| **Heron v JLM Estates LLC** |
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| 2022 NY Slip Op 32071(U) |
| June 28, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 517432/2017 |
| Judge: Ingrid Joseph |
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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of June 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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SUSAN HERON,

Index No.: 517432/2017

Plaintiff,

-against-

JLM ESTATES LLC and HALSTEAD BROOKLYN LLC,

Defendants.

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The following e-filed papers considered herein:

| | E-Filed Papers Numbered |
|---|---|
| Notice of Motion/Affirmation in Support/Memorandum/Exhibits... | 110 - 112; 113 - 131 |
| Affirmation in Opposition/Exhibits/Memorandum..... | 135 - 141; 143 |
| Reply..... | 144 - 147 |

In this personal injury matter, defendants, JLM Estates LLC ("JLM") and Halstead Brooklyn LLC ("Halstead") (referred to collectively as "defendants") move for an order pursuant to CPLR § 2221, granting leave to reargue (Motion Sequences 6 and 7), their prior motions for summary judgment pursuant to CPLR § 3212 (Motion Sequences 4 and 5), and upon reargument, an order granting summary judgment in their favor on the issue of liability.

Plaintiff seeks the recovery of damages for injuries she allegedly sustained when

she tripped and fell while descending a stairway during an open house viewing at the premises known as 106 8th Avenue, Brooklyn, New York 11215. The subject property is owned by JLM and was being shown by a real estate agent employed by Halstead.

Halstead previously moved for summary judgment by notice of motion filed on December 3, 2018. A predecessor justice (King, J.) denied the motion without prejudice by order dated April 24, 2019. In its short form order, the court noted "Halstead's motion for summary judgment (mot. seq. 1) is denied w/o prejudice. ... on [the] basis that there may be triable issues of fact." Thereafter, Halstead and JLM filed motions for summary judgment, on July 14, 2020 and August 28, 2020, respectively. This court denied the motions as untimely by order dated August 10, 2021, since the applications were made more than 120 days after plaintiff filed the Note of Issue (on January 13, 2020). On August 18, 2020, the court (Knipel, J.) vacated the note of issue, and the defendants filed the instant motions for leave to reargue approximately one year later, contemporaneous with the filing of notice of entry of the August 10, 2021 order.

In support of their respective applications, the parties' maintain that their underlying motions for summary judgment were timely, on the ground that the statute of limitations and other statutory deadlines were suspended at the expiration of the 120-day period in which to make such motion, based upon New York State Governor Andrew Cuomo's Executive Orders that took effect on March 20, 2020.

Pursuant to CPLR § 2221 (d)(2), a motion for leave to reargue "shall be based

upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Additionally, a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR § 2221(d)(3)).

Plaintiff's arguments in opposition to the motions to reargue are based upon her contention that both parties could easily have complied with the period of time in which to make their respective motions for summary judgment. Plaintiff also argues that the defendants failed to advise the court of the executive orders in their motion papers. Plaintiff also argues that the defendants' motions to reargue are untimely under CPLR § 2221.

Upon consideration, the court finds that the defendants were required to file their respective motions for summary judgment by April 2, 2020, within 60[1] days of plaintiff's filing of the note of issue (on January 31, 2020). Both motions, filed in July and August 2020, were time-barred but for a series of Executive Orders (202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72) issued by Governor Andrew Cuomo. The executive orders suspended specific time limits for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including the civil practice laws and rules. The

[1]Motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue (Kings County Supreme Court Uniform Civil Term Rules, Part C).

suspension commenced on March 20, 2020 and continued through November 3, 2020, and there exists binding authority that such executive orders did toll the time limitations imposed by statute, local law, ordinance, order, rule, or regulation (*Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

Further, inasmuch as plaintiff was the prevailing party for purposes of CPLR § 2220, her counsel was required to file the August 10, 2021 order in order to begin the running of the limiting time period for filing a motion to reargue under CPLR § 2221(d)(3). Since no such filing occurred until August 13, 2021, the defendants' motions to reargue, filed on August 17, 2021 and September 7, 2021, are timely.

Based upon the foregoing, that branch of the defendants' motion for leave to reargue is granted and upon reargument, the court shall address the parties' underlying motions for summary judgment on the issue of liability.

Halstead contends that it did not own, operate, lease, maintain, manage or control the subject premises as alleged in plaintiff's Complaint. Halstead argues that the Listing Agreement, annexed at NYSCEF Docket No. 24, confirms that the premises were owned by JLM Estates and David Lutley. Halstead submitted the affidavit of its Managing Director of Sales, Trish Martin, who states that Halstead was merely employed to engage in exclusive brokerage and marketing services for the sale of the property. Ms. Martin further states that the listing agreement imposed no obligation on Halstead to maintain, operate, or control the property, and it did not attach or cite to a clause in any document

that obligated Halstead to indemnify the owners for injuries sustained by potential buyers.

Halstead maintains that it had no duty of care to the plaintiff and thus, no liability for any dangerous or defective condition upon the premises that may have caused plaintiff to trip and fall. Moreover, Halstead argues that the law recognizes that a real estate broker does not owe a duty of care to a prospective buyer who is injured at a property that is being showcased for sale. Halstead cites two cases in support of this proposition, namely *Schwalb v Kulaski*, 9 AD3d 563 [2d Dept 2006] and *Perez v Leslie J. Garfield & Co.*, 2003 WL 1793057 [Sup Ct, New York County 2003]. Additionally, based upon Appellate Division, Second Department's case[2] law, Halstead points out that the plaintiff's inability to identify the cause of her fall is fatal to her cause of action.

JLM reiterates that plaintiff, during her deposition, failed to identify the cause of her fall, which renders her unable to establish that JLM was the proximate cause of the accident. JLM also argues that it did not cause or create a hazardous condition in the stairway area and thus, did not have actual or constructive notice of any such condition.

Plaintiff concedes that she did not know the precise cause of her fall during her deposition but reiterates that she did note that she was unable to grab onto the bannister. Plaintiff posits that the defendants erroneously belabored her inability to point to a traditional object that caused her to fall, such as a wet or sticky floor, or other defect.

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[2]Halstead cites *Louman v Town of Greenburgh*, 60 AD3d 915, 916 [2d Dept 2007]; *Jackson v Fenton*, 38 NYS3d 495 [2d Dept 2007]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570 [2d Dept 2003]; and *Curran v Esposito*, 308 AD2d 428, 429 [2d Dept 2003]).

However, plaintiff maintains that in view of her deposition testimony, the defendants were required to establish that neither the staircase nor bannister was defective. Plaintiff claims that in order to prevail on summary judgment grounds, the defendants needed to produce an expert who could provide a professional opinion regarding the age of the building, the floor coverings that were in place, as well as the construction and dimensions of the staircase in relation to applicable rules under the New York City Administrative Code.

Halstead, in response, makes the point that plaintiff failed to address the rule of law that a real estate broker cannot be liable to a prospective buyer on a premises being shown. Halstead reiterates that plaintiff is unable to state any a defect that caused her to fall and the "hand railings," and "bannister," as referenced in plaintiff's Bill of Particulars, are not relevant, since there is no nexus between such items and plaintiff's fall.

In its reply, JLM maintains that it did not cause or create a condition and did not have actual or constructive knowledge of a condition, which plaintiff utterly failed to identify, or even speculate, caused her alleged accident. Additionally, JLM argues that it is under no obligation to have the staircase examined by an expert, particularly in this case, where the plaintiff had no idea why she fell and did not testify to any defect, or any dangerous condition that caused her fall.

Regarding Halstead's motion, the court recognizes that liability for an allegedly

defective condition on property must be based upon occupancy, ownership, control, or special use of the premises (*see James v. Stark*, 183 AD2d 873 [1992]). Halstead established prima facie entitlement to summary judgment as a matter of law by submitting evidence that Halstead did not own, control, occupy, maintain, or manage the subject premises and that their only connection to the property was to show it to prospective buyers. Specifically, Halstead annexed to its motion, the affidavits of its Managing Director of Sales, Trish Martin, its General Counsel, Babette Krolik, and Real Estate Agent, Peter Grazioli. Halstead also submitted a copy of its exclusive brokerage and marketing services agreement with JLM to establish that such agreement was in effect from April 23, 2016 through May 9, 2016, during the time in which plaintiff allegedly tripped and fell on the staircase. In opposition, plaintiff failed to raise a triable issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 557, 562–563 [1980]). Thus, because Halstead owed no duty of care to the plaintiff, and had no knowledge of a defect concerning the staircase, it cannot be held liable to plaintiff under a negligence theory.

To impose liability upon JLM, there must be evidence that a dangerous or defective condition existed, and that JLM either created the condition or had actual or constructive notice of it (*Denker v. Century 21 Dept. Stores, LLC*, 55 AD3d 527, 528 [2d Dept 2008]; *Weber v. City of New York*, 24 AD3d 130, 131 [2d Dept 2005]; *LoCurto v. City of New York*, 2 AD3d 277 [2d Dept 2003). Ordinarily, JLM, as the moving party for summary judgment, would have the burden of establishing that it did not create the

alleged hazardous condition that caused plaintiff's fall, and did not have actual or constructive notice of any such condition for a sufficient length of time to discover and remedy it (*Ash v. City of New York*, 109 AD3d 854, 855 [2d Dept 2013]; *Mei Xiao Guo v. Quong Big Realty Corp.*, 81 AD3d 610, 610–611 [2d Dept 2011]; *Melnikov v. 249 Brighton Corp.*, 72 AD3d 760 [2d Dept 2010]).

However, under binding case law, a defendant in a premises liability case can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation (*Ash v. City of New York*, 109 AD3d at 855; *see McFadden v. 726 Liberty Corp.*, 89 AD3d 1067, 1067 [2d Dept 2011]; *Patrick v. Costco Wholesale Corp.*, 77 AD3d 810 [2d Dept 2010]; *Blochl v. RT Long Island Franchise, LLC*, 70 AD3d 993 [2d Dept 2010]; *Miller v. 7–Eleven, Inc.*, 70 AD3d 791 [2d Dept 2010]). In fact, under relevant case law, it is just as likely that some other factor, such as a misstep or a loss of balance could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation (*Ash*, at 855; *see Alabre v. Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287 [2d Dept 2011]; *Manning v. 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2d Dept 2006]).

Here, the court finds that JLM has demonstrated entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony, which reveals that plaintiff does not know what caused her to trip and fall down the staircase. Plaintiff

testified that the accident occurred on the staircase but speculated that she "believe[d] it was the third floor" (Plaintiff's tr., p. 17). Additionally, plaintiff stated that "all of a sudden, [she] was just going forward. I don't know. It just sort of happened" (Plaintiff's tr., 17, 18). She also averred, "I am not sure what caused it. But I could not – all of a sudden, I was going. I could not control it. I wasn't able to grab onto anything" (Plaintiff's tr. p.20). Further, plaintiff equivocated during her deposition when asked about the staircase bannister as a possible reason for her fall. She stated that there may have been an issue with the staircase bannister but ultimately, she testified that she did not know whether the bannister caused her to fall. Specifically, plaintiff stated,

> "I would normally hold onto a banister going up and down the stairs in general. But not with a grip. You kind of sometimes slide your hand down or whatever. But your hand is making contact with the banister. Perhaps, not in a tight way, but touching the banister. But I believe this one -- I don't know. I could not really -- it was too wide or something. I don't even – ... I just all of a sudden for some reason, I don't know the reason, I was falling down several stairs, maybe five" (Plaintiff's tr. p. 18).

Plaintiff's inability to identify where she fell and what caused her to fall is insufficient to overcome JLM's motion for summary judgment. As noted above, a finding that JLM's negligence, if any, proximately caused the plaintiff's fall and alleged injuries would be based upon mere speculation.

Accordingly, it is hereby

ORDERED that the motions of JLM Estates LLC (Motion Seq. 6) and Halstead

ORDERED that the motions of JLM Estates LLC (Motion Seq. 6) and Halstead Brooklyn, LLC (Motion Seq. 7) for leave to reargue their motions for summary judgment are granted and upon reargument, it is hereby

ORDERED that the motions of Halstead Brooklyn, LLC (Motion Seq. 4) and JLM Estates LLC (Motion Seq. 5) for summary judgment dismissing plaintiff's causes of action against them are granted, and it is further

ORDERED that plaintiff's case is dismissed in its entirety, and it is further

ORDERED that the defendants shall serve a copy of this order upon plaintiff with notice of entry within twenty (20) days of such entry.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice