SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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NEW YORK STATE DIVISION OF HUMAN RIGHTS, on the complaint of Geraldine Pauling, and GERALDINE PAULING, plaintiff-intervenor,

Plaintiffs,

- v -

COOPER SQUARE REALTY INC., n/k/a FirstService Residential New York, Inc., and ROYAL YORK OWNERS CORPORATION,

Defendants.

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INDEX NO. 450486/2013

MOTION DATE

MOTION SEQ. NO. 009, 010, 011

DECISION AND ORDER ON MOTION

The following e-filing documents listed by NYSCEF document number (Motion 009) 173-200, 232-251, 277-281; (Motion 010) 201-222, 252-274, 282; (Motion 011) 225-227, 283 were read on these motions for summary judgment.

In this action for disability discrimination brought under the New York City Human Rights Law and the New York State Human Rights Law, plaintiff the New York State Division of Human Rights and plaintiff-intervenor Geraldine Pauling seek an injunction requiring defendants to provide mats or other traction on the uncovered portions of the lobby of 420 East 64th Street, New York, New York, the building where Ms. Pauling resides, as well as compensatory and punitive damages. Plaintiff NYSDHR and plaintiff-intervenor now move pursuant to CPLR 3212 for summary judgment on liability as well as dismissal of defendants' affirmative defenses, and defendants move pursuant to CPLR 3212 seeking dismissal of the complaint. The motions are consolidated for purposes of this decision.

BACKGROUND

Plaintiff-intervenor Geraldine Pauling is a 77-year old woman who has resided in the building since approximately 1990 as a rent-stabilized tenant. Affidavit of Geraldine Pauling

sworn to on January 17, 2020, para. 1. Ms. Pauling suffers from a significant number of health issues that make it difficult for her to walk and since approximately 2008, she has needed to use forearm crutches to be able to walk. Affirmation of Arlene F. Boop dated January 19, 2020, Exh. E (certified medical records); Affirmation of Gerald J. Smallberg MD, paras. 4, 6, 9; Pauling Aff., paras. 8, 9. When she is walking, Ms. Pauling holds the crutches at her sides at a slight angle and the crutch tips, which are made of rubber, make contact with the floor. Pauling Aff., para. 9. However, due to her weak upper body strength, the tips of her crutches touch the ground gently as she cannot press them down firmly. Pauling Aff., para. 8. Although at times Ms. Pauling also uses a reclining wheel chair to move around, she can only use the chair if her partner is available to push her. Pauling Aff., paras. 62-63.

The parties' dispute regarding the lobby mats first started in May 2009, when Ms. Pauling filed an informal complaint with the New York City Commission on Human Rights. Affirmation of Jacqueline L. Aiello dated April 7, 2020, Exh. E. While this complaint appears to have been resolved and the building provided the requested accommodation, in approximately June 2010, the building removed the runners in the lower lobby area. Ms. Pauling renewed her request to the building's management to have the runners put back but the building rejected the request. Boop Aff. Exhs. K, L. Thereafter, in approximately November 2010, Ms. Pauling slipped on the bare wood floor in the building's lobby and suffered injuries. Pauling Aff., para. 11. After this incident and until approximately December 2012, Ms. Pauling used the building's basement ramp to enter and exit the building and avoided the lobby area. Aiello Aff., Exh. S (Pauling Dep. Tr. 109). In approximately November 2011, after she filed a complaint about the incident with the U.S. Department of Housing and Urban Development, the complaint was referred to the NYSDHR. After a finding of probable cause by the NYSDHR, the defendants exercised their right to have

the matter resolved by the court and in March 2013, the NYSDHR filed its complaint in this action. Boop Aff., Exh. A-1. Thereafter, on consent of all parties, Ms. Pauling filed an intervenor complaint in January 2017.

During the pendency of this lawsuit, from approximately 2012-2015, the building underwent a major renovation. The renovation included changing the façade windows and doors in the front of the building, reconfiguring the lobby so that there was only one set of stairs leading to the upper level of the lobby where the elevators are located, replacing the wooden floor with ceramic like tile, and installing a handicap ramp. Boop Aff., Exh. M (Robert Dep. Tr. 14-16, 25-27). During the renovation, mats were placed in the lobby of the building to prevent the residents from tracking debris through the lobby. Aiello Aff., Exh. S (Pauling Dep. Tr. 131-32). Ms. Pauling used the mats to traverse the lobby and get in and out of the building. Aiello Aff., Exh. S (Pauling Dep. Tr. 131-32).

