

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

D25330  
O/kmg

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Argued - November 12, 2009

WILLIAM F. MASTRO, J.P.  
ANITA R. FLORIO  
RUTH C. BALKIN  
JOHN M. LEVENTHAL, JJ.

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2008-09557  
2009-02899

DECISION & ORDER

Patricia Thierens, respondent, v 520 East 21st Street,  
LLC, et al., appellants.

(Index No. 6097/07)

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York, N.Y. (Stacy I. Malinow of counsel), for appellants.

Michael S. Lamonsoff, New York, N.Y. (Stacey Haskel and Tara Ulezalka of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal (1) from an order of the Supreme Court, Kings County (Schneier, J.), dated August 15, 2008, which denied their motion for summary judgment dismissing the complaint, and (2), as limited by their brief, from so much of an order of the same court dated December 19, 2008, as, upon reargument, adhered to so much of the original determination in the order dated August 15, 2008, as denied that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against the defendant 520 East 21st Street, LLC.

ORDERED that the appeal from the order dated August 15, 2008, is dismissed, as that order was superseded by the order dated December 19, 2008, made upon reargument; and it is further,

ORDERED that the order dated December 19, 2008, is reversed insofar as appealed from, on the law, upon reargument, so much of the order dated August 15, 2008, as denied that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar

December 8, 2009

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as asserted against the defendant 520 East 21st Street, LLC, is vacated, and that branch of the motion is granted, and the order dated August 15, 2008, is vacated; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

The plaintiff slipped and fell while she was descending a flight of stairs between the third and fourth floors of an interior staircase of an apartment building where she resided. According to the plaintiff's deposition testimony, she had walked down "[m]aybe four or five" steps when the accident occurred. In her verified complaint, the plaintiff named as defendants 520 East 21st Street, LLC (hereinafter 520 East), the owner of the subject premises, and Charles Neiss, a member of that entity. After issue was joined in this action, the defendants moved for summary judgment dismissing the complaint. In its order dated December 19, 2008, the Supreme Court granted the defendants' motion for leave to reargue their prior motion for summary judgment, which had been denied in an order dated August 15, 2008. The Supreme Court, upon reargument, granted that branch of the defendants' prior motion which was for summary judgment dismissing the complaint as to Neiss "as he was only a member" of 520 East, and adhered to so much of the original determination as denied that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against 520 East.

The defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law as to 520 East by demonstrating that the plaintiff was unable to identify the cause of her accident (*see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434). The plaintiff acknowledged that there were between 18 and 20 steps in the flight of stairs where she fell, and that, while she observed apple peels on "the floor" after the accident, she could not specify where on the staircase the peels were situated. In opposition, the plaintiff failed to raise a triable issue of fact as to the cause of her accident. Any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation (*see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d at 435).

Accordingly, the Supreme Court, upon reargument, should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint as to 520 East.

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

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2008-09557  
2009-02899

DECISION & ORDER ON MOTION

Patricia Thierens, respondent, v 520 East 21st Street,  
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(Index No. 6097/07)

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Motion by the respondent, inter alia, to strike stated portions of the appellants' brief and the record on appeals from two orders of the Supreme Court, Kings County, dated August 15, 2008, and December 19, 2008, respectively, and, in effect, to dismiss the appeal from the order dated December 19, 2008, on the ground that no appeal lies from an order which denies a motion for leave to reargue. By decision and order on motion of this Court dated May 15, 2009, that branch of the motion which was to strike stated portions of the appellants' brief and the record, and, in effect, dismiss the appeal from the order dated December 19, 2008, was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeals, it is

ORDERED that the motion is denied.

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court