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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 110207/2004
ONWUACHI, CHRIS K.
VS
215 EAST 68TH STREET
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided as stated

FILED
OCT 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/26/07

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CHRIS ONWUACHI,

Plaintiff,

Index No. 110207/04

-against-

215 EAST 68TH STREET, L.P., its General Partner, 215 EAST 68TH STREET LLC, RUDIN MANAGEMENT CO., INC., AMERICAN PROJECT & REPAIR, INC., and LEE NOWAK ELECTRIC CORP.,

Defendants.

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GOODMAN, EMILY JANE, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants 215 East 68th Street, L.P., its General Partner, 215 East 68th Street LLC, and Rudin Management Co., Inc. (Rudin)(collectively, Landlord Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and any and all cross claims against them.

In motion sequence number 002, defendant American Project & Repair, Inc. (American Project) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Defendant Lee Nowak Electric Corp. (Nowak) cross-moves for the same relief.

FACTS

This action arises out of an accident that occurred on November 18, 2003, at the Hold Everything store located at 1309 Second Avenue, New York, New York. Plaintiff Chris Onwuachi (Onwuachi), who was employed as a stock associate by the store, was descending a flight of stairs to the basement, while carrying a box. He shifted the position of the box, and reached for the staircase's handrail. The handrail came off the wall at the bottom bracket, pulling Onwuachi down with it as it fell. Onwuachi sustained injuries, most extensively to his back, which have prevented him from engaging in employment since that time, and have required him to undergo surgery.

DISCUSSION

Landlord Defendants' Responsibility for the Handrail

Landlord Defendants move to dismiss the action as against them because they were not responsible for maintaining or repairing the interior of the premises. Landlord Defendants' lease with the tenant, Williams-Sonoma, Inc., provides that the tenant must make "all repairs and replacements, structural and otherwise, as and when needed to preserve the demised premises in good working order and condition ... ." Notice of Motion, ex. P (the Lease), article 5, section 5.01. Landlord Defendants contend that this language shows that the tenant was responsible for the alleged defect at issue, not Landlord Defendants, and

that Landlord Defendants would not even be notified of a minor repair of that nature. Landlord Defendants point out that when repairs were done to the railing, those repairs were ordered by, the tenant, not by Landlord Defendants.

Plaintiff maintains that Landlord Defendants are liable for the accident because they retained a right to re-enter, and because the defective condition was a structural defect. He also points out that the failure to have a proper bannister is a violation of the Administrative Code.

"An out-of-possession landlord who reserves a right of entry in the lease in order to inspect the premises and make necessary repairs is deemed to have constructive notice of any existing statutory violations (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]; *Velazquez v Tyler Graphics*, 214 AD2d 489 [1995])." *Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 (1st Dept 2006). Here, the landlord reserved such a right of entry. The Lease, article 13, section 13.01. Further, a defective handrail is a structural defect and a violation of the Administrative Code. *Cortes v 1515 Williamsbridge Assoc., LLC*, 295 AD2d 188, 189 (1st Dept 2002); Administrative Code of City of NY § 27-375 (f). Consequently, Landlord Defendants cannot avoid liability based upon the tenant's obligations under the lease.

Notice of the Defect

Landlord Defendants contend that, even if there is a

question regarding their responsibility for the handrail, they cannot be held responsible because they did not have notice of the allegedly loose handrail. They maintain that in order to be held liable, plaintiff must prove that they either created the condition that caused the accident, or had actual or constructive notice of the condition. There is no evidence of actual notice. Landlord Defendants aver that they used the stairway only on rare occasions, and the condition did not exist the last time that one of their employees used the staircase. Landlord Defendants further assert that there is no evidence that the condition existed for a sufficient length of time to warrant a finding of constructive notice, because the handrail could have become loose only moments before the accident. There is no evidence that there were any prior complaints about the handrail, and plaintiff was unaware of any problems despite his regular use of the stairway.

Onwuachi contends that Landlord Defendants had actual notice of the condition because, in December 2002, another employee at Holds Everything was injured on the same stairwell, and the manager of the store spoke to someone at Rudin about when the stairway would be repaired. Further, contrary to Landlord Defendants' assertion that there was no problem with the handrail when their employees were in the store, the testimony shows that when Rudin's employee did come into the premises, he did not know

whether the handrail was intact in that he made no observations regarding the handrail. Therefore, there is no basis for Landlord Defendants to assert that the handrail was properly attached when their employee was using the stairway at issue. Additionally, plaintiff testified that he observed building employees on the staircase between five and 10 times between December 2002 and the date of the accident, including a building employee who was watching repairs being made to the treads and handrail of the staircase. Onwuachi EBT, at 72, 73, 99, 100-102, 106.

Gina Colon, a former supervisor at the Hold Everything store, submitted an affidavit in which she states that she was directed to call Rudin when a repair to the store was needed, and, in fact, made one such call. She further states that before Michael Henriquez fell down the staircase in December 2002, the handrail was loose for several months. As a result of his accident, the handrail became completely detached from the wall at the bottom bracket. The handrail was subsequently taped to the wall for a short period of time. She asserts that it was never repaired between the time of Henriquez's accident and plaintiff's accident.

The photograph of the handrail that is included with the motion papers depicts a bracket that is detached from the wall. It does not show any wood attached either to the wall or to the

handrail. Onwuachi affid.

The evidence presents two conflicting scenarios. Defendants present evidence that the handrail was repaired in December 2002, and that a piece of wood was affixed to the wall at that time, and the handrail was attached to the wood. Plaintiff presents evidence that the handrail was never repaired, and that the handrail was detached from the wall for nearly a year prior to plaintiff's accident. Plaintiff further presents photographic evidence that there was no wood connected to the handrail or the wall, as defendants claim. Thus, there is a question of fact as to whether the handrail was ever repaired after the acknowledged need for it in December 2002. If the repair was never accomplished, there is no question that the time that elapsed was sufficient for Landlord Defendants to have had constructive notice of the defect. Consequently, Landlord Defendants have not demonstrated entitlement to summary judgment based upon lack of notice.

American Project's Motion

American Project contends that plaintiff's complaint against it should be dismissed because it did not create the condition or have actual or constructive notice of it, and because it did not negligently hire Nowak, nor direct Nowak on how to make repairs. American Project does not perform repairs, but subcontracts the work to others; in this case, to Nowak. American Project further

maintains that it was advised by Nowak that the repairs were done, and that it never received any complaint from William-Sonoma or Hold Everything or anyone else pertaining to the handrail. American Project states that it has never had any complaints about Nowak's work, and Nowak had a track record of doing repairs and was experienced.

In the event that summary judgment is not granted dismissing the complaint, American Project seeks summary judgment for common-law indemnification against Nowak.

Onwuachi contends that American Project and Nowak both had actual notice of the defective condition, and failed to properly perform the repairs. He points to a February 2003 facsimile transmittal sheet from American Project to Nowak (the February 2003 document) advising "quote and repair under warranty" with respect to the stairway at Hold Everything. There is no evidence that any work was done on the staircase after that notice. The February 2003 document also raises a question as to whether the repair that was allegedly done in December 2002 was done properly. Plaintiff submits an affidavit by an engineer who opines that even if the repair was done in the manner Nowak claims that it was done, it was improper, because there should have been a piece of wood going the entire length of the bannister, not just an 8" x 12" piece underneath the bottom bracket. Further, the engineer opines that the method of

attaching the wood to the concrete wall was inappropriate.

Nowak objects to the court considering the February 2003 document as lacking a proper foundation in order to be admissible into evidence. However, it is well settled that a party may oppose a motion for summary judgment with evidence that may not comply with all of the rules of evidence, so long as the evidence is capable of being authenticated (*Borchardt v New York Life Ins. Co.*, 102 AD2d 465 [1st Dept], *affd* 63 NY2d 1000 [1984]), or where such evidence does not form the sole basis for the court's determination. *Matter of New York City Asbestos Litigation*, 21 AD3d 320 (1st Dept 2005). Further, since the document is on the letterhead of American Project, and is addressed to Nowak, it was likely obtained during discovery from one of the defendants. Under such circumstances, it should not be disregarded on a motion for summary judgment.

Based both on the February 2003 document, and the affidavit of Gina Colon stating that repairs were never made to the bannister following the incident in December 2002, there is a question of fact as to whether American Project and Nowak performed the requested repairs, and if so, whether the repairs were made properly. Therefore, summary judgment is not appropriate.

While defendants object to the affidavit of plaintiff's engineer, that affidavit is not necessary for the court's

conclusion. The court notes, however, that late notice of an expert does not necessarily preclude that witness's ability to present evidence. CPLR 3101 (d) provides, in relevant part:

> Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

This section makes it clear that late notice can be addressed in less draconian ways than precluding expert testimony completely. In reaching their conclusion that his affidavit should be excluded, defendants rely predominately on cases from the Second Department. However, even that Court has permitted consideration of an affidavit from an expert that was not properly disclosed when no prejudice was demonstrated. *Simpson v Tenore and Guglielmo*, 287 AD2d 613 (2d Dept 2001). The First Department has held, on a number of occasions, that late disclosure of an expert would not preclude presenting the expert's testimony at trial. *See e.g. Alston v New York City Tr. Auth.*, 23 AD3d 239 (1st Dept 2005); *Gilbert v Luvin*, 286 AD2d 600 (1st Dept 2001); *Ryan v City*

of New York, 269 AD2d 170 (1st Dept 2000). There is no reason that the same considerations should not apply to accepting an affidavit on a motion for summary judgment. Thus, unless defendants can demonstrate that they have suffered prejudice, the expert's testimony will not be precluded.

American Project's request for summary judgment as against Nowak is also denied. It is unclear from the evidence before the court whether American Project actually notified Nowak of the alleged request for repairs in February 2003. Furthermore, there is an issue of fact as to whether American Project was notified of the request for repairs in February 2003 and subsequently failed to verify that the repairs were, in fact, done.

Nowak's Cross Motion for Summary Judgment

Nowak cross-moves for summary judgment dismissing all claims and cross claims against it. Nowak maintains that it completed repairs to the premises on December 10, 2002, and that it never received any complaints about the condition of the handrail subsequently. It also points out that a store representative signed off that the repairs were completed.

As discussed above, there is a question of fact as to whether the repairs were done to the handrail, if so, whether they were done properly, and whether there was a subsequent complaint that resulted in American Project faxing the February

2003 document to Nowak with respect to a problem with the handrail. Both American Project and Nowak deny any request for work to be done subsequent to December 2002; therefore, it is clear that if Hold Everything made a subsequent complaint, neither American Project nor Nowak attended to it. Under these circumstances, summary judgment is not warranted.

Accordingly, it is hereby

ORDERED that the motion (seq 001) of 215 East 68th Street L.P., its General Partner, 215 East 68th Street, LLC and Rudin Management Co., Inc. for summary judgment is denied; and it is further

ORDERED that the motion (seq 002) of American Project & Repair, Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion of Lee Nowak Electric Corp. for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: September 26, 2007

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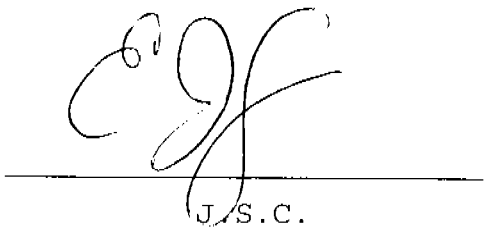

J.S.C.