

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20654
C/hu

_____AD3d_____

Argued - September 18, 2008

A. GAIL PRUDENTI, P.J.
FRED T. SANTUCCI
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-08438

DECISION & ORDER

Anne Van Orden, plaintiff-respondent, v Gail R. McKasty, defendant-respondent, Wendy Burnett, et al., appellants.

(Index No. 28490/05)

Jerrold N. Cohen, Mineola, N.Y., for appellants.

Baron & Pagliughi (Pollack, Pollack, Isaac & DeCicco, New York, N.Y. [Brian J. Isaac and Michael H. Zhu], of counsel), for plaintiff-respondent.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Aimee D. Drexler of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendants Wendy Burnett and Mark Burnett appeal from an order of the Supreme Court, Suffolk County (Mayer, J.), dated August 31, 2007, which denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs.

The defendants Wendy Burnett and Mark Burnett failed to meet their prima facie burden of establishing that they did not have constructive notice of the allegedly defective stairway where the plaintiff alleges she slipped and fell (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *Gonzalez v Jenel Mgmt. Corp.*, 11 AD3d 656). Accordingly, the Supreme Court correctly denied the Burnetts' motion for summary judgment.

October 14, 2008

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The issue raised on appeal by the defendant Gail R. McKasty as to whether she was an out-of-possession landlord was not before the Supreme Court, and therefore we have no authority to search the record and award summary judgment to her on this issue (*see* CPLR 3212[b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430; *cf. Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112; *M.S.B. Dev. Co., Inc. v Lopes*, 38 AD3d 723, 725-726).

The parties' remaining contentions are without merit.

PRUDENTI, P.J., SANTUCCI, McCARTHY and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court