

Lapolla v Sipala 110 Plaza, L.P.

2007 NY Slip Op 31496(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0028502/2002

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-27-07
ADJ. DATE 4-10-07
Mot. Seq. # 001 - MD
002 - XMD

-----X		
GAIL LAPOLLA and JOHN LAPOLLA,	:	FERRO, KUBA, MANGANO, et al.
	:	Attorneys for Plaintiffs
	:	350 Motor Parkway, Suite 200
Plaintiffs,	:	Hauppauge, New York 11788
	:	
- against -	:	MAZZARA & SMALL, P.C.
	:	Attorneys for Defendants Sipala
SIPALA 110 PLAZA, L.P. JEANETTE SIPALA	:	800 Veterans Memorial Hwy., Suite LL5
and CABLEVISION ELECTRONICS	:	Hauppauge, New York 11788
INVESTMENTS. INC., d/b/a THE WIZ,	:	
	:	GOLDBERG SEGALLA, LLP
	:	Attorneys for Defendant Cablevision
Defendants.	:	200 Old Country Road, Suite 210
-----X	:	Mineola, New York 11501-4293

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 23-24; Answering Affidavits and supporting papers 16-17; 18-19; 25-26; Replying Affidavits and supporting papers 20-21; 25-26; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendants Sipala 110 Plaza, L.P. and H. Jeanette Sipala for an order granting summary judgment dismissing the complaint, opposed by plaintiff and defendant Cablevision Electronics Investments, Inc., is denied. It is further

ORDERED that this motion (002) by defendant Cablevision Electronics Investments, Inc. d/b/a The Wiz, for an order granting summary judgment dismissing the complaint, opposed by plaintiff as untimely, is denied.

This is an action sounding in negligence wherein the plaintiff, Gail Lapolla, claims to have fallen on April 7, 2001 at a commercial building at 326 Walt Whitman Road, Huntington Station, New York. Defendant H. Jeanette Sipala is the landlord. Cablevision Electronics Investments, Inc., which was doing business as The Wiz, was the tenant at the building. At the time of the incident, plaintiff was employed by

Cablevision Systems Corporation. Cablevision Electronics Investments, Inc. is a separate corporation from Cablevision Systems Corporation. While plaintiff was working at The Wiz store, she alleges that as she was descending an interior stairwell from the first floor to the basement, she was caused to catch her foot on something and stumble, sustaining injury to her left ankle in the nature of a left ankle sprain with severe distal lower extremity syndesmosis, neuropraxia of the peroneal nerve traction injury of the left foot, avulsion fracture at the talar dome, causing her to undergo left ankle arthroscopy with a subtotal anterior synovectomy with debridement and excision of scar tissue.

Defendants, in motion (001) and (002), seek an order granting summary judgment dismissing the complaint. Plaintiff opposes both motions, but opposes motion (002) by defendant Cablevision Electronics Investments, Inc. d/b/a The Wiz, arguing that their motion is untimely, having been served on March 9, 2007, more than 120 days after the Note of Issue was filed on September 21, 2006. To be timely, this motion should have been served on or before January 19, 2007. Thus, this motion was served forty nine days late. Defendant Cablevision offers absolutely no excuse for such delay in complying with CPLR 3212(a), merely acknowledges the motion is untimely, and argues it should be considered by this court as it is nearly identical to the motion made by defendant Sipala. The Court of Appeals has addressed this very issue in *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004], wherein it held “Good cause in N.Y. C.P.L.R. 3212(a) requires a showing of good cause for the delay in making a motion for summary judgment--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” Because defendant Cablevision has not even attempted to offer this court an excuse for serving the instant motion forty nine days late, and no explanation why this motion could not be served within 120 days of the filing of the Note of Issue, defendant has not come forward with good cause for this court to consider their motion for summary judgment.

Accordingly, motion (002) is denied as untimely.

Turning to motion (001), the 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 eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence

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requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of the request for summary judgment, the Sipala defendants have submitted, inter alia, copies of the pleadings; verified bill of particulars; copy of plaintiff's deposition transcript; copy of the deposition transcript of defendant Cablevision by Joseph Patsco; copy of the deposition transcript of defendant Jeanette Sipala; copy of the deposition transcript of non-party Marie Bermudez; and a copy of the agreement with diagram between H. Jeanette Sipala and defendant Cablevision, merely dated November, 2000 and unsigned by defendant Sipala.

