Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

LYNANNE ARES AND CARLOS ARES, Index No. 16618/05

Plaintiffs, Motion
-against- Date September 12, 2006

TURNER CONSTRUCTION COMPANY, Motion Cal. No. 2

Defendant.

Motion Seq. No. 1

PAPERS NUMBERED

Notice of Motion-Affid-Exhib..... 1-7
Cross-Motion-Affid-Exhib..... 8-10
Reply..... 11-15

This motion was submitted to Justice Geller on September 12, 2006 and was transferred to this court due to the expiration of her term.

Plaintiffs commenced this action seeking to recover damages for personal injuries alleged to have been sustained by plaintiff Lynanne Ares on January 10, 2005 when she fell down cracked, broken, uneven and defective stairs as she was going to the employee parking lot while working at Winthrop Hospital (Winthrop) located at 259 First Street, Mineola, in the County of Nassau, State of New York.

Defendant Turner Construction Company (Turner) moves for an order pursuant to the New York Civil Practice Law and Rules CPLR § 3212 granting summary judgment to defendant and severing and dismissing the verified complaint and each cause of action asserted therein on the ground Turner Construction Company bears no liability; directing the Clerk

to enter judgment severing and dismissing each claim and cause of action asserted against defendant in this action; and granting defendant such other, further and different relief as the court may deem just and proper.

Plaintiffs cross-move for an order pursuant to CPLR 3126 imposing a penalty upon defendant based upon its refusal to comply with a discovery demand for the names and addresses of certain subcontractors.

Contentions of the Parties

Defendant Turner asserts that the evidence establishes that the accident occurred in an area for which it had no responsibility. An affidavit by Chris Nocerino, a Project Supervisor for defendant Turner, is submitted. He states that defendant Turner was the general contractor for certain construction work being performed at Winthrop. The stairs, shown in an annexed photograph, where plaintiff claims to have fallen are located on the main level employee parking garage exit at Winthrop. Said stairs are outside of the construction area and associated yard in which Turner agreed to perform work. Defendant Turner did not use said stairs or perform work on or to them prior to or on the date of the accident. The area shown in the photographs was isolated from the construction area by overhead protection and netting so as not to affect the stairwell which was connected to the overhead walkway leading to the employee garage. At no time did the construction operations damage or cause the deterioration of the stairwell or the associated patio, driveway or parking garage itself.

In addition, it is asserted that Winthrop's records show that it exercised exclusive control over the staircase as, immediately after the accident, an accident report was generated by Winthrop. Said report indicated that Winthrop contacted Winthrop security to follow up the repair of the stairs. Defendant Turner argues that such facts entitle it to dismissal of the complaint.

Plaintiffs oppose the motion on the ground that it is premature and facts are unavailable to them as to the identities of defendant's subcontractors. Plaintiffs are seeking disclosure with respect to the subcontractors who

were present during the 90 days prior to the incident. In addition, plaintiffs seek the daily work logs or job diaries customarily kept by general contractors and progress photos, if they exist, to the extent that they show the stairway or construction relative to it. The defendant's submission includes drawings which are impossible to read and interpret without explanation and context.

Plaintiffs submit the affidavit of plaintiff Lynanne Ares. She states that she tripped and fell while descending the stairs leading to the main level employee parking garage. The nosings of the stairs were cracked, broken and pieces were missing. Prior to the construction the stairs, which she used everyday, were in good condition. After construction began, she saw construction workers near the stairs on a regular basis and saw workers dragging heavy equipment and material up and down the stairs to get them near the work areas near the stairs. It is her belief that their actions caused the defects in the stairs.

In reply, defendant argues that it established that it was not performing work at the accident site and was not responsible for the maintenance and repair of the subject stairs. Plaintiffs offer only speculation that defendant's workers caused the defective condition. It is not shown that such workers were employees of defendant, a subcontractor or Winthrop. The stairs were the responsibility of Winthrop which performed corrective work thereon. As to plaintiffs' cross-motion, defendant Turner asserts that plaintiffs have not raised the discovery issue at any time prior to its motion even though defendant's responses served on or about February 23, 2006. Plaintiffs' demand is very broad and nonspecific and seeks information not relevant to the subject area which was under the control of Winthrop. As to the contracts which show the scope and location of the work, plaintiffs are already in possession of the agreement as it was annexed to defendant's motion.

Decision of the Court

The motion by defendant is granted. The complaint is hereby dismissed as against defendant Turner Construction Company. The cross-motion by plaintiffs is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81. In the instant case, defendant Turner established its entitlement to judgment as a matter of law. The affidavit by its project superintendent showed that the defendant did not use the stairs or perform work on them during the construction project and that said stairs were not within the construction site area.

In opposition to the motion, plaintiff's affidavit states that construction workers worked near the subject stairs and dragged heavy equipment up and down them. However, plaintiff did not identify said workers as employees of defendant Turner, nor of any other entity. Further, plaintiff does not state that she actually saw the actions of the workers cause or create the defect which she alleges caused her fall. As to plaintiffs' cross-motion, plaintiffs' notice for discovery and inspection, dated February 6, 2006, was responded to by defendant Turner by a response dated February 23, 2006. Plaintiffs never moved to compel a further response or otherwise indicated their dissatisfaction with the response until defendant's motion. Further, upon filing the note of issue on February 28, 2007, plaintiffs stated that discovery proceedings now known to be necessary were completed and that there were no outstanding requests for discovery. Finally, mere hope or speculation as to what additional discovery would disclose is insufficient to warrant denial of a motion for summary judgment. Romeo v City of New York, 261 AD2d 379.

Accordingly, the motion by defendant is granted. The complaint is hereby dismissed as against defendant Turner Construction Company. The cross-motion by plaintiffs is denied.

Dated:March 29,2007

.....
HON. DAVID ELLIOT