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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

De La Cruz, Darlisha, et al.

- v -

201 West 109th Street Associates, LLC et al

INDEX NO. 104613/05

MOTION DATE 8/8/07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
AUG 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant 201 West 109th Street Associates, LLC for an order, pursuant to CPLR 3212 granting summary judgment in its favor as against plaintiffs Darlisha De La Cruz, an infant by her mother and natural guardian, Milvia Margarita Gonzalez and Milvia Margarita Gonzalez, individually, is denied. It is further

ORDERED that the motion of defendant 201 West 109th Street Associates, LLC for an order, pursuant to CPLR 3212, granting summary judgment in its favor as against co-defendant BMB Corporation, dismissing all cross-claims of co-defendant BMB Corporation is denied. It is further

ORDERED that the motion of defendant 201 West 109th Street Associates, LLC for an order pursuant to CPLR 3212 granting summary judgment on the issue of contractual as against co-defendant BMB, is denied. It is further

ORDERED that counsel for defendant 201 West 109th Street Associates, LLC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 8/15/07

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

DARLISHA DE LA CRUZ, an infant by her mother and natural guardian, MILVIA MARGARITA GONZALEZ and MILVIA MARGARITA GONZALEZ, individually,

Index No. 104613/05

Plaintiffs,

DECISION/ORDER

-against-

201 WEST 109TH STREET ASSOCIATES, LLC and BMB CORPORATION,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant 201 West 109th Street Associates, LLC ("201") moves for an order, pursuant to CPLR 3212 granting summary judgment in its favor as against plaintiffs Darlisha De La Cruz, an infant by her mother and natural guardian, Milvia Margarita Gonzalez ("plaintiff") and Milvia Margarita Gonzalez, individually, as well as to all cross-claims of co-defendant BMB Corporation ("BMB"); or in the alternative, granting summary judgment on 201's contractual indemnification claim as against co-defendant BMB.

201 argues that summary judgment should be granted in its favor on the ground that it had no notice of the alleged condition and it was not in control of the premises when the accident occurred. Alternatively, summary judgment should be granted in favor of 201 as against BMB because the lease between these parties containing the indemnification language in favor of 201, as against co-defendant BMB, was in full force and effect on the accident date.

The pleadings allege that on December 23, 2004, while on a public sidewalk in front of 992 Amsterdam Avenue, New York, New York (the "subject premises") plaintiff was struck by

a "piece of wood from the defendants' premises." Plaintiff argues that a wooden board came off the facade from above a store in the subject premises. It is alleged that an exterior panel became dislodged from the second floor exterior paneling from the surface of the building, which separates the ground floor bar from the residential apartments above, and injured plaintiff. It is also alleged, and it is undisputed that at the time of the accident, defendant 201 owned the subject premises, and that BMB was the tenant of the bar that leased a portion of the subject premises (the "storefront"), pursuant to a lease dated September 29, 2004 (the "Lease").

On the issue of the timeliness of the instant motion, 201 argues that the motion is timely in that it was made within sixty days of the last scheduled deposition, April 30, 1007. On January 30, 2007, this court extended the time for filing summary judgment motions until sixty days after depositions. In that same order, the follow up deposition of the infant plaintiff on the limited issue of *res ipsa loquitor* was to take place by April 30, 2007. On April 29, 2007, 201 learned that BMB was waiving the follow up deposition of the plaintiff; 201 then too waived the further deposition of the infant plaintiff. The instant motion was then made within sixty days thereafter. Plaintiffs argue that 201's motion is untimely as it was filed more than 60 days from the last deposition. The last non-party deposition was held on February 28, 2007 and both defendants waived the further deposition of plaintiff. Therefore, 201's motion is beyond the sixty-day limit. Plaintiffs further argue that 201's reason for its late submission is not "good cause" for failing to move within sixty days of the last deposition. BMB likewise argues that 201's motion is untimely because the sixty day time period began to run on February 28, 2007 when the last deposition was taken. As such, the time period expired on or about April 29, 2007, and the instant motion is untimely. This court disagrees.

First, 201's motion is timely as it was made within sixty days of the last scheduled, although not held, deposition. Second, 201 has established a good cause for failing to file earlier. (*see Brill v City of New York,* 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431; *Herrera v Felice Realty Corp.,* 22 A.D.3d 723, 804 N.Y.S.2d 397; *Certified Elec. Contr. Corp. v City of New York [Dept. of Transp.],* 23 A.D.3d 596, 804 N.Y.S.2d 794; *Gonzalez v United Parcel Serv.,* 249 A.D.2d 210, 671 N.Y.S.2d 753; CPLR 3212[a]) The litigation strategy of each defendants, deciding not to take the further deposition of plaintiff, did not materialize until April 30, 2007. That then was the triggering date for the sixty-day clock to move for summary judgment.

Plaintiff's Deposition

Just prior to the accident plaintiff did not notice anything on the sidewalk. There was no construction that was going on at the building where the accident occurred. There was no debris of any kind on the ground. There was no one doing any work on the outside or inside of the building. (Pl.s' dep. pp. 18-19) Plaintiff took this route, pass the subject premises, almost every day. (Pl.'s dep. p. 19) Plaintiff never saw any pieces of wood outside of the building prior to the date of the accident. (Pl.'s dep. p. 21) As plaintiff approached the subject premises, a strong wind came and it took this piece of plywood off and it hit her. (Pl.'s dep. p. 46). Plaintiff saw the piece of plywood actually come off of the building and in a few seconds, it hit her. (Pl.'s dep. p. 49) As plaintiff approached the subject premises, the piece of plywood was still attached to the building. (Pl.'s dep. p. 79) Plaintiff saw the piece of plywood come off of the building, fly through the air and hit her. (Pl.'s dep. p. 84)

Deposition Testimony of Milvia Margarita Gonzalez

Ms. Gonzalez was not present at plaintiff's accident. (Gonzalez dep. p. 13) Plaintiff told Ms. Gonzalez that when the accident happened, she was going to the pharmacy. She was running an errand for Ms. Gonzalez' sister. She was walking along. When she was coming back from the pharmacy, she crossed the street, and she was walking. There was a strong wind and she felt like somebody had hit her with a punch in the face. But she kept on walking. (Gonzalez dep. p. 22) She has no knowledge of any eyewitnesses. (Gonzalez dep. p. 23) Ms. Gonzalez never visited the scene where the accident occurred. (Gonzalez dep. p. 32) Ms. Gonzalez almost always passed by the location of the accident, prior to her daughter's accident. She had not seen anybody doing any construction work at the location of plaintiff's accident. (Gonzalez dep. p. 35)

Deposition Testimony of Saul DeLaCruz

He first became aware of plaintiff's accident when he was walking towards his aunt's building and he saw his aunt outside the building and she informed him of the accident. (Saul DeLaCruz dep. p. 9) When he got to Patricia's Salon, he saw through the window, plaintiff sitting down in a chair. (Saul DeLaCruz dep. p. 13) He asked the officers on the scene what happened and they told him plaintiff had been hit with a piece of wood. He asked if he could take a picture of the piece of wood. The officers took him into the storefront bar located at 992 Amsterdam Avenue. The bar was closed. The two pieces of wood were in there. (Saul DeLaCruz dep. pp. 16-17)

When he went inside the storefront bar, he saw workers inside doing construction. (Saul DeLaCruz dep. p. 18) For two weeks prior to the date of plaintiff's accident, he had taken note

of new construction going on at 992 Amsterdam Avenue. He had seen workers coming in and out. (Saul DeLaCruz dep. p. 19) The piece of wood that he saw was missing from the top floor of the business. (Saul DeLaCruz dep. p. 22) The wood was from the second floor of the building. (Saul DeLaCruz dep. p. 23) There were about five workers inside the storefront and he spoke with one of them. The worker told him that he took the piece of wood that hit plaintiff inside. (Saul DeLaCruz dep. pp. 27-28) He does not know what happened to the piece of wood, and he did not return to the accident scene. Prior to the accident, he would occasionally pass the accident site. (Saul DeLaCruz dep. p. 30) And, subsequent to the accident, he noted that construction continued at the bar. About two weeks after he sister's accident, he noticed that the wood was re installed on the building. (Saul DeLaCruz dep. p. 31)

Patricia from the salon originally told Saul DeLaCruz that she saw the accident and would be willing to speak with plaintiffs' attorney. Thereafter, she said she didn't want to have any trouble with the landlord, and would not say anything. (Saul DeLaCruz dep. pp. 42-44)

Deposition of Aryeh Adler

Aryeh Adler ("Adler") has been a member of 201 since its inception. (Adler dep. p. 5) The subject premises have been owned by Adler's in-law family for more than 32 years. (Adler dep. p. 6) Both he and his father-in-law Michael Rosenblatt ("Rosenblatt") interface with the tenants. (Adler dep. p. 10) Rosenblatt goes to the subject premises almost every day. Rosenblatt deals more with the repairs that need to be done at the subject premises, and Rosenblatt tells the super what to do. Adler does, however speak with the tenants, including the commercial tenant BMB. (Adler dep. pp. 11-12)

BMB requested and did work at the storefront prior to the date of plaintiff's accident.

BMB did regular build out work. They were going to renovate the inside, freshen up the place. Adler had no particular understanding that BMB was going to do anything on the exterior other than what anybody else might do when renovating the store, which might be putting up a sign. (Adler dep. p. 26) 201 Adler was not micro managing the work done by BMB. They had permission to do work in the interior or exterior as long as it was legal and BMB had permits. (Adler dep. p. 28) Adler has no knowledge of any work of any type, at any time, performed by BMB to the exterior of the building, prior to the date of plaintiff's accident. (Adler dep. p. 41) Other than a ledger, Adler does not maintain maintenance and repair records of the subject premises. (Adler dep. p. 52) BMB took possession of the storefront on October 1, 2004. (Adler dep. p. 54) Adler has no personal knowledge as to whether or not any part of the exterior of the subject premises had ever been removed or was caused to separate from the exterior of the subject premises. (Adler dep. p. 92)

Deposition Testimony of Michael Rosenblatt

For the past 49 years, Rosenblatt and his family have owned the subject premises. (Rosenblatt dep. p. 6) Rosenblatt says he had nothing to do with the commercial tenants. (Rosenblatt dep. p. 10) He keeps no records. (Rosenblatt dep. p. 27)

Deposition Testimony of Chander Malik

He is a principal of BMB. (Malik dep. p. 6) BMB obtained physical possession of the storefront in September 2004. He was not required to do any repairs in the Lease. (Malik dep. p. 16) Prior to opening as a bar, BMB performed painting work on the outside of the building (Malik dep. p. 27) The first time any work of any type was done on the exterior of the building was the end of January 2005. (Malik dep. p. 27) The first time work was done on the interior of

the storefront was sometime around January, 2005 (Malik dep. p. 28) Malik is uncertain as to when work was done (Malik dep. p. 29) No work was done by BMB to the exterior of the building that required the landlord's consent. (Malik dep. p. 32) He does not recall if the landlord ever gave consent for any work done by BMB in connection with the storefront (Malik dep. pp. 32-33) BMB did have workers at the storefront in December, 2004 (Malik dep. pp. 48-49) And, it is possible that these workers were doing work the week of plaintiff's accident. (Malik dep. p. 50) There were boards covering the windows prior to the bar's opening in 2005, but Malik does not recall when they were removed, or whether he was responsible for putting the wooden boards up. (Malik dep. pp. 50-53) Malik does not recall if his worker, Mr. Pereria, ever had a local worker, Mr. Pedro, do work on the exterior of the building. (Malik dep. pp. 72-73)

201's Contentions

The deposition testimony of the plaintiff, her two family members and all of the defendants establish that no one from moving defendant 201 had any prior actual notice of any alleged defective condition of the wood board on the facade of the co-defendant BMB's storefront. Also, there was no constructive notice of any defect that existed for a sufficient period of time to give warning to the defendant so that its employees could remedy the condition before the incident occurred.

Plaintiff had previously walked past the area almost every day, including two times on the day of the accident. She never testified about a loose board and never complained about the premises. Similarly, plaintiff's mother and brother provided no testimony to even suggest that the defendants had notice of the board. Adler of 201 testified that he would have been the one to receive any violations issued and he did not receive any such violations concerning the exterior

of the subject premises. Further, nothing in BMB's testimony alleges that 201 had notice of the alleged condition. Finally, plaintiff never provided the names of any notice witnesses.

Further, 201 did not have control of the demised premises on the date of the accident. As Adler's testimony establishes, 201 and BMB entered into the Lease for the storefront in September 2004 with an effective date of October 1, 2004. The accident date was December 23, 2004. It is uncontested that the board that fell and struck plaintiff came from the facade of BMB's storefront. Also Malik admitted in his deposition testimony that it was BMB's contractors who were performing work at the premises on the accident date, not anyone from moving defendant 201. It is clear that defendant 201 was not in possession of the subject storefront when the plaintiff's accident occurred.

Therefore, the plaintiff's theory of *res ipsa loquitor* cannot apply to this moving defendant as the necessary element of exclusive control over the instrumentality that caused the accident is absent as to defendant 201.

As to contractual indemnification, the Lease paragraph labeled "Second" contains indemnification language running in favor of defendant 201 as follows:

> "Tenant [BMB] will....forever indemnify and save harmless the Landlord [201]for and against any and all liability, penalties, damages expenses, any and all acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto...."

At the time of the incident, BMB had a contractor on the premises for the purpose of performing renovation. It was BMB's own contractor who advised Malik that the accident involved wood falling from BMB's storefront. That same contractor for BMB subsequently

replaced the wood on the storefront.

Plaintiffs' Contentions

201 had notice of the condition, namely the wooden board that came off from the wood paneled facade, above the store on the exterior of its building.

With respect to the issue of notice, issues of fact exist based on the testimony of Adler, a principal of 201, responsible for dealing with the commercial tenants, including co-defendant BMB. Adler does not recall who put the board on the facade, and did not recall whether the wooden panels were in place either at the time co-defendant BMB entered into possession of the storefront or prior to the plaintiff's accident. Further, he did not recall whether any work was ever done on the outside of the premises prior to the accident. He did not inspect the exterior of the premises prior to the signing of the Lease, and did not maintain any records regarding repairs or maintenance. Nor has 201 come forth with admissible evidence demonstrating that 201 continuously inspected the building prior to the time of the plaintiff's accident.

And, contrary to 201's contention, it is inconsequential whether the plaintiffs' failure to notice the hazard prior to the plaintiff's being struck established 201's lack of notice.

In any event, issues of fact exist as to whether 201 had notice.

And, from a reading of NYC Administrative Code 27-127 and 27-128, it is clear that an affirmative duty to maintain the exterior of the building, is imposed upon 201 as well as liability for any accident proximately caused due to the failure of maintenance/repair. The Lease granted 201 the right to re enter the premises. And, when a landlord retains the right to re enter, liability may be imposed.

And, plaintiffs' theory of *res ipsa loquitor* remains alive because the doctrine may apply

to multiple defendants where, as here, it cannot be shown that only one had exclusive control or access to the offending instrumentality.

BMB's Contentions

BMB opposes that portion of 201's motion that seeks contractual indemnification as against BMB. The facade, located between the first and second floors, is not part of the leased premises. It is owned by the landlord, who is responsible for its operation, repair, and maintenance, just as the landlord is solely responsible for all other unleased parts and areas of the building, e.g., the brick walls, the lobby, the roof. As such, the indemnification clause does not cover the facade. At a minimum, it should be an issue of fact for a jury to decide as to whether the plywood facade is part of the leased premises.

And, even if the facade is part of the leased premises, the landlord was responsible for maintaining the premises.

In order to be entitled to the contractual indemnification it seeks, 201 must establish "liability....arising from injury....to person....occasioned wholly or in part by ...acts...or omissions of the Tenant...growing out of the occupation of the demised premises...." 201 has failed to address any aspect of BMB's purported negligence involving the repair and maintenance of the second floor plywood facade. Further, even assuming that the facade is part of the leased premises, the facade is a latent defect. There is no proof that anyone had notice that this piece of plywood might fly off the building on a windy day.

Analysis

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist 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]; *Guttierez 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]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*,

67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

An out-of-possession landlord is not liable for injuries sustained on the premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (*see Ingargiola v Waheguru Mgt.*, 5 A.D.3d 732, 774 N.Y.S.2d 557; *Dominguez v Food City Mkts.*, 303 A.D.2d 618, 756 N.Y.S.2d 637). Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries

caused by a dangerous condition, but only where liability is based on a significant structural or design defect that violates a specific statutory provision (*see Ingargiola . Waheguru Mgt., supra; Dominguez v Food City Mkts., supra*).

In the moving papers in support of its motion, 120 has failed to argue that it was an out-of-possession landlord that lacked control over the area in question (*see Phillips v Sinba Assoc.,* 296 A.D.2d 389, 745 N.Y.S.2d 447; *Dalzell v McDonald's Corp.,* 220 A.D.2d 638, 632 N.Y.S.2d 635). 201's argument challenging plaintiff's contention that 201 is still responsible for maintaining the storefront because the Lease contains a limited right to re-enter the premises, is a proper challenge to the contentions raised by plaintiff, but, 201's argument, recitation and application of case law that it is an out-of-possession landlord ,raised for the first time in reply, cannot be considered to support summary judgment. Because this argument in support of summary judgment was raised for the first time in defendants' reply brief, it is not properly before the Court as a basis for granting summary judgment(*see Markovitz v Markovitz,* 29 A.D.3d 460 [2006]).

And 201 has failed to make a *prima facie* showing that it neither created the alleged dangerous and defective condition, nor had constructive notice of the condition and a reasonably sufficient time to remedy the same (*see Edwards v DeMatteis Corp.,* 306 A.D.2d 309, 760 N.Y.S.2d 658; *Kyung Sook Park . Caesar Chemists,* 245 A.D.2d 425, 666 N.Y.S.2d 679). Defendant 201 owner of the premises, has failed to establish that it lacked constructive notice of the allegedly defective board affixed to the exterior wall of the subject premises as a matter of law. *Gordon v American Museum of Natural Hist.,* 67 N.Y.2d 836, 837 [1986]; *Chapman v Silber,* 97 N.Y.2d 9, 19 [2001]).

As such, defendant 201's motion for summary judgment dismissing the complaint and any and all cross claims, is denied.

As noted by plaintiff in opposition to this motion, Aryeh Adler, a principal of 201, does not recall who put the board on the facade, and did not recall whether the wooden panels were in place either at the time co-defendant BMB entered into possession of the storefront or prior to the plaintiff's accident. Further, he did not recall whether any work was ever done on the outside of the premises prior to the accident. He did not inspect the exterior of the premises prior to the signing of the Lease, and did not maintain any records regarding repairs or maintenance. Nor has 201 come forth with admissible evidence demonstrating that 201 continuously inspected the building prior to the time of the plaintiff's accident.

Contractual Indemnification

Where the lease provides for the lessee to indemnify the lessor for injury to third parties due to some act or omission on the part of the lessee, such a provision has been held to not be violative of public policy. *Hogeland v Sibley, Linsay & Curr & Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 502 (1977).

BMB argues that the facade plywood that struck the infant plaintiff was not part of the subject premises being leased by BMB. Since 201 is asking for indemnification based on the "acts...or omissions of the Tenant...growing out of the occupation of the demised premises,..." the motion should be denied. The facade is not part of the leased premises.

However, this court finds that an issue of act exists as to whether the facade is a part of the leased premises. And, an issue of fact exists as to who - 201 or BMB - is responsible for placing and/or maintaining the area where the plywood was placed. As such, summary judgment on the issue of contractual indemnification is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant 201 West 109th Street Associates, LLC for an order, pursuant to CPLR 3212 granting summary judgment in its favor as against plaintiffs Darlisha De La Cruz, an infant by her mother and natural guardian, Milvia Margarita Gonzalez and Milvia Margarita Gonzalez, individually, is denied. It is further

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ORDERED that counsel for defendant 201 West 109th Street Associates, LLC shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: August 15, 2007

Carol Robinson Edmead, J.S.C.