SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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YOLANDA ROMANO,

Plaintiff,

-against-

ASPEN KNOLLS CORP., ASPEN KNOLLS ESTATES HOME OWNERS ASSOCIATION, INC., ASPEN KNOLLS CONSTRUCTION CORP., and ASPEN KNOLLS MAINTENANCE CORP.,

Defendants.

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DCM Part 6
Present:
Hon. Philip G. Minardo

Decision and Order

Index No. 101174/06
Motion Nos. 1288-004
1309-005

The following papers numbered 1 to 5 were submitted on this motion the 31st day of July, 2008:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants Aspen Knolls Corp., Aspen Knolls Construction Corp., and Aspen Knolls Maintenance Corp., with Supporting Papers and Exhibits (dated April 18, 2008)	1
Notice of Motion for Summary Judgment by Defendant Aspen Knolls Estates Home Owners Association, Inc., with Supporting Papers and Exhibits (dated April 22, 2008)	2
Affirmation in Opposition to Motions for Summary Judgment by Plaintiff, with Supporting Papers and Exhibits (dated July 15, 2008)	3
Reply Affirmation by Defendants Aspen Knolls Corp., Aspen Knolls Construction Corp., and Aspen Knolls Maintenance Corp. (dated July 24, 2008)	4
Reply Affirmation by Defendant Aspen Knolls Estates Home Owners Association, Inc. (dated July 30, 2008)	5

Upon the foregoing papers, defendants' motions for summary judgment on the issue of

liability and dismissal of the complaint by defendants are both granted. For the sake of simplicity, Aspen Knolls Corp., Aspen Knolls Construction Corp., and Aspen Knolls Maintenance Corp. will be referred to collectively herein as "Aspen Knolls", while the co-defendant Aspen Knolls Estates Home Owners Association, Inc. will be referred to as the "Home Owners Association".

This is an action for personal injuries allegedly sustained by plaintiff when she fell in her home due to a defective staircase banister. To the extent relevant, plaintiff purchased her condominium unit located at 231 Jamie Lane on Staten Island on August 27, 1999 (Aspen Knolls' Exhibit "F"). During the construction of the unit, plaintiff requested the installation of upgraded oak railings to the interior staircase. Approximately one to two years following her move-in date of September 1999, plaintiff claims that the subject banister became loose and was repaired by Aspen Knolls Maintenance. On February 3, 2005, while descending the staircase, plaintiff alleges that the banister detached from the wall and caused her to fall down the stairs.

In support of their motion for summary judgment, the Aspen Knolls defendants maintain that they did not own the premises at the time of the subject accident, and did not have notice of the alleged condition prior to the accident date. They also deny having knowledge of any complaints regarding a defective banister or becoming involved with the repair of same. Finally, based on the deposition testimony of their witness, John Gromkoski (Aspen Knoll's Exhibit "H" p 62), the Aspen Knolls defendants maintain that the entity referred to in the caption as the Aspen Knolls Maintenance Corp. was not in business on the date of plaintiff's accident.

For its part, defendant Home Owners Association maintains that it did not have notice of the alleged condition prior to the accident date. Based on the deposition testimony of its witness, Michelle Bracco (Home Owners Association Exhibit "I" pp 11-12), it is argued that at the time of plaintiff's accident, a non-party, Island Condo Management, was responsible for the daily maintenance of the development where the subject unit is located.

A defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition nor had actual or constructive notice

of its existence (*see Powell v. Pasqualino,* 40 AD3d 725 [2nd Dept 2007]; *Lal v. Ching Po Ng,* 33 AD3d 668 [2nd Dept 2006]; *Curiale v. Sharrotts Woods, Inc*., 9 AD3d 473, 475 [2nd Dept 2004]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it *(see Curiale v. Sharrotts Woods, Inc*., 9 AD3d at 475). Moreover, constructive notice cannot be found where a defect is latent, and would not be discoverable upon reasonable inspection (id.). Here, the defendants made a prima facie showing of their entitlement to summary judgment by submitting evidence, particularly plaintiff's own deposition testimony, which established that they neither created the underlying condition nor had actual or constructive notice of any latent defect which may have caused the staircase railing to detach from the wall (id.). In fact, plaintiff conceded as much at her deposition by stating that she never complained to anyone following the repairs allegedly made to the banister some four years earlier (Plaintiff's EBT pp 77-78, 203-204).

Under these circumstances, the burden then shifts to the plaintiff to come forward with sufficient evidence to raise a triable issue of fact as to the defendants' liability (*see Greenberger v. Philip's Freeport Assoc*, 278 AD2d 275 [2nd Dept 2000]). In this case, plaintiff has failed to offer admissible evidence sufficient to raise a triable issue of fact *(see Curiale v. Sharrotts Woods, Inc*., 9 AD3d at 475; *Wheeler v. Princess Assoc,* 259 AD2d 611 [2nd Dept 1999]).

To the extent relevant, plaintiff testified at her deposition that she pays a monthly maintenance fee to the Home Owners Association, which sends her monthly newsletters containing telephone numbers that she can call in the event of a covered problem, (Plaintiff's EBT, p 75-76). She also testified that prior to the subject accident, repairs were performed on the latter's behalf to the interior of her unit, including leaks under the sink and cracked tiles in her kitchen (id. at pp 96, 101). According to plaintiff, "if you complained [to the Home Owners Association], they came and fixed it" (id. at p 202). In response, the Home Owners Association has submitted a copy of the warranty from the builder, Aspen Knolls, which purports to guaranty every banister for one year from the date of closing (Home Owners Association Exhibit "G"). In addition, the Home Owners

Association has submitted a copy of the Offering Plan, which allegedly does not require it to maintain the *interiors* of the individual units (Home Owners Association Exhibit "J").

While plaintiff's deposition testimony may be sufficient to raise a factual issue as to the maintenance obligation or control exercised by the Home Owners Association over the interior of her premises in the past (*see Scudero v. Campbell,* 288 NY 328 [1942]; *Radnay v. 1036 Park Corp*, 17 AD3d 106, 108 [1st Dept 2005]; *Reische v. Montgomery*, 273 App Div 824 [2nd Dept 1948]), it demonstrates, at best, that the latter would respond to the complaints of its unit owners when minor, nonstructural repairs were requested. Since there is no evidence of an inspection regimen, nor any claim that the defect in the railing was open, obvious or longstanding, plaintiff's concession that she never raised the issue of its condition with these defendants undermines her ability to raise a triable issue of fact with regard to notice (*see Gallier v. Watnick,* 23 AD3d 615 [2nd Dept 2005]; *Curiale v. Sharrotts Woods, Inc*., 9 AD3d at 475). Finally, plaintiff's assertion that the banister in her unit was *negligently* repaired some four years earlier is unsubstantiated, speculative, and insufficient to defeat summary judgment (*see Friedenreich v. Roosevelt Field Mall Mgt,* 18 AD3d 808 [2nd Dept 2005]; *Padilla v. White Plains City School Dist*, 266 AD2d 442 [2nd Dept 1999]). The court notes the absence of any evidence, whether by way of an expert's affidavit or otherwise, explaining how or why the bannister was repaired defectively.

Accordingly, it is

ORDERED that defendants' motions for summary judgment are granted; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

s/ Philip G. Minardo

J.S.C.

DATED: September 29, 2008