

**Samulik v Dunton Development Corp.**

2007 NY Slip Op 34162(U)

December 17, 2007

Supreme Court, Suffolk County

Docket Number: 0001752/2005

Judge: Robert W. Doyle

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 8-13-07 (002)  
8-27-07 (003 & 004)  
ADJ. DATE 10-12-07  
Mot. Seq. # 002 - MG  
003 - MG  
004 - XMG; CASEDISP

-----X		MURRAY AND HOPKINS
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Upon the following papers numbered 1 to 60 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 39; Notice of Cross Motion and supporting papers 40 - 51; Answering Affidavits and supporting papers 52 - 58; Replying Affidavits and supporting papers 59 - 60; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion(#002) by defendant Dorf Associates for summary judgment is granted; and it is further

**ORDERED** that the motion(#003) by defendant Dunton Development Corp. for summary judgment is granted; and it is further

**ORDERED** that the cross-motion(#004) by American Molded Products, Inc. for summary judgment is granted.

The plaintiff Marilyn Samulik, as Administrator of the Estate of George Samulik, and individually, seeks damages for personal injuries allegedly sustained by George Samulik as the result of a slip and fall accident on November 14, 2003 occurring at the premises located at 62K South 2<sup>nd</sup> Street, Deer Park, New York. Plaintiff claimed that the door opened violently causing him to be thrown to the ground. Plaintiff died during the pendency of this action and his estate was substituted as plaintiff. The premises were owned by defendant Dunton Development Corp. (“Dunton”), managed by defendant Dorf Associates (“Dorf”) and leased and exclusively occupied by defendant American Molded Products, Inc. (“American”).

Defendant Dorf has moved for summary judgment on the grounds there is no evidence establishing what caused plaintiff’s fall. In support, it offers, *inter alia*, the pleadings, the verified bill of particulars, the deposition testimony of defendant’s representative Eric Dorf, a copy of the lease, and the deposition of defendant American’s representative, Francis John Formosa.

Defendant Dunton has moved for summary judgment on the grounds there is no evidence as to what caused plaintiff’s alleged slip and fall, or that Dunton had actual or constructive knowledge of the alleged concition that caused plaintiff’s fall. In addition to the evidence offered by co-defendant Dorf, Dunton offers plaintiff Marilyn Samulik’s deposition testimony, and the deposition testimony of its representative, Jeffrey Dunton.

Defendant American has cross-moved for summary judgment on the grounds plaintiff has failed to establish that the door located at the premises was defective in any manner, that any of the defendants had actual or constructive notice of any alleged dangerous condition, or that a defect in the door was the proximate cause of plaintiff’s injuries. In support, it relies on essentially the same evidence offered by the co-defendants.

Eric Dorf testified at his deposition that Dorf is a property management company which does leasing for industrial buildings, bills and collects the rent, and handles service-type maintenance and repair-type maintenance. One of its properties is the industrial park where the subject premises, 62K South 2<sup>nd</sup> Street, is located. There are approximately 24 units divided by block walls in this industrial park. The units vary in size and each has a front door. Certain units have a rear door. Each unit is identified by a letter and unit 62K was occupied entirely by defendant American at the time of Samulik’s accident. The door that allegedly caused Samulik’s accident, is a hinge door with a spring loaded chain connecting the door to the doorjamb. Eric Dorf testified that in 2003, Dorf did not maintain any doors for the tenants of the industrial park, nor did it perform any work on the doors for either American or any other of the tenants. In his affidavit, Eric Dorf avers that the lease provides, in relevant part, that the tenant of the premises was responsible for any maintenance of the doors and that if any maintenance was to be performed by someone other than the tenant, it would be performed by Dorf, the managing agent, and not by defendant Dunton, the owner of the premises. Pursuant to an agreement between Dunton and Dorf, Dorf was wholly responsible for the maintenance of the premises, if any was required, while Dunton merely received rental revenue through Dorf, its managing agent. Dorf hired a contractor, Door-to-Door to replace all the doors in the complex a month or two before plaintiff’s accident.

Francis John Formosa testified that he is the owner of American located at 62K South 2<sup>nd</sup> Street in Lindenhurst, New York. He recalled that November 14, 2003 was a very windy day. George Samulik

was a mold maker for his company. On the day of the accident, George Samulik came to visit; he was not working. Another friend, Mel Rosen, who also died during the pendency of this action and was never deposed, was also present at the shop. Formosa did not witness the accident. He testified that Rosen was the only witness to the accident. Rosen told Formosa that plaintiff fell outside the premises because "the wind picked him up and threw him to the ground". Before his death, and about five weeks after the accident, Rosen gave a sworn statement in which he stated that George Samulik fell because he was pulled out of the building holding the door knob "when a gust of wind blew the door open and outward, sending George flying out of the office. He had held onto the door knob but he was still pulled out of the doorway." Formosa testified that he never had any difficulty with the door prior to plaintiff's accident, nor had he made any complaints to anyone about the door prior to the accident.

It is fundamental that to recover in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see, Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). To prove a prima facie case of negligence in a slip and fall action, plaintiff is required to show either that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition (*see, Goldman v Waldbaum, Inc.*, 248 AD2d 436, 669 NYS2d 669 [2d Dept 1998]). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (*see, Werner v Neary*, 264 AD2d 731, 694 NYS2d 734 [2d Dept 1999]; *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494 [1994]) unless it can be shown that defendant created or increased a hazardous condition (*see, Genen v Metro-North Commuter Railroad*, 261 AD2d 211, 690 NYS2d 213 [1999]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discover and remedy it (*see, DeGiacomo v Westchester County Healthcare*, 295 AD2d 395, 395, 743 NYS2d 548 [2d Dept 2002]).

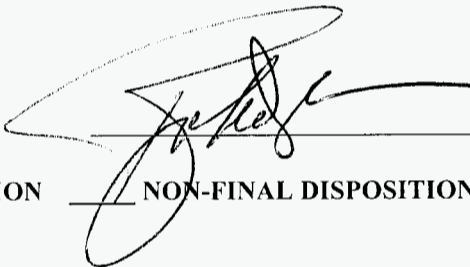
Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see, Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]; *Bardi v City of New York*, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see, Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see, Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550, 684 NYS2d 139 [1998]; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908 [1987]; *Schneider v Kings Hwy. Hosp. Ctr.*, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (*Gayle v City of New York, supra*, at 937, 680 NYS2d 900; *see, Grob v Kings Realty Assocs.*, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; *New York Tele. Co. v Harrison & Burrowes Bridge Contrs.*, 3 AD3d 606, 771 NYS2d 187 [3d Dept 2004]; *Collins v City of New York*, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see, Gayle v City of New York, supra; Bernstein v City of New York, supra; Bardi v City of New York, supra*).

The defendants have established their entitlement to judgment as a matter of law. The adduced evidence shows that plaintiffs are unable to explain how or why George Samulik was thrown to the ground, leaving it to conjecture to suggest that the accident occurred as a result of an alleged defect with the door (*see, Pluhar v Town of Southampton*, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; *Rodriguez v Cafaro*, 17 AD3d 658, 794 NYS2d 113 [2d Dept 2005]; *LaFemina v Brambell*, 2 AD3d 409, 767 NYS2d 795 [2d Dept 2003]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; *Bongiorno v Penske Auto Ctr.*, 289 AD2d 520, 735 NYS2d 617 [2d Dept 2001]). The burden, therefore, shifts to plaintiffs to raise a triable issue as to whether defendants' alleged negligence was a proximate cause of George Samulik's accident (*see, Derdiarian v Felix Contr. Corp.*, *supra*; *Hartman v Mountain Val. Brew Pub*, *supra*; *see generally, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiffs failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see, O'Connor v Lakeview Assocs., LLC*, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf., Stanojevic v Scotto Bros. Rest. Enters.*, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). Thus, as there is no evidence from which a jury could rationally conclude that George Samuliks' fall was more likely due to an alleged defective condition of the door than to a sudden loss of balance or a misstep, or an act of God, the motion for summary judgment dismissing the complaint is granted (*see, Manning v 6638 18th Ave. Realty Corp.*, *supra*; *Hennington v Ellington*, 22 AD3d 721, 804 NYS2d 395 [2d Dept 2005]; *Rygel v 8750 Bay Parkway, LLC*, 16 AD3d 572, 792 NYS2d 160 [2d Dept 2005]; *Bitterman v Grotjohann*, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]).

Accordingly the motions (#002 and # 003 ) and cross-motion (#004) for summary judgment are granted, and the complaint is dismissed.

Dated: DEC 17 2007



J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION