

Arce v Haven Plaza Hous. Dev. Fund, Inc.
2021 NY Slip Op 32100(U)
October 27, 2021
Supreme Court, New York County
Docket Number: Index No. 150286/2019
Judge: Lewis J. Lubell
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**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF NEW YORK**

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

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MYRNA ARCE,

Plaintiff(s),

-against-

HAVEN PLAZA HOUSING DEVELOPMENT FUND, INC.,
HAVEN PLAZA SQUARE LLC and ICS BUILDERS, INC.,

Defendant(s).

**INDEX NO.: 150286/2019
MOTION DATE: 5/20/21
MOTION SEQ. NO(s): 2
DECISION & ORDER
ON MOTION**

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HAVEN PLAZA HOUSING DEVELOPMENT FUND, INC.,
HAVEN PLAZA SQUARE LLC and ICS BUILDERS, INC.,

Third-Party Plaintiff(s),

-against-

SAGE BUILDERS CORP., MG SECURITY and CTA
ARCHITECTS P.C.,

Third-Party Defendant(s).

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Defendants Haven Plaza Housing Development Fund, Inc. and Haven Plaza
Square LLC move for summary judgment.

The following papers filed on NYSCEF were read on the motion:

	Doc. Nos.
Notice of Motion, Affirmation, and Exhibits (11)	86-98
Affirmation in Opposition and Exhibits (7)	101-108
Affirmation in Reply	112
Affirmation in Partial Support	113

By way of background, a certain premises known as 710 East 13th Street, New York, New York is comprised of several two-story attached residential units (Premises). Each residential unit has an exit door, which leads to a walkway that runs parallel to East 13th Street. At the south side of the Premises, there is a ramp that leads to the sidewalk on East 13th Street. At the north side of the Premises there is a set of stairs that leads to the sidewalk on East 13th Street (Stairs). On March 14, 2018, plaintiff was a tenant at the Premises and, at approximately 6:00 a.m., plaintiff was descending the Stairs when she

allegedly fell and sustained personal injuries. This action ensued. Subsequently, defendants Haven Plaza Housing Development Fund, Inc. and Haven Plaza Square LLC (collectively, Haven Plaza) interposed an answer¹ along with cross-claims against defendant ICS Builders, Inc. Thereafter, Haven Plaza commenced a third-party action. Now, Haven Plaza moves for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant makes a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the movant makes such a showing, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In support of the motion, Haven Plaza makes several arguments. First, Haven Plaza contends that plaintiff has failed to identify the cause of her fall. Haven Plaza cites to portions of plaintiff's deposition testimony wherein she testified that she did not know what caused her to fall. Second, Haven Plaza contends that there is no evidence that it either created the subject condition or had notice of it. Third, Haven Plaza contends, among other things, that the relevant building code is from 1938 and not from 1968, given that the construction of the Premises was completed in 1968.² Under the 1938 Building Code, Haven Plaza's expert (that is, Peter Chen) asserts that the Premises "was likely exempt from the Article 7, Means of Egress, of the code as 26-272, Application of Means of Egress Requirement" Fourth, Haven Plaza contends that plaintiff's expert (that is, Thomas Turkel) visited the accident location two years after the alleged accident and after a building was built nearby. Thus, Haven Plaza contends, Mr. Turkel's opinions lack probative value.

In opposition, plaintiff addresses Haven Plaza's arguments. First, plaintiff contends that she has repeatedly testified that she fell because the Stairs were dark. Second, plaintiff notes that Mr. Turkel opined that the Stairs are dark because of where the light is positioned on the façade of the Premises, which leaves the lower part of the Stairs in deep shadow. Plaintiff proffers evidence that the Stairs were renovated in 2016 and the lighting conditions remained the same until the date of the accident. Plaintiff notes that Mr. Turkel measured the lighting conditions at the accident location and opined that they were inadequate by any standard. Plaintiff also proffers evidence that Haven Plaza's security patrol the Premises every hour, looking for, among other things, the

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In their answer, defendant Haven Plaza Housing Development Fund, Inc. admitted to being the title owner of the Premises and defendant Haven Plaza Square LLC admitted to being the beneficial owner of the Premises.

² For ease of reference, the building codes shall be referred to as the 1938 Building Code and the 1968 Building Code.

sufficiency of the lighting. Thus, plaintiff contends, there is a material issue of fact as to whether Haven Plaza had constructive notice of the lighting condition on the Stairs. Third, plaintiff contends that Haven Plaza had a duty under common law and under the relevant building code to adequately light the Stairs.

Initially, the Court notes that plaintiff testified that she fell because it was dark (Plaintiff's Deposition tr at 28, lines 14-15). Further, the following exchange occurred during plaintiff's deposition:

“Q. Did you miss your step because it was dark?

A. I don't know if I--

MS. DONOVAN: Asked and answered.

Q. You don't know what caused you to fall?

A. No.

MS. DONOVAN: Objection. She said multiple times she fell because there was no light. She said --

THE WITNESS: That it was dark.”

(Plaintiff's Deposition tr at 46, lines 14-22). Viewing the evidence in the light most favorable to the non-moving party (*see Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]), the Court cannot find that plaintiff does not know what caused her accident. Next, the Court considers the application of the building codes.


The 1968 Building Code was effective December 6, 1968 (1968 Building Code [Administrative Code] § 27-105). The evidence proffered appears to indicate that construction of the Premises was completed in February 1968. As such, the 1938 Building Code would be applicable (*see* 1938 Building Code [Administrative Code] § C26-272.0). The 1938 Building Code further provides that in relevant part that “[a]ll stairways, fire towers, hallways, passageways and *other required means of egress*, together with all areas to which the public has access, shall be equipped with adequate artificial lighting facilities. Such lighting facilities shall be used when adequate natural light is unavailable” (*see* 1938 Building Code [Administrative Code] § C26-280.0 [emphasis added]). Plaintiff has proffered sufficient evidence for purposes of this motion to establish, *prima facie*, that the Stairs may be considered a required means of egress and Haven Plaza's expert's assertion that the Premises is “likely exempt” from the lighting requirements of the 1938 Building Code is clearly insufficient to establish, *prima facie*, that the Premises was exempt.

Regardless, the conflicting expert affidavits, as well as plaintiff's deposition testimony as to the manner in which she fell, raise issues that are inappropriate for summary judgment (*see Hernandez v 21 Realty Co.*, 113 AD3d 503 [1st Dept 2014]).

To the extent not specifically addressed herein, the Court finds the remaining arguments of Haven Plaza to be without merit. Based on the foregoing, it is hereby

ORDERED that Haven Plaza's motion (Motion #2) for summary judgment is DENIED.

Dated: New York, New York
October 27, 2021


HON. LEWIS J. LUBELL, J.S.C.

CHECK ONE:

APPLICATION

CHECK IF APPROPRIATE

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN
- DENIED
- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE