

Lapadula v J.A.A. Grocery Corp.

2006 NY Slip Op 30498(U)

June 26, 2006

Supreme Court, New York County

Docket Number: 105940/04

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Marian Lapadula + John Lapadula

INDEX NO. 105940/04

MOTION DATE 4/20/06

- v -

JAA Grocery Corp. d/b/a. 8th Avenue Grocery and 46 Estates Corp.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUL 10 2006

NEW YORK COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion for summary judgment, pursuant to CPLR 3212, made by the defendant, J.A.A. Grocery Corp. d/b/a 8th Avenue Grocery, requesting an order dismissing the complaint of plaintiffs, Marian Lapadula and John Lapadula, and all cross-claims asserted by defendant 46 Estates Corp. against JAA, is denied. It is further

ORDERED that the cross-motion for summary judgment, pursuant to CPLR 3212, made by the defendant, 46 Estates Corp., requesting an order dismissing the complaint of plaintiffs, Marian Lapadula and John Lapadula, is denied. It is further

ORDERED that counsel for the defendant, J.A.A. Grocery Corp. d/b/a 8th Avenue Grocery, shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of the Court.

Dated: 6/26/06

[Signature]
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

MARIAN LAPADULA and JOHN LAPADULA, x

Plaintiffs,

Index No. 105940/04

-against-

DECISION/ORDER

J.A.A. GROCERY CORP. d/b/a 8th AVENUE GROCERY
and 46 ESTATES CORP.,

Defendants.

EDMEAD, J.S.C. x

FILED

JUL 10 2006

NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this negligence/trip-and-fall action, the defendant, J.A.A. Grocery Corp. d/b/a 8th Avenue Grocery ("JAA"), moves for an order, pursuant to CPLR 3212, dismissing the complaint of the plaintiffs, Marian Lapadula ("plaintiff") and John Lapadula ("Mr. Lapadula") (collectively, "the plaintiffs"), and all cross-claims asserted by defendant 46 Estates Corp. ("46") against JAA. Both the plaintiffs and 46 oppose the motion. In addition, 46 cross-moves for an order, pursuant to CPLR 3212, dismissing the plaintiffs' complaint against 46. Both plaintiff and JAA oppose 46's cross-motion.

Background

Plaintiff alleges that while exiting the premises located at 733 Eighth Avenue, New York, New York ("premises") on January 19, 2003, she fell due to the height of the "step off" from the doorway of the premises onto the adjacent sidewalk, and suffered injuries. Plaintiffs allege that the doorway of the premises was negligently designed and unreasonably dangerous since the New York City Building Code ("the Code"), Article 5, Title 27, Subchapter 6 requires "step offs"

to be less than 7.5 inches, and the “step off” at the premises was 9 inches.

It is uncontested that defendant 46, the owner of the premises, leased the premises to defendant JAA, which operated a grocery store at the premises.¹

Deposition of Plaintiff

On the day of the accident, at approximately 3:30 p.m., plaintiff and her co-workers were eating dinner at a restaurant on Eighth Avenue in Manhattan. During dinner, plaintiff had two glasses of wine. Upon the completion of her meal, at approximately 5:00 p.m., plaintiff left the restaurant to purchase a pack of cigarettes. She came upon JAA’s store, which is located on the same city block as the restaurant where she ate dinner, and entered the store through the front doorway. Before entering the store, plaintiff noticed that there was still daylight outside, and she did not see any snow or ice on the ground or lighting on the sidewalk. After purchasing the cigarettes, she proceeded to exit the store.

When exiting the store through the front doorway, plaintiff was able to see the curb that dropped off from the store to the sidewalk. The doorway had no sign that said “watch your step.” Plaintiff exited through the doorway with her right foot first. She specifically stated that “[w]hen [she] came off the step, it seemed like the step was a lot higher than [she] expected it to be. Therefore, when [she] came down, [her] foot didn’t come down flat because the expectation was different and so it caused [her] to roll ... on [her left] ankle.” Plaintiff did not notice what the floor inside the store was comprised of, nor if there were any cracks or blemishes on the floor inside the store. She “believes” that the height of the step off caused her accident.

¹ Pursuant the lease between JAA and 46, JAA agreed to occupy the premises for a “... candy store and sale of newspapers, stationery, grocery, cigars and cigarettes and for no other purpose.”

Affidavit of Richard Berkenfeld, P.E.

According to Richard Berkenfeld, P.E., a licensed professional engineer, he reviewed plaintiff's deposition testimony, plaintiff's sworn affidavit, and the photographs depicting the scene of the accident. Based on such review, "the difference between floor level inside of the premises and the level outside, which totaled 9 inches, in clear violation of the Section 27-371 of the Building Code of the City of New York, presented an extremely dangerous condition which caused plaintiff's accident." Furthermore, Mr. Berkenfeld avers that "[p]edestrians grow accustomed to traversing areas in conformity with the safety rules encoded in [the] Building Code. It is quite obvious that the awkward (and Code violating) height differential presented here caused Mrs. Lapadula to lose her balance and fall." Further, "the proximate cause of the accident ... was the differential between the floor level inside the premises ... and the level of the sidewalk outside of the premises, which totaled a nine inch drop, in violation of the Building Code."

Deposition of JAA

According to Jameel Ali, the President of JAA, before the date of the accident, JAA renovated the interior of the premises and "changed" the glass and the aluminum door frame. JAA did not modify, repair, or make any renovations to the front "step off" of the doorway to the premises. JAA testified that he did not remember who conducted the renovation work.

JAA also did not know if there were any signs on the doorway warning those going through the doorway of a "step off." Prior to the day of the accident, JAA knew of no other accidents on the premises or complaints regarding the "step off." Furthermore, no building violations had been issued regarding the steps to the premises, and JAA never made any

complaints to 46 or received any complaints concerning the step or any other part of the premises.

Deposition of 46

According to Lila Scheiner, the President of 46, 46 did not have an engineering study done on the property subsequent to its purchasing of the building. 46 did not make any alterations to the premises prior to the date of accident and was unaware of any alterations to the premises made by JAA after JAA occupied the premises in January of 2001. Also, 46 was unaware of any complaints, violations, repairs, or modifications, if any, concerning the "step off" of the premises prior to the date of the accident. However, 46 noticed that JAA renovated the front of the premises, but was not sure whether that renovation occurred before or after the date of the accident.

According to 46's understanding of the lease, JAA as the tenant is responsible for maintaining all parts of the store. Specifically, JAA was responsible for the front of the premises, except when either bricks or the roof of the premises fall and create a hazard; if such were the case, 46 would be responsible for the repairs.

The Lease between JAA and 46

In pertinent part, the lease states:

Alterations 3. Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent....

Repairs 4. Owner shall maintain and repair the public portions of the building, both exterior and interior, Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty,

excepted....

Access to Premises 13. Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations, and other directions of governmental authorities....

Condition of Premises 40. (Rider) The Tenant has inspected the premises and agrees to accept same in its present "as is" condition. The Tenant assumes the sole responsibility for the condition, repair, operation, maintenance and management of the demised premises at Tenant's sole expense.

Contentions of the Parties

JAA's Motion

JAA argues that it cannot be held liable to plaintiff. JAA contends that, as a matter of law, the out-of-possession landlord, 46, is liable to plaintiff because it had constructive notice of the design defect which caused plaintiff's injuries and is responsible for the premises' maintenance and/or repair. JAA asserts that constructive notice of the defect may be found since 46 reserved a right under the lease to enter the premises to inspect, maintain, and/or repair the premises, and a specific statutory violation exists. Specifically, JAA argues that a significant structure or design defect in violation of a specific statutory safety provision will support the imposition of liability against the landlord. Accordingly, JAA contends that since 46 retained the right to re-enter and repair the premises in the lease between JAA and 46, and plaintiff's accident was caused by the height of the "step off," which violates the Code, summary judgment in favor of JAA is appropriate.

Plaintiffs' Opposition to JAA's Motion

Plaintiffs argue that based on plaintiff's account of the accident, and the engineer's affidavit, issues of material fact exist regarding the liability of JAA, thereby precluding summary judgment. Plaintiffs contend that JAA's assertion that it has no liability to plaintiff since 46 is liable to plaintiff, is misguided. Since JAA was the tenant-in-possession, made certain modifications to the premises, and had a duty to warn plaintiff of any dangerous conditions, JAA can be held liable for plaintiff's injuries.

Further, plaintiffs contend, an issue of fact exists as to 46's liability. Since the lease grants 46 the right to re-enter the premises to inspect, maintain, and/or repair the premises, and plaintiff's injury was caused by a violation of the Code, 46 can be held liable for plaintiff's injuries.

Plaintiff also asserts that JAA, as the occupier of the premises, had a duty of reasonable care to invitees on the premises. In light of her assertion that the step "clearly violated Code," plaintiff asserts that issues of fact exist as to how JAA breached its duty of reasonable care by making revisions to the doorway, being aware of the defective step, having inadequate demarcation between the raised area within the store and the lowered area of the sidewalk, and failing to warn invitees of the dangerous condition. Furthermore, plaintiff contends that under Section 78 of the Multiple Dwelling Law, both 46 and JAA can be held liable for plaintiff's injuries in the present case.

46's Opposition to JAA's Motion

In opposition, 46 argues that JAA failed to submit any evidence to suggest that 46 created or had actual or constructive notice of any defective condition, and failed to establish its freedom

from negligence to support summary judgment.

There is no claim that 46 created the alleged defective condition, or is vicariously liable for the actions of one who did. Further, the record demonstrates that 46 never received actual notice of the defective condition, in that 46 was unaware of any complaints or building code violations concerning the step-off. Nor is there any evidence that 46 had constructive notice of the step-off. 46 argues that JAA failed to furnish any expert affidavit or documentary evidence to suggest that the step did not conform to the Building Code, and JAA cannot rely on an affirmation by an attorney who lacks personal knowledge of the facts to support summary judgment. 46 also notes that any attempt by JAA to remedy such an evidentiary deficiency in its reply would be improper and should be disregarded by the court.

46 further argues that under the theory of common law indemnification, 46 may be relieved of liability for the alleged defective condition. Since it is undisputed that JAA made numerous alterations and modifications to the inside and outside of the premises, and it may be determined that JAA's alteration created a structural defect, JAA would be liable to the plaintiff.

Furthermore, 46 contends, absent evidence that a specific statutory violation exists and that the structural or design defect proximately caused plaintiff's injuries, 46's reservation of the right to re-enter the premises will not constitute sufficient retention or control to permit a finding that a landlord had constructive notice of a defective condition. 46 also asserts that although the lease allows 46 to re-enter the premises, JAA was obligated to maintain and repair the premises, and it is clear that JAA failed to maintain the "step off" and the area immediately surrounding it pursuant to the lease. Thus, since JAA cannot establish its freedom from negligence, summary judgment must be denied.

JAA's Reply

JAA notes that while plaintiff "concedes" that the lease gives 46 a contractual right to re-enter, and 46's liability to her, plaintiff does not provide a basis or evidence to support liability against JAA. JAA argues that plaintiff failed to provide any evidence establishing that its replacement of the door and/or window panes in any way affected, altered, or changed the height of the step, which is flush with the interior floor of the premises. JAA maintains that any suggestion that such actions changed the height of the step would be mere speculation. Furthermore, JAA argues that plaintiff failed to allege any "failure to warn" in her Bill of Particulars or her Amended Bill of Particulars, and failed to submit any evidence indicating that JAA's purported failure to post warnings of the allegedly dangerous step contributed to or would have prevented plaintiff's injuries. JAA additionally contends that plaintiff failed to present any evidence that she failed to see the "step off" or that it was not readily observable, especially in light of her testimony that she climbed the subject step upon entering the store. Finally, JAA asserts that the caselaw cited by plaintiff to support her position is distinguishable.

JAA further argues that since it is uncontested that the step-off is 9 inches, an expert is unnecessary to establish constructive notice against 46, and 46 must be found to have constructive notice of such Building Code violation. Further, 46 also failed to provide any evidence that JAA's modifications to the store affected the height of the step, especially in light of 46's testimony that it did not alter the step. Additionally, JAA argues that the Court should disregard the statement of 46's superintendent, which is not in admissible form and was not previously provided to JAA.

46's Cross-Motion

In support of summary judgment in its favor, 46 argues that plaintiff's own deposition testimony undermines her claim that the height of the step-off was the proximate cause of the accident. Plaintiff testified that she had consumed several alcoholic beverages within an hour prior to the accident, misjudged the height of the step, could not state with certainty what caused her fall, did not notice any defect on the front steps, and that she could not recall the lighting surrounding the steps. In light of plaintiff's testimony, even assuming the step failed to conform to the Building Code, any determination that that such defect was a proximate cause of plaintiff's accident would be based on sheer speculation and surmise. Moreover, since plaintiff's did not conclusively testify that the height of the step caused her to slip and lose her balance, plaintiff's deposition testimony cannot support an expert opinion that a proper step-off would have prevented her fall. Therefore, given this absence of proof of the issue of proximate cause, plaintiff cannot maintain her cause of action.

Plaintiffs' Opposition to 46's Cross-Motion

Plaintiff argues that since 46 had the contractual right to re-enter the premises and the "step off" on the premises violated the Code §§ 27-128 & 27-371, 46 had constructive notice of the dangerous condition that caused plaintiff's injuries and cannot avoid liability.

Furthermore, plaintiff asserts that there can be more than one proximate cause of an accident, and plaintiff is not required to exclude every possible cause other than a defendant's breach of duty. Notwithstanding that argument, plaintiff reiterates that plaintiff's fall was proximately caused by the Code violating height of the "step off." Plaintiff asserts that as demonstrated by the engineer's and plaintiff's affidavit, issues of fact exist as to whether 46,

JAA, or both are liable for the height of the “step off,” and this issue must be decided by a jury.

JAA’s Opposition to 46’s Cross-Motion

Essentially, JAA argues that it is undisputed that the height of the subject step is 9 inches, in violation of the Building Code. Therefore, upon such violation, the building owner, 46, must be found to have constructive notice of the defective condition.

46’s Reply in Support of its Cross-Motion

46 argues that since plaintiff’s testimony shows that she cannot identify the precise cause of her accident, 46 has sustained its *prima facie* burden for summary judgment. Further, 46 contends that plaintiff failed to raise an issue of fact in opposition to 46’s cross-motion. 46 asserts that plaintiff can only speculate that the height of the step caused the accident, and it “has not been proven” that the height of the step is in violation of the Code, and that such violation was the proximate cause of her accident.

Further, 46 argues that plaintiff’s affidavit is self-serving and inconsistent with her deposition testimony since she stated in her deposition that she “believed” the height of the “step off” caused her to fall, but she stated in her affidavit that the height of the “step off” caused her to fall. 46 asserts that such an inconsistency cannot be the basis for the existence of an issue of fact. The affidavit of plaintiff’s engineering expert also fails to raise an issue of fact since he never visited the accident site and failed to take into account plaintiff’s alcohol impaired condition. Further, the expert affidavit fails to demonstrate that the Code violation was the proximate cause of plaintiff’s injuries. Although the expert claims that pedestrians grow accustomed to traversing areas in conformity with safety rules encoded in New York’s Building Code, plaintiff was a New Jersey resident. Finally, 46 contends that a violation of the Building Code does not constitute

negligence *per se*.

Analysis

Summary Judgment

Generally, to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212(b)). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212(b)), sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v. St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v. National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad*, 64 NY2d 851, *supra*; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v. Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept. 2003]; *Thomas v. Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept. 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings, and by other available proof, such as depositions" (CPLR § 3212(b)). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon

documentary evidence (*Zuckerman*, 49 NY2d 557, *supra*; *Prudential Securities, Inc. v. Rovello*, 262 AD2d 172 [1st Dept. 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212(b)). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v. Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, 49 NY2d 557, *supra*; *Forrest v. Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept. 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d 557, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v. Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v. Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept. 1998]).

46's Cross-Motion

Specifically in a trip and fall action, in order to establish a *prima facie* case of negligence, a plaintiff must demonstrate that the defendant created the dangerous condition which proximately caused the accident or that the defendant had actual or constructive notice of the

injury causing condition (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; see also *Segretti v. Shorestein Company, East, LP*, 256 AD2d 234, 682 NYS2d 176 [1st Dept. 1998]; *Weiss v. Gerard Owners Corp.*, _ NYS2d _, 2005 NY Slip Op 07847 [1st Dept.]; *O'Rourke v. Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept. 1999]; *Gordon v. Waldbaum, Inc.*, 231 AD2d 673, NYS2d 996 [2nd Dept. 1996]).

Thus, defendant 46, as the proponent of a summary judgment motion, must submit evidence in admissible form showing the absence of issues of fact that it both (1) did not create the dangerous condition nor (2) had actual or constructive notice of the dangerous condition (see *Colt v. Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294, 618 NYS2d 721 [1st Dept. 1994]; see also *Giuffrida v. Metro North Commuter Railroad Company*, 279 AD2d 403, 720 NYS2d 41 [1st Dept. 2001]; *Gordon v. Waldbaum, Inc.*, 231 AD2d 673, *supra*). Constructive notice may be found against an out-of-possession landlord where (1) the landlord expressly reserves a right under the terms of the lease to enter the premises for the purposes of inspection, maintenance and repair, and (2) there is a specific statutory violation on the premises (see *Guzman v. Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451 [1987]; see also *Lopez v. 1372 Shakespeare Avenue Housing Development Fund Corp.*, 299 AD2d 230, 750 NYS2d 44 [1st Dept. 2002]).

In *Guzman*, plaintiff sustained injuries on the premises owned by defendant Village East, who leased the premises to defendant Daitch-Shopwell, allegedly from falling down a flight of stairs on the premises. In plaintiff's trial against the defendants, plaintiff obtained a jury verdict against Village East for her injuries. The Court of Appeals held that a basis existed for holding Village East liable for plaintiff's injuries since, among other things, Village East had constructive

notice of the dangerous condition due to its right to reenter the premises under its lease with Daitch and its specific duty to provide invitees who use the stairs on the premises with minimum handrail clearance and minimum illumination according to the Code (*see Guzman*, 69 NY2d 559, *supra*).

Similarly, in *Lopez*, plaintiff sustained injuries on the premises owned by defendant 1372 Shakespeare Avenue Housing Development Fund Corp., who leased the premises to defendant Medina's Supermarket, allegedly due to both the accumulation of water on a ramp on the premises and the slope and handrail of the ramp, where the slope of the handrail violated the Code. Shakespeare moved to dismiss plaintiff's complaint, contending that as an out-of-possession landlord, it did not have constructive notice of the alleged hazardous conditions. The First Department reversed the motion court's dismissal of plaintiff's complaint against Shakespeare, finding that Shakespeare had constructive notice of the Code violating condition² since Shakespeare expressly reserved a right under the terms of its lease with Medina to enter the premises for the purposes of inspection, maintenance and repair and since Shakespeare had a specific duty to conform the slope of the handrail to the Code (*see Lopez*, 299 AD2d 230, *supra*).

In the present case, Section 13 of the lease, entitled "Access to Premises," states that the

Owner ... shall have the right (but shall not be obligated) to enter the demised premises ... at ... reasonable times, *to examine the same and to make such repairs, replacements and improvements* as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform.... (emphasis added).

In addition, Building Code § 27-371 states, in pertinent part, that

[t]he floor on both sides of all exit ... doors shall be essentially level and at the same

² The First Department determined that an issue of fact existed as to the ramp's slope and handrail violating the Code based on both plaintiff's testimony and the affidavit of plaintiff's expert, a licensed professional engineer.

elevation for a distance, perpendicular to the door opening, at least equal to the width of the door leaf, except that *where doors lead out of a building the floor level inside may be seven and one-half inches higher than the level outside* (emphasis added).

Therefore, Building Code § 27-371 requires that the floor onto which plaintiff stepped when exiting the store be either level with or no more than seven and one-half inches from the floor leading to the door opening. It is uncontested that the difference between the floor level inside of the premises and the level outside totaled 9 inches. Therefore, since the record indicates both that 46 expressly reserved a right under the terms of the lease to enter the premises for the purposes of inspection, maintenance and repair, and there is a specific statutory violation on the premises (*see Guzman*, 69 NY2d 559, *supra*; *see also Lopez*, 299 AD2d 230, *supra*), 46 has failed to demonstrate that it did not have constructive notice of the dangerous condition as a matter of law (*see Colt*, 209 AD2d 294, *supra*; *see also Giuffrida*, 279 AD2d 403, *supra*; *Gordon*, 231 AD2d 673, *supra*), thereby precluding 46 from summary relief.

46's assertion of other potential causes for plaintiff's injuries and that plaintiff failed to establish that the violation was a proximate cause of her injuries, is insufficient to establish summary relief in its favor. It is well settled that there can be more than one cause of an accident and there is no requirement that a plaintiff exclude every possible cause other than a defendant's breach of its statutory duty (*see Lopez*, 299 AD2d 230, *supra*). Therefore, 46's cross-motion for summary judgment is denied.

JAA's Motion

JAA, as the proponent of a summary judgment motion, must submit evidence in admissible form showing that it did not have constructive notice of the dangerous condition (*see Colt*, 209 AD2d 294, *supra*; *see also Giuffrida*, 279 AD2d 403, *supra*; *Gordon v. Waldbaum*,

Inc., 231 AD2d 673, *supra*). A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and it exists for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Melendez v. American Airlines, Inc.*, 290 AD2d 241, 735 NYS2d 128 [1st Dept. 2002]; *Gutierrez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]).

In *Melendez*, plaintiff was injured after falling over a 10 foot long and 2 to 3 inch deep crack on the pavement on the premises leased to defendant American Airlines, Inc. American moved for summary judgment to dismiss plaintiff's complaint. In reversing the motion court, which granted American's motion, the First Department found that the record indicated that the alleged defective condition that caused plaintiff's injuries was "readily visible and apparent" and existed for such a period of time as to impart constructive notice onto American, thereby precluding American from summary relief (*see Melendez*, 290 AD2d 241, *supra*).

In the present case, JAA fails to submit any evidence establishing its lack of constructive notice of the allegedly defective "step off." JAA failed to establish that such "step off" was not visible and apparent or that the height of the "step off" existed for an amount of time insufficient to be discovered and remedied. The crux of JAA's motion simply shifts the blame for plaintiff's injuries onto 46. While JAA correctly notes that 46 may be held liable for plaintiff's injuries, JAA failed to demonstrate that it lacked constructive notice so as to warrant summary judgment in its favor. Thus, notwithstanding the viability of JAA's contention that its replacement of the

door and/or window panes in no way affected, altered, or changed the height of the step, there remains an issue of fact as to whether JAA had constructive notice of the alleged defective “step off.”

Moreover, regardless of 46's culpability, JAA had an independent common law duty to keep the premises in a reasonably safe condition (*see Putnam*, 38 NY2d 607, *supra*; *see also Zito*, 223 AD2d 353, *supra*). Contrary to JAA's contention, 46's potential liability to the plaintiff does not eliminate JAA's duty to keep the premises free of dangerous conditions. It is well settled that a tenant-in-possession has a common law duty to keep the premises in a reasonably safe condition and to remove dangerous defects from the premises that it occupies, and such a duty exists independently of the terms of a lease with the landlord and irrespective of whether the tenant actually covenanted to keep the property in good repair (*see Putnam v. Stout*, 38 NY2d 607, 381 NYS2d 848 [1976]; *see also Zito v. 241 Church Street Corp.*, 223 AD2d 353, 636 NYS2d 40 [1st Dept. 1996]; *Helena v. 300 Park Avenue*, 306 AD2d 170, 763 NYS2d 542 [1st Dept. 2003]).

In *Zito*, plaintiff sustained injuries while on the premises leased by her employer, third-party defendant New York City Human Resources Administration, from landlord defendant 241 Church Street Corp. Defendant NYCHRA moved to set aside the jury verdict against it and to dismiss 241 Church's third-party complaint against it. NYCHRA argued that the lease between itself and 241 Church imparted the duty to repair on 241 Church, thereby absolving NYCHRA of any liability for plaintiff's injuries. However, the First Department found that the lease did not completely divest NYCHRA of responsibility for repairs and maintenance of the premises, and independent of any lease provision that may place liability onto 241 Church, NYCHRA, as the

tenant-in-possession, had a common law duty to keep the premises in a reasonably safe condition (*see Zito*, 223 AD2d 353, *supra*). Thus, JAA, the tenant-in-possession of the premises at the time of plaintiff's accident, had a duty to keep the premises in a reasonably safe condition and to prevent or remove dangerous conditions from the premises, notwithstanding the terms of its lease with 46.

Thus, JAA's motion for summary judgment is denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment, pursuant to CPLR 3212, made by the defendant, J.A.A. Grocery Corp. d/b/a 8th Avenue Grocery, requesting an order dismissing the complaint of plaintiffs, Marian Lapadula and John Lapadula, and all cross-claims asserted by defendant 46 Estates Corp. against JAA, is denied. It is further

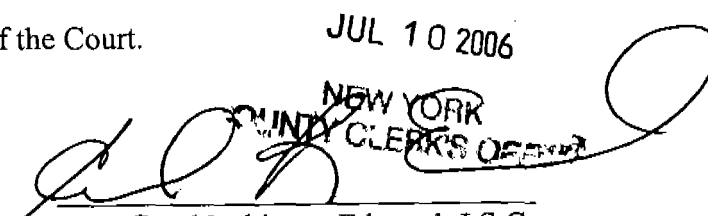
ORDERED that the cross-motion for summary judgment, pursuant to CPLR 3212, made by the defendant, 46 Estates Corp., requesting an order dismissing the complaint of plaintiffs, Marian Lapadula and John Lapadula, is denied. It is further

ORDERED that counsel for the defendant, J.A.A. Grocery Corp. d/b/a 8th Avenue Grocery, shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of the Court.

Dated: June 26, 2006

FILED
JUL 10 2006
NEW YORK
CLERK'S OFFICE



Hon. Carol Robinson Edmead, J.S.C.