To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x__ Seq. No. 3 Type _ SJ_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

----------X

PHILLIP BLUMENFELD and NINA BLUMENFELD,

Index No. 53358/2018

Plaintiffs,

DECISION AND ORDER

-against-

SORELLE BEVILACQUA, INC. and PAULIES, INC. d/b/a BUON AMICI,

Defendants.

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The following papers numbered 1 to 5 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibit in Opposition	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Affirmation in Reply	5

Defendant Sorelle Bevilacqua, Inc. (the "landlord") brings its motion seeking summary judgment dismissing it from the action. Movant also seeks contractual indemnity against co-defendant Paulies, Inc. d/b/a Buon Amici (the "restaurant").

The facts are simple. The landlord has owned the building for decades, renting it out for approximately 20 years to the restaurant. Before the restaurant was located there, there was another similar establishment there. The building has not

changed substantially since a renovation in 1980, at which time a side staircase, the site of the accident, was installed. There is no dispute that the staircase, which is over 44 inches wide, has a railing on only one side.

Plaintiff Phillip Blumenfeld fell when leaving the restaurant after an early dinner in the summertime. There is no dispute that it was light out at the time of the accident. Plaintiff testified that he fell because he reached for a railing, only to fall over because there was none on that side of the staircase. There is some dispute as to whether his dining companion was walking ahead of him or behind him when leaving the restaurant.

The landlord argues that because it got a building permit, and it has never received a violation, no handrail was necessary. The landlord also contends that the lack of a handrail did not cause plaintiff's accident. Rather, it argues, it was plaintiff's own inattentiveness that caused his accident, because he failed to notice that there was no handrail on that side. As movant's engineer expert stated, "A non-emergent reach for a handrail will not cause a loss of balance."[1] Movant also argues that the restaurant has indemnified it "for any injury or damage to persons or property resulting from any cause of whatsoever

[1]There is no evidence that movant's expert engineer is qualified to opine on the movements of the human body.

nature;" "from all liabilities, obligations, damages, penalties, claims, costs, and expenses;" and "against any and all claims arising from personal injury."

Assuming for purposes of this motion that movant did meet its prima facie burdens, the restaurant and plaintiff rebut them. Beginning with the restaurant, it points out that it "is not responsible for making any structural repairs or alterations unless they are necessary to remedy a violation" that it caused. The lease further states that the restaurant "assumes responsibility for ensuring compliance with ordinances, but only to the extent that the premises were in compliance to begin with —**i.e. Tenant is not responsible for correcting any code violations that existed at the inception of the lease.**" (Emphasis in original). As the restaurant correctly points out, the indemnification provision does not apply unless and until there is a determination that either or both defendants are responsible for plaintiff's accident. This aspect of the motion for summary judgment is thus denied.

As for defendants' liability to plaintiff, that is for a jury to determine. Although the landlord does argue that the building codes at the time of the installation of the staircase did not require two railings, this is inaccurate. Rather, as plaintiffs point out, the building code at the time plainly states that "Any alteration or addition made to a building shall be made in conformity with applicable regulations of this Code,"

which required railings on both sides of staircases that are more than 44 inches wide. The landlord argues in its reply papers that "This section is particularly ambiguous since it does not state whether it references 'Existing Buildings' solely described in Section C 1-5-2.1 or all existing buildings including the subject premises. When Mr. Bevilacqua [the landlord's predecessor] allegedly performed renovations to the property on or about 1980, it is not clear if the renovations needed to comply with C 105-2.3." The Court disagrees. If the provision about renovations applied to "Existing Buildings" only, the code would have said so. *People v. Buyund*, 179 A.D.3d 161, 168, 112 N.Y.S.3d 179, 184 (2d Dept. 2019) ("Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning. . . . Had the Legislature intended this result, it could have clearly said so."). Rather, by referring to alterations to "a building," the code applies to all buildings, and all renovations.

Contrary to the landlord's assertions, plaintiff does not "merely speculate[] that a lack of a second handrail was the only condition that caused him to fall." In fact, it is quite clear that this is plaintiff's definitive contention. Whether the lack of the required railing caused the accident, or whether it was plaintiff's inattention, or something else entirely, is for the jury to determine.

The motion for summary judgment is thus denied in its entirety. The parties are directed to attend a Settlement Conference in the Settlement Conference Part, Courtroom 1600, at time to be scheduled by the Court.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
August 25, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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