| **Denstman v Manhattan Eye, Ear & Throat Hosp.** |
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| 2020 NY Slip Op 33070(U) |
| September 18, 2020 |
| Supreme Court, New York County |
| Docket Number: 157345/2018 |
| Judge: Arlene P. Bluth |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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PEARL DENSTMAN,

Plaintiff,

- v -

MANHATTAN EYE, EAR & THROAT HOSPITAL, LENOX HILL HOSPITAL, NORTHWELL HEALTH, INC.

Defendant.

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**INDEX NO.** 157345/2018

**MOTION DATE** 09/15/2020

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 55, 56, 57, 58, 59, 61

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendants for summary judgment is granted.

**Background**

This action arises out of plaintiff's alleged trip and fall at Manhattan Eye, Ear and Throat Hospital on October 12, 2017. After attending a seminar, plaintiff claims that she tripped at the bottom of a staircase. Plaintiff claimed that she thought the last step was part of the floor and didn't know the step was there.

Defendants argue that the case must be dismissed because it was not negligent and there is no basis to support plaintiff's claim of optical confusion. They emphasize that the step on which plaintiff fell was a different color from the floor. Defendants claim that plaintiff had adequate warning. While defendants acknowledge that plaintiff suffers from macular degeneration, they point to her deposition where plaintiff admitted she has no trouble seeing or

getting around that she needs glasses merely for reading. Defendants add that there is no evidence that any building code regulations were violated that might support a claim for negligence.

In opposition, plaintiff maintains that the entire stairway was covered in brown carpeting and had rubber edging on each step. She contends the last step of the stairway was uncarpeted, had no rubber edging and was similar in color to the floor below it. Plaintiff also argues that the handrails for this stairway did not extend the full length of the stairway.

She attaches the affidavit of Stanley Fein, a licensed engineer, who claims that there was no edging on the last step and was an "extreme tripping hazard" (NYSCEF Doc. No. 58 at 2). Plaintiff maintains that defendants had actual notice of this dangerous condition and that the failure to have a handrail to the end of the staircase violates the Building Code.

In reply, defendants emphasize that the bottom step was not the same color as the floor. They dismiss the expert's affidavit regarding the color discrepancy by noting that Mr. Fein only stated the bottom step and the floor were light colored without identifying the actual color. Defendants argue that the incorporation of Manhattan Eye, Ear and Throat Hospital into Lenox Hill Hospital in 2007 predates the Building Code regulation plaintiff relies on (Section 28-102.4.2) which applies to changes in use or occupancy of a building made after July 1, 2008. Defendants also point out that plaintiff's expert failed to cite a single Building Code provision in his affidavit.

Defendants also argue the accident report merely suggests that conferences, such as the one plaintiff attended, that cater to the seniors should be held on the main floor so that attendees need not traverse any stairs and is not an admission of guilt.

**Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The central issue in this motion is if plaintiff has raised a material issue of fact regarding whether the bottom step caused optical confusion and, therefore, a dangerous condition. "Optical confusion occurs when conditions in an area create the illusion of a flat surface, visually obscuring any steps. Findings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and

lower areas, or some other distraction or similar dangerous condition" (*Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 n, 924 NYS2d 32 [1st Dept 2011]).

After reviewing the pictures of the step, the Court finds that there was no optical confusion that created a dangerous condition (NYSCEF Doc. No. 42). The final step is beige and the floor below it is blue. The two colors are clearly different and contain enough of a contrast to reject any claim of optical confusion (*see Namm v Levy*, 172 AD3d 507, 508, 98 NYS3d 426 (Mem) [1st Dept 2019] [rejecting an optical confusion case where last step was a lighter shade of gray than the balcony floor]) . The Court also notes that the last step is a different color from the rest of the steps in the stairway and from the floor, which provided even more notice to plaintiff. Plaintiff walked down a stairway covered by a dark-colored carpet, followed by a light beige last step and then down to a blue floor. The Court is unable to credit plaintiff's or her expert's contention that the colors were similar enough to create optical confusion.

To the extent plaintiff claims that there is an issue of fact with respect to the handrails, the Court denies that argument. As defendants point out, plaintiff's expert failed to cite a single Building Code violation and there is no evidence that the unavailability of a handrail was a proximate cause of plaintiff's fall. Moreover, as defendants pointed out in reply, the standards set forth in the 2014 Building Code § 28-102.4.2 do not apply in this case and the city issued a certificate of occupancy in 2009.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants is granted and the Clerk is directed to enter judgment when practicable in favor of defendants along with costs and disbursements after presentation of proper papers therefor.

9/18/2020
DATE

ARLENE P. BLUTH, J.S.C.

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| 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 |