

Boss v 83-85 Baxter St., LLC
2020 NY Slip Op 34072(U)
July 7, 2020
Supreme Court, New York County
Docket Number: 156974/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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MARIE BOSS,

Index No. 156974/2016

Plaintiff

- against -

DECISION AND ORDER

83-85 BAXTER STREET, LLC, MAROLDA
PROPERTIES, INC., M&C FOOD BEVERAGE, LLC,
and BREAK ROOM RESTAURANT,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues for personal injuries she sustained January 21, 2016, when she tripped on the sidewalk and fell down a stairwell on premises owned by defendant 83-85 Baxter Street, LLC, and managed by defendant Marolda Properties, Inc., at 83-85 Baxter Street in New York County. The stairwell descended to a level below ground between the sidewalk and the building on the premises, which housed a restaurant on the ground level. Plaintiff claims that the cracked and pitched sloping pavement surrounding the stairwell, the disrepair of the stairwell as well as the pavement, and the absence of a handrail on the staircase all contributed to her fall. Defendants owner and manager move for summary judgment dismissing the complaint and cross-claims against these defendants. C.P.L.R. § 3212(b).

II. EVIDENCE

Defendants rely on their engineer's inspection of the sidewalk and stairwell June 13, 2019. No evidence indicates, however, that the sidewalk and stairwell were in the same condition June 13, 2019, as January 21, 2016. Therefore the court may not consider the engineer's affidavit as evidence of the premises' condition when plaintiff was injured. Serrano v. TED Gen. Contr., 157 A.D.3d 474, 474 (1st Dep't 2018); Santana v. New York York City Hous, Auth., 128 A.D.3d 564, 565 (1st Dep't 2015); Green v. Gracie Muse Rest. Corp., 105 A.D.3d 578, 579 (1st Dep't 2013); Alston v. Zabar's & Co., Inc., 92 A.D.3d 553, 553 (1st Dep't 2012).

A. The Sidewalk

Although plaintiff admits that she lost her balance as she stood on the sidewalk and tried to look through a window into the premises behind the stairwell, she testified at her deposition that she lost her balance on the cracked and pitched sloping sidewalk. Defendants' field supervisor Jose Perez acknowledged at his deposition that in December 2015 there were cracks in the sidewalk cement where it held the vertical poles of a gate at the top of the stairwell and that the repairs eventually were completed, but he could not recall that they were completed before plaintiff's injury.

Defendants' engineer does not even address the pitch or slope of the sidewalk of which plaintiff complains. 34 R.C.N.Y. § 2-09(f)(4)(xi) limits the slope of a sidewalk to three inches

per five feet and requires the pitch to slope down from the building to the curb. Therefore, even assuming the sidewalk's condition remained the same in June 2019 as in January 2016, the engineer does not indicate his measurements or observations of its pitch or slope.

B. The Absence of a Gate or Guardrail

Even if the condition of the sidewalk did not cause plaintiff to lose her balance, plaintiff claims that the absence of a gate or guardrail at the top of the stairwell allowed her to fall down the stairs, rather than simply falling to the ground. Perez further acknowledged that in December 2015 the gate at the top of the stairwell was loose and that the repair work that eventually was undertaken may have necessitated temporary removal of the gate.

Although defendants claim that the stairwell and the absence of a gate or guardrail at the top were open and obvious, the visibility of a dangerous condition obviates only defendants' duty to warn of the danger, not their duty to maintain safe premises. Matos v. Azure Holdings II, L.P., 181 A.D.3d 406, 407 (1st Dep't 2020); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 454-55 (1st Dep't 2018); Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d 522, 522 (1st Dep't 2018); Polini v. Schindler El. Corp., 146 A.D.3d 536, 536 (1st Dep't 2017). Plaintiff also testified, and her companion January 21, 2016, Durbin Mitchiner corroborates, that there was no artificial lighting illuminating the exterior of the building at 5:30 p.m. in January, a condition

that the engineer could not assess in June and that obviously prevented the stairwell from being open and obvious. Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 455; Powers v. 31 E 31 LLC, 123 A.D.3d 421, 422-23 (1st Dep't 2014); Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d 89, 92-93 (1st Dep't 2011). Even if lighting was installed, the engineer could not determine whether it was illuminated January 21, 2016, at 5:30 p.m. Defendants present no evidence that exterior lighting in fact was installed January 21, 2016, but that neither the owner nor the manager of the premises bore any responsibility for ensuring that the lighting was operating when the exterior turned dark.

Defendants also claim that the unguarded stairwell was not dangerous, but their engineer expresses no opinion whether the absence of a gate or guardrail was a safe condition. It is not an expert's province to determine the applicable law and whether it was violated. Morris v. Pavarini Constr., 9 N.Y.3d 47, 51 (2007); Buchholz v. Trump 767 Fifth, 5 N.Y.3d 1, 7 (2005); Lopez v. Chan, 102 A.D.3d 625, 626 (1st Dep't 2013); McCoy v. Metropolitan Transp. Auth., 53 A.D.3d 457, 459 (1st Dep't 2008). Moreover, even if a condition does not violate any statute or regulation, the condition still may be unsafe. Kellman v. 45 Tiemann Assocs., 87 N.Y.2d 871, 872 (1995); Sussman v. MK LCP Rye LLC, 164 A.D.3d 1139, 1140 (1st Dep't 2018). Defendants nowhere explain the applicability of the International Property Maintenance Code on which their engineer relies, nor does he attest that it is an industry standard. If the court nonetheless

accepts it as an industry standard, it requires that "every open portion of a stair, landing, . . . or other walking surface that is more than 30 inches above the floor or grade below, shall have guards" 2015 Intl. Prop. Maintenance Code § 307.1, quoted in Aff. of Mara Schiefelbein Ex. E ¶ 41.

C. The Absence of a Handrail

Plaintiff further testified that she grasped for any fixture on the staircase that would arrest her fall, but there was no handrail to grasp on either side of the staircase. While the engineer claims there was a handrail on one side of the staircase in June 2019, Perez at his deposition confirmed that there was no handrail on either side of the staircase in January 2016, as does Mitchiner in his affidavit. Obviously defendants well may have installed a handrail after plaintiff's injury.

Plaintiff's engineer concludes that a purpose of a handrail on a staircase is to arrest a fall down the staircase, a conclusion that defendants' engineer does not dispute. In fact, according to defendants' engineer, based on the 2015 International Property Maintenance Code § 307.1, a handrail on at least one side of the staircase was required.

III. CONCLUSION

Defendants thus fail to eliminate all factual issues whether the conditions that plaintiff claims caused her fall were present when she fell and were unsafe. Even if the court considers the opinions of defendants' engineer, the testimony by both plaintiff and defendants' witness Perez and the affidavit by Mitchiner

dispute the assumptions on which the engineer bases his opinions. Reif v. Nagy, 175 A.D.3d 107, 125-26 (1st Dep't 2019); Pastora L. v. Diallo, 167 A.D.3d 424, 425 (1st Dep't 2018); Tuzzolino v. Consolidated Edison Co. of N.Y., 160 A.D.3d 568, 568 (1st Dep't 2018); Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d 404, 407 (1st Dep't 2017). Therefore the court denies the motion by defendants 83-85 Baxter Street, LLC, and Marolda Properties, Inc., for summary judgment. C.P.L.R. § 3212(b).

DATED: July 7, 2020



LUCY BILLINGS, J.S.C.

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