

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

CHRISTOS CHRISTODOULOU, an Infant by his
m/n/g PENNY CHRISTODOULOU and
PENNY CHRISTODOULOU, Individually

Plaintiff,

-against-

MARINE TERRACE ASSOCIATES, LLC and
WEN MANAGEMENT CORP.

Defendants.

Index No: 12143/07

Motion Date:6/24/09

Motion Cal. No.: 4

Motion Seq. No.: 1

The following papers numbered 1 to 13 read on this motion by defendants for summary judgment dismissing the complaint; and cross-motion by plaintiffs for striking the defendants' answer for spoliation of evidence and willful failure to provide discovery or in the alternative directing defendant, WEN MANAGEMENT CORP. to appear for deposition.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits	5 - 8
Answering Affidavits-Exhibits.....	9 - 11
Replying Affidavits.....	12 - 13

Upon the foregoing papers it is ordered that these motions are determined as follows.

On June 29, 2006 the infant plaintiff broke his wrist when he allegedly tripped and fell due to a broken and cracked step while walking down exterior stairs on the grounds of the apartment complex where he lives. The plaintiffs commenced this action for damages against the owner of the premises Marine Terrace Associates, LLC (hereinafter Marine) and WEN Management Corp. (hereinafter WEN) the managing agent.

Defendants now move for summary judgment dismissing the

complaint on the ground that the plaintiffs cannot establish that the defendants had actual or constructive notice of the defect which allegedly caused the fall. Plaintiffs oppose and cross-move for summary judgment on the ground that due to defendants' spoliation of essential evidence and refusal to provide discovery, their answer should be stricken. In the alternative, plaintiffs move for an Order directing defendant WEN to appear for depositions by producing Kevin Cooke and Jeffrey Wasserman.

The defendants had the duty to exercise reasonable care in maintaining the premises in a reasonably safe condition under all of the circumstances (see [Peralta v. Henriquez](#), 100 NY2d 139, 144 [2003]; [Basso v. Miller](#), 40 NY2d 233, 241 [1976]). To prove a prima facie case of negligence in a trip and fall case, a plaintiff must demonstrate that the defendant either created or had actual or constructive notice of a dangerous or defective condition which caused the accident (see [Puma v. New York City Tr. Auth.](#), 55 AD3d 585 [2008]; [Medina v. Sears, Roebuck and Co.](#), 41 AD3d 798 [2007]; [Roussos v. Ciccotto](#), 15 AD3d 641, 642 [2005]). A defendant moving for summary judgment dismissing the complaint based on lack of notice, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (see [Scoppettone v. ADJ Holding Corp.](#), 41 AD3d 693 [2007]; [Joachim v. 1824 Church Ave., Inc.](#), 12 AD3d 409 [2004]; [Colon v. Produce Warehouse Carle Place](#), 303 AD2d 354 [2003]). This burden is not met by pointing out the gaps in the plaintiffs' proof (see [Restrepo v. Rockland Corp.](#), 38 AD3d 742 [2007]; [Ramos v. Mac Laundry Hemp, Inc.](#), 22 AD3d 822 [2005]; [Kucera v. Waldbaums Supermarkets](#), 304 AD2d 531, 532-533 [2003]).

The defendants have failed to establish their entitlement to summary judgment. In support of the motion, defendants submitted, inter alia, the deposition testimony of Patricia Sellers, Marine's on site Property Manager, and Kevin Winters, WEN's Executive Director of Property Management and an affidavit of Patricia Sellers. Sellers testified that she, together with Angela Villada, Marine's former maintenance supervisor, made monthly inspections of the interior and exterior of the entire complex consisting of 49 three story buildings, and prepared monthly property inspection reports. Sellers also testified that if she observed any condition which would require repair, including repairs to the exterior stairs and walkways, it would be noted on the monthly report and a work ticket would be prepared. Sellers, however did not testify about when the stairs at issue were last inspected and no monthly inspection reports or work tickets were ever produced despite her testimony that they were kept in her office for seven years. While such evidence may be sufficient to demonstrate, prima facie, lack of actual notice,

the defendants failed to submit any evidence of when the exterior steps were last inspected to show that it did not have constructive notice of the condition (see [Birnbaum v. New York Racing Ass'n, Inc.](#), 57 AD3d 598 [2008]; [Porco v. Marshalls Dept. Stores](#), 30 AD3d 284, 285 [2006]; [Joachim v. 1824 Church Ave., Inc.](#), 12 AD3d 409 [2004]).

In addition the testimony of Winters also raises questions of fact as to what inspection and maintenance procedures existed, their adequacy and constructive notice. Winters testified that since about 2000 he has been an employee of WEN, and that between 1994 and 2000 he was the Property Manager at Marine. He also testified that while he was the property manager, there were no regularly scheduled inspections and maintenance of the walkways and outside stairs; that repairs were made in response to tenant complaints or whatever was reported by the handymen. However, after a conversation with the attorneys at a break in the deposition, Winters "amended" this testimony stating that he made inspections once a month to make sure that the property complied with Section 8 guidelines.

In addition, plaintiff's counsel produced photographs of the stairs which plaintiff identified as being the location of his fall. After viewing these photographs, both Sellers and Winters testified that a condition was depicted on the stairs that showed a prior repair and another condition which they each would have noted on their respective monthly inspection report as needing repair. Despite this testimony, no inspection reports as to either of these conditions was produced. This testimony raises issues of fact as to Seller's credibility regarding what, if any, procedures existed regarding inspection and maintenance of the premises, the adequacy of such inspection and maintenance procedures as well as constructive notice of the condition at issue (see e.g. [Yadegar v. International Food Market](#), 28 AD3d 475 [2006]).

In considering such a motion, the evidence must be construed in the light most favorable to the nonmoving party, and the motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question (see [Szczerbiak v. Pilat](#), 90 NY2d 553, 556 [1997]; [Cathey v. Gartner](#), 15 AD3d 435 [2005]; [Cameron v. City of Long Beach](#), 297 AD2d 773 [2002]).

Accordingly, the defendants' motion for summary judgment dismissing the complaint is denied.

With respect the branch of plaintiffs' cross motion seeking to strike the defendants' answer for spoliation of evidence, and upon striking their answer, granting summary judgment as to liability, the cross-motion is denied. The plaintiffs have failed to establish that the defendants either intentionally or negligently failed to preserve crucial evidence (see [Kelley v. Empire Roller Skating Rink, Inc.](#), 34 AD3d 533, 534 [2007]). The only evidence to support plaintiffs' claim of spoliation is defendants' failure to produce work tickets and/or monthly inspection reports for the period demanded which is insufficient to sustain plaintiffs' burden.

Moreover, even where spoliation is established, the drastic remedy of striking a pleading is generally imposed only in instances of willful or contumacious conduct ([Molinari v. Smith](#), 39 AD3d 607, 608 [2007]), where no other sanction would serve to ameliorate the resultant prejudice and where striking the pleading is necessary as a matter of elementary fairness (see [De Los Santos v. Polanco](#), 21 AD3d 397, 398 [2005]). Where a party's negligent loss or destruction of evidence does not deprive its opponent of a means to present or defend against a claim, striking a spoliator's pleading is not warranted (see [E.W. Howell Co. Inc. v. S.A.F. La Sala Corp.](#), 36 AD3d 653, 655 [2007]; [De Los Santos v. Polanco](#), 21 AD3d at 397, 398 [2005]). Under the circumstances of this case, striking the defendants' answer is not warranted.

The branch of the plaintiffs' motion to compel defendant, WEN to produce Kevin Cooke and Jeffrey Wasserman for depositions is granted. Despite the affidavits of Kevin Cooke and Jeffrey Wasserman, Winters testified, inter alia, that WIN has its own maintenance staff, who occasionally help Marine's maintenance staff with repairs that required more skill and that in 2006 Kevin Cooke, the WIN's Director of Maintenance, supervised the WIN's maintenance staff. Winters also testified that Jeffrey Wasserman was the one who visited the properties to assess their condition. Winters further testified that sometime in December of 2006, the CEO of WIN, Denise Coyle, and other executives of WIN, after speaking with Wasserman fired Villada. Regardless of on whose behalf Kevin Winters, appeared and testified, based upon his testimony, it is apparent that Cooke and Wasserman are likely to possess evidence material, necessary and relevant on the issues in this case. Moreover, despite Cooke's and Wasserman's affidavits, it appears that they are under WEN's control as they are, or were, at the relevant times, employees of WEN and/or corporations related to and/or controlled by WEN and/or its officers and executives.

Accordingly, the defendants shall within 30 days of service of this Order with notice of entry, produce Cooke and Wasserman for a deposition at a time and place to be agreed upon by the attorneys. If, however, Cooke and Wasserman are no longer under the control of WEN or its officers and executives, defendants shall provide the plaintiffs with their addresses, within 10 days of being served with a copy of this Order with notice of entry so that plaintiffs may subpoena them for a deposition.

Dated: July 28, 2009
D# 39

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J.S.C.