

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

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_____AD3d_____

Argued - March 24, 2009

STEVEN W. FISHER, J.P.
HOWARD MILLER
CHERYL E. CHAMBERS
LEONARD B. AUSTIN, JJ.

2008-00534

DECISION & ORDER

Jermaine Jackson, plaintiff-respondent, v Tide Way Homes, Inc., defendant third-party plaintiff-respondent, Angel Associates, Inc., d/b/a Stairbuilders By A&A, Inc., a/k/a Stairbuilders by B&A, Inc., defendant third-party defendant-appellant, et al., defendant.

(Index No. 22166/03)

Milber Makris Plousadis & Seiden, LLP, Woodbury, N.Y. (Lorin A. Donnelly, Christine Andreoli, and Sarah M. Ziolkowski of counsel), for defendant third-party defendant-appellant.

Rosenberg & Gluck, LLP, Holtsville, N.Y. (Michael V. Buffa of counsel), for plaintiff-respondent.

John P. Humphreys, Melville, N.Y. (David R. Holland of counsel), for defendant third-party plaintiff-respondent.

In an action to recover damages for personal injuries, the defendant third-party defendant Angel Associates, Inc., d/b/a Stairbuilders By A&A, Inc., a/k/a Stairbuilders by B&A, Inc., appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Jones, J.), dated November 26, 2007, as denied that branch of its motion which was for summary judgment dismissing the cause of action alleging negligence and all cross claims insofar as asserted against it.

May 12, 2009

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ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The plaintiff allegedly was injured when a staircase he was ascending collapsed. At the time of the accident, he was installing tiles in a house that was part of a new housing development. He commenced this action against, inter alia, the defendant third-party defendant Angel Associates, Inc., d/b/a Stairbuilders By A&A, Inc., a/k/a Stairbuilders by B&A, Inc. (hereinafter Stairbuilders), the manufacturer of the staircase, asserting causes of action to recover damages for, inter alia, negligence.

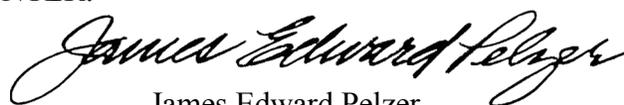
The Supreme Court correctly denied that branch of Stairbuilders' motion which was for summary judgment dismissing the negligence cause of action insofar as asserted against it. In support of its motion, Stairbuilders failed to establish, prima facie, that there was no defect in the manufacturing of the stairs, or, if there was a defect, that it was not a proximate cause of the alleged damages (*see Galassa v Lizda Realty, Ltd.*, 18 AD3d 809, 811).

Stairbuilders' argument that evidence was spoliated was raised for the first time in its reply papers, and therefore is not properly before this Court (*see Costello v Zaidman*, 58 AD3d 593; *LaFemina v LaFemina*, 57 AD3d 856; *Murphy v Town of Hempstead*, 56 AD3d 631; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546).

Stairbuilders' remaining contentions are without merit.

FISHER, J.P., MILLER, CHAMBERS and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court