SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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LAURA MANKO, JOHN MANKO,

Plaintiff,

- v -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK, PRESIDENT, IN HIS/HER REPRESENTATIVE CAPACITY, OF THE BOARD OF MANAGERS FOR THE NEW YORK RESOURCE CENTER CONDOMINIUM, NEW YORK RESOURCE CENTER, INC.,GEORGE COMFORT & SONS, INC.,

Defendant.

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INDEX NO. 154618/2020

MOTION DATE 10/16/2024

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 185, 186, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 261

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

Upon the foregoing cited papers and after oral argument, defendants' motion for summary judgment is determined as follows:

Plaintiffs Laura Manko and John Manko commenced the instant action to recover damages for personal injuries sustained by Laura Manko when she allegedly tripped and fell at the property located on 5th Avenue between 34th Street and 35th Street in front of a CUNY school. Plaintiffs commenced the instant action against defendants,[1] asserting negligence causes of action against each defendant. Defendants New York Resource Center Condominium i/s/h/a President in his/her capacity, of the Board of Managers for the New York Resource Center

[1] This action was discontinued as to defendants The City University of New York (CUNY), CUNY Graduate Center and CUNY Graduate School on October 7, 2020 (NY St Cts Elec Filing [NYSCEF] Doc No. 40) and against defendant Dormitory Authority of the State of New York on May 22, 2023 (NYSCEF Doc No. 157).

Condominium and George Comfort & Sons Inc. (defendants) now seek summary judgment pursuant to CPLR 3212 on the basis that there are no statutory or common-law grounds for negligence. Plaintiffs oppose the motion, arguing that defendants have neither demonstrated entitlement as a matter of law or the absence of material issues of fact. For the following reasons, defendants' motion for summary judgment is denied.

Background

On September 13, 2019, between 3:30 p.m. and 4:00 p.m., Laura Manko tripped and fell over a raised section of pavement (base stone plinth) located within a window bay of CUNY Graduate Center causing her to fall into and onto the metal spiked anti-loitering loafer rails (loafer rails) outside the Art Gallery window located at 365 Fifth Avenue, New York, NY injuring her right arm.[2] Laura Manko testified that she did not notice the base stone plinth or the loafer rails prior to her tripping and falling; her foot encountered the base stone plinth, and she fell forward; she tried to catch herself but was unable to do so (NYSCEF Doc No. 170, Laura Manko 6/29/21 tr at 142, lines 21-23; NYSCEF Doc No. 227, Laura Manko 10/7/21 tr at 20, line 23 through 21, line 8; at 21, lines 11-16; at 22 lines 10-12; NYSCEF Doc No. 226, Laura Manko aff at ¶¶ 17, 36). Laura Manko further testified that the sidewalk was crowded, the step was "concealed" with no markings on it and was the same color as the sidewalk (Laura Manko 10/7/21 tr at 20, line 23 through 21 line 8; at 22, lines 20-24; Laura Manko 6/29/21 tr at 159, lines 14-21; at 160, lines 4-9; at 161, lines 11-15). John Manko testified that he also did not notice the height differential between the sidewalk and the base stone plinth until after the

[2] Plaintiffs were apparently confused during their depositions as to the exact window bay in which Laura Manko fell, however this mix-up was clarified by the testimony of the witnesses who responded to the scene on the date of the incident, and the location does not appear to be a point of contention (NYSCEF Doc No. 178, Pitera Report at n 1).

accident (NYSCEF Doc No. 171, John Manko tr at 87, lines 17-20; at 97, lines 13-20; NYSCEF Doc No. 198, John Manko aff at ¶ 10).

In support of the motion, defendants submit copies of the pleadings, plaintiffs verified bill of particulars, party and non-party deposition transcripts, expert reports, and photographs. In his report and an affidavit, Stan A. Pitera, P.E., opined that the base stone plinth and loafer rails were safe and complied with the applicable New York City Building Code and Administrative Code of the City of NY and that no additional visual cues, warnings, guards, or handrails were needed (NYSCEF Doc No. 178, Pitera Report at 4, 6, 9; NYSCEF Doc No. 215, Pitera aff at ¶¶ 11-12, 44). Pitera opines that the base stone plinth was not a single step and not a "toe trap" or "tripping hazard" because it was not located in an area intended for pedestrian traffic or loitering (Pitera aff at ¶ 15). He further opined that there was no evidence to reasonably conclude that the LPC prohibited the replacement of the subject loafer railings and that no permit was required from the NYC Building Department because the loafer railings were a replacement of existing work (Pitera Report at 7). He further stated that the American Society for Testing and Materials (ASTM) standards referred to by plaintiffs' expert witness has not been accepted by the City of New York or State of New York and are thus not applicable (*id.* at 8). Pitera concludes that the "base stone 'plinth' and loafer rails were safe and well maintained and not a substantial cause of Plaintiff's accident" (Pitera aff at 23).

In opposition, plaintiffs submitted a counsel affirmation, copies of the pleadings, plaintiffs verified bill of particulars, affidavits from the plaintiffs, party and non-party deposition transcripts, expert reports, and accident reports. In an affidavit of plaintiff's expert David Jimenez, an architect, Jiminez opined that the loafer railings along the building façade was dangerous and that the base stone plinth was a trip hazard and defendants failed to act reasonably

by not erecting barriers near the base stone plinth or loafer rails (NYSCEF Doc No. 222, Jimenez aff ¶¶ 15, 67, 73). He contends that defendants failed to comply with the NYC Building Codes of 1901, 1968, and 2014 as well as the regulations of the LPC (*id.* at ¶¶ 16-17). He opines that it is the owner's responsibility to maintain in a safe condition any alteration, replacement, repair, and maintenance of any appurtenances connected or attached to all buildings and the replacement and reinstallation of the loafer rails created and left a newly installed unsafe condition (Jimenez aff at ¶ 17; NYSCEF Doc No. 223, Suppl Jimenez aff at ¶ 12). He further opines that the LPC regulates any changes to the building's façade including repair or restoration of deteriorating façade materials and features and that defendants failed to comply with this regulation when they replaced the loafer railings (Jimenez aff at ¶¶ 28-30; Suppl Jimenez aff at ¶¶ 13-17). He averred that defendants ignored safer alternatives to the loafer railings which should have been removed or at the very least had a barrier installed (Suppl Jimenez aff at ¶¶ 18-19).

Plaintiffs also submitted a report from Nicholas Bellizzi, P.E., a professional engineer, and safety expert in the field of roadway and sidewalk surfaces and conditions (NYSCEF Doc No. 221, Bellizzi aff at ¶ 7). Bellizzi opines that the raised base stone plinth and pointed metal anti-loitering loafer railings were dangerous and hazardous to pedestrians as they are an unwarned of and unmarked tripping hazard (*id.* at ¶ 52). He opines that the loafer railings are violative of Chapter 33 of the 2014 NYC Building Code as they posed a risk to the public (*id.* at ¶¶ 54-59). Since a small change in surface elevation are difficult to perceive, single steps have been prohibited by the NYC Building Code since 1968 as it poses a tripping hazard (*id.* at ¶¶ 60-77). He opines that the raised base stone plinth violated several sections of the NYC Building Code as it was uneven, irregular, and non-uniform (*id.* at ¶¶ 80, 82).

Standard

A movant seeking summary judgment pursuant to CPLR 3212 in its favor "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party"' (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [citation omitted]), "and every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Discussion

Defendants argue that they are entitled to summary judgment as there was no statutory negligence because the building and sidewalk violations alleged by plaintiffs do not apply (NYSCEF Doc No. 161 at 3-5). Defendants contend that the subject window bay area was constructed before the current statutes or building codes (NYSCEF Doc No. 216 at 1). Defendants also argue that the building's landmark status was not affected by the reinstalment of the loafer rails because the cost of the renovations did not exceed 50% of the replacement cost of the building (NYSCEF Doc No. 161 at 4-5). Plaintiffs oppose defendants' contention that they are immune from liability because the unmarked raised base stone plinth was a dangerous condition, defendants did not have permission from the LPC to make the renovations to the

loafer rails, and that defendants knowingly added a hazardous dangerous condition (NYSCEF Doc No. 219 at 5-9). Plaintiffs contend that defendants' argument primarily focuses on the defectiveness of the base stone plinth and not the loafer rails (*id.* at 5). Defendants counter that the installation of the loafer rails did not cause the building to lose its landmark status as the reinstallation was a minimal renovation, and a permit from the LPC was not needed as the loafer rails were replaced with the exact same design (NYSCEF Doc No. 216 at 3).

To demonstrate entitlement to summary judgment in a trip-and-fall case, the defendant must establish that it maintained the premises in a reasonably safe condition and that it did not create a dangerous or defective condition on the property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). "Whether a dangerous or defective condition exists on property so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Coakley v City of New York*, 286 AD2d 576, 577 [1st Dept 2001], quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993] [citations omitted]). Viewing the facts in the light most favorable to the non-movant, there are triable issues of fact which preclude summary judgment.

Defendants failed to establish that none of the statutory requirements promulgated after the construction of the subject landmark building applies. Plaintiffs allege that defendants violated the 1968 Building Code of the City of New York (Administrative Code of the City of NY) §§ 27-375 and 27-376, Administrative Code of the City of NY §§ 7-210, 16-123, and 19-152, and the LPC laws and regulations by not maintaining the premises in a reasonably safe condition (NYSCEF Doc No. 165 at ¶¶ 123, 125, 138-139, 142; NYSCEF Doc No. 168, Bill of Particulars at ¶¶ 4, 6). Administrative Code § 27-375 pertains to interior building stairs while

Administrative Code § 27-376 pertains to exterior building stairs. Administrative Code § 7-210 imposes a nondelegable duty on owners of a building to maintain the sidewalk abutting their property in a reasonably safe condition and provides that these owners are liable for personal injury that is proximately caused by such failure. Administrative Code § 16-123 governs a property owners' duty to remove snow, ice, and other debris from the public sidewalks. Administrative Code § 19-152 requires property owners to maintain sidewalks[3] in good condition, including resolving trip hazards such as sidewalk flags being out of level, broken or loose.

Defendants argue generally that none of these statutes apply. However, there is no evidence that a review was undertaken by the LPC on whether the reinstallation of the loafer rails was permitted (Administrative Code § 25-310). The LPC provides guidelines regarding the steps necessary to make alterations to landmarked property (Administrative Code § 25-300 et. seq.). Alterations, even replacement of existing fixtures, undertaken without a permit is a violation of the Administrative Code except as provided for in the statute (Administrative Code § 25-305). It is undisputed that the initial date of the installation of the loafer rails is unknown (Pitera Report at 6; Supp Jimenez aff at ¶¶ 16, 19; NYSCEF Doc No. 238, Kendra Logan tr at 19, lines 9-11), and there is no documentation establishing that the LPC was ever contacted to determine what work, if any, was appropriate before removal and reinstallation of the loafer rails was undertaken. There has been no showing that such violation is of a minor procedural nature that would render the LPC's approval ineffective (*cf. Crell v O'Rourke,* 88 AD2d 83, 86 [2d Dept 1982], *affd* 57 NY2d 702 [1982]).

[3] Administrative Code § 19–101 (d) defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (*James v 1620 Westchester Ave., LLC,* 105 AD3d 1, 5 [1st Dept 2013]).

