

Schiff v ABI One LLC
2016 NY Slip Op 31753(U)
September 21, 2016
Supreme Court, New York County
Docket Number: 158161/12
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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FRAN SCHIFF, as Proposed Administratrix of the
Estate of Ira Aaron Schiff, deceased,

Plaintiff,

-against-

Index No.: 158161/12

Motion Seq. No.: 002

ABI ONE LLC and BLDG MANAGEMENT CO., INC.,

DECISION & ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Defendants ABI One LLC (“ABI”) and BLDG Management Co., Inc. (“BLDG”) (collectively, the “defendants”) move for summary judgment dismissing the complaint. Plaintiff Fran Schiff, as Proposed Administratrix of the Estate of Ira Aaron Schiff, deceased (“plaintiff” or “Fran”) opposes the motion. Plaintiff cross-moves for partial summary judgment and to amend her Verified Bill of Particulars. Defendants oppose the cross-motion.

Background

This is an action to recover damages for wrongful death arising out of a fire. Plaintiff is acting as the proposed administratrix of the estate of her late brother Ira Aaron Schiff (“Ira”). Ira was the former resident of premises located at 124 East 24th Street, New York, NY, Apartment 3B (the “Premises” or “Ira’s Apartment”). The Premises is owned by ABI and managed by BLDG (Complaint, ¶¶ 10, 37).

In her Complaint, plaintiff alleges that Ira died as a result of injuries sustained in a fire which occurred on the Premises in the early morning of December 29, 2011 (Complaint, ¶¶ 20, 24, 48). Ira was discovered by firefighters in his bathroom and was taken to New York - Presbyterian

Columbia University Medical Center. Ira remained at the Medical Center until his death on February 22, 2012. Plaintiff claims that Ira suffered from second- and third- degree burns on over sixty percent of his body, smoke inhalation, carbon monoxide poisoning, pain, shock and mental anguish, and death approximately two months after the accident (Verified Bill of Particulars [“Bill of Particulars”], ¶ 13).

Plaintiff alleges that defendants were negligent in failing to install, maintain and provide an operating smoke and fire detector on the Premises; in failing to provide information for establishing a household emergency evacuation plan; in failing to post fire safety notices in public areas and on tenants’ doors; in failing to provide information about installing, maintaining and testing smoke detectors; and in failing to inform Ira of the proper location and placement of smoke and fire detectors in accordance with the law (Complaint, ¶¶ 20-22, 44-46; Bill of Particulars, ¶¶ 6-7). Plaintiff alleges claims for common-law negligence as well as statutory negligence (Complaint, ¶¶ 20-22, 44-46; Bill of Particulars, ¶¶ 7, 12). Plaintiff has further asserted a cause of action for loss of services resulting from the death of Ira (Complaint, ¶¶ 50-54; Bill of Particulars, ¶ 20).

Deposition of Fran Schiff

Plaintiff claims that although she had no firsthand knowledge of the circumstances surrounding the fire, she visited Ira on an approximately monthly basis, and never observed a smoke detector in the Premises. She also does not remember seeing markings or holes in the walls for a smoke detector (Notice of Motion, Exhibit “D” [plaintiff’s deposition] at 38, 55-66). Although Ira had a history of landlord-tenant disputes with “the building”, plaintiff stated she was unaware whether Ira ever complained about a lack of a smoke detector (Notice of Motion, Exhibit

“D” [plaintiff’s deposition] at 56, 59-62).

Deposition of Carmine Jichetti, Jr.

Carmine Jichetti Jr. (“Jichetti”) was the fire marshal with the New York City Fire Department in charge of investigating the subject fire at the Premises on the day of the incident (Notice of Motion, Exhibit “G” [Jichetti deposition] at 23-24, 53-54). Jichetti stated that he responded to the fire early in the morning of December 29, 2011 at approximately 4:22 a.m (Notice of Motion, Exhibit “G” [Jichetti deposition] at 53). When he arrived, firefighters were already present and had extinguished the fire (Notice of Motion, Exhibit “G” [Jichetti deposition] at 26). Jichetti testified that he was informed by the battalion chief that a victim had been removed from the bathroom area of the apartment and was in the hospital (Notice of Motion, Exhibit “G” [Jichetti deposition] at 27).

Jichetti prepared a ‘cause and origin’ report or ‘Fire Incident Report’ (the “Report”) following his investigation (Notice of Motion, Exhibit “G” [Jichetti deposition] at 40-41, 44-45; Notice of Motion, Exhibit “I” at 1). The Report provides, under a heading entitled “Origin and Extension”, the following:

“Examination showed fire originated inside the subject premises, on the 3rd floor, in apartment 3B, in the livingroom/bedroom, approximately 15 feet from the north wall and approximately 2 feet from the east wall, approximately 1.5 feet from the floor, on the couch armrest, in combustible material (cloth/foam). Fire extended to couch. Fire further extended to chair. Fire further extended to adjacent combustibles. Fire extended to floor. Fire further extended to east wall and ceiling. Fire further extended to the person of Ira A. Schiff, m/w/54. Fire was thereto confined and extinguished.”

Jichetti determined that Ira was exposed to the fire in the area of a couch and chair in the main room (where smoking materials had been discarded) (Notice of Motion, Exhibit “G” [Jichetti deposition] at 61-62). Jichetti testified that Ira was found in the bathroom (Notice of Motion,

Exhibit "G" [Jichetti deposition] at 27, 236-238). Jichetti believes that Ira had walked or crawled to the bathroom (Notice of Motion, Exhibit "G" [Jichetti deposition] at 237).¹ The Report provides that the cause of the fire was "Smoking (Cigarette/Cigar)" and describes further under the "cause" section that there was a "careless discard of smoking materials. ****Not Fully Ascertained****" (Notice of Motion, Exhibit "T"; Notice of Motion, Exhibit "G" [Jichetti deposition] at 55). A 10-45² Report of the Bureau of Fire Investigation was also completed (the "10-45 Report") (Notice of Motion, Exhibit "T").

Jichetti testified that photographs were taken which reflect that there were smoking materials on the floor in the "vicinity of the area of origin" described as "two pieces of a pipe and cigarette butts", "alcoholic beverage containers" on the floor, and "narcotics-related paraphernalia" inside a dresser in the dining area (Notice of Motion, Exhibit "G" [Jichetti deposition] at 90-91). Jichetti stated that the Report indicated that the cause of the fire was 'not fully ascertained' as Ira could not be interviewed (Notice of Motion, Exhibit "G" [Jichetti deposition] at 55). Jichetti also testified that the Report indicated that the fire was not drug related because from the information he had at the time, it could not be determined whether drugs were involved (Notice of Motion, Exhibit "G" [Jichetti deposition] at 43). Jichetti stated that electrical and gas causes were ruled out and there were no electrical devices observed in the area of the fire (Notice of Motion, Exhibit "G" [Jichetti deposition] at 56-57; 117).

Jichetti also stated that the fire had extended to the ceiling which firefighters had been

¹Jichetti made this determination based on the nature of Ira's burns and the fact that there was no fire in the bathroom (Notice of Motion, Exhibit "G" [Jichetti deposition] at 237).

²A "1045" refers to a victim who was injured by a fire (Notice of Motion, Exhibit "G" [Jichetti deposition] at 25).

responsible for taking down. Jichetti examined the debris from the ceiling and was not able to determine whether a smoke detector had been present in the apartment (Notice of Motion, Exhibit "G" [Jichetti deposition] at 59).³ Jichetti stated "we could not find a smoke detector" (Notice of Motion, Exhibit "G" [Jichetti deposition] at 60).

Deposition of Sophia Lamas

Sophia Lamas ("Lamas") is a former property manager for BLDG (Notice of Motion, Exhibit "F" [Lamas deposition] at 12). Lamas testified that in or about November 2004, she learned that a new law had been passed requiring the installation of carbon monoxide detectors in all apartments in New York residential buildings (the "2004 Law") (Notice of Motion, Exhibit "F" [Lamas deposition] at 22).⁴ She stated that smoke detectors had first been installed in apartments at the Premises prior to 2004, and that after the 2004 Law was passed, carbon monoxide detectors, together with replacement smoke detectors, were installed at the Premises (Notice of Motion, Exhibit "F" [Lamas deposition] at 23-24). Lamas testified that she gave instructions to Steven Maietta ("Maietta"), the superintendent of the Premises at the time, regarding the need to install carbon monoxide and smoke detectors (Notice of Motion, Exhibit "F" [Lamas deposition] at 30-31).⁵ Lamas stated that the new detectors were installed in a timely manner, although she acknowledged that she did not personally conduct an inspection to confirm that there were

³The 10-45 Report indicates that a smoke detector was not present at the Premises. The 10-45 Report lists "Smoking (Cigarette/Cigar)" as the cause of the incident (Notice of Motion, Exhibit "I").

⁴New York City Administrative Code § 27-2046.1.

⁵Lamas testified that she told Maietta that BLDG would purchase the detectors (Notice of Motion, Exhibit "F" [Lamas deposition] at 31).

detectors in each apartment (Notice of Motion, Exhibit “F” [Lamas deposition] at 35).

Lamas testified that Maietta submitted to her an Affidavit of Services Performed (“Affidavit of Services”) which confirmed the installation of carbon monoxide detectors in each apartment at the Premises (Notice of Motion, Exhibit “F” [Lamas deposition] at 36-44; Exhibit “L” [Affidavit of Services]). Lamas also testified that a “Smoke & Carbon Monoxide Detector - Certificate of Installation” (the “Certificate”) was filed with the City of New York Department of Housing Preservation and Development Division of Code Enforcement certifying that the installation was completed (Notice of Motion, Exhibit “F” [Lamas deposition] at 45-46; Exhibit “M”).⁶

Deposition of Steven Maietta

At the time of the fire, Steven Maietta (“Maietta”) was the commercial property manager for approximately sixty properties managed by BLDG, although he did not have specific responsibilities with respect to the Premises (Notice of Motion, Exhibit “E” [Maietta deposition] at 19-20, 27).⁷ Maietta testified that there were smoke detectors in every hallway, and fire safety plans posted in the “common area and lobby” of the Premises (Notice of Motion, Exhibit “E” [Maietta deposition] at 53, 55, 78-79) . In 2004, Maietta installed carbon monoxide and smoke

⁶Lamas stated that the superintendent of the Premises at the time of the fire, Jovic Novika (“Novika”), now deceased, told her that he believed Ira removed the smoke and carbon monoxide detectors which had been installed (Notice of Motion, Exhibit “F” [Lamas deposition] at 122-123). Lamas testified that Novika told her “right after the fire” that he recalled seeing the smoke detector on the floor of the apartment amidst the rubble on the day of the fire, although there is no written documentation indicating that a smoke detector was discovered at the Premises (Notice of Motion, Exhibit “F” [Lamas deposition] at 124-127).

⁷ Maietta testified that he had been the superintendent of the Premises from 2004 to 2005 (Notice of Motion, Exhibit “E” [Maietta deposition] at 42).

detectors in all the apartments at the Premises⁸, including Ira's Apartment, which he activated after installation (Notice of Motion, Exhibit "E" [Maietta deposition] at 85, 88-89, 110).⁹ Maietta kept a log as written proof that he installed detectors in each tenant's apartment.¹⁰ The log would include the "room" number, tenant's name and signature, or if the tenant was not present, Maietta's signature. Rather than listing the tenant's name next to an apartment number in several instances, however, the word "DONE" was written in (Notice of Motion, Exhibit "E" [Maietta deposition] at 96-99, 106). With respect to Apartment 3B (Ira's Apartment), Maietta inserted "DONE" rather than Ira's name, as required by the pre-printed Affidavit of Services form (Notice of Motion, Exhibit "L" [Affidavit of Services]).

Maietta recalled installing detectors in Ira's Apartment (Notice of Motion, Exhibit "E" [Maietta deposition] at 110-111). Maietta stated that he "installed it in a certain area where it wouldn't go off constantly, [*sic*] he [Ira] made that kind of request" (Notice of Motion, Exhibit "E" [Maietta deposition] at 111). Specifically, Maietta testified that he installed the detector on the ceiling to the right of the doorway entrance to the apartment and away from the kitchen appliances (Notice of Motion, Exhibit "E" [Maietta deposition] at 121-122). He testified that Ira was present

⁸Maietta installed two separate devices in each apartment (Notice of Motion, Exhibit "E" [Maietta deposition] at 85, 87). He recalled distributing memos to the tenants informing each tenant of an installation date (Notice of Motion, Exhibit "E" [Maietta deposition] at 91-92). However, Maietta also testified that the memos may not have included a date but rather provided that he "would arrange [the date] with the tenant" (Notice of Motion, Exhibit "E" [Maietta deposition] at 94-95).

⁹Maietta testified he delivered a memo to Ira about the need for an installation and does not recall Ira "giving [him] a problem" (Notice of Motion, Exhibit "E" [Maietta deposition] at 94).

¹⁰The 'log' was Maietta's name for the Affidavit of Services (Notice of Motion, Exhibit "E" [Maietta deposition] at 103).

in his apartment when the installation was completed (Notice of Motion, Exhibit “E” [Maietta deposition] at 114).

Deposition of Mickey Napolitano

Mickey Napolitano (“Napolitano”), BLDG’s Director of Residential Realty, testified that she was familiar with the New York City Code requiring the installation of new detectors in residential apartments and the filing of certain forms with “HPD” (Notice of Motion, Exhibit “H” [Napolitano deposition] at 70-71, 76). Napolitano stated that Ira never raised a complaint regarding the presence or lack of a smoke detector in his apartment (Notice of Motion, Exhibit “H” [Napolitano deposition] at 76-77). Napolitano stated that a fire safety notice is posted in the lobby but she was not certain if such notices were also mailed to the tenants (Notice of Motion, Exhibit “H” [Napolitano deposition] at 183, 186).

Affidavit of Services Performed

The Affidavit of Services signed by S. Maietta, as Superintendent of the Premises, certifies that “on the ____ day of November of 2004, [he] hereby certifi[es] that one or more approved and operation [*sic*] Carbon Monoxide detecting device [*sic*] has been installed in each dwelling unit of the above premises as prescribed by the Department of Buildings and DHPD” (Notice of Motion, Exhibit “L” [Affidavit of Services]; Notice of Motion, Exhibit “F” [Lamas deposition] at 48-54)¹¹ Next to the listing for Ira’s Apartment, “3B”, is written “DONE”, “Steve” in cursive writing and

¹¹Lamas and Maietta both testified that when the 2004 Law went into effect requiring the installation of carbon monoxide detectors, BLDG installed replacement smoke detectors at the same time (Notice of Motion, Exhibit “F” [Lamas deposition] at 24; Notice of Motion, Exhibit “E” [Maietta deposition] at 85-86). Lamas stated that the Affidavit of Services did not include a day indicating when all work was completed given that the date in November, 2004 when Maietta certified that detectors were installed in each apartment at the Premises, was left blank (Notice of Motion, Exhibit “F” [Lamas deposition] at 56, 58-61).

“12/8/04”. Ira’s name or signature does not appear on the Affidavit of Services (even though the Affidavit of Services form calls for a tenant’s name in print and the tenant’s signature).

Smoke & Carbon Monoxide Detector - Certificate of Installation

The Certificate provides that “in accordance with the provisions of Section 27-2045, 27-2046, 27-2046.1 and 27-2046.2 of the Administrative Code of the City of New York [(“Administrative Code”)] and the rules promulgated by the Department of Housing Preservation and Development (DHPD)...the owner of the [P]remises must file with DHPD Division of Code Enforcement Borough Office...a certification of satisfactory installation of smoke and carbon monoxide detecting devices within 10 days after such installation” (Notice of Motion, Exhibit “M” [the Certificate]).

The Certificate was completed by Lamas who, by purportedly signing the form,¹² “certif[ied] that one or more approved operational smoke and carbon monoxide detectors has been installed in each dwelling unit as prescribed in the rules of the Department of Buildings and DHPD, with the exception of those locations listed below...¹³ The Certificate provides that there were 58 dwelling units in which one or more approved and operational smoke and carbon monoxide detecting devices were installed. The Certificate is dated “11/30/04” (Notice of Motion,

¹²In her deposition, however, Lamas claimed that the signature that appears on the Certificate is not hers but that “somebody wrote [her] name.” She testified further that she did not recognize the handwriting on the Certificate, although acknowledged the signature “might” be that of her assistant Debbie (Notice of Motion, Exhibit “F” at 73-74, 78-83-86). However, Maietta testified at his deposition that he recognized the signature on the Certificate to be that of Lamas (Notice of Motion, Exhibit “E” [Lamas deposition] at 103)

¹³There were no apartments listed under the section of the Certificate entitled “Smoke & Carbon Monoxide Detecting Devices Not Installed” (Notice of Motion, Exhibit “M”[the Certificate]).

Exhibit “M” [the Certificate]; Notice of Motion, Exhibit “F” [Lamas deposition] at 45-47, 61, 72-79). Lamas testified that she did not recall and could not explain why the Certificate filed with the City of NY reflected an installation completion date of November 30, 2004, while the Affidavit of Services provided that the last date of installation occurred on December 9, 2004 (Notice of Motion, Exhibit “F” [Lamas deposition] at 86). Lamas testified that the date of completion set forth on the Certificate was not accurate (Notice of Motion, Exhibit “F” [Lamas deposition] at 87-89). Napolitano testified that Lamas did not fill out the Certificate, or insert November 30, 2004 as the date of completion (Notice of Motion, Exhibit “H” [Napolitano deposition] at 87, 91, 93). Napolitano also testified that the Certificate was filed with New York City in February 2005, which was after the last date of installation (December 9, 2004) set forth on the Affidavit of Services (Notice of Motion, Exhibit “H” at 173-175). Napolitano stated that the November 30, 2004 date represented the date when “someone...started completing the form” (Notice of Motion, Exhibit “H” [Napolitano deposition] at 174). However, the plain wording of the Certificate shows that November 30, 2004 represented a completion date rather than a start date.

Affidavit of Defendants’ Expert

In support of their motion, defendants submit an Affidavit of William E. Hayden (“Hayden”) a “professional licensed New York State fire and explosion investigator”, sworn to on April 1, 2015 (Notice of Motion, Exhibit “Q” [Hayden Affidavit]). Hayden conducted a site inspection on August 6, 2012 and reviewed records and reports pertaining to the fire (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶¶ 3, 4). Hayden noted that “wooden pipes with residue in the smoking bowls as well as cigarette butts were recovered from the floor at direct proximity to the area of fire origin” (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 9). Hayden opined

that the fire was of a short duration (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 12). Hayden concluded that “the only source of ignition for this fire loss was either the careless discard of smoking material or ignited drug paraphernalia” (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 10). Hayden noted that there was no evidence that “any fixed electrical or fixtures served as [an] ignition source” (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 30). Hayden speculated that “while no smoke detector was noted during or after the fire incident in the apartment, this does not preclude the possibility the tenant of 3B, Ira Schiff, removed the smoke detector in order to avoid setting it off with his smoking activity in the apartment” (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 42). Hayden opined that the “presence or absence of a smoke detector [did not] bear on [Ira’s] injuries or subsequent death” (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 42). Hayden also stated that there was no record that Ira ever requested a replacement smoke detecting device. Hayden noted that a fire safety plan was posted in the first floor lobby (Notice of Motion, Exhibit “Q” [Hayden Affidavit], ¶ 16).

Affidavit of Plaintiff’s Expert

In opposition to defendants’ motion and in support of her cross-motion, plaintiff submits an Affidavit of Eugene J. West (“West”), a “nationally recognized expert in fire origin and cause, fire/arson related behavioral profiling, the management of major case fire incidents, fire department operations, fire incident sequencing, fire scene reconstruction, building and fire codes with a specialized expertise in the investigation and reconstruction of major fire incidents and fatal fires” (Notice of Cross-Motion, Amended Affirmation [“Notice of Cross-Motion”], Exhibit “K” [West Affidavit], at ¶ 1). West conducted a physical examination of the Premises on August 17, 2012 and reviewed records and reports pertaining to the fire (Notice of Cross-Motion, Exhibit “K”

[West Affidavit] at ¶ 4). West concluded to a “reasonable degree of fire investigative certainty” that “defendants’ negligence in not providing a working smoke detector and/or carbon monoxide detector in apartment 3B was the proximate cause of the injuries sustained by plaintiff Ira Schiff during this fire incident” (Notice of Cross-Motion, Exhibit “K” [West Affidavit] at ¶¶ 56, 57). West discussed blood stain evidence to support his contention that Ira tried to flee the fire and fell to the dressing room floor (Notice of Cross-Motion, Exhibit “K” [West Affidavit] at ¶ 15). West noted that the fire constituted a “smoldering fire event” which continued over a protracted time, and that the “activation of a smoke alarm at any point during the smoldering combustion phase of the fire, or even the incipient free burning stage of the fire, would have provided plaintiff Ira Schiff with sufficient early warning to safely escape the fire” (Notice of Cross-Motion, Exhibit “K” [West Affidavit] at ¶ 55).

Discussion

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be “viewed in the light most favorable to the opponent of the motion” (*People v Grasso* 50 AD3d at

544 [internal citation omitted]).

NYC Administrative Code

Section 27-2045

Section 27-2045(a) provides in pertinent part that “it shall be the duty of the owner of a class A multiple dwelling...to (1) provide and install one or more approved and operational smoke detecting devices in each dwelling unit...(3) replace any smoke detecting device which has been stolen, removed, missing or rendered inoperable during a prior occupancy of the dwelling unit and which has not been replaced by the prior occupant prior to the commencement of a new occupancy of a dwelling unit with a device...(4) replace within thirty calendar days after the receipt of written notice any such device which becomes inoperable within one year of the installation of such device due to a defect in the manufacture of such device and through no fault of the occupant of the dwelling unit.” Section 27-2045(b) provides that “it shall be the sole duty of the occupant of each dwelling unit... to...(1) keep and maintain such [smoke detecting] device in good repair; and (2) replace any and all devices which are either stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit with a device meeting the requirements of...the [A]dministrative [Code].” Section 27-2045(c) provides that “an owner... shall not be required to keep and maintain such device in good repair or to replace any such device which is stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit” (*see Poree v New York City Hous. Auth.*, 139 AD3d 528, 529 [1st Dept 2016]; *Peyton v State of Newburgh*, 14 AD3d 51, 53 [1st Dept 2004] *lv denied* 5 NY3d 704 [2005]). Administrative Code Section 27-2045 also requires an owner to post certain notices in common areas [§ 27-2045(a)(2)] (*see Defendants’ Affirmation in Reply*, Exhibit “C”).

Section 27-2046.1

Section 27-2046.1, effective November 1, 2004, enacted a comparable provision regarding the obligation of owners to install carbon monoxide detectors. Defendants contend that in 2004, BLDG installed carbon monoxide detectors and in addition voluntarily installed new smoke detectors in each apartment at the Premises. The addition of Section 27-2046.1 did not change the owner's and tenants' responsibilities with regard to smoke detectors.¹⁴

The parties' contentions

In support of their motion for summary judgment defendants argue that (i) the record demonstrates the fire was caused by the careless discard of smoking materials rather than defendants' negligence; (ii) defendants did not breach a duty of care to plaintiff's decedent under NYC Administrative Code §§ 27-2045 and 27-2046, and cases thereunder; (iii) even if plaintiff can show that defendants failed to provide a smoke detector, defendants have established that the lack of a smoke detector was not a proximate cause of the accident; (iv) the record fails to support plaintiff's allegations in her Bill of Particulars that defendants were negligent in failing to provide information establishing an evacuation plan and for failing to post notices about fire safety.

In support of her cross-motion and in opposition to defendants' motion, plaintiff argues that (i) the evidence establishes that a fire detector was never installed in Ira's Apartment on December 8, 2004, as set forth in the Affidavit of Services; (ii) plaintiff is entitled to summary judgment as defendants had actual notice of the dangerous condition caused by the breach of their duty to install smoke and carbon monoxide detectors; (iii) the record establishes that plaintiff was not

¹⁴A 2014 amendment to Administrative Code Section 27-2045 does not apply herein given that the accident occurred in December of 2011 (Defendants' Affirmation in Reply, Exhibit "C").

comparatively negligent, and in any event, the evidence put forth by defendants' of statements made by non-party Jovic Novika, deceased, suggesting Ira's comparative negligence, is barred by the Dead Man's Statute (CPLR § 4519); (iv) defendants' negligence in failing to comply with the Administrative Code, was a proximate cause of Ira's injuries and death; and (v) leave to permit plaintiff to amend her Verified Bill of Particulars to add further statutory violations should be granted.

In reply to plaintiff's opposition to defendant's motion and in opposition to plaintiff's cross-motion, defendants argue among other things that (i) plaintiff's expert West and purported factual witness Alfred Nicasio¹⁵ should be precluded as there has been no prior formal CPLR § 3101(d) disclosure by plaintiff; (ii) under the Administrative Code, a building owner is obligated to install a detector prior to the commencement of a new occupancy but not to maintain the detector during the course of a tenancy¹⁶; (iii) plaintiff's expert fails to provide an alternative to the explanation proffered by defendants that the fire was caused by discarded smoking materials; and (iv) defendants would be prejudiced by the plaintiff's late application to amend her Bill of Particulars.¹⁷ Defendants submit a further expert Affidavit of Hayden, sworn to on September 16,

¹⁵Plaintiff submitted an affidavit of Alfred Nicasio, a property manager for non-parties Halstead Management and Lawrence Properties, sworn to on “___ July 2015”, opining on necessary procedures to ensure compliance with Administrative Code § 27-2046 (Notice of Cross-Motion, Exhibit “I”).

¹⁶Defendants also argue that the Administrative Code does not mandate dual smoke and carbon monoxide detectors as asserted by plaintiff (Administrative Code § 27-2046; Defendants' Affirmation in Reply at ¶ 34, 35).

¹⁷Defendants also argue that plaintiff's forty-five page affirmation is twenty pages in excess of the New York County, Supreme Court, Civil Branch Rules of the Justices [Rule 14(b)] which sets forth a twenty page limit on affidavits/affirmations unless advance permission is granted by the court for good cause (Defendants' Affirmation in Reply, ¶ 4).

2015 (Affirmation in Reply, Exhibit “D”).

In reply to defendants’ opposition to plaintiff’s cross-motion, plaintiff argues, among other things that (i) defendants’ procedural grounds are baseless especially considering that defendants have also committed the identical procedural transgressions; (ii) the proposed amendment to the Bill of Particulars does not change the claims in this matter and accordingly should be allowed; (iii) there is no evidence in the record to dispute plaintiff’s claim that there was no smoke detector in Ira’s Apartment and defendants’ contention that Ira removed the smoke detector is speculative; and (iv) the absence of a smoke detector was the proximate cause of plaintiff’s injuries and death. In addition, plaintiff proffers a further Affidavit of West, sworn to on September 28, 2015 (Plaintiff’s Amended Reply Affirmation).

Defendants’ motion for summary judgment dismissing plaintiff’s complaint

Based on the foregoing record, defendants have failed to make a *prima facie* showing of entitlement to judgment as a matter of law. Specifically, there is contradictory testimony and documentary evidence as to whether or not there was an operational smoke detector installed in Ira’s Apartment. In fact, the documentary evidence undermines the credibility of the deposition testimony. Although defendants have presented the Affidavit of Services indicating that a smoke detector was installed in Ira’s Apartment on December 8, 2004, and the deposition testimony of Maietta that he installed a smoke detector, there is evidence which suggests otherwise (*see Taylor v New York City Hous. Auth.*, 116 AD3d 695, 695 [2d Dept 2014] [defendants “failed to establish that it installed an operational smoke detector in the subject apartment in compliance with section 27-2045(a)(1) of the Administrative Code of the City of New York prior to the subject fire”]).

First, the Certificate provides that all installations at the Premises were completed by

November 30, 2004 although the Affidavit of Services, together with the deposition testimony of Lamas and Maietta, indicates that a smoke detector was installed in Ira's Apartment on December 8, 2004. Second, even though Lamas' signature appears on the Certificate, she testified that she did not sign the Certificate. Third, Ira did not sign the Affidavit of Services (*cf Peyton v State of Newburgh*, 14 AD3d at 53-54 [decedent acknowledged on a rider to decedent's lease that her apartment was equipped with an operational smoke detector]; *Acevedo v Audubon Mgt*, 280 AD2d 91, 93-94 [1st Dept 2001] [receipt signed by deceased acknowledging installation of a smoke detector]; *Fields v S & W Realty Assoc.*, 301 AD2d 625, 625 [2d Dept 2003] [signed form by tenant acknowledging installation of a smoke detector]). Fourth, it is undisputed that no smoke detector or mounting plate or screws were found in Ira's Apartment after the fire. Fifth, Fran testified at her deposition that she had never seen a smoke detector at Ira's Apartment. Sixth, the fact that Ira never requested a replacement smoke detector, does not eliminate the possibility that a smoke detector was not installed in the first place.

Furthermore, even if defendants breached a duty of care to plaintiff by failing to properly install a smoke detector in Ira's Apartment, there is no evidentiary support for defendants' contention that the absence of a smoke detector, was not a proximate cause of the Ira's injuries and death. Hayden's opinions that (1) the lack of a smoke detector "does not preclude the possibility" that Ira removed the smoke detector and (2) that the lack of a smoke detector has no bearing on Ira's injuries or death, given Ira's position on the upholstered chair and "involvement with the ignition of the fire", are conclusory at best and not based on adequate foundational support. *See e.g. Bulluck v Fields*, 132 AD3d 1382, 1382 [4th Dept 2015]

Likewise, plaintiff has failed to meet her burden establishing *prima facie* entitlement to

summary judgment on liability. First, plaintiff has failed to offer admissible evidence that a smoke detector was not installed in 2004. Second, plaintiff's expert relies on speculative incident reconstruction, blood stain analysis, and review of Ira's medical records for his opinion that a smoke detector would have provided Ira with the ability to safely escape the fire. Third, although Jichetti ruled out an electrical cause, West states it is "possible" that electrical overloads could have caused the fire. Fifth, although the Report indicates that the cause of the fire was "careless discard of smoking materials, not fully ascertained", plaintiff fails to offer a non speculative alternative cause.¹⁸

Given the conflicting accounts and affidavits of plaintiff's and defendants' experts which create triable issues of fact, summary judgment in this case is inappropriate. As such, it cannot be said as a matter of law whether or not defendants were negligent, and if so, whether defendants' negligence was a proximate cause of Ira's injuries and subsequent death. *See Mero v. Vuksanovic*, 140 AD3d 574, 575 [1st Dept 2016]; *Bulluck v Fields*, 132 AD3d at 1382; *Taylor v New York City Hous. Auth.*, 116 AD3d at 696. "Negligence cases by their very nature do not usually lend themselves to summary judgment" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979])

Dead Man's Statute

Plaintiff seeks dismissal of Lamas' deposition testimony with respect to her conversation with the deceased former superintendent, Jovic Novika, which suggested comparative negligence on Ira's part, as well as the existence of a smoke detector at the Premises. Plaintiff

¹⁸The Court notes that both plaintiff and defendant's experts examined the Premises almost eight months after the fire. Defendants state that they preserved the subject apartment to allow plaintiff's access to conduct an inspection on August 17, 2012 (Defendants Affirmation in Reply, ¶ 11).

claims that this testimony is barred by CPLR § 4519, the Dead Man's Statute.

The hearsay comments of the deceased superintendent Novika, as revealed by Lamas, are not rendered inadmissible by the Dead Man's Statute. The statute prevents a person or party who is interested in an event from testifying to a personal transaction or communication between him or herself and a deceased person unless the representative of the deceased has waived the protection of the statute. *See Matter of Wood*, 52 NY2d 139, 144 [1981]. Here, Lamas is not an interested party or person in this case and accordingly she is not subject to the statute. However, the testimony is clearly hearsay, which cannot support a motion for summary judgment in the absence of other direct evidence. *See AIU Ins. Co. v American Motorists Ins. Co.*, 8 AD3d 83, 85 [1st Dept 2004].

Discovery issues

In their reply to plaintiff's opposition and in opposition to plaintiff's cross-motion, defendants contend that West's affidavit should not be considered by the court because plaintiff failed to disclose him as an expert witness prior to the filing of the Note of Issue. In reply, plaintiff contends that West's affidavit is admissible in the absence of prejudice or wilfulness. This Court determines that notwithstanding the failure of plaintiff to disclose West's as an expert earlier, defendants have failed to make an adequate showing of plaintiff's willfulness or of prejudice to defendants (*see Downes v American Monument Co.*, 283 AD2d 256 [1st Dept 2001]; *see also Georgia Malone & Co., Inc. v Extell Dev. Co.*, 118 AD3d 591 [1st Dept 2014]).

Plaintiff also seeks leave to supplement the Bill of Particulars pursuant to CPLR § 3025(b) with additional statutory violations against defendants. Defendants contend that the motion for leave to amend is untimely and prejudicial. In reply, plaintiff avers that she is not providing a new

legal theory in her motion and, as such, plaintiff's motion to amend her Bill of Particulars is not prejudicial.

Leave to amend a pleading, including a bill of particulars, shall be freely given. "In the absence of prejudice, mere delay is insufficient to defeat the amendment" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [1st Dept 2007] [internal quotes and citation omitted]).

Applying said principle in the instant matter, the Court shall permit plaintiff to amend the Bill of Particulars in the form attached as Exhibit "Q" to plaintiff's "Amended Affirmation in Support of Plaintiff's Motion and in Opposition to Defendants' Motion for Summary Judgment" to add the statutory violations set forth therein.

Accordingly, it is

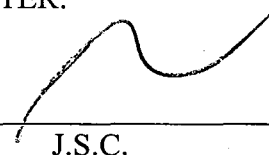
ORDERED, that defendants ABI One LLC and BLDG Management Co., Inc.'s motion for summary judgment is denied; and it is further

ORDERED, that plaintiff Fran Schiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED, that plaintiff's cross-motion for leave to amend the bill of particulars is granted and the amended bill of particulars, in the form annexed as Exhibit "Q" to plaintiff's "Amended Affirmation in Support of Plaintiff's Motion and in Opposition to Defendants' Motion for Summary Judgment" shall be deemed served upon service of a copy of this order with notice of entry upon defendants.

Dated: September 21, 2016

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.