Defendant Sipala essentially argues in her affidavit accompanying this motion that the Sipala defendants owed no duty of care to plaintiff, or had any connection with the premises at the time of the accident, and had no contract with plaintiff. Defendant Sipala further argues she did not do anything affirmatively to cause or create the defect alleged by plaintiff, namely, a tear in a carpet on a flight of steps, had no actual or constructive notice of the alleged condition prior to the accident, and did not fail to remedy it.

In her supporting affidavit, defendant Sipala also sets forth that she is advised that plaintiff claims she stumbled as the result of catching her food on torn carpet on a cement stairway leading to the basement. The cement stairway was carpeted with a runner down the middle. She states that at the time of the alleged incident there were two common stairways to the basement, one on the eastside and one on the westside. The westside stairway was made of wood steps with carpet. The eastside steps were fully carpeted from side to side and top to bottom for years prior to and including the date of the alleged accident. She states the Wiz had its own internal stairway leading from the first floor to the basement. That stairway was made of cement and it was the responsibility of The Wiz to maintain. No one ever complained to her about any rips, holes or tears in the carpet on either the westside or eastside common stairs, nor any other stairway leading from the first floor to the basement, before or after the plaintiff's alleged accident. She further claims she was usually at the building at least once a month for years and never saw any holes, rips or tears in the carpet on any stairs from the first floor to the basement. She also claims she was not renovating any stairway at the time of the accident.

In the transcript of the examination before trial on September 14, 2005 of defendant Sipala, (defendant Sipala's exhibit H), defendant Sipala testified she was a partner in the entity of Sipala 110 Plaza, with her husband who died in July 2000. Whitman Plaza is the current owner of the premises located at 326 Walt Whitman Road, Huntington Station, previously owned by Richard and Jeanette Sipala.

She described the building has having three tenants on the retail space on the first floor, a beauty shop and office space on the second floor, and the lower basement level was developed twenty or thirty years ago for office space. When asked how many entrances there were to the basement presently for tenants, she answered, two: these are the east and west entrances and are in the lobbies. She was unsure if either of the lobbies entered onto that retail space of The Wiz and was unsure when Cablevision, known as the Wiz, first occupied the premises, but said there was a lease between herself and Cablevision.

Renovations were made to that leased area by or on behalf of Cablevision. She had an office, Whitman Plaza, in the 326 Walt Whitman Road premises during the time the renovations were being performed by Cablevision. Defendant Sipala did not know if any renovations were done to the east lobby after Cablevision first starting occupying the 326 Walt Whitman Road premises.

Defendant Sipala's daughter, Marie Bermudez, worked for her or Sipala 110 Plaza, is presently an owner of Whitman Plaza, L.L.C., and maintains an office at Whitman Plaza. Marie Bermudez watched the maintenance of the building and various work during the time Cablevision occupied the premises.

Defendant Sipala also testified that upstairs tenants gained access to the upstairs from the front lobby stairs, or elevator, and if they parked on the west side of the building, they'd have to go downstairs to walk over and get the elevator. The elevator went up to the second floor and down to the basement and is located on the southwest corner of the lower level hallway. The eastside lobby did not have an elevator, but had a stairway that would go down to the basement level. She described that stairway as going down, makes a turn, goes down to the lower level hallway where the offices located on the lower level enter into. She stated those stairs were covered with a wine colored carpet, and there was wine colored tile on the floor. She did not know when that carpeting was installed or if there would be any records maintained as to that information. The stairs were never covered with a runner and were a common area of the premises. She also testified there is also a stairway that leads from the lower level hallway up to the west lobby entrance. That stairway has two flights of stairs that lead from the west lobby (Route 110 entrance) second level to the lower level with wine colored carpeting.

Cablevision had storage space in the basement of the building during the time they occupied the premises. They could access that storage area by an inner stair from the street level to the lower level in the northwest area which was previously occupied by the Diamond Exchange. That inner stair was described by defendant Sipala as being made of cement, narrow with no carpeting. She did not know if there were handrails.

In April, 2001, the offices in the lower level of the building had their own bathroom facilities, and there was a men's room and ladies' room that was kept locked in the lower level for the tenants and for which all the tenants on the lower level had a key. She did not know if The Wiz had a bathroom, but the former tenants in that space, Lane Bryant and the Diamond Exchange, both had a bathroom at the time they occupied the premises. There was a locked bathroom in the hallway on the west end of the upper level lobby on the second floor for tenants on the second floor.

Prior to April 7, 2001, defendant Sipala stated she did not become aware of any complaints made by anyone with respect to the condition of the stairway leading from the east entrance of the building to the lower level, but was mildly aware of complaints made by tenants in the lower level of the building with respect to employees of Cablevision using the bathroom in the hallway of the lower level, that the stairs were dirty from tracking. She did not receive complaints about the bathroom, only with respect to the condition of the stairway, and she saw it herself. Her daughter Marie complained to her about the condition of the stairway because there was tracking on the stairway leading from the east entrance from the winter. It looked like dark coffee stains. The carpeting was then replaced in the summer of 2001.

Marie Bermudez testified at her examination before trial (defendant's exhibit I) that she was never employed by Whitman Plaza, L.L.C., is employed by and is the owner of American Wholesale Nurseries who does the maintenance work and cleaning for Whitman Plaza for the last twelve to fifteen years. She stated her mother, H. Jeanette Sipala is the owner of 326 Walt Whitman Road in Huntington Station, and a principal in Whitman Plaza, L.L.C. Ms. Bermudez testified she was present at 326 Walt Whitman Road on mostly a daily basis in April, 2001 to check in at the office that's there for the Whitman Plaza, Whitman Plaza L.L.C., to make sure that the bathrooms got their cleaning, and that things were picked up around the yard. She testified that that office for the Whitman Plaza, Whitman Plaza L.L.C., came into being after her dad passed in 2000. Prior to his passing, he operated the 326 Walt Whitman Road under the name of Whitman Plaza. Whitman Plaza had a secretary in the office to answer phones, but that secretary was employed by American Nurseries. There were a couple of different people, including Isa Smith, who did cleaning of the common areas at 326 Walt Whitman Road.

Ms. Bermudez also testified that The Wiz became a tenant in the building in 1999 or 2000, and that she was involved in negotiation of the lease between The Wiz and her parents. When The Wiz took occupancy, they did a major renovation consisting of taking down all existing ceilings, carpeting and flooring, anything existing in the space, and renovated it for their company. M.J. Macaluso was the general contractor at the job. Because The Wiz space took up the entire space between the east and west entrances, they could enter from both the east and west, but through their own doors which were right next to the lobby doors; they entered into their own space. No portion of The Wiz space entered into the lobby areas of the building. At one time they had an entrance in the front and in the east lobby, and when they moved into the other side, they closed up the entrance to the east lobby and used the entrance they had in the back of where the Lane Bryant space was. When renovations were going on in what used to be the Leather Center, the workers would get in and out of The Wiz space through the back doors on the east side of the building. The witness was not sure when these renovations were being done, but stated there were renovations being performed in April, 2001, and most of the work crew showed up between 7:30 and 8:00 in the morning and were mostly gone by early afternoon.

During the renovations of The Wiz space, Bermudez testified, Cablevision employees would not utilize bathrooms in the common are of the building as the bathrooms were locked for use by the tenants on each of their own floors. During the renovations, she would stop in to look around every couple days, and never saw anyone using the common stairways as they had their own stairway which lead to an additional 5,000 square feet in the lower level, and where they had a bathroom. She testified there was carpeting on the eastside common stairs, but this carpeting was never ripped up during the renovation of The Wiz premises, and it never had a runner. She was not aware of any complaints with respect to the carpeting on the east side of the stairway leading to the basement of the premises from the east lobby prior to April 7, 2001.

She described the interior stairway from the old Leather Center to the basement as being steel with cement, but was not able to describe the condition of that stairway on April 7, 2001.

Defendants have also submitted the transcript of the examination before trial of plaintiff Gail

Lapolla (defendant's exhibit F) wherein she testified she was employed by Cablevision in April, 2001, having started with them in January, 1998 as a customer service representative. In April, 2001, she was working at the 326 Walt Whitman Road, Huntington Station location for several months out of the facility known as The Wiz. When she started working at that location, there was no construction going on, but it started a couple months later. She described it as a major renovation, knocking down walls, and the store was practically gutted. After the expansion, The Wiz continued to have its own entrances and exits. Before the renovations began, she knew of only one generic restroom that they used, adjacent to her workstation, and it was used for employees and the public in general. She knew of no other restrooms in The Wiz store. She described The Wiz as having two floors, ground level and basement level. Once, prior to renovations, she went downstairs for training.

Plaintiff testified she was involved in an accident on Saturday, April 7, 2001 about 3 o'clock in the afternoon at which time there were renovations going on in The Wiz store. Prior to the accident, she made complaints to the supervisor and to the general manager about the lack of restrooms and was told there was nothing they could do, that this was what was available to them. She was told by her immediate supervisor, Ms. Herman, where to go for a key to use the facilities downstairs as they had to go downstairs to the Dentist's office or another office which would give them the key to a locked bathroom.

To get to this lower level restroom, one would come out of the entranceway to the store (The Wiz) into an alcove, like a foyer, and go down two flights of stairs to the basement, physically leaving The Wiz store, but not leaving the building. She further described the route as leaving The Wiz, going into the foyer, bearing left and going down one flight of stairs, and coming to a landing. Then there was a second flight of stairs. She described the stairs as painted cement, with a carpeted runner. She believed there was a railing on the stairway, but did not recall if it was the right or left or both. She did not know if the landing was carpeted, but described the lower section of the stairs the same as the upper section with cement and a carpet runner. The carpet, which she described as extremely worn, was placed on the stairs with something that reminded her of electrical tape. There was an open space between the risers.

Plaintiff testified that prior to her accident, she used that bathroom once or twice and got the key from the dentist's office downstairs. When the incident occurred, she was going down the stairs. She did not know how many steps she went down. She was wearing a Cablevision standard shoe requirement at the time, and was watching where she was going because there was debris on the stairs, which she described as spackle buckets, wood two by fours, and saw equipment. She remembered the carpet being torn and worn.

When the accident occurred, she felt her foot get stuck or catch on something. She lost her footing and went down a couple of steps and felt a popping noise in her ankle. She had to sit down on the stairs because she couldn't put pressure on her leg. She did not know what it was that she felt her foot get stuck or caught on, but believed it was torn carpet. She had previously seen torn carpeting and pieces of the molding, or whatever was used to hold it down was torn and pulled away. She saw this on her way coming back up the stairs and concluded that this was what it was.

After sitting for sometime, she went back up the stairs and told Sylvia Hill she hurt herself. She complained to the general manager, Amro, about the debris or material on the stairs after the accident. She continued to work the rest of the day. Following the accident, she states she may have told someone she slipped, or that she just thought she stepped off the step wrong. When she went to work on Tuesday, she told Ms. Herman of Cablevision what happened. Cablevision gave her family medical leave. She returned to work July 2, 2001 for about 19 days. She received Worker's Compensation Benefits from July 2001 through October, 2001. She was terminated by Cablevision in October 24, 2001. When she was able to return to work, she reached out to Cablevision to be rehired, but she was not

For a landowner to be liable in tort to a plaintiff injured as a result of an allegedly defective condition upon the landowner's property, it must be established that a defective condition actually existed and that the landowner either affirmatively created the condition or had actual or constructive notice of its existence (*Fargot v Pathmark Stores, Inc.*, 264 AD2d 708, 694 NYS2d 743 [2nd Dept 1999]). In opposing motion (001), Cablevision has set forth in its affidavit in partial opposition, that if their motion for summary judgment is denied, they are opposing the Sipala defendants' motion, essentially arguing that Sipala, as owner of the property, owed a reasonable duty of care to all patrons who used the property. Cablevision further argues that Sipala hired her daughter to perform maintenance and cleaning of the building, and to the extent the maintenance company hired by Sipala failed to properly maintain the steps, Sipala is responsible for any liability stemming from the failure to properly maintain the steps. Defendant The Wiz also argues that plaintiff clearly testified she fell in the common stairway, outside of the Wiz store. It is determined that defendant Sipala has failed to demonstrate entitlement to summary judgment as a matter of law as defendant has not been able to establish that the plaintiff was unable to identify the cause of her accident or the place of her accident (*Burnstein v Mandalay Caterers*, 306 AD2d 428, 761 NYS2d 494 [2nd Dept 2003]), and also due to the existence of factual issues.

Plaintiff opposes defendants' motion and, as she testified at her examination before trial, sets forth she had previously seen torn carpeting, pieces of the molding or whatever they use to hold it down was torn and pulled away on the stairway on which she fell. Plaintiff testified that she felt her "foot got stuck to--I don't know if stuck is the right word. I just felt it catch on something. I lost my footing and I went down a couple of steps and felt this popping noise in my ankle and had to sit down on the stairs because I couldn't put any pressure on my leg." She also testified she did not know what it was that she felt her foot get stuck or caught on, but believed it was torn carpet (p. 126).

There are factual issues concerning where plaintiff fell. Defendant Sipala described the east stairway as being covered with a wine colored carpet. The tile on the floor of the east entrance was a wine color also. She said they were never covered with a runner. She did not know when that carpeting was installed or if there would be any records maintained as to that information. She also testified that the carpeting on that stairway was changed in the summer of 2001. She described these east lobby stairs as a common area of the premises and described them as going down, making a turn, and going down to the lower level hallway where the offices are located. This description was similar to the description plaintiff gave in her examination before trial wherein she described the stairway off the foyer as going

down one flight of stairs, a landing and then a second flight of stairs.

Marie Bermudez testified that at one time The Wiz had an entrance in the front and in the east lobby, and when they moved into the other side, they closed up the entrance to the east lobby and used the entrance they had in the back of where the Lane Bryant space was. The witness was not sure when these renovations were being done, but did testify that there were renovations being performed in April, 2001. This raises a factual issue with the testimony by defendant Sipala that The Wiz did not have access to the common staircase from the interior of the building.

There are further factual issues raised by the Sipala defendants in their supporting papers. Defendant Sipala disputes that the east lobby stairway was the stairway where plaintiff fell, but this is argued by plaintiff and co-defendant Cablevision to be the stairway. Plaintiff described having to leave The Wiz, but not the building, and go into a foyer where there was a staircase leading downstairs where she had to get a key for the bathroom from the Dentists's office or another office to use the lower level bathroom. Accordingly, there are factual issues concerning, on the date of the accident, whether The Wiz did in fact have an entrance to the east lobby which accessed the foyer and staircase in the common area.

Marie Bermudez also testified that during the renovations of The Wiz space, Cablevision employees would not utilize bathrooms in the common area of the building as they couldn't because the bathrooms were locked for use by the tenants on each of their own floors. However, plaintiff described having to leave The Wiz, but not the building, and get a key for the bathroom from the Dentists's office or another office to use the lower level bathroom. This raises a factual issue as well concerning whether employees from The Wiz were using common stairways and the downstairs bathrooms. Also, Ms. Sipala testified there were complaints from the lower level tenants about employees from The Wiz using the lower level bathrooms.

There is further factual issue concerning whether The Wiz directed their employees to get keys from other tenants and to use other tenant's bathrooms on the lower level and whether employees of The Wiz were using the lower level bathrooms in the common area. Plaintiff testified she had only used the interior Wiz staircase once previously for training, but used the common stairway on other occasions to access the bathroom when she got the key from the Dentist's office on the lower level.

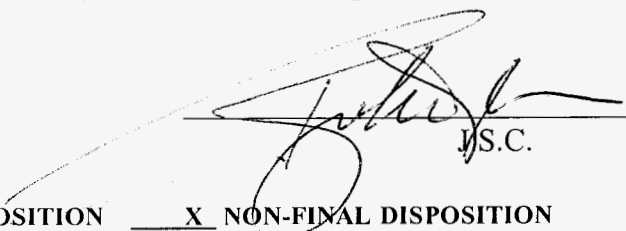
Defendant further argues that plaintiff's deposition testimony is fatal to this action. However, it is determined that plaintiff's deposition testimony is not fatal to plaintiff's complaint (*Hennington v Ellington*, 22 AD3d 721, 804 NYS2d 395 [2nd Dept 2005]; *Rodriguez v Cafaro*, 17 AD3d 658, 794 NYS2d 113 [2nd Dept 2005]; *Tejada v Jonas*, 17 AD3d 448, 792 NYS2d 605 [2nd Dept 2005]; *Curran v Esposito*, 308 AD2d 428, 764 NYS2d 209 [2nd Dept 2003]), as based upon the testimony submitted, it is determined that the trier of fact would not be required to base a finding of proximate cause upon pure speculation.

Based upon the foregoing, defendant has failed to demonstrate prima facie that there are no factual issues to entitle them to an order granting summary judgment.

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Accordingly, defendants' motion (001) for an order granting summary judgment dismissing the complaint is denied.

Dated: MAY 31 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION