 AD3d 319, 320 [1st Dept 2004]).

First, plaintiff contends that defendant violated § C-26-292: 6.4.1.12.1 of the 1938 NYC Building Code (the “1938 Code”) by not having sufficient handrails on the stairs. Plaintiff relies on her expert, who, in his affidavit, states that defendant violated § C-26-292: 6.4.1.12.1 of the

1938 Code. However, neither plaintiff nor her expert explain why, as a matter of fact or law, the 1938 Code applies. Conversely, defendant contends that the 1968 NYC Building Code (the “1968 Code”) governs the stairs at issue, and further contends that the 1968 Code does not require handrails on these stairs. Likewise, defendant does not explain why the 1968 Code applies.

Generally, the version of the Building Code that was in existence at the time the building was constructed applies, unless there was sufficient alteration to the building, in which case the version of the Building Code that was in existence at the time of the alteration applies (*Lester v Waterman*, 242 AD2d 683, 684 [2d Dept 1997]; *Marie D. v R.C. Church of the Sacred Heart*, 161 AD3d 448 [1st Dept 2018]).

In this case, Israel Landau, the managing agent of the building, testified at his deposition that the building was built “approximately in the 1930s”. Landau also testified, somewhat vaguely, about work he performed on the building, describing “concrete work” and “brick work”. When asked whether he knew of any work that had been done to the railings of the building, Landau testified “If I’m not mistaken, which I could double-check, I might have done something for cosmetic reasons . . . . I might have replaced them to match the railings—I put a gate in between the brick columns and the landscaping”. Plaintiff also submits authenticated records from the NYC Department of Buildings’s (the “DOB”) file on the building, which reference the 1968 Code, but it is not clear whether any of the work described in this file concerns the staircase. Defendant submits in its reply papers an unauthenticated certificate of occupancy, which is not considered because its is not in admissible form.

In short, there is not sufficient information to establish when the building or staircase was erected, or if – or when – there was sufficient alteration to the staircase to effect which Building Code applies. Accordingly, the portions of plaintiff's motion, and defendant's cross-motion, regarding plaintiff's claim for negligence per se, based on violation of the NYC Building Code, are denied.

Plaintiff also asserts a claim for negligence per se based on violation of the NYS Building Code or Residential Code. Specifically, plaintiff argues, in its moving papers (namely, counsel's affirmation in support, bill of particulars, and its expert's affidavit) that the violated code is "New York State Building Code, Section R315.1 'Handrails'". However, this court cannot find any such provision in the NYS Building Code.

In plaintiff counsel's affirmation in opposition to defendant's cross-motion, plaintiff changes her identification of the code provision to "the Residential Code of New York State [RCNY] § 315." There is such a provision. However, the Residential Code applies to "detached one- and two-family dwellings and townhouses not more than three stories above-grade in height with a separate means of egress and their accessory structures and one-family dwellings converted to bed and breakfast dwellings"(2010 NYS Residential Code § R101.2). At his deposition, Mr. Landau described the building at issue here as both commercial and residential, having 32 residential units and one commercial space that occupies three units. Thus, the NYS Residential Code does not apply. This portion of plaintiff's motion for summary judgment is denied, and the portion of defendant's cross-motion to dismiss this cause of action is granted.

Plaintiff also asserts a cause of action for negligence per se based on defendant's purported violation of Section 52 of NY MDL. Defendant argues that the MDL does not apply

because Section 52 specifically refers to “exterior stair[s] in connection with any dwelling altered or erected after January first, nineteen hundred fifty-one” and that “[t]he memorandum of the Joint Legislative Committee on House and Multiple Dwellings, which accompanied the legislation, stated it would apply to structures erected after July 1, 1951, but would not be retroactive as to exterior stairs”. As explained above, there is a triable issue of fact regarding whether or when the stairs were altered. Accordingly, the portion of plaintiff’s motion, and the portion of defendant’s cross-motion, for summary judgment on this cause of action, are denied.

Plaintiff’s final claim for negligence per se is based on defendant’s purported violation of Sections 504.2 and 505.2 of the Americans with Disabilities Act (the “ADA”). These do not appear to be statutory sections from the ADA. Rather, they are sections from the ADA Accessibility Guidelines adopted on September 15, 2010, by the U.S. Department of Justice in its ADA Standards for Accessible Design for public accommodations. In any event, defendant is correct in asserting that the ADA provides only injunctive relief, and not damages to private litigants (*Lugo v St. Nicholas Assocs.*, 18 AD3d 341, 342 [1st Dept 2005], citing 42 USC § 12188[a], § 2000a–3[a]). Accordingly, the portion of plaintiff’s motion for summary judgment as to its ADA cause of action is denied, and the portion of defendant’s cross-motion regarding the same is granted.