After the renovation was completed and the floors replaced, the building removed the mats. In response, the NYSDHR, on behalf of Ms. Pauling, sent a letter demanding that the building put the mats back down. Aiello Aff., Exh. M. When the building refused, the NYSDHR moved for a preliminary injunction seeking an order directing the defendants to permanently install mats in the lobby of the building. By decision and order dated November 30, 2015, this court denied the NYSDHR's motion, finding that, even according to the Division's own expert, the new floor in the lobby was sufficient to meet the ADA threshold for slip-resistance when the floor was dry and that, although the floor was slippery when wet, this was not an issue because the building always put mats down during inclement weather. Boop Aff., Exh. R.

Thus, from 2015 to 2018, the floor in the lobby was covered with mats only during inclement weather. Aiello Aff., Exh. R (Pauling Dep. Tr. 26). However, the mats did not cover the

two steps leading from the entranceway to the upper level of the lobby. Aiello Aff., Exh. R (Pauling Dep. Tr. 26). During this time, Ms. Pauling walked through the lobby only during inclement weather because that was when the mats were down. Aiello Aff., Exh. R (Pauling Dep. Tr. 32). Since the new floors were installed in 2015, Ms. Pauling has not attempted to walk on the floor when the mats were not down. Aiello Aff., Exh. R (Pauling Dep. Tr. 43). In approximately January or February 2018, the building also began putting mats down when Ms. Pauling advised them in advance of medical appointments. Aiello Aff., Exh. R (Pauling Dep. Tr. 41). Then, in approximately January 2019, the building began putting the mats down in the lobby on a permanent basis. Aiello Aff., Exh. V (Pauling Dep. Tr. 83). However, the defendants refused to give Ms. Pauling advance notice if they planned to remove the mats. Boop Aff., para. 71.

In her complaint, Ms. Pauling alleges that the defendants discriminated against her based on her disability by denying her request for a reasonable accommodation to lay down permanent mats across the lobby of the building so that she may enter and exit the building safely using her forearm crutches. She asserts claims under the New York City Human Rights Law, N.Y.C. Admin. Code Sections 8-107(5)(a)(1)(b), which prohibits housing discrimination on the basis of disability, and 8-107(15), which requires that "reasonable accommodation" be provided to a person with a disability. She also asserts claims under the New York State Human Rights Law, New York Executive Law Sections 296(5), which prohibits housing discrimination based on disability, and 296(18)(2), which requires that "reasonable accommodations" be provided "when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling . . . ."

DISCUSSION

"To prove a discrimination claim based on a failure to accommodate a person's disability, the person must establish that he or she is disabled within the meaning of the statute, that the charged party knew or should reasonably have known of the disability, that the accommodation was likely necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling, that the requested accommodation was reasonable and that the charged party refused to make the accommodation." *Hollandale Apts. & Health Club LLC v. Bonesteel*, 173 A.D.3d 55, 60 (3d Dep't 2019) (analyzing housing discrimination based on disability under the Fair Housing Act and the NYS Human Rights Law) (internal quotations and citations omitted); *see also Olsen v. Stark Homes Inc.*, 759 F.3d 140, 156 (2d Cir. 2014) (same). The parties do not dispute that Ms. Pauling suffers from a disability as defined in the statutes or that the defendants were aware of this disability. Rather, their arguments focus on whether the mats are necessary for Ms. Pauling to enter and exit the building.

The Second and Third Departments appear to interpret the issue of necessity differently and neither the First Department nor the Court of Appeals has opined on this issue. In the Second Department, the term is more narrowly defined to mean "actually necessary" for a disabled tenant to enjoy the dwelling. *See Matter of Kennedy Street Quad v. Nathanson*, 62 A.D.3d 879, 880 (2d Dep't 2009) (holding that residents of a building with a no pets policy were not entitled to reasonable accommodation of depression and other conditions because they did not show that the dog was actually necessary for them to enjoy the apartment); *see also Matter of One Overlook Ave. Corp. v. New York State Division of Human Rights*, 8 A.D.3d 286 (2d Dep't 2004). However, the Third Department has declined to apply such a restrictive standard, finding that it is "inconsistent with the plain language of the FHA and HRL, which requires only a determination that an

accommodation 'may be necessary'". *Hollandale Apts. & Health Club LLC*, 173 A.D.3d at 65 (finding that support dog was necessary within meaning of statute where it would alleviate the effects of the disability). Given the plain language of the statute and the fact that the NYSHRL should be construed liberally in order to accomplish its purpose, the less restrictive standard will be applied. *See* N.Y. Executive Law Sections 290 and 300.

Although plaintiff submits evidence that she could not safely walk on the wood floor in the lobby using her crutches, given that the lobby floor was replaced in 2015 with ceramic like tile that met ADA standards for slip-resistance, the analysis will focus on the new floor and whether Ms. Pauling's request for permanent mats on the new floor may be necessary for her to safely enter and exit the building using her crutches. This in turn can be broken down into two issues: (1) whether Ms. Pauling is vulnerable to slipping on the new floor when it is dry and (2) whether Ms. Pauling is vulnerable to slipping on the new floor when it is has moisture or debris on it.

With respect to the issue of the dry floor, Ms. Pauling avers in her affidavit that based on her experience over the last ten years using her crutches, most tiled, wood or marble flooring does not provide sufficient traction for her crutches. Pauling Aff., para. 54. In addition, Ms. Pauling conducted a test, with the assistance of her counsel, to see if the new tile provided sufficient traction and determined that it did not. Pauling Aff., para. 55. Ms. Pauling also submits the affidavit of Edward Steinfeld, an architect with experience in accessibility issues, who states that the "glazed ceramic tile surface is not particularly slip-resistant." Affidavit of Edward Steinfeld sworn to on December 23, 2019, para. 13.

However, it is undisputed that Ms. Pauling has never walked on the bare new ceramic floors using her crutches since they were installed in 2015 and thus, despite her experience with other smooth floor surfaces, she has no practical experience using the floors at issue. Further, her

self-test, which was conducted with the aid of counsel and without an expert, is insufficient to prove that the floors do not provide sufficient traction for her crutches. Although Mr. Steinfeld opined that the floor does not seem particularly slip-resistant, he did not conduct any experiment to test the traction of the floor. Finally, even if this evidence is sufficient to meet plaintiff's burden, the prior submission by the NYSDHR's expert in support of its motion for a preliminary injunction and the court's determination that the floor met the ADA's slip resistance standards when dry raises an issue of fact regarding plaintiff's vulnerability to slipping on the floors when they are dry and free of debris.

Ms. Pauling also asserts that she is vulnerable to slipping on the floors if they have moisture or debris on them. In support, Ms. Pauling submits the affidavit of Mr. Steinfeld, who states that the due to the smooth nature of the floor, it is unlikely to absorb any moisture which is tracked in from outside and that small pieces of debris are likely to slip easily across the surface when a crutch tip lands on them. Steinfeld Aff., para. 13. Ms. Pauling also submits her affidavit and testimony explaining that, due to her weak upper body strength, she cannot press down firmly with her crutch tips on the floor and that as a result, she slides easily. Pauling Aff., para. 8; Aiello Aff., Exh. R (Pauling Dep. Tr. 19). Indeed, Ms. Pauling has allegedly already slipped on the lobby floor in 2010, albeit when the floors were wood.

Defendants argue that Ms. Pauling is seeking preferential treatment over other, non-disabled tenants, in the building. However, Mr. Pauling has submitted evidence in the form of her affidavit, deposition testimony and the affidavit of Mr. Steinfeld which describes in detail the mechanics of her crutches and how, as a result, she is much more vulnerable than non-disabled individuals to slip on a wet surface or debris which is on the lobby floor. Thus, contrary to defendants' contention, Ms. Pauling is not seeking an accommodation which would give her an

advantage above and beyond what other tenants have. *See Matter of Lindsay Park Hous. Corp. v. New York Division of Human Rights*, 56 A.D.3d 477, 479 (2d Dep't 2008) (complainant not entitled to parking space for her caregivers as other non-disabled tenants do not have such an accommodation, even though they may need it).

Defendants have not submitted any evidence to contradict Ms. Pauling's showing that she is more vulnerable than other non-disabled tenants to slipping on moisture or debris on the lobby floor. Instead, they argue that Ms. Pauling will always be vulnerable to slipping on any surface, that she slipped twice on the rug in the lobby and that she is attempting to impermissibly impose a duty on defendants to eliminate all of the hazards associated with her disability. However, the fact that Ms. Pauling may have slipped on other occasions does not rebut her showing that the mats will ameliorate her risk of slipping on the lobby's floor if it is wet or there is debris. *See Hollandale Apts. & Health Club*, 173 A.D.3d at 65. Further, contrary to defendants' assertions, Ms. Pauling is not attempting to impose a duty on defendants to remove all of the hazards of her disability but rather seeks to remedy one very significant hazard in the building where she resides. Accordingly, Ms. Pauling has met her burden of showing that the mats may be necessary for her to have an equal opportunity to use and enjoy the dwelling.

Finally, defendants assert that the new flooring was a reasonable accommodation for Ms. Pauling's request. However, this argument is based on a misstatement of the law. The issue is whether Ms. Pauling's request to permanently place mats on the lobby floor is a reasonable accommodation, not whether the defendants' actions constitute a reasonable accommodation. A requested accommodation is considered reasonable where the cost is modest and it does not pose an undue hardship or a substantial burden on the housing provider. *Olsen*, 759 F.3d at 156. Here, defendants concede that the cost of the mats is minimal and that their refusal to accommodate this

request is based purely on the building's policy and aesthetics. Indeed, defendants have laid mats down on the lobby floor on numerous occasions since this dispute arose in 2009 and the mats have been on the floor full time since January 2019. Accordingly, plaintiffs have sufficiently established that the mats are a reasonable accommodation since putting them on the floor does not pose an undue burden on defendants, and as such Ms. Pauling is entitled to summary judgment on liability.

Defendants also argue that even if the court finds that the owner of the building is liable, the complaint should be dismissed against defendant FirstService Residential, the managing agent for the building, because it did not actually participate in the alleged discrimination and that the cooperative's board was ultimately responsible for the decisions. However, both the NYSHRL and the NYCHRL place the responsibility to provide a reasonable accommodation on both the owner and the managing agent. N.Y.C. Admin. Code Sections 8-107(5); New York Executive Law Sections 296(5). Contrary to defendants' contentions, the statutes do not require a showing that the managing agent actually participate in the alleged conduct and the court will not engraft such a requirement on the plain terms of the statute. The cases that defendants rely on to support their argument are inapposite as they pertain to the liability of individual employees, not managing agents. *See Hughes v. Twenty-First Century Fox Inc.*, 304 F.Supp.3d 429, 450-51 (S.D.N.Y. 2018). In any event, there is ample evidence that Steven Hirsch, the executive managing agent for FirstService and its predecessor, Goodstein, were actively involved with this matter and communicated with Ms. Pauling regarding her requests. Accordingly, the complaint will not be dismissed as against defendant FirstService.

In light of the court's ruling on plaintiffs' summary judgment motion and the finding of necessity, the first, second, fourth, tenth and twelfth affirmative defenses must be dismissed. The defendants have withdrawn the remaining affirmative defenses except the seventh affirmative

defense which is based on Ms. Pauling's alleged failure to participate in the interactive process. However, other than a self-serving email, defendants have failed to provide any evidence that they attempted to engage in an interactive process with Ms. Pauling regarding the selection of the floor material for the lobby renovation. In any event, defendants fail to show that Ms. Pauling's alleged failure to participate in the interactive process constitutes an affirmative defense to her discrimination claims, rather than an affirmative showing that defendants must make in order to be entitled to summary judgment on such claims. *See Jacobsen v. New York City Health & Hospitals Corp.*, 22 N.Y.3d 824, 837 (2014). Accordingly, this defense will also be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the plaintiff NYSDHR's motion (#011) and plaintiff-intervenor Geraldine Pauling's motion (#009) for summary judgment on liability are granted and the defendants' motion (#010) for summary judgment is denied; and it is further

ORDERED that the defendants' affirmative defenses are dismissed; and it is further

ORDERED and ADJUDGED that defendants shall provide the requested accommodation by laying down full time carpet runners, mats or other floor covering over a sufficiently wide path from the entrance door of the lobby of 420 East 64th Street, New York, New York, the building in which Ms. Pauling resides, to the carpeted portions of the east wing elevator hallway on the upper level of the lobby, including some kind of covering on the existing, interior lobby stairs between the lobby's two levels; and it is further

ORDERED that the issue of damages is severed and continued.

8/19/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE