At Part 94, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on this 19 day of March 2021

P R E S E N T:
HON. PAMELA L. FISHER, J.S.C.

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SVETLANA SHISHONOK

Plaintiff,

-and-

ESTIE REALTY CO., L.P. and PERFECT SHOPPING, INC., PERFECT SAVING PRODUCE, INC. and RAV HIDO APHRAEMOV

Defendants.

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DECISION/ORDER

Index No. 519217/2017

Defendant's motion (Motion Sequence 3) for summary judgment in favor of defendant Estie Realty Co., L.P. pursuant to CPLR 3212 on the grounds there are no material issues of fact and no basis for liability to be imposed on movant and Plaintiff's cross-motion (Motion Sequence 4) permitting plaintiff to serve an amended bill of particulars or deeming the previously served Amended Bill of Particular, dated October 12, 2020, properly served, nunc pro tunc pursuant to CPLR 3042(b) and 3025(b) are decided as follows:

Plaintiff commenced the instant action seeking damages for personal injuries by filing a summons and complaint on October 4, 2017. On January 23, 2018, issue was joined by the defendant Estie Realty Co., L.P. with service of their verified answer. Plaintiff filed an amended complaint, and defendant Estie filed an answer to the amended complaint on February 27, 2018 and March 9, 2018, respectively. On July 30th, 2018, plaintiff served her bill of particulars. Defendants Perfect Shopping, Inc., Perfect Saving Produce, Inc and Rav Hido Aphraemov have not appeared in the action. The Note of Issue was filed on December 17, 2019. The complaint alleges the following salient facts:

Defendant Estie Realty Co., L.P. ("Estie") is the deeded owner of the premises known as 3924 18th Avenue, Brooklyn, New York 11218 ("premises"). Defendant Perfect Shopping Inc., Perfect Saving Produce and Rav Hido Aphraemov ("collectively co-defendants") leased the premises (first floor and basement) from Estie to operate a retail store. On September 22, 2017 plaintiff, a patron of the fruit market, asked a salesperson to use the bathroom and was directed to use the bathroom in the back of the store. As plaintiff was walking toward the restroom, plaintiff fell into an open stairway located in the floor. The complaint alleges that the accident was caused due to the negligence of defendants in the ownership, maintenance and control of the premises.

PLAINTIFF'S MOTION TO AMEND

Plaintiff moves pursuant to CPLR 3042(b) and 3025(b) to serve an Amended Bill of Particulars or deem the previously served Amended Bill of Particulars dated October 12, 2020 properly served, nun pro tunc. "It is well settled that leave to amend or supplement pleadings should be freely granted . . . unless prejudice and surprise directly result from the delay in seeking the amendment" (*Adams v Jamaica Hosp*., 258 AD2d 604 (1999)). Additionally, delay or lateness alone is insufficient to deny a motion for leave to amend unless the proposed amendment is palpably insufficient or patently devoid of merit (*Com. Land Title Ins. Co. v. Sienna Abstract, LLC,* 136 A.D.3d 965 (2nd Dept 2016)). Here, Plaintiff seeks leave to amend the pleadings approximately three (3) years after filing the complaint and ten (10) months after filing the Note of Issue and although plaintiff does not proffer an excuse for the delay, a delay by itself is insufficient to deny the requested relief (*Dimoulas, et al v. Roca, et al* 120 A.D.3d 1293 (2nd Dept 2014)). Here, there is no prejudice or surprise regarding the amendment which seeks to plead specific statutory code violations (*Spiegel v. Gingrich*, 74 A.D.3d 425 (1st Dep 2010). While the plaintiff did not allege the specific statutory violations in their bill of particulars, their complaint generally alleges defendant failed to "comply with laws, rules, ordinances, statutes, and codes of NYS and NYC then in effect" and on December 17, 2019, plaintiff exchanged their expert affidavit and report which addresses the specific statutory code violations which is sufficient to demonstrate merit to the proposed amendment. In opposition and in support of their motion for summary judgment, defendant Estie submitted their own expert affidavit contesting the application of the statutory code violations but failed to establish that the proposed amendments were patently devoid of merit. Accordingly, plaintiff's motion deeming the amended bill of particulars served nun pro tunc is granted and defendants are granted leave to conduct further discovery on the limited issues raised in the amended bill of particulars.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT OF MICHAEL CRONIN

In support of their motion, defendant Estie submitted the Affidavit of Michael Cronin, a licensed engineer, who offers his professional opinion, to a reasonable degree of engineering certainty, based upon a review of the pleadings, parties deposition testimony, plaintiff's expert exchange, photographs of the accident scene, Lease Agreement and his own personal site inspection (Def. Exhibit J). Mr. Cronin states that during his site inspection, he noted that the cellar door is located in a rear hallway, measuring eight (8) feet in length, which provided access to a bathroom. Mr. Cronin states that a wooden hatch measuring five (5) feet three (3) inches in length and two (2) feet in width was installed into the hallway floor which, when opened, provided access to a stairway leading to the basement. Mr. Cronin avers that when the cellar door is open, the hallway walking surface was reduced to one (1) foot eight (8) inches in width. Mr. Cronin opines the owner Estie was not in violation of any applicable code, standard or ordinance as it

related to plaintiff's accident. In his opinion the hallway width was insufficient due to the tenant's action of tying the wooden hatch in the open position. Mr. Cronin states had the hatch been closed, the hallway width would have been sufficient, and plaintiff would not have been exposed to an unprotected elevation change. Had the hatch been closed, no guard rail would be required. Additionally, Mr. Cronin states that the building has not been renovated or modified after its initial construction in 1933 and therefore the codes adopted subsequent to the building construction would not apply to the design or construction of the hallway.

AFFIDAVIT OF RICHARD ROBBINS

In opposition, plaintiff submitted the Affidavit of Richard Robbins, a consulting architect, who offers his professional opinion, to a reasonable degree of architectural certainty, based upon a review of the pleadings, parties deposition testimony, photographs of the accident scene, the Lease Agreement, Mr. Cronin's report and his own personal site inspection (Plaintiff Exhibit A). Mr. Robbins states that during his inspection, he measured the hallway where the accident occurred to be twenty-five (25") inches wide. Mr. Robbins avers that when the cellar door is open, almost the entire width of the hallway is blocked by the cellar door, leaving insufficient walking space. Mr. Robbins opines that the cellar door being embedded in the floor constitutes trap and menace that can be said with a high margin of certainty caused the plaintiff's accident. Mr. Robbins further opines that: (1) the twenty-five (25) inches wide hallway which leads to the restroom and exit, was too narrow to afford safe pedestrian passage and that a minimum width of thirty-six (3) inches wide is required by code, (2) while the cellar door is left in an open position, a guardrail was not present as required by code to safeguard open-sided walking surfaces and (3) that the dark color of both the hallway floor and the cellar hole renders the cellar opening invisible.

LAW AND DISCUSSION

Defendant moves pursuant to CPLR 3212 for summary judgment stating that an as out-of-possession owner it has no duty to the plaintiff and that even assuming a duty, Estie had neither actual or constructive notice of the conditions. As an out-of-possession landlord, Estie turned over all the duties and obligations to maintain the premises. Defendant contends the lease agreement provided co-defendants/tenants with complete control over the interior of the store including access to the cellar. Additionally, defendant states that based on the deposition testimony and affidavits, Estie had no knowledge of any alleged defect within the premises and received no complaints regarding the cellar door. Estie states the cellar door being "tied off" was a transitory condition and not a structural defect which Estie had control over.

In opposition, plaintiff states that there is no dispute that Estie is an out-of-possession landlord and that there is no dispute as to how the accident occurred. Plaintiff contends that the issue is whether

defendant Estie's failure to address the inherent structural defects, presented by the layout of the cellar door, were a proximate cause of plaintiff's accident. Plaintiff states that their expert, Mr. Robbins opined that the subject premises, specifically the area in which the plaintiff's accident occurred, is in violation of the New York City Building Codes (Plf. Exhibit A).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986)). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v. Citibank*, 100 N.Y.2d 72 (2003)). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v. Prospect Hospital*, supra, 68 N.Y.2d at 324). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio*, 81 N.Y.2d 923 (1993)).

Under New York common law a landowner has a duty to maintain their premises in a reasonably safe condition, taking into account all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Alnashmi v. Certified Analytical Group, Inc*., 89 AD3d 10 (2nd Dept 2011)). It is also a general rule that no liability attaches to the landlord for injuries resulting from the condition of premises where such injuries are sustained after the landlord has divested themselves of possession and control even though the landlord is permitted to use such premises by the tenant (*Lugo v. Austin–Forest Associates,* 99 AD3d 865 (2nd Dept 2012)). It is well settled that absent evidence that an owner or possessor of a premises created a dangerous condition, or that said owner had prior notice of a defective condition, actual or constructive, said owner cannot be held liable for an accident resulting from said dangerous condition. (See *Acevedo v. York Intern. Corp*., 31 A.D.3d 255, 818 N.Y.S.2d 83 (1st Dept. 2006). Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when a specific statutory violation exists and there is a significant structural or design defect (*Lowe–Barrett v. City of NY*, 28 AD3d 721, 722 (2nd Dept 2006)).

Here, Estie alleges that the co-defendants/tenants opened and "tied off" the cellar door to the basement. Since the plaintiff does not allege that Estie had regular access to the premises and does not allege that Estie or anyone else on behalf of Estie was present at or near the time of the accident, it would not be reasonable to infer that Estie had actual or constructive notice that the cellar door was being left open without warning. Defendant Estie has established it did not control the property, did not create the allegedly dangerous condition and it had no actual or constructive notice of the alleged condition (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986)).

In opposition, plaintiff raises a triable issue of fact as to the existence of a violation of a specific statutory safety provision or structural defect under which an out-of-possession landlord may be liable. While Estie's expert opines that there are no statutory violations, plaintiff's expert opines that the hallway width and lack of guard rail around the cellar door were statutory violations of the 1922 New York City Building Code. This case is distinguishable from the cases cited by defendant, namely *Raffa v. Verni*, 139 A.D.3d 441 and *Yuying Qiu v. J & J Grocery & Deli Corp, et al*, 115 A.D.3d 627. In both of those cases, plaintiff failed to show a violation of a specific statutory provision as required to impose liability on an out-of-possession landlord. Here, plaintiff contends that the hallway width in conjunction with the open cellar door was a structural defect for which liability could be imposed on an out-of-possession landlord thereby raising triable issues of fact.

ORDERED, that defendant's motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED, that plaintiff's motion deeming the previously served Amended Bill of Particulars dated, October 12, 2020 properly served, nun pro tunc is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

J.S.C.

HON. PAMELA L. FISHER