Indeed, defendants concede that the LPC rules requires at least an application to determine if a permit is necessary to make renovations including for minor work (NYSCEF Doc No. 216 at 3 ("the website states minor jobs can be reviewed to determine if a permit is necessary"). Defendants' expert witness, Pitera, only speculates that defendants complied with the LPC requirements (Pitera Report at 9 ["it was reasonable to conclude that [if] the New York City Landmarks Preservation Commission prohibited the replacement, the original loafer railings would have remained in place"]). No permit application or permit from the LPC was listed among the items Mr. Pitera reviewed (*id.* at 3; Pitera aff at ¶ 6). Defendants cite no legal authority excusing it from complying with the regulations from the LPC to undertake the renovations (*see* NYSCEF Doc No. 216 at 3). In any event, compliance with applicable regulations does not completely exempt defendants from liability (*Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032 [4th Dept 2004] [compliance with relevant building codes "'does not necessarily preclude a jury from finding that the ... [step or the entryway] was part of or contributed to any inherently dangerous condition existing in the area of [plaintiff's] fall'"]).

The cases defendants rely on are factually dissimilar and distinguishable as the alleged defects in those cases did not involve a modification or renovation of the building that would render a subsequent code provision applicable, and causation had not been established (*see Sakol v Kirsch*, 25 AD3d 523, 523 [1st Dept 2006] [affirming dismissal of personal injury action by plaintiff who fell near the bottom of a winding staircase at defendants' mansion where plaintiff's engineering expert failed to identify the violation of any specific safety guidelines in effect at time of the mansion's construction over a century ago and prior to the adoption of the building codes]; *Jones v Presbyterian Hosp. in the City of N.Y.*, 3 AD3d 225, 227 [1st Dept 2004] [action to recover damages for personal injuries suffered by plaintiff after trip and fall down auditorium

stairs dismissed where plaintiff admitted to miscalculating the number of steps and fire prevention and building code did not apply as auditorium was constructed in 1961 before promulgation of the regulation]; *see also Boodie v Town Hall Found.*, 5 AD3d 210, 210 [1st Dept 2004] [personal injury case dismissed where plaintiff admitted to not knowing what caused her to trip and fall down theater stairs and the stairs were constructed well before the current regulations]; *Vachon v State of New York*, 286 AD2d 528, 528 [3d Dept 2001] [dismissal upheld in personal injury case where plaintiff tripped and fell down a stairway while exiting the State Capitol since plaintiff testified she did not know what exactly caused her to fall, and the building fire resistance codes for the second handrail was enacted decades after the premises were constructed were inapplicable as no renovations costing more than 50% of the cost of the building had been done during any six month period]; *Gomez v Konstantakopoulos*, 2017 WL 5655969, *1 [Sup Ct, Bronx County, Oct. 20, 2017, No. 304889/2014, Rodriguez, J. I.] [dismissal granted in personal injury action where plaintiff trip and fall in an interior stairwell and defendant established lack of notice about alleged defective condition as well as that the building was built in 1901 and had never undergone structural changes to bring it under building code compliance]).

Additionally, questions of material fact exist which cannot be determined as a matter of law on whether defendants allegedly caused and/or permitted unsafe conditions in the area where Laura Mauro fell. Plaintiffs contend that there were two unsafe conditions on the sidewalk, the raised base stone plinth and the spiked loafer rails which proximately caused plaintiff Laura Manko's injury. Defendants' arguments focus on whether the building codes were in place at the time the premises was built, conclusorily asserting that there were no sidewalk violations (NYSCEF Doc No. 161 at ¶¶ 7, 8, 11). Laura Manko testified that the base stone plinth was

uneven in height, irregular in shape, and located near the loafer rails without any barriers or warnings (Laura Manko 10/7/21 tr at 20, line 23 through 21, line 8; at 22, lines 20-24). She also testified that the base stone plinth had no distinguishable characteristics between it and the sidewalk (Laura Manko 10/7/21 tr at 20, line 23 through 21, line 8; at 21, lines 11-16; at 22 lines 10-24; Laura Manko aff at ¶¶ 11, 17, 36). John Manko also testified that the height differential was not noticeable (John Manko tr at 87, lines 17-20; at 97, lines 13-20; John Manko aff at ¶ 10). Plaintiffs' description of the condition of the sidewalk and the circumstances surrounding Laura Manko's fall present a triable issue of fact concerning whether a statutory violation existed at the location where Laura Manko fell.

Dismissal is further inappropriate as the issue of whether defendants breached the duty of care it owes to the plaintiffs remains unresolved. Defendants concede that they had a duty of reasonable care toward plaintiffs (NYSCEF Doc No. 161 at ¶ 14). Defendants, however, argue that no common-law negligence exists because there was no breach of their duty (*id.* at ¶ 14-15). Rather, defendants contend that plaintiff Laura Manko inadvertently stubbed her toe on a trivial, open and obvious condition that was a part of the foundation of the building (*id.* at 15). Defendants fail to submit evidence sufficient to establish, prima facie, that it did not have actual or constructive notice of the alleged condition. Defendants failed to provide conclusive testimony establishing that no prior similar accident had occurred or an affidavit or sworn statement averring that a search was conducted for and failed to disclose any accident or incident reports related to the alleged defects.

Defendants' reliance on the testimonies of Sergeant Vincent Brigante ("Sgt Brigante") and Sergeant Albert Bregendahl ("Sgt Bregendahl") to establish lack of notice is misplaced as their testimonies are speculative and not conclusive. Sgt Brigante testified only as to his lack of

awareness of any other persons tripping on the base stone plinth at any of the bay areas over the years (NYSCEF Doc No. 173, Sgt Brigante tr at 59, lines 10-13; at 63, lines 11-15), but not that there were no accidents at all. Similarly, Sgt Bregendahl testified only as to whether he had ever heard of anyone else tripping on the ledges or spikes other than Laura Manko (NYSCEF Doc No. 174, Sgt Bregendahl tr at 52, lines 4-14). At his deposition, Sgt Bregendahl testified that he would not necessarily be aware of every accident, especially if it happened on a different shift (*id.*). In fact, Sgt Bregendahl was completely unaware of an accident that occurred in June 2019, when confronted with the accident report at his deposition (*id.* at 77, line 16 through 82, line 10). In any event, evidence of no prior accidents in the subject area is only a factor to be considered as to lack of notice (*see Orlick v Granit Hotel & Country Club*, 30 NY2d 246, 250 [1972] [evidence of no prior incidents "would merely be a *factor* for consideration and not in any way be conclusive on the issue of the nature of the condition of the stairway"]).

Defendants further argue that the base stone plinth condition was a trivial defect ((NYSCEF Doc No. 161 at ¶¶ 19-21). However, "[a] defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). The Court must examine all the facts presented including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury" (*Nin v Bernard*, 257 AD2d 417, 417 [1st Dept 1999] [reversing the granting of summary judgment to defendant finding that defect was not trivial based on the unevenness of the platform, sharpness of edges and location of the defect], quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

Here, upon consideration of the facts presented, this court cannot conclude that the alleged defect was trivial as a matter of law. The photographs in the record depict an open raised section of pavement between two columns with a sloped angular step leading up to the window bay, with two rows of spiked loafer rails located in the area in front of the window bay (Pitera Report, exhibit AEL – No. 1 through No. 9; Jimenez Report, exhibit 9. Site Images; NYSCEF Doc No. 224, Robert Fein aff). Laura Manko testified that the base stone plinth was uneven in height, irregular in shape, near the loafer rails without any barriers, visibility was limited due to the brightness of the sun, the sidewalk was crowded, and she was not looking down at her feet (Laura Manko 10/7/21 tr at 20, line 23 through 21, line 8; at 22, lines 20-24). The testimonial and photographic evidence reveal that the design of the base stone plinth created an uneven platform, with a height differential between the sidewalk and the building line, and the color of the base stone plinth made it indistinguishable from the sidewalk-conditions which plaintiffs assert were the proximate cause of Laura Manko's trip and fall. Accordingly, a triable issue of fact remains (*Mendoza v One Fordham Plaza, LLC*, 84 AD3d 547, 547 [1st Dept 2011] [court cannot conclude that "overly and improperly sloped sidewalk" was trivial defect as a matter of law] [citations omitted]).

Defendants also argue that the base stone plinth was an open and obvious condition (NYSECF Doc No. 161 at ¶¶ 22, 24). The evidence submitted establishes a triable issue of fact as to the creation of optical confusion due to the lack of markings on the base stone plinth or differentiation in color between the base stone plinth and the sidewalk (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]; *Saretsky v 85 Kenmore Realty Corp.*, 85 AD3d 89, 92-93 [1st Dept 2011] [reversing summary judgment and reinstating complaint as the evidence supported plaintiff's theory of "optical

confusion" as the similarity in surface colors and failure to demarcate the edge of the step created the illusion of a level surface and there were no signs warning of the step]). Plaintiffs' testimonies indicate that the design and color of the base stone plinth created an illusion of one level plane. Accordingly, an issue of fact exists as to whether the lack of visual warnings or barricade proximately caused Laura Manko's fall.

Plaintiffs correctly point out that defendants' arguments primarily focus on the defectiveness of the base stone plinth, and not whether the loafer rails were an inherently dangerous condition (NYSCEF Doc No. 192 at 5). Defendants' attempt to expand their argument to include the loafer rails in its reply papers (NYSCEF Doc No. 216 at 3-4) is unpersuasive. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] [citations omitted]). In any event, defendants failed, as a matter of law, to meet their burden to show that the loafer rails were open and obvious and not inherently dangerous (*S. S. v Village of Sleepy Hollow*, 228 AD3d 891, 893 [2d Dept 2024] [triable issues of fact exists as to whether the spikes, located at the base of the fence where infant plaintiff fell off a retaining wall injuring her hand, was open and obvious and not inherently dangerous]). The common purpose of the loafer rails is to deter pedestrians from sitting or walking on the building's walls or windowsills (Pitera Report at 2, 6 (¶ 1)). It was not uncommon for pedestrians, including tourists and students to congregate in the window bay to look inside the windows (NYSCEF Doc No. 232, Katherine Carl tr at 61, line 14 through 63, line 15; at 69, lines 9-15; at 72, line 23 through 73, line 19).

Moreover, dismissal is inappropriate as the parties' experts dispute whether the alleged defects created a safety hazard as well as which statutory regulations apply. Generally,

"conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment" (*Carter v HP Lafayette Boynton Hous. Dev. Fund Co., Inc.*, 210 AD3d 580, 581 [1st Dept 2022], citing *Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]; *see also* *Bossert v New York Univ. Langone Med. Ctr.-Tisch Hosp.*, 213 AD3d 547, 548 [1st Dept 2023]; *Castellanos v 57-115 Assoc., L.P.*, 211 AD3d 459, 460 [1st Dept 2022]). Plaintiffs' expert witnesses opined that the base stone plinth and loafer rails were safety hazards and violated several building codes. Defendant's expert disagrees with the opinions of plaintiffs' expert witnesses, arguing that the base stone plinth and loafer rails posed no hazard and the codes they rely on are inapplicable. Here, because the parties' experts disagree as to whether the raised base stone plinth and loafer rails created a safety hazard breaching defendants' duty of care, defendants have failed to demonstrate that there are no disputed material issues of fact (*see Bossert*, 213 AD3d at 548 [affirming lower court's denial of defendant's motion for summary judgment as the parties' experts offered conflicting opinions as to the safety of the ramp]).

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that defendants New York Resource Center Condominium i/s/h/a President in his/her capacity, of the Board of Managers for the New York Resource Center Condominium and George Comfort & Sons Inc.'s motion for summary judgment, pursuant to CPLR 3212, is denied.

1/16/2025
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE