SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 450462/2016

SHIRA BELFER,

Plaintiff,

MOTION SEQ. NO. 002

- v -

MACY'S, INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Shira Belfer, defendant Macy's, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this action by filing a summons and verified complaint in the Supreme Court, Queens County on December 2, 2014. Doc. 1.[1] In her amended verified complaint, plaintiff alleged that, on January 10, 2013, she was injured at a store ("the store") operated by defendant at 88-01 Queens Boulevard, Elmhurst, New York, when she walked into "a door in the front of the store which was not properly labeled and which appeared to be a window." Doc. 32 at par. 5.

[1] The venue of this case was transferred to New York County on April 8, 2016. Doc. 2.

In her verified bill of particulars dated November 23, 2015, plaintiff alleged that the incident occurred as she was leaving the store to meet a friend. Doc. 34 at par. 4. Specifically, she alleged that "the doorway area was deceptive in that there were no markings to indicate a window area and [she was injured when she was] caused to walk into the window area." Doc. 34 at par. 4.

Plaintiff amended her verified bill of particulars on November 29, 2016, alleging that defendant was negligent in "permitting an expansive unmarked clear glass wall which was floor to ceiling and measur[ing] about 20 feet across" to exist in the store. Doc. 35 at par. 5. She also claimed that "[d]ue to sunlight at that time and place it was impossible for a person unfamiliar with the area to be aware that this clear glass was actually there." Doc. 35 at par. 5. Further, she alleged that there were "no warning devices of any kind on the glass", that "[t]he reflection of the sunlight prevented [her] from observing the glass . . . and allowed her to walk into the glass", and that she "was totally unaware that this clear glass wall barrier was preventing her from reaching the exit." Doc. 35 at par. 5.

At her deposition, plaintiff testified that, on the afternoon of January 10, 2013, her friend dropped her off at the store and went to pick up her sick child at school. Doc. 36 at 35. The friend told plaintiff that she would drive back to get her after the child was picked up. Doc. 36 at 35, 40. Plaintiff then entered the store by walking through two sets of doors with a vestibule or hallway between them. Doc. 36 at 21, 24, 30, 32, 38, 42, 64. After entering the store, she "had to go around to the side" to see a display near the front and side windows of the store. Doc. 36 at 21-22, 25, 35. In the area where the display was located, one window faced the front of the store and a side window faced the steps leading into the store. Doc. 36 at 31-33. The side window of the display faced the vestibule between the two doors of the store. Doc. 36 at 49. She spent time at the display

trying to figure out the price and size of a bed. Doc. 36 at 27-28. A while later, while she was speaking with a salesperson, she could see, through the front and side windows adjoining the display, her friend pulling up in her car outside. Doc. 36 at 36, 39-42, 47, 49-51.[2]

In order to exit the store from the area where she was looking at the display, plaintiff would had to have walked around the display area to the front door of the store. Doc. 36 at 53. When plaintiff's friend pulled up in front of the store about 3-4 p.m., "there was nothing on [the] front windows to indicate any window being there and the sun was shining through the window. Doc. 36 at 41, 53. Plaintiff maintained that, because of the way the sun was shining in, "it actually looked like [she] . . . could simply walk out [the] side window . ." and there was "no indication at all . . . that there was actually a window there." Doc. 36 at 54-55. She said that "because there was nothing on these windows and the sun was coming into the windows, [she] made the mistake that there was actually a doorway or some kind of space in between these two sets of doors in the hallway." Doc. 36 at 54. She then "went to walk out that window thinking that [she] could just get to the . . . hallway . . . and go out. [She] did not understand that there was another set of doors . . . [b]ecause you cannot see it when the sun is coming in any of these windows." Doc. 36 at 54. She "waved [to her] friend out the window . . . [a]nd because [she] could not see anything, [she] walked into [the] window that's in between the hallway and the doors." Doc. 36 at 54, 56-58. Although plaintiff maintained that there was nothing on the window to indicate that there was glass present, she admitted that "the reason that [she] had [the] accident [was]" "because of the glare." Doc. 36 at 57-60, 62-63.

Plaintiff later testified that "the windows that [she] actually bumped into were the front windows of the store because [she] was blinded by the light." Doc. 36 at 66. Specifically, she

[2] Plaintiff initially testified that she saw her friend pull up through the front and side windows (Doc. 36 at 41), but later stated that she saw her friend only through the front window of the store. Doc. 36 at 50-51.

said that she "walked into the front window and staggered back, fell back on something and [then] walked into [the side] glass [panel leading to the vestibule]" "because [she] thought that there was a hallway [t]here." Doc. 36 at 66-69.[3]

Following the incident, plaintiff returned to the store, at which time she saw that defendant had put a piece of paper or "a plastic thing" on the window to indicate the presence of the glass. Doc. 36 at 180. However, she conceded that, even if "the little thing" the store put on the window had been present on the day of her accident, it "still would not [have] indicated that there was a window to me because it would have been obliterated by the sun." Doc. 36 at 180-181.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendant submits an attorney affirmation, the pleadings and bills of particular, plaintiff's deposition transcript, photographs marked at plaintiff's deposition, and the affidavit of Jeffrey J. Schwalje, P.E., a licensed professional engineer, who opines based, inter alia, on an inspection of the premises, that the store did not violate any New York law, code, statute or regulation; which he reiterated in his reply affidavit..

Defendant argues that it is entitled to summary judgment since no dangerous condition existed at the premises and, in any event, the glass into which plaintiff walked was an open and obvious condition. Of particular relevance, Schwalje opines that, although Part 47 of the Building Code governs sidelights, or fixed panels of transparent glass located near transparent glass doors, that section became effective in 1968, whereas the store was built in 1962 and thus did not need to comply with that section. Doc. 31 at pars. 4-6. Defendant further asserts that it is not liable because it merely furnished a condition for the accident but did not cause it.

[3] This testimony conflicts with the account given by plaintiff's counsel in opposition to the motion. Counsel represents that "plaintiff hit the plate-glass wall once, then again on the rebound . . ." Doc. 41 at par. 23.

In opposition, plaintiff submits the affidavit of Daniel S. Burdett, a professional engineer, who opines, inter alia, that, if the sidelight adjacent to the vestibule had borne warning markings, plaintiff would not have been injured. Plaintiff further asserts that, at the very least, there is an issue of fact regarding plaintiff's comparative negligence which precludes the granting of summary judgment.

In reply, defendant argues that Burdett's affidavit must be disregarded since he was not disclosed as an expert until plaintiff opposed the instant motion. Defendant further argues that, even if section 47 of the Building Code, effective 1968, applied herein, it is not applicable to the store since the building in which the store was located was built in 1962.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). Only if, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, will summary judgment be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

It is well settled that in a premises liability action such as this, a property owner is required to establish that it maintained its premises in a reasonably safe condition and that it did not create

a dangerous condition which posed a foreseeable risk of injury to an individual expected to be present on the premises. *See Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71 (1st Dept 2004).

Here, defendant has established its prima facie entitlement to summary judgment by submitting the evidence set forth above, including Schwalje's affidavit attesting to the fact that the windows at defendant's store were properly constructed, were not required to have warning markings on them, and did not violate any law, code, statute or regulation. In attempting to create an issue of fact, plaintiff relies on Burdett's affidavit. However, as defendant notes, this Court cannot consider Burdett's affidavit since defendant demanded expert witness information in March 2015 (Doc. 10) and Burdett's was not disclosed as an expert until plaintiff opposed the instant motion. *See Abrams v Related, L.P.*, 137 AD3d 655 (1st Dept 2016). Even if this Court were to consider Burdett's affidavit, however, he completely disregards Schwalje's correct representation that the 1968 Building code does not apply to the premises since the building in which the store was located was built in 1962, prior to the enactment of the code. *See Baterna v Maimonides Med. Ctr.*, 139 AD3d 653 (2d Dept 2016). Thus, plaintiff's argument that the sidelight was improperly constructed is without merit and fails to raise a material issue of fact.

Even assuming, arguendo, that the window into which plaintiff walked was dangerous, defendant correctly asserts that it merely furnished the condition or occasion for the occurrence of the alleged accident and was not the proximate cause of plaintiff's injuries. *See Starks v R+L Carriers*, 134 AD3d 500, 501 (1st Dept 2015). Indeed, plaintiff conceded as much at her deposition, clearly testifying several times that the accident occurred due to sun glare (Doc. 36 at 58, 63, 66). Additionally, although the gravamen of plaintiff's complaint is that defendant failed to place proper markings on the glass to avoid accidents (Doc. 35 at par. 5), she admitted that such

markings "still would not [have] indicated that there was a window to [her] because it would have been obliterated by the sun." Doc. 36 at 180-181. Therefore, defendant's motion for summary judgment dismissing the complaint must be granted.

This Court deems the remainder of the parties' contentions without merit or declines to address the same given the conclusion above.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant Macy's, Inc. seeking summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that this constitutes the decision and order of the court.

5/30/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE