

**Figarola v Waverly Mews Corp.**

2008 NY Slip Op 30125(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0115924/2005

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE  
*Justice*

PART 25

Carmen Figarola

INDEX NO. 115924/05

Waverly News Corp

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

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

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS CASE IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
JAN 17 2008  
NEW YORK COUNTY CLERK'S OFFICE

JAN 14 2008

*HO*

Dated: \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

-----X  
CARMEN FIGAROLA :

Index No.: 115924/05

Plaintiff, :

-against- :

WAVERLY MEWS CORP., HOFFMAN  
MANAGEMENT CORP., CITY LIGHTS BED &  
BREAKFAST, LTD., YEDIDA NEILSEN, individually  
and d/b/a CITY LIGHTS BED AND BREAKFAST, LTD. :  
DONNA HAMILTON, STAHL MIDTOWN  
PROPERTIES, L.L.C., AMIN HIMANI, individually :  
and as a partner of STAHL MIDTOWN PROPERTIES,  
L.L.C. :

Defendants. :

-----X  
DeGRASSE, J.:

**FILED**  
JAN 17 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

In this personal injury action defendant Donna Hamilton moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as asserted against her. Defendants Waverly Mews Corp. ("WMC") and Hoffman Management Corp. ("HMC") cross-move for the same relief, and for summary judgment on their claims for contractual and common law indemnification against Hamilton.

**FACTS**

Plaintiff Carmen Figarola commenced the underlying action to recover for injuries she allegedly sustained on June 8, 2003, when she slipped and fell on the steps she was using to descend from a loft bed in a co-op apartment located at 23 Waverly Place in Manhattan. The building is

owned by WMC, a cooperative corporation, and managed by HMC. Hamilton was a shareholder-tenant of the corporation and held a proprietary lease to the subject apartment. Plaintiff, a resident of Spain who was vacationing in New York, had subleased Hamilton's apartment pursuant to an agreement that she had entered into with defendant City Lights Bed & Breakfast, Ltd., a short term rental company. Plaintiff, along with her daughter and her friend, were scheduled to stay at the apartment from June 7, 2003 to June 14, 2003. The premises was equipped with a futon bed and a loft bed. The loft bed was approximately four feet from the floor and located on top of a closet. Four metal steps were used to access the bed. Plaintiff alleges that she was injured when she was attempting to descend the steps of the loft bed. The amended complaint as supplemented by the bill of particulars alleges that the "black spiral stairway" leading up to the loft bed was in a dangerous condition because there was no handrail. It is further alleged that plaintiff was injured as a result of the dangerous condition and that defendants were negligent in creating the condition that caused plaintiff's injuries. By stipulation dated March 8, 2007, the action against Stahl Midtown Properties, L.L.C. was discontinued.

### DISCUSSION

The law is well-settled that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361 [1974]; *Benincasa v Garrubo*, 141 AD2d 636 [1988]). The court's concern in reviewing such a motion is "issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion" (*Robinson v Strong Mem. Hosp.*, 98 AD2d 976, 976 [1983], quoting *Goldstein v County of Monroe*, 77 AD2d 232, 236 [1980]). To

prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg., Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

In order for plaintiff to succeed in a prima facie case of negligence against defendants, plaintiff must establish that defendant owed a duty to plaintiff and that the breach of that duty was the proximate cause of plaintiff's injury (*see Pietrunti v Is. Diagnostic Laboratories*, 252 AD2d 576, 576 [1998]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976], *rearg denied*, 41 NY2d 901 [1977]).

Hamilton now moves to dismiss the complaint on the grounds that the lack of a handrail on the steps of the loft bed did not create a dangerous condition and that there was no duty to provide a handrail. Hamilton further asserts that plaintiff cannot identify what caused her to fall, and cannot prove that a defective condition existed at the subject premises. In support of the motion, Hamilton submits her deposition testimony and that of plaintiff. At her deposition Hamilton testified as follows: that after she purchased the subject apartment in May 1993, she hired a contractor to install a loft bed in the apartment. Hamilton submitted the alteration plans to the co-op board and managing agent who approved the plans. Hamilton further testified that a table lamp, lighted by a 40 watt bulb, was located next to the loft bed. Lastly, Hamilton stated that there had never been any incidents involving the steps or the loft bed prior to plaintiff's accident.

At her deposition plaintiff testified as follows: prior to her accident, plaintiff had been asleep and awoke around 3:00 a.m. because she needed to go to the bathroom. It was the second time that plaintiff had descended the staircase since arriving at the apartment. Plaintiff turned on the night

table light and, barefooted, started down the steps "with her right foot, then the left and then the right." When asked what portion of her right foot made contact with the third step, plaintiff answered "[t]he thing is I don't know. I am not able to be precise because I don't know." Plaintiff remembered that her right heel touched the third step "a little bit," but "there was not enough of a step there," and "[she] was not able to put [her] entire foot there." Plaintiff further testified "[b]ecause I was not able to put my foot there I lost my balance." When plaintiff lost her balance, she "tried to hold on to a handrail," but "[t]here was [nothing] there and [she] fell down to the ground." When shown a photograph of the steps and asked to point out where on the step her heel made contact, plaintiff answered, "I don't know. I was not looking at it." However, later, during her deposition, plaintiff testified that when she was at the top of the staircase, proceeding to go down, she was looking "downward" and when she touched the third step with her right foot, she was looking "[t]o the step." Plaintiff further testified that the bedside reading light "was very dim" and she "didn't see [the step] very well because there was not much light."

When asked if she had an opportunity to inspect the apartment and observe the staircase leading up to the loft bed upon her arrival at the apartment, plaintiff answered "I saw the entire apartment." Plaintiff further testified that she did not go up the steps at that particular time, because they had arrived at the apartment around 10:00 p.m. and "it was very late." When asked if she made any complaints to Hamilton about the staircase in the apartment, plaintiff answered "[n]o, I don't think so."

In support of their cross motion, WMC and HMC argue that the complaint should be dismissed as against them, because they were not in control of the portion of the premises where the accident occurred as the co-op apartment was under the sole ownership, maintenance and control of

plaintiff. Defendants further argue that they cannot be charged with creating the alleged dangerous condition because they had no role in constructing the loft bed which was built and installed by contractors retained by Hamilton. Lastly, defendants argue that at her deposition, Hamilton admitted that she had never obtained permission from the co-op board to operate her apartment as a bed and breakfast. As such, defendants claim that they had no knowledge of Hamilton's conduct until the commencement of this litigation, and, therefore, they did not have actual or constructive notice of the alleged defective condition that brought about plaintiff's injury.

In opposition, plaintiff asserts that "a question of fact exist[s] as to whether the absence of a handrail and treads of uneven dimension contributed to [p]laintiff's fall and whether [d]efendants were negligent in creating those conditions and/or failing to correct those conditions." Plaintiff further asserts that the affidavit of her expert, Robert L. Schwartzberg, a licensed engineer, together with her deposition testimony and the photographs submitted by defendants establish that Hamilton created the dangerous condition. Finally, plaintiff asserts that Hamilton's deposition testimony establishes that WMC and HMC "had constructive notice of the defective condition as the plans for the modifications by [Hamilton] were submitted and approved by the co-op board and the management company."

The expert's affidavit that the stairway was dangerous and violated accepted standards and building code provisions states that he reviewed the "photographs and architectural drawings of the subject stairway located at St James Park at Morris Avenue and East 193<sup>rd</sup> Street, Bronx, New York on September 27, 2007," and found that the "tread widths vary more than that permitted by the building code, as they are narrower at one end of the tread than the other, there are no handrails at the subject stairway; [and] there exists an open side at the subject stairway as there is neither a wall,

a grille or a guard in place.” Inasmuch as the stairway involved in this case is located at 23 Waverly Place in Manhattan, the expert’s affidavit is insufficient to raise an issue of fact. Even crediting the expert’s affidavit, he fails to identify a specific statutory or building code violation. “Merely demonstrating the lack of handrails will not stave off summary judgment” (*Pena v Women’s Outreach Network, Inc.*, 35 AD3d 104, 111 [2006]; citing *Birman v Birman*, 8 AD3d 219 [2004]). Nor does evidence of uneven stairway treads imply a dangerous condition, especially in the absence of testimony that plaintiff’s fall was causally connected to the uneven treads (*Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [2004]).

Hamilton has met her burden of establishing her *prima facie* entitlement to summary judgment by submitting evidence in admissible form, namely, plaintiff’s deposition testimony, that she did not know what caused her to fall (*see Birman*, 8 AD3d at 219; *Kane*, 4 AD3d at 190). Plaintiff testified that as she was descending down the stairs, her right heel touched the third step “a little bit,” but “there was not enough of a step there.” Further, when asked to point out where on the step her heel made contact, plaintiff’s initial response was “I don’t know. I was not looking at it.” Plaintiff’s testimony also established that prior to her fall, she had descended the stairs earlier that evening without incident. It is well established that where a plaintiff is unable to identify the cause of her fall, summary judgment is properly granted to the defendant (*Hennington v Ellington*, 22 AD3d 721 [2005]). Since in the absence of admissible evidence to establish the cause of plaintiff’s fall, “it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation” (*id.*, quoting *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478 [2001]). Further, “[a]lthough proximate cause can be established in ‘the absence of direct

evidence of causation [and] ... may be inferred from the facts and circumstances underlying the injury' ... '[m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action'" (*Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 639 [2005]; see *Hartman v Mtn. Val. Brew Pub*, 301 AD2d 570 [2003]; *Garvin v Rosenberg*, 204 AD2d 388 [1994]).

In opposition, plaintiff has failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "While plaintiff's evidence need not positively exclude every possible cause of [her] fall other than the alleged staircase defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation" (*Reed v Piran Realty Corp.*, 30 AD3d 319, 319 [2006]).

Inasmuch as plaintiff has failed to show the existence of a defective or dangerous condition, the issue of actual or constructive notice as to WMC and HMC has been rendered moot. The proprietary lease requires Hamilton to indemnify WMC for any loss, damage and expense arising from injury to person occasioned by Hamilton's failure to comply with any provision of the lease. It is undisputed that plaintiff's accident arose out of Hamilton's subletting of her apartment without the permission of WMC's board in violation of paragraph 15 of the proprietary lease. Accordingly, WMC is entitled to recover from Hamilton the defense expenses, including reasonable attorneys' fees, it has incurred in this lawsuit. Hamilton opposes WMC's contractual indemnification claim citing the lease which provides: "t]his paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against Lessee." Hamilton has failed to meet her burden in this regard by producing a copy of the appropriate insurance policy.

**CONCLUSION**

Accordingly, the motion and cross motion are granted to the extent that the Clerk shall enter judgment dismissing the complaint. WMC's motion is granted to the further extent that liability is determined in its favor on its contractual indemnification cross claim against Hamilton. In light of the jury trial waiver set forth in the proprietary lease and pursuant to CPLR 3212 (c), this matter is referred to the Special Referee Clerk in the IAS Motion Support Office for assignment to a special referee to hear and determine the amount of WMC's defense expenses, including reasonable attorneys' fees, incurred in this lawsuit. Pursuant to CPLR 4301 judgment shall be entered on the special referee's determination without further application to this court. As a condition of the reference, WMC shall file a copy of this order with the Special Referee Clerk within 20 days after entry. The branch of the cross motion by which Hamilton seeks a dismissal of WMC's contractual indemnification cross claim is denied.

This constitutes the decision and order of the court.

DATED: **JAN 11 2008**



J.S.C.

**HON. LELAND DeGRASSE**

**FILED**

**JAN 17 2008**

**NEW YORK  
COUNTY CLERKS OFFICE**