McClendon-Mitchell v Brooklyn Academy of Music, Inc.
2021 NY Slip Op 31629(U)
April 16, 2021
Supreme Court, Kings County
Docket Number: 503779/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of APRIL, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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SPRING McCLENDON-MITCHELL,

Plaintiff,

-against-

BROOKLYN ACADEMY OF MUSIC, INC.

Defendants,

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Index No.: 503779/2018
Decision and Order

After having heard Oral Argument on APRIL 16, 2021 and upon review of the Motion in Limine submissions marked as trial exhibits the court finds as follows:

Defendant, moves by Motion in Limine seeking to preclude plaintiff from offering testimony on James Pugh, PE as to the lack of handrails and snow appearing on the staircase. Defendant also moves by motion in limine seeking to quash the subpoena for Lynn Alexandria. Plaintiff oppose both motions.

In the present case, the plaintiff seeks to present the testimony of an expert witness, James Pugh, PE, who plans to testify as to generally accepted engineering safety standards, and that, in his expert opinion, such standards required that a handrail be present in the staircase where the plaintiff fell. Generally, the admission of expert testimony is a matter that lies within the sound discretion of the trial court (*see Berger v Tarry Fuel Oil Co.*, 32 AD3d 409 [2006]).

In the present case, the defendants' seeks to preclude the testimony of the

plaintiff's expert, contending that, the absence of a handrail does not violate any applicable code or ordinance, the plaintiffs experts should not be allowed to testify or present any evidence regarding the absence of a handrail.

In the present case it is disputed that the absence of a handrail on the subject stair violated any code or ordinance.

Irrespective of whether or not any ordinances apply, it is well settled the absence of such violations only absolved the defendants of the mandatory duty that such provisions might otherwise impose (see Swerdlow v WSK Props. Corp., 5 AD3d 587, 588 [2004]), and is not dispositive of the plaintiff's allegations based on common-law negligence principles (see Washington v Albany Hous. Auth., 297 AD2d 426, 427 [2002]; see also Kellman v 45 Tiemann Assoc., 87 NY2d 871, 872 [1995]; *Wilson v Proctors Theater & Arts Ctr. & Theater of Schenectady*, 223 AD2d 826, 828-829 [1996]). In the present case, the plaintiff's expert can address whether, under the circumstances presented here, the absence of a handrail was a departure from generally accepted customs and practices, and whether the defendants were negligent in failing to provide a handrail. (*see Duncan v Corbetta*, 178 AD2d 459, 459 [1991]; see also Kormusis v Jeffrey Gardens Apt. Corp., 31 AD3d 392, 393 [2006]), *quoting, Zebzda v. Hudson St., LLC*, 72 A.D.3d 679, 680–81, 897 N.Y.S.2d 727 (2010). Whereas here, someone falls on a staircase, where a handrail is not present, the lack of such a handrail can be a proximate cause of the fall, thus becoming an issue for the jury.

As to the code violations, 27-376 of the Code. Section 27-232 of the Code defines the pertinent terms. That section defines an interior stair as "[a] stair within a building, that serves as a required exit." An exit, in turn, is defined as "[a] means of

egress from the interior of a building to an open exterior space which is provided by ... interior stairs [or] exterior stairs." Finally, exterior stair is defined as "[a] stair open to the outdoor air, that serves as a required exit.". Section 27-375 (f) (1) discusses interior stairs and requires that, when an interior staircase is more than 88 inches wide, it must have an intermediate handrail dividing the stairway. Section 27-376 provides that "[e]xterior stairs may be used as exits in lieu of interior stairs" provided they comply, inter alia, with all of the requirements for interior stairs except that such stairs need not be enclosed.

In the present case, it is undisputed that this case does not involve a section 27-375 interior staircase. As a result, plaintiff points to section 27-376. Plaintiff maintains that the staircase on which she fell is a section 27-376 staircase, that is, an exterior staircase being used as an exit in lieu of interior stairs. As already indicated, the Code requires such stairs to comply with all the requirements for interior stairs and hence, from plaintiff's perspective, the staircase needed the intermediate handrail called for by section 27-375. See Gaston v. New York City Hous. Auth., 258 A.D.2d 220, 221–22, 695 NYS2d 83 (1st Dept. 1999). Additionally, In a building "four stories or fifty feet in height or more, there shall be no openings in the building walls adjoining" the stairs unless such openings are protected by self-closing fire-rated doors (§ 27-376 [d]). The stairs must further comply with section 27-369 (f) (see, § 27-376 [c]), which provides that such stairs "be protected along their outer side by guards or parapets at least three feet six inches high"). Additionally, there are also issues of fact a to whether or not ADA requirements apply to this matter.

In the present case, the plaintiff seeks to establish the above points by eliciting

testimony from the expert as to his professional opinion, and the building manager Lynn Alexandra, as to her knowledge of the stairs in question and based on building records whether any improvements or renovations have been made to the building. Whether or not Ms. Alexandra was employed at the time of the accident is irrelevant to her probative knowledge about the subject building, whether there were issues with the handrail, why there is handrails on some of the exterior staircases, but not all of the stairs, specifically the stairs the plaintiff slipped on in this case. In order for the court to make a determination as a matter of law as to whether or not the sections of the building code apply the Court will hear the testimony of this witness and will not quash said subpoena.

This courts also notes that it is the law of the case that there are questions of fact regarding the applicability of these statutes. " 'The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned' " (*Clark v. Clark*, 117 AD3d 668, 669, 985 NYS2d 276, *quoting Martin v. City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 332 NE2d 867; *see Erickson v. Cross Ready Mix, Inc.*, 98 AD3d 717, 717, 950 NYS2d 175). '[T]he 'law of the case' operates to foreclose re-examination of **[the] question absent a showing of subsequent evidence or change of law' "** (*J–Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 809, 847 NYS2d 130, *quoting Matter of Yeampierre v. Gutman*, 57 AD2d 898, 899, 394 NYS2d 450). "The doctrine 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (*Erickson v. Cross Ready Mix, Inc.*, 98 AD3d at 717, 950 NYS2d 175, *quoting*

Baldasano v. Bank of N.Y., 199 AD2d 184, 185, 605 NYS2d 293; *see Ramanathan v. Aharon*, 109 AD3d 529, 530, 970 NYS2d 574); *quoting Strujan v. Glencord Bldg. Corp.*, 137 AD3d 1252, 1253, 29 NYS3d 398, 400 (2016). Justice Jiminez-Salta previously denied defendants summary judgment motion which they contended the subject staircase was grandfathered in and the building is not subject to the building codes because it is grandfathered in and that the building is subject to pre-existing codes that do not require a hand rail. Specifically, Justice Jiminez-Salta found there are issues of fact. In the present motion there has been no showing of subsequent evidence or a change of the law that would alter the law of the case. Notably, Administrative Code 27-111 permits the continued use of a building subject to statutes in effect at the time of construction unless a retroactive change is required. Administrative Code 27-118 provides that "if alteration of a building change the occupancy group classification of the building under the provision then the entire building shall be made to comply with the requirements of this code." There is nothing in this record to establish the same and as such issues of fact remain before a determination can be made.

Accordingly, defendant's Motion in Limine seeking to preclude plaintiff from offering testimony on James Pugh, PE, is hereby denied in its entirety, for the reasons stated above. Defendant's motion in limine seeking to quash the subpoena for Lynn Alexandria is hereby denied, for the reasons stated above.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
April 16, 2021

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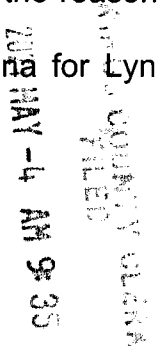

HON. RICHARD VELASQUEZ