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| Padilla v 567 Realty Co. LLC |
| 2022 NY Slip Op 32719(U) |
| August 10, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 157450/2018 |
| Judge: William Perry |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

ESPERANZA PADILLA

Plaintiff,

- v -

567 REALTY CO. LLC,

Defendant.

-----X

INDEX NO. 157450/2018

MOTION DATE 07/22/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Esperanza Padilla alleges that on May 2, 2018, she was caused to slip and fall on a staircase located at 567 West 170th Street, New York, NY due to the negligence of the building owner, Defendant 567 Realty Co. LLC. In motion sequence 001, Defendant moves for summary judgment on the grounds that Plaintiff cannot identify the cause of her fall and admitted in deposition testimony that there was no dangerous condition on the staircase. The motion is fully submitted.

CONTENTIONS/STANDARD OF REVIEW

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition.” (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012] [internal citations omitted].) However, notice alone is not enough, as a defendant must have

also had “a sufficient opportunity, within the exercise of reasonable care, to remedy the situation” after receiving such notice. (*Lewis v Metropolitan Transp. Auth.*, 99 A.D.2d 246, 250 [1st Dept 1984].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].)

Once a defendant has made a prima facie showing, the burden shifts to the plaintiff to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

“It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury.” (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011].) “However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred.” (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]; compare *Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012] [reversing order granting dismissal where, although defendants met their initial burden by citing to portions of plaintiff’s deposition wherein he “seemed unable to identify the cause of his fall,” plaintiff raised issue of fact with submission of expert affidavit finding variety of defects and code violations at the top tread of the step which plaintiff identified, through an interpreter, “was bad”] with *Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006] [finding dismissal proper where plaintiff testified that he was unable to identify the cause of his

fall down staircase, thus any finding of proximate cause would be based on speculation; expert opinion regarding staircase's code violations was irrelevant in the absence of evidence connecting violations to the fall].)

Defendant relies on portions of Plaintiff's deposition testimony in which she stated that she did not notice a defective condition or foreign substance on the staircase, that she "just fell," and that "the light was no good and [she] couldn't see and then [she] fell." (NYSCEF Doc No. 18, Ms001 Memo, at ¶¶ 12-15, *citing* NYSCEF Doc No. 22, Pl. Transcript.)

Defendant also submits the deposition testimony of Freddy Torres, who served as the substitute superintendent on the day of the accident. Mr. Torres testified that he performed an inspection immediately after Plaintiff's fall, concluded that the stairway lights had been working and that "everything was good." (Ms001 Memo at ¶¶ 20-30, *citing* NYSCEF Doc No. 23, Torres Transcript.) Adriano Guzman, the building's regular superintendent, testified that no one had fallen on the staircase prior to Plaintiff, that there had never been any lighting issues, that he had never received any complaints about visibility, and that there "was plenty of light." (Ms001 Memo at ¶¶ 31-40, *citing* NYSCEF Doc No. 24, Guzman Transcript.) Jennifer Mejia, a fellow tenant in the building, testified that she encountered Plaintiff while she was still laying on the ground after her fall, that Plaintiff had stated to her that she did not know what happened, and that "the lighting was good." (Ms001 Memo at ¶¶ 41-54, *citing* NYSCEF Doc No. 25, Mejia Transcript.)

Finally, Defendant submits the expert affidavit and report of Stan Pitera, who performed an inspection of the staircase on February 17, 2020 and concluded that "at the time of the accident, there was sufficient artificial illumination on the stair tread at the location of Ms. Padilla's accident, as well as on adjacent treads and landings, affording her the opportunity to make reasonable, expected observations of the walking surfaces and stairway characteristics. The lighting

conformed to the requirements of the New York State Multiple Dwelling Section 37 and even exceeded light-level requirements of modern New York City Building Codes (one (1) footcandle).” (NYSCEF Doc No. 26, Pitera Affidavit, at ¶ 29.)

In opposition, Plaintiff submits a supporting affidavit wherein she states that “if [she] were asked a question [at her deposition] about the color of the stairs, then [she] would have responded that the stairs were all black ... [and that there was] no visual color contrast between the steps to differentiate where one step ends and the next begins.” (NYSCEF Doc No. 32 at ¶ 8.) Similarly, she states that “if [she] were asked a question about the shape or size of the handrail, then [she] would have responded that the handrail is more than 2 inches wide and more than 2 inches deep and has an irregular shape ... [which] would have prevented [her] from adequately grasping it.” (*Id.* at ¶ 9.)

Plaintiff submits the expert affidavit of Himad Beg, who performed an inspection of the staircase on December 10, 2020 and concluded that there was insufficient illumination in the area of the staircase where Plaintiff fell. (NYSCEF Doc No. 31, Opposition, at ¶ 17, *citing* NYSCEF Doc No. 33, Beg Affidavit.) Mr. Beg also concluded that the specific step on which Plaintiff lost her balance was excessively worn, slippery, lacked non-slip strips, and lacked color contrast with adjacent tread, and that the handrail had a shape and size that made it difficult to grasp in an emergency. (Beg Affidavit at ¶ 18.)

In reply, Defendant argues that Plaintiff’s affidavit is self-serving and improperly identifies the specific step on which she fell for the first time, in contrast to her deposition testimony, where she did not identify the specific location. (NYSCEF Doc No. 37, Reply, at ¶¶ 39-50.) Defendant also submits a supplementary expert affidavit of Stan Pitera based on a second inspection of the staircase on June 7, 2021. (NYSCEF Doc No. 38.)

ANALYSIS


Defendant has failed to meet its burden for summary judgment on the grounds that Plaintiff is unable to identify the cause of her fall. Plaintiff repeatedly testified that she had trouble seeing and thus sufficiently identified poor lighting as the cause of her fall. (Pl. Transcript at 24 [“It’s dark. It just has like a focus light and you can’t see much.”]; at 29 [“I didn’t see the step and then I went down.”]; at 30 [“I was going down. Going down the steps but I didn’t see. I didn’t see and then I fell. I saw that the light was no good and I couldn’t see and then I fell.”].)

Even if Defendant had met its initial burden, Plaintiff’s testimony and expert affidavit “when viewed in a light most favorable to Plaintiff, as the opponent of summary judgment, create[] questions of fact as to whether the alleged inadequate lighting on the subject stairway was a proximate cause of [her] fall.” (*Haibi*, 156 AD3d at 149.) Plaintiff’s expert avers that his measurements indicated that illumination in the staircase amounted to 0.5 foot-candles (Beg Affidavit at 92 [photograph showing a 0.4 foot-candle light measurement]) while New York City Building Code § 1006.2 requires a minimum of 1 foot-candle in areas of egress. (Beg Affidavit at 22-23.) Although Defendant counters that the premises meets the different requirements provided by the 1938 Building Code, which applies based on the premises’ 1940 Certificate of Occupancy (Reply at ¶ 14), Defendant fails to attach the Certificate, and it pertains to “569 West 170th Street” rather than the premises here, 567 West 170th Street. In any event, “whether or not the subject stairway is subject to any of the Code provisions is an issue of fact. Even if this is not the case, defendant[] can remain liable if it is shown that the stairway or the premises in the possession of defendant[] was otherwise defective, and such defect or defects were the proximate cause of the accident.” (*Yanagisawa v Kyoto Omen USA, Inc.*, 2019 WL 2436109, at *5 [Sup Ct, NY County 2019].)

Moreover, Plaintiff’s affidavit identifying the location of her fall (NYSCEF Doc No. 32 at ¶ 11, Beg Affidavit at 77-82 [stating that Plaintiff lost her balance descending from the second intermediate landing above the first floor and fell down the stairway to the first floor landing]) is not self-serving as Defendant contends (NYSCEF Doc No. 37, Reply at ¶¶ 39-50) but is consistent with prior deposition testimony. (NYSCEF Doc No. 25, Mejia Transcript at 25:19-26:05 [Plaintiff was on the first floor landing]; Torres Transcript at 54:12-55:15 [Plaintiff was horizontal to the first step of the stairs on the first floor].) It is not the court’s province to resolve fact issues on a motion for summary judgment

Viewing the record in a light most favorable to Plaintiff, a question of fact exists as to whether Defendant fulfilled its obligation to maintain the staircase and the illumination therein in compliance with the applicable NY City Building Code sections. (see *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 552, 947 NYS2d 85 [1st Dept 2012].) “[W]here [as here,] there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide.” (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008].) Accordingly, it is hereby

ORDERED that Defendant’s motion sequence 001 for summary judgment is denied.

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| <u>8/10/2022</u> | | |  | | |
| DATE | | | WILLIAM PERRY, J.S.C. | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
| | | | | REFERENCE | |