

PART 25

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

DIPINI, VANESSA

Index No. 0305655/2011

-against-

Hon. MARK FRIEDLANDER

381 E.160 EQUITIES LLC

Justice.

The following papers numbered 1 to 4 Read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on November 16 2012 and duly submitted as No. _____ on the Motion Calendar of 1/11/2013

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

**MOTION IS DECIDED IN ACCORDANCE WITH
MEMORANDUM DECISION FILED HEREWITH.**

Motion is Respectfully Referred to:

Justice: _____
Dated: _____

Dated: 5, 24, 13

Hon. 
MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

VANESSA DIPINI,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 305655/11

-against-

381 E. 160 EQUITIES LLC A/K/A
563-569 CAULDWELL REALTY LLC,

Defendants.

HON. MARK FRIEDLANDER

Defendants move for an order, pursuant to CPLR§3212, granting summary judgment to them and dismissing plaintiff's complaint in its entirety. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on June 16, 2011, as a result of the negligence of the defendant. More specifically, plaintiff alleges that she tripped and fell while descending the staircase located between the 4th and 3rd floors of 563 Cauldwell Avenue, Bronx, New York (the "Premises"), because of the hazardous condition of the staircase and banister which defendants purportedly failed to properly maintain and repair.

On December 7, 2011, plaintiff was deposed and gave the following account. Plaintiff was a resident of the Premises for five years, residing on the 6th floor with her husband and two children. On June 16, 2011, sometime between 2:00 and 2:30 P.M., she exited her apartment, with the intention of going to pick up her daughter from school. There is only one staircase within the Premises which provides access to plaintiff's apartment. Her accident occurred on

this staircase as she was descending from the fourth floor to the third floor.

Plaintiff described the staircase layout as follows: From the fourth floor landing, there are seven steps, a landing, another seven steps, and then the landing of the third floor. This stairwell has a handrail, located on the left side as one is descending. On the fourth floor landing, she placed her hand on the handrail, took one step down with her left foot and slipped. When she hit the first step her left leg went forward, her right leg "stood back there" and she went all the way down to the landing. She stated that the handrail "was damaged, felt it was loose. So, it just, like, it didn't have - - give me balance to, you know, hold myself on, so I just continued to fall down the steps." When she looked back she "realized that the step of where I slipped at was like a curved, like slippery, like worned (*sic*) out. It wasn't like, straight flat, it was like, folded in... Like. The step wasn't straight, it was, like, slippery, like, in, like, worned (*sic*) out, the edge... Like it was , um, oval, you know."

Color photographs of the stairwell were marked at the deposition as Exhibits A, B, C and D, and were annexed to the moving papers as Exhibit "I." On Exhibit B, plaintiff marked with an "X" the area where she slipped. She also marked on Exhibit B where she landed after falling. With respect to the other steps, plaintiff testified that some were straight and some were damaged and worn out. Plaintiff further testified that she had seen the steps in this condition all the time, used the staircase every day, never made any complaints about the steps and was unaware of any prior complaints having been made by other tenants with respect to the stairwell in issue.

On April 5, 2012, Thomas McCabe was deposed. He testified that he was employed by Metropolitan, LLC. His was the superintendent of the premises. He resides at the Premises in a basement apartment with his family. His duties included sweeping and mopping the Premises,

taking care of the garbage, taking complaints from the tenants (who would either call him on his telephone or stop him in the hall when they saw him) and bringing them over to the management office. No record of complaints received was kept by McCabe. If work needed to be done after receiving a complaint, he would create a work order if he could handle the job. He kept copies of the work orders. He would do painting, plastering and sheetrock. If a step on the stairs were to break, he would repair or replace it. If the job was too big, he would call an outside contractor. Jerry Glick was his superior at Metropolitan.

He described the Premises as being over one hundred years old, having two sides, a north and a south side, each side having six floors. There is no elevator in the Premises. Each side has a stairway that goes from the bottom to the top. Each level of the stairs has eight steps with an intermediate landing that continues with eight more steps that gets you to the next floor. Both stairwells were swept by him on a daily basis, early in the morning, from 6:00 A.M. and 7:00 A.M., from the lobby to the sixth floor. He also mopped the stairwells from top to bottom three or four times a week. In addition to his sweeping and mopping the stairwells, he would inspect and stairs and railing for any defective condition and notify management of any defective condition found. He did not keep a record of his inspections. If a person was injured on the Premises, no accident report was prepared.

On the morning of the accident he swept the stairs, including the area where the accident occurred. He did not observe any water on the ground in that area or any substances. He did not observe the railing to be loose. He learned of the accident that evening when a tenant informed him that someone had slipped and fallen on the stairway. He then went and inspected the steps. He testified as follows:

A. ... I looked at the steps. I didn't see nothing wrong with the steps. Then I seen her husband and the husband said, "She lost her balance." I said, "Where, on the steps?" He said, "No, the banister was loose." And I checked out the banister.

Q. Was the banister loose?

A. The banister was pretty loose.

Q. In the area where the banister was loose, did you ever observe that that banister was loose before that occasion?

A. No.

(McCabe Tr., Pg. 23, lines 7 – 19).

With respect to the banister, McCabe further testified as follows:

Q. Where you observed the banister was loose, did you put your hand on the banister to check it out?

A. I checked out the banister, yes.

Q. Did you determine why it was loose?

A. A lot of force.

(McCabe Tr., pg. 24 , lines 16 – 22).

With respect to the steps, McCabe testified as follows:

Q. Did you observe if the nosing of the second step was in a worn-out condition?

A. No.

Q. Did you, did the nosing of the second step look acceptable?

A. Yes.

Q. Did you see if the nosing of any of the steps just on that stairwell were in a worn out condition?

A. No. The steps are in a pretty fair condition up there.

Q. Pretty fair condition?

A. Fair condition, yes.

Q. Could they have done with repair in your estimation?

A. No, they don't need no repair at this point.

(McCabe Tr., pg. 28 , lines 5 – 21).

Plaintiff's expert, Robert L. Schwartzberg ("Schwartzberg"), a professional engineer licensed in the State of New York, alleges that the stairs where plaintiff's alleged accident occurred did not confirm to the New York State Building Code, the Administrative/Building Code of the City of New York, or the Property Maintenance Code of the State of New York. More specifically, plaintiff in her bill of particulars (¶20), as well as Schwartzberg in response to defendants' expert disclosure demand, and Schwartzberg's affidavit, assert that defendants violated the following statutes:

(1) The 1968 Building Administrative Code of the City of New York, Sections 27-127, 27-128, 27-375(e), 27-375(f), 27-375(h), and Table 6-4;

(2) The 1938 Building Administrative Code of the City of New York, Sections 6.4.1.4 (a/k/a §C26-292(d), 6.4.1.7.1 (a/k/a §C26-292(g), and 6.4.1.12 (a/k/a §C292(1));

(3) The 1984 New York State Uniform Fire Prevention and Building Code, Part 1240 (§§1240.1 and 1240.2), Part 1242 (§1242.7); and

(4) The 2007 New York State Property Maintenance Code, Sections 101, 101.2, 102, 102.1 and 102.2.

Schwartzberg states that the subject stairway was constructed with marble treads, steel

risers and steel stringers, with a single handrail, located to the left side as one is descending.

In essence, plaintiff and her expert allege that the stairs were unsafe because of the violation of various Code provisions, in that:

- (1) the treads were not level and true;
- (2) the tread widths were not constant and uniform;
- (3) the riser heights were not constant or uniform;
- (4) the tread widths were less than the minimum mandated by the Code;
- (5) the treads were not built of or surfaced so as to be non-skid; and
- (6) the handrail was improperly placed.

Schwartzberg further ascribes additional unsafe conditions to the stairway, including a loose and wobbly handrail, low spots atop the treads and severely rounded slick and slippery nosing members.

Defendant's expert, Vincent A. Ettari ("Ettari"), a licensed professional engineer in the State of New York, submits his affidavit, wherein he states the following: he has reviewed the archived record of the Buildings Department, Bronx County, for the Premises. His review of the records revealed that the Premises was constructed in 1921 pursuant to the standards and requirements of the New York Tenement House Law and that the subject stairway is original to the Premises. His examination of the Buildings Department records further revealed that no alteration work was done to the subject stairway between January 1, 1938 and December 6, 1968, when the 1938 Code was in force and effect. His examination of the records also revealed that no alteration work was done on the subject stairway from December 6, 1968 through the present, when the 1968 Code is in force and effect.

The stated purpose of the 1938 Building Code was "... to provides standards, provisions and requirements for safe and stable design, methods of construction, and sufficiency of materials in structures constructed, or demolished, after January first, nineteen hundred thirty-eight, and to regulate the equipment, maintenance, use and occupancy of all structures and premises." (C26-3.0) The 1938 Building Code further provided as follows: "Occupancy of existing structures. The legal occupancy and use of any structure existing on January first, nineteen hundred thirty-eight, may continue, except as may be specifically prescribed by this title or as may be necessary for the safety of life, health or property..." (§C26-184.0).

Section 27-11 (C26-102.1) of the 1968 Building Code provides as follows:

Continuation of lawful existing use.

The lawful occupancy and use of any building, including the use of any service equipment therein, existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements, as provided in section 27-105 of article one of this subchapter, may be continued unless a retroactive change is specifically required by the provisions of this code.

As the Premises was constructed in 1921, the Premises are governed by the Tenement House Law and not the Administrative Code of the City of New York or the Building Code. *Rivera v. Bilynn Realty Corp.*, 85 A.D.3d 518 (1st Dept. 2011); *Erlicht v. Boser*, 259 A.D. 269 (1st Dept. 1940). Thus, the provisions of the Building Codes of 1938 (C26-3.0)(§C26-184.0) and 1968 (27-111), are not applicable to the Premises, which is almost one hundred years old.

In addition, the 1984 New York State Uniform Fire Prevention and Building Code is not applicable to the Premises. Executive law §383(1)(a). The 2007 New York State Property Maintenance Code is now part of the New York State Uniform Fire Prevention and Building Code and is not applicable to the Premises.

Ettari stated, in his affidavit, that he conducted an inspection of the subject stairway on September 13, 2011, approximately three months after plaintiff's accident. He stated that his inspection showed that the subject stairway was typical for the type of stairways which were installed in the 1920's and 1930's, and that (1) the stairway conformed to the standards which were being followed at that time; (2) the defendants properly maintained the Premises and kept the stairway and handrail in proper and serviceable condition; and (3) the subject stairway afforded a reasonable degree of safety to all those who used it and exercised a reasonable amount of caution while ascending or descending it.

In plaintiff's opposition papers, Schwartzberg, plaintiff's expert, asserts, without explanation, that the aforementioned Codes are applicable. He then asserts that even if the aforementioned Codes are found not to be applicable, the Code of Ordinances of the City of New York, including the Sanitary Code, the Building Code, and Park Regulations, adopted on June 20, 1916, would be applicable. The Court notes that plaintiff has not moved to amend his bill of particulars to assert violations of these Codes.

Defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed. As previously stated, plaintiff's cause of action is based upon her slipping and falling on worn marble tread while descending the stairs in defendants' building. Worn marble tread is not an actionable condition. *Sims v. 3349 Hull Ave. Realty Co. LLC*, — A.D.3d — (1st Dept. 2013), NYLJ, May 9, 2013, pg. 20, col. 1.; *Murphy v. Conner*, 84 NY2d 969, 971-972 (1994); *Cintron v. New York City. Tr. Auth.*, 77 A.D.3d 410, 411 (1st Dept. 2010); *Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 111 (1st Dept. 2006). Schwartzberg, plaintiff's expert, submits an affidavit in opposition to defendants' motion, wherein he states that he used a drag-

sled tester, a device to determine the co-efficient of friction. The readings obtained for the uppermost and next lower treads on the subject stairway varied from 0.46 and 0.48 when dry. Schwartzberg then stated that a co-efficient of friction of 0.50 or less is indicative of an unsafe slippery condition, and has been adopted as the "working definition" accepted by most state laws, municipal ordinances and building codes, including The Department of Commerce. He further cites to co-efficients of friction of 0.60 (ADA Flat Surfaces), 0.80 (ADA Inclined Surfaces), 0.50 (OSHA), and 0.68 (NFPA). Schwartzberg's opinion pertaining to the inadequacy of the co-efficient of friction on the subject stair is without probative value, as he does not specify the sections of the regulations, etc., used by the Department of Commerce, ADA, OSHA and NFPA. *Rivera v. Bilynn Realty Corp.*, *Sanders v. Morris Hts. Mews Assocs.*, 69 A.D.3d 432 (1st Dept. 2010); *Sarmiento v. C & E Assocs.*, 40 A.D.3d 524 (1st Dept. 2007); *Jenkins v. New York City Hous. Auth.*, 11 A.D.3d 358 (1st Dept. 2004).

Assuming arguendo, that the co-efficient of friction of the tread where plaintiff fell was below the generally accepted minimum as alleged by plaintiff's expert, and notwithstanding the opinion of plaintiff's expert that this caused the stairs to be dangerously slippery, absent evidence that the stairs were slippery for reasons other than their inherent smoothness, such inherent slipperiness is not actionable. *Green v. Gracie Muse Rest. Corp.*, 105 A.D.3d 578 (1st Dept. 2013); *Eichelbaum v. Douglas Elliman, LLC*, 52 A.D.3d 210 (1st Dept. 2008); *DeMartini v. Trump 767 5th Ave., LLC*, 41 A.D.3d 181 (1st Dept. 2007). There is no evidence that plaintiff slipped on any dirt, debris or foreign substance. Plaintiff used this staircase every day, never made any complaints about the steps and was unaware of any prior complaints having been made by other tenants with respect thereto. There is insufficient evidence to create a triable issue of

fact that the hand rail was loose prior to the accident or that the hand rail would have prevented plaintiff's fall.

Plaintiff contends that defendant violated the 1916 Building Code, Article 8, Sections 153(1)(c), (Supports for treads and landings), 154(4), (Treads and risers), and 153(6), (Hand rails). Assuming arguendo, that these code provisions are applicable and were violated, there is no proof that any alleged violation thereof was causally related to or the proximate cause the accident. *See, Igboodu-Edwards*, 105 A.D.3d 448 (1st Dept. 2013); *Rivera v. Bilynn Realty Corp.*, *supra*.

By reason of the foregoing, the motion is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 5/24/13



MARK FRIEDLANDER, J.S.C.