

Sacarello v City of New York

2009 NY Slip Op 32370(U)

September 30, 2009

Supreme Court, Kings County

Docket Number: 29281/2003

Judge: Robert J. Miller

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At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of September, 2009.

P R E S E N T:

HON. ROBERT J. MILLER,
Justice.

-----X

RICARDO SACARELLO,
Plaintiff,

- against -

Index No. 29281/2003

THE CITY OF NEW YORK, CRYSTAL WINDOWS
& DOORS SYSTEMS and A.W.L. INDUSTRIES, INC.
Defendants.

-----X

A.W.I. INDUSTRIES, INC.
Third-Party Plaintiff,

-against-

Index No. 75937/2007

TOMORROW WINDOW CORP.
Third-Party Defendant.

----- X

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3-4 _____
Reply Affidavits (Affirmations) _____	5 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Memorandum of Law</u> _____	6 _____

The plaintiff is represented by the law of Manual A. Romero, P.C., by Manual A. Romero, Esq. of counsel, the defendant the City of New York is represented by Michael

A. Cardozo, Esq. Corporation Counsel of the City of New York by Dana Wiczuk, Esq., of counsel, the defendant Crystal Windows and Doors Systems LTD s/h/a Crystal Windows and Doors Systems is represented by the law firm of Hammill O'Brien, Croutier, Dempsey & Pender, P.C., by Merle Schragar, Esq. of counsel, the defendant A.W.L. Industries, Inc., is represented by the law firm of Conway, Farrell, Curtin & Kelly, P.C., by Peter J. Calandrella, Esq. of counsel.

Upon the foregoing papers, defendant Crystal Windows & Door Systems (Crystal) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Ricardo Sacarello (plaintiff) and all cross-claims insofar as asserted against it.

The instant personal injury action was commenced by Richard Sacarello, a New York City police detective (plaintiff), against defendants the City of New York (the City), A.W.L. Industries, Inc., (AWL) and Crystal Windows (Crystal) for injuries plaintiff allegedly sustained on June 17, 2003 when a pane of glass (or sash) from a window in the stairwell of the fourth floor of the building in which he was working struck him on the top of his head. The City owned the building where the accident occurred, which was located at 245 Glenmore Avenue in Brooklyn,¹ and had contracted with AWL to install windows on the third and fourth floors. Crystal was the manufacturer of the subject window.

After the completion of discovery, plaintiff cross-moved for, among other things, summary judgment against the City and AWL. By order dated December 11, 2008, this

¹The building is also known as Brooklyn Narcotics North.

court denied plaintiff's cross motion for summary judgment against both defendants, directed the City to produce certain documents for inspection and copying, and set down a date for the parties to appear for a compliance conference to settle all outstanding discovery. On February 23, 2009, plaintiff filed his note of issue. Thereafter, on or about April 13, 2009, Crystal made the instant motion for summary judgment.

Arguments

In support of its motion, Crystal argues that there are no material issues of fact concerning its alleged negligence, or any improper design or manufacture of the window which allegedly struck plaintiff. In this regard, Crystal contends that “[t]here has been no proof offered during pre-trial discovery and no expert exchange to allege that [it] caused or contributed to plaintiff’s accident.” Crystal further asserts that its “only involvement with this case is the fact that it may have manufactured the window involved with the accident.” In addition, Crystal states that “[i]t has been established prima facie that the window was not defective in terms of its design or manufacture and that the only issues that exist as to the cause of plaintiff’s accident concern the installation and/or maintenance of the window, neither of which are relevant to [it], since [it] did not install or maintain the window at issue, nor did [it] have a duty to do so.” In support of these contentions, Crystal summarizes the deposition testimony of plaintiff, Ms. Angela Maddox, project manager for the City who oversaw the window installation/renovation

project at 245 Glenmore Avenue, Mr. Andrew Martin, project manager for AWL who oversaw the window installation/renovation project, and Mr. Hui Wang, Manager of Research and Development of Crystal. Crystal also annexes the affidavit of its expert, Mr. Harry Meltzer, R.A., a registered architect. The relevant portions of the testimony noted above are summarized below.²

Plaintiff testified that on June 17, 2003, he went from his office on the fourth floor of the building at 245 Glenmore Street³ into the stairwell landing to make a quiet undercover cell phone call. There was a window on the landing which was open, which was approximately three to four feet high and three feet wide, with a double pane of glass, one on top of the other. The bottom pane was open as wide as it could go up to the middle point of the window. Since it was noisy from the traffic outside, plaintiff attempted to close the window. He touched the bottom ledge of the window and the bottom glass pane or sash (which had been pushed up) flipped open, “came down,” struck him on the top of his head, and broke.⁴

Ms. Angela Maddox, the City project manager for window installation/renovation

²Summaries of the testimony of the deposed witnesses is also set forth in the court’s order dated December 11, 2008.

³Although plaintiff testified that the accident occurred at 245 Glenmore *Street*, it appears undisputed that the accident occurred at 245 Glenmore Avenue.

⁴Plaintiff first testified that the whole frame and the glass pane of the window came down. He then clarified that the glass pane came out of its frame and struck him on the head. The frame to which plaintiff referred was the frame which surrounded the glass pane, or sash, as opposed to the frame in which the window was set or connected to the wall.

project, testified that the windows installed at this project were double-hung, namely the sash would go up and down in order to open and close, and would open inward so the window (sash) could be cleaned. In order to open the window inward, there were clips at each end of the top of the sash which extended out and engaged against the frame of the window in order to prevent the window from coming out. Ms. Maddox did not “observe anything with the clips themselves that was defective or problematic.” There were never complaints concerning the design or manufacture of the windows; the only complaints made were those concerning the installation of the windows. A week after the accident, Ms. Maddox inspected the window in question and said that the cause of the accident was improper installation. In this regard, she testified that “[t]he supports of the window were not industry standard;” meaning there was no wood or metal backing to hold the window to the brick wall. She also said that when she observed the frame for the window, there were no problems with the frame itself, but with the installation, namely that “you can see the wood sitting on the side, actually the ceiling tile.”⁵ Ms. Maddox did not observe any defects or problems with the clips that were attached to the sash of the subject window,

⁵As indicated in the court’s prior decision denying plaintiff’s cross motion for summary judgment, by letter dated July 8, 2003, the NYPD informed AWL that on June 17, 2003, a “Member of Service was injured by a window sash falling out of a 4th floor window frame.” The letter also states that “BMS [Building Maintenance Services] personnel met with a representative from [Crystal], a sub-contractor to AWL [for 245 Glenmore Avenue] [and] [i]t was determined that the windows were not installed as per standard industry practices. Upon examination it was discovered that ceiling tiles were cut and used as blocking for the window frames and not properly fastened. AWL is here by [sic] notified to contact [Crystal], the manufacturer and installer of the 3rd and 4th floor windows, to immediately make repairs to all windows, so as to prevent any further accidents.”

nor any missing clips; both clips were intact and were not broken in any way. Ms. Maddox examined the window at the NYPD BMS glass shop and did not find any defects or problems with the window except for the broken glass from when it fell. Ms. Maddox testified that a subcontractor of AWL installed the windows, that she did not know if AWL installed any of the windows, and that Crystal did not install any of the windows at this project.

Mr. Andrew Martin, who oversaw the window installation/renovation project for general contractor AWL, testified that the project included window replacement and repair pursuant to a contract between AWL and the City, and that the windows were manufactured by Crystal and installed by Tomorrow Windows. After the accident, Mr. Martin was advised by the NYPD that there had been a problem with the installation of the window at issue and other windows due to ceiling tiles being used to shim the windows. Mr. Martin testified that shims are used to make the window “square, plum and level,” and that it was not standard practice to use a ceiling tile as a shim.

Mr. Hui Wang, employed by Crystal as a Research and Development Manager, testified that Crystal manufactures windows and doors; that it is a wholesale manufacturer that sells to the general contractor or installer, that it does not engage in direct sales to any final user; that it does not install windows and did not do so on or before 2003; and that it did not hire any subcontractors to install its windows on or before June 17, 2003.

Finally, Mr. Harry Meltzer, R.A., a registered architect in New York and

Connecticut, states in his affidavit that he inspected the subject window on May 5, 2004 and January 26, 2005, after it had been removed to an NYPD facility, and examined the original window location and various other windows on the third and fourth floors at 245 Glenmore Avenue. Mr. Meltzer first opines that plaintiff's accident occurred "due to faulty installation and maintenance of the window." In this regard, he asserts that:

"The windows were installed in a poor manner and were not installed within industry standards. The window was also improperly maintained by the building owner. The tolerance between the window sash and the frames were [sic] too large on windows I observed with the gap (space) between the edge of the window sash and frame being so large that the locking clips barely reached the frame to form a valid closure. I also understand that the installer is alleged to have used ceiling tiles as support between the window frame and the rough opening and this would not be to industry standard and would constitute an improper installation."

Mr. Meltzer also opines that "there was no design or manufacturing defect with the windows and specifically the window that I inspected and is alleged to have struck the plaintiff." In this connection, he states that:

"Although I observed that the window presented to me at the police facility had one of its high strength plastic locking clips sheared off, it has been established that this was not a cause of the window falling since these clips were observed to be intact by a police department representative following the accident. These clips are not defective and consist of high strength plastic. I did not observe any clips that were broken or sheared off at the 245 Glenmore Avenue location during my inspection. It is my opinion that there was no design or manufacturing defect with respect to the windows which caused or contributed to plaintiff's alleged accident."

In opposition to Crystal's motion, the AWL and the City⁶ (collectively AWL) argue that Crystal's failure to provide certain discovery raises a question of fact which precludes the court from granting Crystal's motion. AWL also argues, in effect, that Crystal's limited citation to portions of the witnesses' deposition testimony, as well as the affidavit of its expert, Mr. Meltzer, fail to make a prima facie showing entitling Crystal to summary judgment. In addition, although AWL sets forth additional deposition testimony of Ms. Maddox, it relies solely upon the testimony of Mr. Wang, and the affidavits of Mr. Meltzer and its own expert, Mr. Allison, in its argument opposing Crystal's motion. In this regard, AWL first points out that the common-law claims for contribution and indemnification against Crystal are not limited to claims of defective product design and manufacture of the subject window, but include common-law negligence claims relating to Crystal's failure to warn purchasers of the dangers associated with installation of the windows, Crystal's role in supplying the windows in question, and whether Crystal inspected the windows or was obligated to do so. AWL argues that since Crystal did not address the failure to warn claim, this claim cannot be dismissed.

AWL also asserts that notwithstanding Crystal's failure to comply with its discovery demands, issues of fact exist with regard to Crystal's negligence. Specifically, AWL notes that Mr. Wang testified, in substance, as follows:

⁶The City also submits an affirmation in opposition but in the interest of judicial economy and brevity, it adopts AWL's arguments.

- the size of each window Crystal makes is custom made. Crystal will recommend a specific window to a customer based upon blueprints for the project but if the customer selects a window, Crystal does not know where the customer intends to install it. Mr. Wang did not know if anyone provided a blueprint for the subject window.

- the subject window was a double-hung aluminum window. One of the latches (locks) was broken off and the other lock was damaged from being hit. Mr. Wang did not know whether these were the original latches provided with the window. The hardware on the subject window sash was standard and not custom made.

- although Crystal had an installation manual, it would not be provided to a purchaser unless it was requested. Crystal would provide shop drawings and a maintenance manual to the installer depending on the project. Crystal would not provide any written instructions or directions to installers, but would provide the aluminum camping.

- pursuant to prior contracts with the New York City School Construction Authority (NYCSCA), Crystal was required to inspect and ensure that the windows were installed correctly.

- prior to the incident, Crystal had engaged in contracts to manufacture windows for the NYPD and recalled receiving shop drawings and recommending the window to be installed.

Based upon the foregoing, and in light of Crystal's failure to turn over documents regarding what work was requested of it, what it actually did and whether it inspected the windows pursuant to a contract, AWL argues that a question of fact exists as to whether Crystal's action were a proximate cause of plaintiff's accident; that since Crystal custom-made its windows and only provided a standard locking mechanism, a jury could determine whether Crystal was negligent in failing to provide a longer locking mechanism "in light of what [it] designed;" that if proper camping was not used in

installing the windows, a jury could determine that Crystal was negligent in failing to provide the camping for these windows; and that since Crystal failed to provide the contract in issue, a jury could determine, based upon Mr. Wang's testimony concerning prior New York City contracts, that Crystal was obligated to inspect the windows and that it did so negligently, "if in fact a defect is determined."

AWL next argues that Mr. Meltzer is not qualified to offer an expert opinion because he does not have experience in the design, manufacture or installation of windows but merely planning as to same. AWL also notes that Mr. Melzter incorrectly refers to the sash in question as a "window," further evidencing his lack of expertise.

On the merits, AWL contends that Mr. Melzter never inspected the subject sash and frame together yet offered an opinion as to how they functioned by observing other windows at the site, without proof that these other windows used for comparison were the same as the window in question. AWL also notes Mr. Meltzer's statement that the window installation was not performed according to industry standards cannot be credited since Mr. Melzter does not set forth the industry standards. AWL next asserts that Mr. Melzter offers no opinion on Crystal's failure to "provide any documentation or warnings with its windows regarding installation," or on Crystal's "failure to warn purchasers of how to install their windows and potential harms if they are not 'properly' installed," and therefore the claim for a product defect based on the failure to warn cannot be dismissed. To the extent Mr. Melzter opines that a gap between the window sash and frame

prevented the locking clips from engaging, A WL argues that Mr. Melzter does not explain how he arrived at this conclusion, and disregards the possibility that manufacture or design of the subject window caused the gap to occur. Finally, A WL argues that since Mr. Melzter did not examine the entire window (only the sash), his opinion that there was no design or manufacturing defect must be rejected.

In further opposition to Crystal's motion, A WL submits the affidavit of its own expert, Donald E. Allison, PhD., a registered engineer, who reviewed various documents relating to the instant litigation, and examined and tested a Crystal Window & Door Systems window unit (the exemplar) provided to his firm and which was "represented to be of the same model (Series 2000) and similar size to the subject window." First, Mr. Allison provides a general description of the exemplar, as follows:

"[T]he tilting feature of the lower sash (upper sash as well) is enabled by two latches located at the top of the sash. Each latch consists of a latch body and spring-loaded latching tab which interfaces with the vertical side-frames of the window. For normal opening and closing of the sash, the latch tabs are extended for guiding and keeping the top of the sash within the channels of the side frames. For tilting of the sash (e.g., for cleaning of the exterior pane), the user manually retracts both spring-loaded tabs momentarily to clear the side frames and pulls inward from the top of the sash to rotate the sash about its bottom pivots. To return the sash to its normal vertical position, the user rotates and pushes outwardly on the sash until the beveled latch tabs automatically retract to glide over the side frame and re-extend to engage in their respective channels to guide and secure the sash from tilting."

Next, Mr. Allison lists observations he made of the exemplar after it was installed; as

follows:

“The tabs of the sash latches extend approximately 0.4 inches beyond the latch body when fully extended.

The gaps between the latch bodies and the vertical channel in which the latch tabs engage ranged from approximately 0.05 to 0.10 inches. If the tabs were capable of full extension, the total tab/channel engagement length would range from 0.30 to 0.35 inches.

The tabs of the tilt latches were restricted from full extension because of contact with the inner lower sash balance tube. Actual engagement length of the tab with the channel ranged from approximately 0.14 to 0.24 inches.

The lower sash could be raised and lowered without pivoting freely outward with only one tilt latch engaged in its vertical channel.”

Mr. Allison also observed that certain force applied to the vertical side frame failed to disengage the latch tabs or release the sash. Specifically, he states the following:

“With the window unit intentionally offset in its opening to permit a starting gap of approximately 0.5 inches between the aluminum vertical side frame and the opening, application of screw mounting loads (at top and bottom of vertical frame) and manually-applied lateral loads to the vertical side frame near its mid-height, in an attempt to forcefully bow out the frame, failed to cause disengagement of the latch tabs or release of the sash.”

Mr. Allison also observed a “false latch condition,” namely:

A false latch condition was observable and repeatable in which the tip of the latch tab engaged in linear depressions running along the faces of both vertical side frame channels. The lower sash would remain in an up or down position, but in a semi-tilted inward orientation for this unstable condition.

The engagement on the face of the frame channel was accompanied by a slight clicking sound. With continued outward force on the sash, the tabs move beyond this depression into their 'full latch' positions with the side frames accompanied by a louder click/latching sound. The linear depressions appear to be associated with the manufacturing and/or extrusion process. In this false latch condition, it was noted that the sash could be lowered and raised and that on various occasions, the sash/latches would return to their fully engaged position or would release fully causing inward rotation of the sash."

Assuming the "exemplar examined and tested . . . is representative of the subject window unit design and manufacture," Mr. Allison concludes that:

"[T]he findings, to a reasonable degree of engineering certainty, include a potential window unit design and/or manufacturing condition or defect that can result in a false latching position with subsequent unexpected release and rotation of the lower sash, and [] a potential for user error in not properly checking and/or securing the lower sash in its full-latched position if the sash were in this unstable latch position.

[T]he test findings to date indicate that despite intentional attempts to manually force and deflect (e.g., bending but without permanent deformation) the side rail away from the latch tab, the vertical side rail was of sufficient stiffness to prevent latch tab disengagement from its side rail channel. If it is alleged that both latch tabs disengaged from their channels to permit rotation of the lower sash as a result of excessive gaps between the sash and the frame, then in light of the exemplar tests, a contributing condition or cause of the incident which in my opinion, to a reasonable degree of engineering certainty, cannot be excluded in the absence of fit-up measurements of the subject sash and subject window frame, is that the subject window unit was manufactured with larger than designed and/or intended gaps."

In further opposition to Crystal's motion, AWL asserts that if, "[a]s per the affidavit

of Mr. Allison,” a gap could occur between the sash and the window frame such that the locks would not engage, either because of the window’s design, manufacture or installation, Crystal had an obligation to warn purchasers of this danger, which it failed to do because it did not provide any documentation to purchasers regarding installation of the windows.

AWL also contends that assuming the accident did not occur because the window sash was not closed entirely to its upright position, then there was a defect in the manufacture of the window since there should not have been a gap between the sash and the window frame which negated the locking mechanism. Stated otherwise, AWL posits that:

“In order for the locking mechanisms to be negated a gap in excess of 4/10's of an inch must exist on both sides of the frame because if one lock is engaged the window will remain closed. If there was something in the installation of the window that could somehow cause a total gap of 8/10's of an inch that was a manufacturing defect on the part of Crystal in producing a frame or sash that could in some way be installed such that the window could still open and the locks not engage.”

In its reply, Crystal first notes that it provided complete responses to all discovery demands. Further, Crystal submits the affidavit from Ryan P. Burke, Esq., general counsel to Crystal, wherein Mr. Burke affirms that Crystal made a search for the records requested by AWL in its November 11, 2008 demand, that the records and responses provided in responses thereto are true and accurate and “reflect a diligent effort to search for the requested documents.” As to AWL’s demand for copies of blueprints, contracts, purchase orders, etc. between Crystal and the City, Crystal states that only AWL contracted with the City, not Crystal, and that if a contract existed between AWL and Crystal, AWL would have

produced it. Crystal also notes that there is no evidence in admissible form to demonstrate that Crystal sold the subject window to either AWL or the City.

As to AWL's contention that the purported records would set forth any responsibilities Crystal had with respect to installation of the windows, Crystal states that this claim is belied by the testimony of Ms. Maddox, who testified that the City was responsible for inspecting the windows which were installed by AWL and/or its subcontractor. Further, Crystal points out that Ms. Maddox testified that there were never any complaints made about the design or manufacture of the windows, but only about the installation of the windows. Crystal also notes that AWL failed to cite the testimony of its own witness, Mr. Andrew Martin, who confirmed that the accident was due to faulty installation of the subject window. Specifically, Mr. Martin testified that the windows were manufactured by Crystal, that they were installed by a company called Tomorrow Windows, and that Crystal did not install or repair any of the windows, but was solely a manufacturer. Mr. Martin also testified that after the accident, he was advised by the NYPD (the City) that there had been a problem with the installation of the subject window and other windows because ceiling tiles had been used to "shim" or frame the windows.

Crystal next argues that AWL has failed to produce any evidence in admissible form to substantiate its claims regarding its purported duty to warn and/or inspect. Specifically, Crystal notes that it is undisputed that the City had a duty to and in fact inspected the work of AWL and/or its contractors, and that there is no evidence that either the City or AWL

purchased the windows from or had any contact with Crystal before the subject window was installed. Crystal states that the suggestion that it had a duty to inspect the installation of the windows is rank speculation.

With respect to its expert, Crystal notes that Mr. Meltzer's experience as a practicing, licensed architect includes work on institutional and residential buildings; that he examined the sash in question and went to the building where the subject window had been installed; and had observed other windows at the premises. Crystal states that Mr. Meltzer's conclusion - that the use of ceiling tiles as a support between the frame and the rough opening was improper - was logical, that the use of the ceiling tiles was confirmed by AWL and the City, and that Mr. Meltzer's conclusion was not refuted by Mr. Allison. Further, Crystal contends that Mr. Allison's conclusions are speculative because they are premised upon the supposition that the exemplar he examined was representative of the subject window. Crystal also notes that Mr. Allison does not assert that the windows were properly installed. In conclusion, Crystal asserts that Mr. Meltzer's opinion that the use of ceiling tiles to install the windows was improper was confirmed by the witnesses of the City and AWL, and that it is clear that this improper installation led to the bowing of the subject window that caused the locking clip to barely reach the frame in order to form a valid closure, which led to the accident.

Discussion

“[T]he proponent of a summary judgment motion must make a prima facie showing

of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make a prima facie showing the motion must be denied, regardless of the sufficiency of the opposing papers (*id.*). However, “[o]nce this showing has been made . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

Here, Crystal has made a prima facie showing that the subject window was not defectively manufactured or designed, and that the only issues of fact which exist as to the cause of the accident are the installation and/or the maintenance of the subject window, neither of which involved Crystal or which Crystal had a duty to perform. In this regard, the deposition testimony of Ms. Maddox demonstrates that either AWL and/or its subcontractor installed the subject window, that Crystal did not install the windows, that Ms. Maddox did not observe that the clips were “defective or problematic;” and that the only complaints about the windows concerned their installation, not their design or manufacture.

Moreover, upon Ms. Maddox’ inspection of the subject window at the fourth floor stairwell one week after the accident, Ms. Maddox determined that the cause of the accident was “improper installation” in that “[t]he supports of the window were not industry standard” because there was no wood or metal backing to hold the window to the brick wall. She also testified that when she observed the frame for the window, there were no problems with the

frame itself, but with the installation, namely that “you can see the wood sitting on the side, actually the ceiling tile.” Further, she did not observe any defects or problems with the clips that were attached to the sash of the subject window, nor any missing clips; both clips were intact and were not broken in any way. Moreover, when she examined the window at the NYPD glass shop, she did not find any defects or problems with the window except for the broken glass from when it fell.

Mr. Andrew Martin testified that the windows were manufactured by Crystal and installed by Tomorrow Windows, and that after the accident, he was advised by the NYPD that there had been a problem with the installation of the window at issue and other windows because ceiling tiles were used to shim or frame the windows, which was not standard practice.

Finally, Mr. Wang testified that Crystal is a wholesale manufacturer that sells to the general contractor or installer; that it does not engage in direct sales to any final user; that it did not install windows and did not do so on or before 2003; and that it did not hire any subcontractors to install its windows on or before June 17, 2003.

Based upon the foregoing, Crystal has made a prima facie showing that the windows were not defectively designed or manufactured, that the design and manufacture of the windows did not cause the plaintiff’s accident, and that it did not have a duty to inspect the windows or to warn purchasers how to install its windows or to warn purchasers of any potential harm if the windows were not properly installed. Although Crystal also relies

upon the affidavit of Mr. Melzter to support its motion, the court finds the affidavit to be conclusory and vague. Mr. Meltzer's opinion that the accident occurred due to faulty installation and maintenance is based upon his examination of windows which were not proven to be similar to the window in question. Moreover, he failed to set forth the industry standards to which he referred. In addition, his opinion that the subject window did not contain a design or manufacturing defect was conclusory and based solely upon one factor - the locking clips. Thus, the court does not rely upon this affidavit in deciding the motion (*cf. Maria Jilma Rivas-Chirino v Wildlife Conservation Socy.*, 64 AD3d 556, 558 [2009]; *Greco v Starbucks Coffee Co.*, 58 AD3d 681, 682 [2009]). Despite the foregoing, the evidence presented by Crystal sufficiently sets forth a prima facie showing entitling it to summary judgment.

AWL and the City have failed to raise an issue of fact to rebut the prima facie showing made by Crystal. Although AWL argues that the motion should be denied because of Crystal's failure to comply with discovery, Crystal has submitted an affidavit of its general counsel, as directed by the court in its May 1, 2009 order⁷, affirming that a search was conducted for records requested by AWL pursuant to a notice for discovery and inspection dated November 11, 2008, and that the records and responses provided in response thereto dated January 26, 2009 "are true, accurate and reflect a diligent effort to search for the

⁷By order of this court dated May 1, 2009, Crystal was directed to provide an affidavit "from an officer as to records referenced in Crystal's discovery and response dated 1/26/09 within 30 days."

requested documents.” In any event, in the court’s view, Crystal correctly asserts that AWL’s discovery demands merely assume, absent support, that certain documentation exists which could potentially raise issues of fact as to Crystal’s liability. However, as Crystal asserts, as to AWL’s demand for copies of contracts, purchase orders etc. between Crystal and the City, AWL has failed to raise an issue of fact as to whether Crystal had a contract with the City. Further, to the extent the demand seeks contracts and purchase orders AWL had with Crystal, if such documents existed, Crystal correctly notes that they would be in AWL’s possession. Moreover, while AWL asserts that “records regarding what responsibilities and obligations Crystal had with regard to the installation of the windows, including potentially inspecting the window installation, are pertinent to the claims for common[-]law negligence against Crystal that are not based upon a product liability theory,” this argument must be rejected as purely speculative in light of the testimony of Ms. Maddox that the City was responsible for inspecting the windows and the work of AWL, that Crystal was not responsible for installing the windows, and that AWL and/or its subcontractor was responsible for installing the windows, as well as the testimony of Mr. Martin, who stated that the windows were manufactured by Crystal and installed by a company called Tomorrow Windows, and that Crystal did not perform any installation or repair of windows and was solely a manufacturer.

AWL also asserts that since Crystal failed to provide the purported “contract in question,” a jury could determine, based upon Mr. Wang’s testimony concerning Crystal’s

prior New York contracts, that Crystal was obligated to inspect the windows and did so negligently, “if in fact a defect is determined.” This argument also fails to raise an issue of fact. Aside from the clearly speculative claim as to whether a potential defect exists, and the failure of AWL to provide any competent evidence that such a contract exists, AWL’s suggestion that Crystal was required to inspect the windows because it was obligated to do so pursuant to other contracts is also purely speculative. As such, AWL has not supported its argument that Crystal’s purported failure to turn over documents raises a question of fact as to whether Crystal’s “actions were a proximate cause of plaintiff’s accident.”

Nor does the additional testimony of Mr. Wang raise material issues of fact. Although Mr. Wang testified that the size of each window is custom-made based on the specifications, and that the hardware he saw on the subject sash when he inspected the window was standard, there has been no testimony or evidence to suggest that the windows required a longer locking mechanism, as suggested by AWL. Further, merely because Crystal provided camping fails to raise an issue of fact that Crystal failed to provide proper camping.

Finally, the affidavit of Donald Allison, AWL’s expert, fails to rebut the prima facie showing made by Crystal. As an initial matter, whether the exemplar examined by Mr. Allison is similar to the subject window has not been established. Mr. Allison states that he examined the exemplar which was provided to his firm and which was “represented to be of the same model (Series 2000) and similar size to the subject window.” However, he fails to identify who made this representation. In any event, the findings of Mr. Allison are

conclusory, speculative, and are not clearly presented, since the terminology used is technical and undefined.

Nevertheless, in effect, Mr. Allison states that since he could not force the latch tabs (presumably the locking mechanisms) to disengage or the sash to release by manually applying force to the vertical frame of the exemplar window, then “if it is alleged that both latch tabs disengaged from their channels to permit rotation (presumably the falling inward) of the lower sash as a result of excessive gaps between the sash and the frame, the “subject window unit was manufactured with larger than designed and/or intended gaps.” However, as noted, it is unclear whether the exemplar was in fact representative of the subject window. Thus, Mr. Allison’s conclusion, in effect, that since manually applied force to the window could not negate the latches, if there was a gap between the sash and the frame, then the cause of the incident was a manufacturing or design defect, must be disregarded as speculative. In addition, Mr. Allison concedes, in effect, that his conclusions are based upon an incomplete examination of the window, inasmuch as he states in his affidavit that “there were no physical measurements recorded by any party for the actual window frame or the installation ‘fit-ups’ of the subject window unit, including but not limited to, the geometry/dimensions of the sash within the aluminum window frame, the window frame itself, and the aluminum window frame within its opening (rough opening/casement).” As such, Mr. Allison’s conclusion that a contributing cause of the accident which cannot be excluded “in the absence of fit-up measurements of the subject sash and subject window

frame” is that “the subject window unit was manufactured with larger than designed and/or intended gaps” must also be considered speculative. Finally, counsel for AWL argues that “as per the affidavit of Donald Allison, if a gap could occur between the sash and the window frame such that the locks would not engage, either due to its design, manufacture, or through its installation, Crystal had an obligation and duty to warn purchasers of the danger.” However, as noted above, the premise of this claim is entirely speculative. Further, AWL’s contention that Crystal was obligated to warn purchasers of its windows of any unreasonable dangers, which it failed to do because it provided no documentation to purchasers, is also without merit since AWL failed to raise a question of fact as to whether the windows or their installation presented any dangers. In light of the foregoing, the affidavit of Mr. Allison fails to rebut the prima facie showing made by Crystal.

In sum, the motion of Crystal for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

This constitutes the decision and order of the court.

ENTER

Robert J. Miller
J. S.C.