In addition to its negligence per se claims, plaintiff also asserts a negligence claim based on the defective condition of the stairs. First plaintiff argues that the handrail itself is defective, presumably because it does not extend to the end of the stairs. “Whether 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”

(*Trincere v Cty. of Suffolk*, 90 NY2d 976, 977 [1997], quoting *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]).

In *Kunsman v Baroody* (60 AD3d 1369, 1370 [4th Dept 2009]), the Fourth Department upheld a jury's determination that a failure to provide a handrail for exterior steps constituted an unsafe and dangerous condition. However, there is no evidence to suggest that the missing handrail in *Kunsman* and the handrail in this case are so similar that this court should take this issue of fact from the jury. Under the circumstances, there is a triable issue of fact concerning whether the length of the handrail in this case is an unsafe condition. Accordingly, the portion of plaintiff's motion for summary judgment, and the portion of defendant's cross-motion, as to this negligence cause of action are both denied.

Plaintiff also asserts a claim for negligence on the basis that the construction of the staircase resulted in an optical distortion that prevented pedestrians from appreciating height differentials between steps. Plaintiff avers that "the uniform gray color of the stairway treads which hazardously differed in size from step to step, contributed to the dangerous condition as they presented visual distortions as to the actual size of the steps, causing me to lose my balance and misstep" (Affidavit of Malka Shahar<sup>1</sup>, at ¶ 4). In her bill of particulars, plaintiff states that the steps were "uneven", "irregular", as well as "dangerous and/or hazardous" (Bill of Particulars, at ¶ 5). Therefore, defendant has sufficient notice of plaintiff's theory of negligence. Furthermore, defendant does not claim prejudice in its opposition to plaintiff's claim of optical

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<sup>1</sup> Although the affidavit states on the first page that it is sworn by Malka Shahar, it is signed by "Malika Shagaraeva". There is no explanation for this, but defendant does not object.

distortion. Indeed, defendant's expert responds to the optical distortion argument in defendant's opposition and cross-motion.

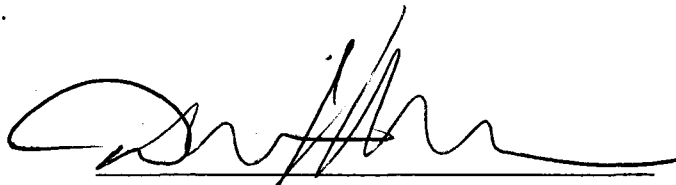
Optical distortion is a recognized dangerous condition in premises liability (*Matheis v Hunt Country Furniture, Inc.*, 140 AD3d 713, 714 [2d Dept 2016]; *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012]). In his affidavit, plaintiff's expert explains that "the varied sizes of gray concrete steps and risers contributed to plaintiff experiencing a visual distortion when navigating the steps". Conversely, defendant's expert contends that plaintiff's optical distortion claim has no merit because the subject stairs are concrete and uniform in color, "which bring out the nosing edges of the steps". Defendant's expert further argues that optical distortion is most often found when nosings to steps are camouflaged by strongly patterned carpets. Given the conflicting reports from the two experts, the court finds that there are triable issues of fact as to whether the steps created an optical distortion.

Finally, defendant argues that the plaintiff caused the accident by assisting her patient, and not because of the missing handrail or the steps. The determination of proximate cause, or substantial cause of the accident, is generally the province of the trier of fact (*Canals v Tilcon New York, Inc.*, 135 AD3d 683, 683-84 [2d Dept 2016]). Additionally, there may be more than one proximate cause of any accident (*id.* at 684). Under the circumstances, there is not sufficient consensus between the parties on proximate cause to take this issue away from the trier of fact (*see, e.g., Scala v Scala*, 31 AD3d 423, 425 [2d Dept 2006] [reversing the trial court's decision to grant defendant's cross-motion for summary judgment because there was potentially more than one proximate cause of the plaintiff's accident, in which she tripped over a doll on stairs and was unable to stop her fall because there was no handrail]).

Based on the foregoing, plaintiff's motion for summary judgment is denied. Defendant's cross-motion is granted to the extent that plaintiff's causes of action for negligence per se based on the violation of the NYS Building or Residential Code, and the ADA, are dismissed. The remainder of defendant's motion is denied.

This constitutes the order of the court.

September 5, 2018  
**DATE**

  
**DEVIN P. COHEN**  
Acting Justice, Supreme Court

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