

Pearce v 67 Owners Ltd.

2008 NY Slip Op 32303(U)

August 15, 2008

Supreme Court, New York County

Docket Number: 0104278/2006

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

Index Number : 104278/2006

PEARCE, JANET

vs

67 OWNERS

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 104278/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

is 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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/15/08

BARBARA R. KAPNICK / S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
JANET PEARCE,

Plaintiff,

- against -

67 OWNERS LTD., MAXWELL KATES, INC.,
VESTIL MANUFACTURING CORP. d/b/a
T&S EQUIPMENT CO., T&S EQUIPMENT
CO., INC. and T&S EQUIPMENT CO.,

Defendants.

-----X
VESTIL MANUFACTURING CORP. i/s/h/a VESTIL
MANUFACTURING CORP. d/b/a T&S EQUIPMENT
CO., INC., T&S EQUIPMENT CORP. i/s/h/a
T&S EQUIPMENT CO., INC. and T&S EQUIPMENT
CO.,

Third-Party Plaintiffs,

- against -

HAROLD EDWARDS,

Third-Party Defendant.

-----X
67 OWNERS LTD. and MAXWELL KATES, INC.,

Second Third-Party Plaintiffs,

- against -

HAROLD EDWARDS,

Second Third-Party Defendant.

-----X
BARBARA R. KAPNICK, J:

In this action, plaintiff Janet Pearce seeks to recover damages for personal injuries she sustained on September 24, 2005, when she fell from her motorized wheelchair as she was descending

DECISION/ORDER
Index No. 104278/06
Motion Seq. No. 002

Third-Party
Index No. 590142/07

FILED
AUG 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

Second Third-Party
Index No. 590235/07

a portable telescoping ramp consisting of two tracks from the lobby to the street level of the building located at 67 Park Avenue in Manhattan. Plaintiff claims that the doorman of the building kicked one of the rear wheels of her wheelchair in order to align it with the ramp, causing her to fly through the air.¹

The building is owned by defendant/second third-party plaintiff 67 Owners, Ltd. and managed by defendant/second third-party plaintiff Maxwell Kates, Inc.

Plaintiff was visiting a friend, third-party defendant/second third-party defendant Harold Edwards, who was a resident of the building.

Maxwell Kates, Inc. purchased the ramp from the manufacturer, defendants/third-party plaintiffs Vestil Manufacturing Corp. s/h/a Vestil Manufacturing Corp., d/b/a T&S Equipment Co., Inc. and T&S Equipment Corp. s/h/a T&S Equipment Co., Inc., and T&S Equipment Co. (collectively referred to herein as "Vestil").

After allegedly experiencing difficulty on various occasions in maneuvering the rear wheels on the tracks, the building's owner

¹ The doorman denies this allegation.

and/or management company allegedly cut portions off the lips of the upper portion of the ramp on the inside corners of the tracks.

Vestil now moves for summary judgment dismissing plaintiff's Complaint and all cross-claims and counterclaims against it on the grounds that: (i) there is no evidence that a design defect existed with the ramp when it left the manufacturer's hands, i.e., no expert has reviewed the ramp at issue on plaintiff's behalf or provided support for plaintiff's claims; (ii) the ramp was equipped with warning labels regarding its use; (iii) there is no evidence that any lack of warning was a proximate cause of plaintiff's accident; and (iv) the ramp was subject to substantial modification by the consumer, which changed the structure and use of the ramp.

Defendants/second third-party plaintiffs 67 Owners, Ltd. and Maxwell Kates, Inc., and third-party defendant/second third-party defendant Edwards all oppose the motion on the ground that it was made more than 120 days after the filing of the Note of Issue and Vestil has not requested leave to file a late motion, nor has it demonstrated 'good cause shown', pursuant to CPLR § 3212(a).

The Note of Issue was filed on October 19, 2007, and the instant motion was not made until on or about March 20, 2008, five months later. Vestil has not sought leave of this Court nor made a

showing of 'good cause' for the delay. Thus, the instant motion must be denied as untimely. See, *Brill v City of New York*, 2 NY3d 648 (2004); *Perini Corp. v City of New York*, 16 AD3d 37 (1st Dep't 2005).

Even were this Court to consider the motion on the merits, this Court finds based on the papers submitted and the oral argument held on the record on June 18, 2008 that there are questions of fact as to whether the post-sale modifications to the ramp constituted a material alteration that rendered an otherwise safe product defective.

Specifically, Vestil has not submitted an affidavit to rebut the affidavit from John W. Frisch, a professional engineer retained by defendants 67 Owners Ltd. and Maxwell Kates, Inc. who inspected the ramp on December 13, 2005 as well as being present for the investigation performed by plaintiff's expert on February 7, 2006, reviewed the deposition transcripts, and is of the opinion that "the modification of the ramp sides, in which a small portion of the side was removed, did not affect the intended use of the ramp in any way and was not a causal factor in the matter in question."

Nor has Vestil submitted an expert's affidavit to rebut the affidavit of Harry Ehrlich, the engineer retained by plaintiff, who

also inspected the ramp on February 7, 2006, and reviewed the manual for the wheelchair and the discovery responses from Vestil, and is of the opinion that "Vestil failed to provide explicit warnings and safety instructions with regard to slope and handrails", and "failed to alert people to the seriousness of the hazards associated with the use of their product," failures which were "a cause of Ms. Pearce's incident."

Counsel for all parties shall appear for a final settlement conference in IA Part 12 on September 24, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: August 15, 2008



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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