SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____x

TRACY ASCANI,

Plaintiff(s),

-against-

JM and AM REALTY HOLDINGS, LLC.,

Defendant(s).

_____x

TRIAL/IAS, PART 21
NASSAU COUNTY

Index No.: 614048/17

Motion Seq. No.: 001
Motion Submitted: 9/20/19

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, JM and AM Realty Holdings, LLC (JM), moves this court for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Plaintiff, Tracy Ascani, (Ascani), opposes the motion.

Ascani commenced this action, sounding in negligence, by service of a summons and complaint, dated December 5, 2017. Issue was joined by service of an answer dated February 26, 2018. The case certified on March 7, 2019 and a note of issue was filed on May 22, 2019.

Ascani was a part-time employee for a company that rented space in an building owned by JM. Ascani's company was not the only tenant. The building had two floors, and had two entrances, one in the front of the building and one in the back. Though Ascani usually used the rear entrance, since that was near where she normally parked her car, on occasion she would use the front entrance. She estimated she used the front entrance 2% of the time. The front entrance had one cement step outside that led to the sidewalk in front of the building. On June 14, 2017, Ascani was leaving the building through the front entrance. She was holding a cup of coffee in one hand. As she exited the building, she was looking straight ahead. She pushed open the door and instead of stepping onto the cement step, she stepped over it. As her foot came down onto the sidewalk, she fell forward on her knees. JM now moves for summary judgment, arguing there was no defective condition, and if there was one, they had no notice of it. Also, if there was a defective condition, it was open and obvious.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"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" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

"To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and

failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

In her bill of particulars, other than claiming the step itself was "dangerous and hazardous", the rest of JM's alleged negligence is described in general terms and no specifics. In her deposition, Ascani claims to have not used the front entrance very often. She claims it was 2% of the time. There is no context for that number, but it appears that, though she was a part-time employee, she worked in the building every day. There are roughly 20 works days a month, which means 240 work days a year. Taking into consideration holidays, vacation and sick days, it is fair to assume she walked into the building on 200 days a year. She worked there for five years at the time of the accident, which would be 1,000 days. Two percent of 1,000 is 20. The court therefore assumes she used the front entrance approximately 20 times.

In support of the motion, JM submits, *inter alia*, the deposition transcripts of Ascani, James Mikhail, and owner of JM, and a report issued by their expert, a professional engineer. The court cannot consider the expert report as it is not signed or sworn to, and there is no accompanying affidavit. Mr. Mikhail testified he has owned the building since 2012, and he was not aware of any complaints about the front step, nor was he aware of any prior accidents involving the front step of the building. There was no construction or other worK done on the front step, and at the time he purchased the

building in 2012, an inspection was done and no violations or defects were noted.

Based upon the deposition transcripts of Ascani and Mr. Mikhail, the court finds JM has established entitlement to summary judgment as a matter of law. Mr. Mikhail establishes that there was no defective condition and that he had no notice of any defective condition. Further, Ascani's deposition testimony makes it clear that her accident was just as likely caused by her own misstep as anything defective about the cement step. (*Hahn v. Go Go Bus Tours, Inc.*, 144 A.D.3d 748 [2nd Dept. 2016]). This conclusion is supported by the assumption that Ascani previously, successfully traversed the step approximately 20 times. The burden shifts to Ascani to raise a material issue of fact requiring a trial of the action.

In opposition, Ascani offers, *inter alia*, the expert report and affidavit of Stanley H. Fein, a licensed professional engineer. Mr. Fein offers an opinion that the cement step was defective. He bases this opinion on the information provided to him by Ascani, by pictures of the subject location, and on his own inspection of the subject step in October, 2017. Mr. Fein opines as follows:

> Good and accepted engineering safety practice and Section 1008.1.4 of the New York State Building Construction Code requires that there shall be a floor or landing on each side of a door. Such floor or landing shall be at the same elevation on each side of the door. Landings shall be level except for exterior landings which are permitted to have a slope not to exceed 0.25 units vertical in 12 units horizontal (2%slope).

Mr. Fein further alleges that the step should be at least as long as the door, so that

when the door opens over the step, the door should not over hang the step at any point. The step herein did not meet that requirement. These assertions alone raise an issue of fact that a defective condition existed. As the step was in existence, and unchanged, for the five years JM owned the building prior to the accident, there was constructive notice.

The court notes that not all of Mr. Fein's opinions would be admissible as stated in his affidavit as some are conclusory, but he does offer enough admissible opinions to raise an issue of fact. The court further notes that in reply JM urges the court to accept the report of their expert, even though it is unsworn and even though no affidavit accompanied it. They cite to cases that purportedly support their argument, but the cases are inapposite. The unsworn reports in those cases were used in opposition to a motion, and after the opposing party relied on it or adopted it. *(See Prokocimer v Avon Prods., Inc.*, 2018 NY Slip Op 33170[U], (Sup Ct, NY County 2018); *A.B. Med. Servs., PLLC v Travelers Prop. Cas. Corp.*, 5 Misc.3d 214 (Civ Ct, Kings County 2004). The movant in a summary judgment has a higher burden and must meet it with admissible evidence.

Accordingly, it is hereby

ORDERED, that JM's motion for summary judgment is DENIED.

This foregoing constitutes the Decision and Order of the Court.

Dated: December 2, 2019
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

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ENTERED
DEC 04 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE