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

PRESENT: RAKOWER EILEEN A. RAKOWER J.S.C. PART 5
Justice

Index Number : 106223/2004
AGUILERA, KAYLA
VS.
SPYRIDAKIS, IAKOVOS
SEQUENCE NUMBER : # 002
SUMMARY JUDGMENT

INDEX NO. 106223-04
MOTION DATE
MOTION SEQ. NO. #002
MOTION CAL. NO.

e read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/2/07

EILEEN A. RAKOWER J.S.C.

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: PART 5

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KAYLA AGUILERA, an infant, by her legal guardian, SILENIA LORA, on behalf of the Estate of MARIA MARTE, deceased, and SILENIA LORA, Individually,

Plaintiffs,

- against -

IAKOVOS SPYRIDAKIS and THE CITY OF NEW YORK,

Defendants.

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Index No. 106223/04

DECISION /ORDER

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries and wrongful death arising from a fire at their apartment building located at 15 Washington Terrace New York, New York on January 25, 2003. The owner and landlord of the building was Iakovos Spyridakis ("landlord"). Defendant the City of New York ("City") moves for summary judgment pursuant to CPLR 3212. Plaintiffs and landlord oppose the motion.

Infant plaintiff, who was then six years old, her mother Maria Marte, now deceased, and plaintiff Silenia Lora ("Lora") were in Apartment 6E on the third floor of the subject building when a fire broke out. Infant plaintiff's mother was found dead in the backyard of the building in a pool of blood. It was later determined that she died of massive internal injuries as a result of a fall from the third floor. Infant plaintiff's cousin, Lora, sustained injuries when she fell from the third to the second floor while trying to escape the fire. Lora has since become infant plaintiff's legal guardian.

Plaintiffs claim that the apartment they were living in did not have any smoke alarms, and the building had no sprinkler system or handrails. Additionally, many of the windows on the third floor were boarded, covered or nailed shut and the landlord

had locked the door leading to the roof days before the fire broke out. Plaintiffs argue that these violations of the building code, fire code, and administrative code were a proximate cause of their damages. Further, plaintiffs claim that the City's failure to properly inspect the premises contributed to their damages.

City submits the following: (1) a notice of claim; (2) the pleadings; (3) a Decision and Order by the Honorable Justice Michael Stallman, transferring venue from Kings to New York County; and (4) part of the deposition transcript of the landlord. Plaintiffs submit: (1) their verified bill of particulars; (2) an "A-119" card; (3) the deposition transcript of Michael Ciampo, Lieutenant for the New York Fire Department; (4) the full deposition transcript of the landlord; (4) a Department of Buildings ("DOB") Complaint Disposition Form for 5 Washington Terrace; (5) a DOB Complaint Disposition Form for 15 Washington Terrace; (6) Four color photocopies of photographs of the interior and exterior of 15 Washington Terrace; (7) the deposition transcript of Lora; and (8) an affidavit by Lora. Landlord simply provides the affirmation of counsel, and adopts papers submitted in conjunction with another matter. The court, however, has no other motion before it, and has been unable to unearth a motion submitted under the "other" index numbers provided.

City, in support of its motion, argues that it is not liable for negligent inspection because it has governmental immunity and no special relationship was formed between it and plaintiffs. Plaintiffs, in opposition, argue that the subject building was deemed a "multiple dwelling" by the City which created an obligation to inspect for violations on a regular basis . Further, plaintiffs argue that a special relationship did exist between them and the City, and thus City owed them a duty of care.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

It has long been held in this state that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation. (*O'Connor v. City of New York*, 58 N.Y.2d 184[1983]) In *Sanchez v. Village of Liberty*, (42 N.Y.2d 876[1977]) survivors of a massive fire which occurred in a multiple dwelling building, sued the village for damages and the court found that because the statutes and ordinances involved created no special relationship, no liability may be imposed. The court reaffirmed its position in (*Worth Distributors, Inc. v. Latham*, 59 N.Y.2d 231[1983]), when it found that the City should not have been held liable for damages sustained for failure to enforce building safety codes in a multiple dwelling building.

A special relationship is created when the following elements are met: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. (*Cuffy v. City of New York*, 69 N.Y.2d 255[1987]).

Initially, in Ms. Lora's deposition, she states that neither she nor Ms. Marte made complaints to the landlord or to City agencies about the conditions existing in the building at 15 Washington Terrace.

Q: Did you ever complain to the landlord that there was no fire exit in the building?
A: No.
Q: To your knowledge, did Maria Marte ever complain to the landlord that there are no fire exits?
A: Not that I know.
. . .
Q: Did you ever call the fire department and complain that there was no fire escape on your building?
A: No.
Q: Did your Aunt Maria Marte ever complain to the fire department to complain that there was no fire escape to your building?
A: I don't know.

. . .

Q: Did you ever call any City agency to complain that there was no fire escape on your building?

A: No.

Q: To your knowledge, did your aunt call any City agency regarding the fact that there was no fire escape to your building?

A: I don't know. (Lora deposition, page 72, line 20 through page 74, line 7)

Plaintiffs, in opposition to the instant motion, attempt to supplement their papers with the October 9, 2007 affidavit of Ms. Lora, which now states: "during the time that I lived at 15 Washington Terrace, my aunt Maria Marte had complained to the City of New York about the conditions of the building. . . . I personally do not remember any person from the City of New York coming to inspect the interior or the exterior conditions of the premises." Further, Lora states in her affidavit:

> Maria Marte had complained to Iakovos Spyridakis, our landlord, about the dangerous conditions in the building and that the windows and egress were shut. He responded that they did not need to be opened. Maria Marte also had complained to the New York Buildings Department or the New York Fire Department about the conditions of the building.

Plaintiffs also argue that Maria Marte and City had a special relationship which was created when Ms. Marte resided in 5 Washington Terrace. Ms. Lora now asserts that:

> Marte told me the reason we had to move out of 5 Washington Terrace was because the City of New York informed her that The City had inspected the building at 5 Washington Terrace and it was falling apart, was dangerous, and had to be abandoned. Maria Marte informed me that The City was going to condemn the building, and they did shut it down. I do not know who my aunt spoke to with The City, but I do know that her contact with The City is the only reason that we moved from 5 Washington Terrace to 15 Washington Terrace.

The Lora deposition explains

A: My au [sic] lived in Five Washington Terrace with Jako. So the

house was taken away from Jako and Jako moved her to 15 Washington Terrace.

Q: So the City of New York did not help you in finding this apartment?
A: No. (Lora deposition, page 75, lines 11 through 18)

Plaintiffs cannot create an issue of fact with Ms. Lora's self serving affidavit. In opposing a motion for summary judgment, hearsay evidence regarding statements of deceased persons may be utilized as long as it is not the only evidence submitted. (*Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307[1972]). Here, the only other relevant evidence submitted by plaintiffs to demonstrate that a special relationship was created between City and plaintiffs is the fire department "A-119" card.

The "A-119" card is created by the fire department to keep track of inspections that it does at a particular location. Each building is designated A-E by the fire inspector and depending on the designation, a building is inspected annually (A); biannually (B); every three years (C); every four years (D); and every five years (E). Plaintiffs claim that the subject building was designated E and that it should have been inspected every five years. (Ciampo Deposition, Page 28 & 29, Lines 21-25 & 2-5). The card submitted by plaintiff has an "E" at the top but there is a line through it. When asked about the designation, Lt. Ciampo states that "possibly it [the subject building] has been revoked or revised as a building that needs to be inspected." (Id. at Page 111, Lines 13-23). The inspections appear to be ongoing every six months until about 1961 and then the inspections get more sporadic and farther apart.

The fact that there were various inspections done since 1957 does not serve to create a special relationship between plaintiffs and the City. City's performance of the inspections was not an action or promise done *on behalf* of plaintiffs nor was there ever any direct contact between plaintiffs and the City which plaintiffs could have reasonably relied upon. (An example of such a promise is seen in *Cuffy, supra*. There, a City police Lieutenant told plaintiff's father that he would provide individual protection but failed to do so. [*Id.* at 260]). Even if considered, Lora's report of what Maria Marte told her does not create a special relationship as she does not state that the City made an affirmative promise to inspect or otherwise make the building safe.

Wherefore it is hereby

ORDERED that defendant the City of New York's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant the City of New York, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

All other relief requested is denied.

DATED: November 2, 2007

EILEEN A. RAKOWER, J.S.C.