At an IAS 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 360 Adams Street, Brooklyn, New York, on the 24th day of February, 2025.

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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REGINALD RIVERS,

Plaintiff,

-against-

5674 REALTY, LLC,

Defendants.

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Index No.: 523390/2022

DECISION AND ORDER

Mot. Seq. Nos. 6-7

The following e-filed papers read herein:	NYSCEF Doc Nos.
Motion Seq No. 6	
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Plaintiff Reginald Rivers ("Plaintiff") commenced this action seeking damages for personal injuries allegedly sustained on January 16, 2021 around midnight, when he slipped and fell on the staircase at the premises located at 674-684 Empire Boulevard in Brooklyn, New York (the "Premises"), which is owned by defendant 5674 Realty, LLC ("Defendant"). Specifically, Plaintiff contends that he slipped on water that accumulated on the stairs and he was unable to grab the handrail because it was too short.

Plaintiff now moves for an order: (1) pursuant to CPLR 3212, granting him summary judgment on the issue of liability and (2) striking Defendant's affirmative defenses of comparative

fault (Mot. Seq. No. 6). Defendant also seeks an order granting it summary judgment dismissing Plaintiff's complaint on the grounds that it did not create, or have notice of, the alleged condition (Mot. Seq. No. 7).

In his motion, Plaintiff asserts that he is entitled to summary judgment because he "slipped on the recurring condition of water on a defective marble step and could not grab the handrail because it was too short" (NYSCEF Doc No. 103, ¶ 23). Based on the testimony of the superintendent James Mulligs that the handrail has been the same for 27 years, Plaintiff asserts that Defendant had actual and constructive notice of the fact that it does not extend to the bottom step and therefore, knew or should have known, that it constitutes a dangerous condition and a slip hazard. In support of his motion, Plaintiff relies on his expert Scott Silberman's report. In his report, Mr. Silberman opined that the treads were narrow and excessively sloped at 2.6% and the stairway required handrails on both sides. In addition, Plaintiff avers that he previously complained to the superintendent about the recurring condition of water leakage from the ceiling and the open window located at the landing between the first and second floor. Plaintiff further contends that photographs from Mr. Silberman's inspection indicates that there was preexisting water damage. Therefore, Plaintiff argues that Defendant had notice. With respect to the part of the motion seeking to strike Defendant's affirmative defenses of comparative fault, Plaintiff argues that he was merely traversing the staircase, looking forward and not using a cellphone or doing anything else negligently.

In opposition, Defendants argue that there is no evidence that Defendant created any alleged wet condition. Moreover, there were no prior complaints about the open window causing a wet condition on the staircase or about the handrail. Defendants also cite to Plaintiff's deposition testimony in which he acknowledged that he saw wet conditions on the last step prior to his fall. In addition, Plaintiff did not know how long the window was open. Defendant further contends that there are questions of fact as to whether the steps and the railing were sufficient. Defendant relies on the report of their engineering expert, Peter Chen. With respect to the handrail, while it did not start or continue to the first step, Mr. Chen opined that the post that began on the second step was graspable and usable. Pursuant to 1968 NYC Building Code, Mr. Chen found that the stair largely conformed to the handrail requirements and there was no requirement that the handrail extent to or beyond the ground level. Mr. Chen further opined that the window closest to the stair was largely protected from the elements. In addition, Mr. Chen stated that the treads were slip

resistant both wet and dry. Defendant further notes that Mr. Silberman did not conduct any slip resistance testing. Since Plaintiff testified that he was aware of the wet condition and assumed the risk of walking on wet staircase, Defendant maintains that its affirmative defenses as to comparative fault should not be stricken.

In his reply, Plaintiff argues that Mr. Chen failed to address Mr. Silberman's finding that the failure of the handrail to extend to the bottom step violates all applicable statutes requiring proper handrails and industry custom and practice. Moreover, Plaintiff asserts that Defendant has not rebutted Plaintiff's prima facie showing that it had constructive notice of the defective and short handrail for at least 27 years and did not repair it. Even assuming Defendant never received complaints about an open window, Plaintiff maintains that Defendant did not address his testimony regarding the ongoing leaking conditions. With respect to Mr. Chen's opinions regarding the slip resistance of the steps, Plaintiff argues that they are inadmissible since the methodology used has been rejected in the industry as an unreliable test.

In its motion, Defendant focuses solely on the alleged wet condition of the staircase and argues that there is no evidence establishing that it created any alleged wet staircase condition or any condition that would have caused the wetness on the staircase.

In opposition to Defendant's motion, Plaintiff notes that Defendant did not address Plaintiff's contentions regarding the structural defect allegations. Thus, to the extent it seeks dismissal of all of Plaintiff's claims, Defendant's motion must be denied. Moreover, Plaintiff argues that Defendant failed to establish that it had no notice of the water and failed to demonstrate when the staircase or stairway was last cleaned or inspected before the accident. Further, Plaintiff contends that Mr. Chen's observations three years post-accident do not establish that Defendant did not have constructive notice.

In reply, Defendant maintains that it did not have any notice concerning the condition of the staircase. In addition, Defendant argues that it received no prior complaints. With respect to the handrail, Defendant relies on Mr. Chen's opinion that there was no evidence that it failed structurally or in a manner so as to cause the accident. Even though Plaintiff argues that Mr. Chen's methodology used to test the slip resistance has been rejected by the industry, Defendant points out that Mr. Silberman failed to conduct any slip resistance test or raise an issue of fact as to whether the stairs offered sufficient slip resistance.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"In order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition" (*Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944 [2d Dept 2016]). When the defendant is moving for summary judgment, it must establish that it "maintained the subject property in a reasonably safe condition and that it neither created the alleged dangerous condition nor had actual or constructive notice thereof" (*McGee v New York City Hous. Auth.*, 122 AD3d 695, 696 [2d Dept 2014] [internal citation omitted]). Constructive notice is established if the defect (1) is visible and apparent and (2) existed for a sufficient length of time before the accident to allow the defendant to discover and remedy it (*Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]). "In addition, a defendant who has actual knowledge of a particular ongoing and recurring hazardous condition may be charged with constructive notice of each specific reoccurrence of that condition" (*Willis v Galileo Cortlandt, LLC*, 106 AD3d 730, 731 [2d Dept 2013]).

The Court will first address the alleged wet condition of the stair. Plaintiff avers that the wet condition was created by rain infiltrating the inside of the staircase through an open window. Upon review of the documents submitted, the Court finds that there is no evidence establishing that Defendant created or had actual notice of the alleged wet condition on the stair. Plaintiff's reliance on Mr. Silberman's opinion that there was preexisting water damage in the windowsill and broken glass, indicating actual notice, is unavailing since it is based on observations made more than three years after the accident. In addition, Plaintiff testified that he saw the window

open prior to the accident in the early afternoon but did not observe water (Pl tr at 60, lines 17-25; at 61, lines 1-8). Although Plaintiff testified that he saw the wet condition as he was descending the stairs (Pl tr at 53, lines 7-13; at 55, lines 7-9), there is no evidence demonstrating that the rainwater had accumulated on the step for a sufficient amount of time to allow Defendant to discover and remedy it (*Dawkins v Long Is. R.R.*, 302 AD2d 349, 350 [2d Dept 2003]). Nonetheless, Plaintiff testified that he previously complained of leaks from the roof and the open window causing "water all down the stairs" (Pl tr at 62, lines 7-15) and the window being opened during inclement weather (Pl tr at 61, lines 15-20).

At his deposition, Mr. Mulligs denied receiving complaints about the windows being open (Mulligs tr at 23, lines 11-15). He further denied ever noticing water coming in from the windows in the stairwell (Mulligs tr at 23, lines 20-23). In addition, Mr. Milligs responded "No" when asked if he ever mopped up water in the stairwell from rain coming in through the windows prior to the date of the accident (Mulligs tr at 24, lines 3-9).

Mere testimony of general practices is insufficient to establish lack of constructive notice; instead, there must be specific evidence of the last inspection of the subject area prior to the accident. (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Goodyear v Putnam/N. Westchester Bd. of Co-op. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]). Here, there are no maintenance logs or other evidence establishing when Defendant last inspected the stairs. However, based upon the conflicting testimonies, the Court finds that there is an issue of fact as to whether Defendant had constructive notice of a recurring dangerous condition.

The Court next turns to the alleged structural or physical defects with the handrail and stairs. On the one hand, Plaintiff argues that the handrail and stairs violated several codes in place since 1916. On the other hand, Defendant maintains that the handrail and stairs were subject to, and in compliance with, the 1901 Tenement House Law. Regardless of which code applies, a code violation "constitutes only some evidence of negligence" and it is "plaintiff's burden to also establish that the violation proximately caused [his] injuries" (*Scala v Scala*, 31 AD3d 423, 424 [2d Dept 2006]; *DiLallo v Katsan LP*, 134 AD3d 885, 886 [2d Dept 2015] ["[I]f proven, a violation of the Building Code of New York State can be considered by a jury as some evidence of negligence"]).

In his motion, Plaintiff argues that (a) the staircase required handrails on both sides, (b) the subject handrail was too short, (c) the treads were too narrow and excessively sloped, and (d) the risers were deficient. First, any argument that Defendant was negligent because there was no handrail on the other side, even if required by law, is unpersuasive since Plaintiff failed to establish that the missing, secondary handrail was a proximate cause of his slip and fall (*see Secchi v Waldbaum, Inc.*, 270 AD2d 329, 330 [2d Dept 2000]; *Jenkins v NY City Hous. Auth.*, 11 AD3d 358, 359 [1st Dept 2004]).

Second, while it is undisputed that the handrail did not extend to the last step, neither the 1901 Tenement House Law nor the 1968 NYC Building Code contain language requiring that the handrail run the length of the entire staircase. In fact, the requirement that handrail extensions be installed first appears in the 2008 NYC Building Code (*see* NYSCEF Doc No. 113, pp. 24-25). The record does not reflect that any repairs to or replacement of the handrail were undertaken such that Defendant was required to conform the handrail to the 2008 NYC Building Code. Nonetheless, the absence of a code violation is "not dispositive of the plaintiff's allegations based on common-law negligence principles" (*Zebzda v Hudson St., LLC*, 72 AD3d 679, 680-681 [2d Dept 2010]). Here, Plaintiff testified that he was holding onto the handrail until "there was no more handrail" (Pl tr at 54, lines 3-5; at 55, lines 3-6) and that he "reached for the banister but there was no banister" and fell (Pl tr at 58, lines 22-23). Even if the presence of rainwater was the precipitating factor in Plaintiff's fall, there is an issue of fact as to whether the absence of a handrail adjacent to the last step was a proximate cause of his injury (*see Jean-Charles v Carey*, 217 AD3d 660, 661 [2d Dept 2023]; *Antonia v Srour*, 69 AD3d 666, 666-667 [2d Dept 2010]; *Asaro v Montalvo*, 26 AD3d 306, 307 [2d Dept 2006]; *Kanarvogel v Tops Appliance City, Inc.*, 271 AD2d 409, 411 [2d Dept 2000]).

Third, assuming arguendo that the risers and treads were improperly constructed, there is no testimony from Plaintiff attributing these alleged defects to his fall (*see Hodge v Niagara Falls Gazette Publ. Co.*, 1 NY2d 801 [1956]; *Lissauer v Shaarei Halacha, Inc.*, 37 AD3d 427, 427 [2d Dept 2007]). Thus, the Court finds that Plaintiff has failed to establish entitlement to summary judgment as to the alleged structural defects of the stair.

Lastly, the Court turns to the issue of Plaintiff's alleged comparative negligence. "[W]here, as here, the plaintiff's motion for summary judgment also seeks to strike the defendant's affirmative defense of comparative fault, "the issue of a plaintiff's comparative negligence may

be decided in the context of [such] a summary judgment motion'" (*Yongyong Zhu v Shrestha*, 229 AD3d 844, 845 [2d Dept 2024], quoting *Sapienza v Harrison*, 191 AD3d 1028, 1029, 142 NYS3d 584 [2d Dept 2021]). Although it is uncontested that Plaintiff was familiar with the stairs and he testified that he saw the wet condition of the stairs as he was descending, any argument that he was aware of the condition and assumed the risk raises an issue of fact as to his comparative negligence (*see Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 792 [2d Dept 2023]).

In sum, upon consideration of the documents submitted, the Court finds that there are issues of fact as to whether: (a) Defendant had constructive notice of a recurring dangerous wet condition, (b) the length of the handrail was a proximate cause of Plaintiff's fall and (c) Plaintiff was comparatively negligent.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Mot. Seq. No. 6) for summary judgment on the issue of liability and to strike affirmative defenses asserting comparative fault is denied; and it is further

ORDERED, that Defendant's motion (Mot. Seq. No. 7) for summary judgment dismissing Plaintiff's complaint is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice