

**Marte v Jachar Mgt. LLC**

2008 NY Slip Op 32793(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 107732/06

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 107732/2006

**MARTE, MARILYN**

VS.

**JACHER MANAGEMENT**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment  
by defendants is decided in accordance with  
the attached memorandum decision.

**FILED**

OCT 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/6/08

DORIS LING-COHAN  
J.S.C.

J.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 IAS PART 36

-----x  
MARILYN MARTE an infant by her Mother and  
Natural Guardian, AMANDA MARTE and  
AMANDA MARTE Individually,  
Plaintiffs,

DECISION AND  
JUDGMENT

v.

Index. No. 107732/06

JACHAR MANAGEMENT LLC and 450 WEST  
162<sup>nd</sup> MANAGEMENT LLC,

Motion Seq. No.: 001

Defendants.

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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LING-COHAN, DORIS, J.S.C.

In this personal injury action, defendants Jachar Management LLC ("Jachar"), the owner of an apartment house located at 408 West 130<sup>th</sup> Street, and 450 West 162<sup>nd</sup> Management LLC move pursuant to CPLR 3212 for summary judgment dismissing the complaint.<sup>1</sup>

BACKGROUND

Plaintiffs claim that infant plaintiff, Marilyn Marte ("the infant" or "Marilyn") was injured on January 21, 2005, in the kitchen of the family apartment located at 408 West 130<sup>th</sup> Street in Manhattan ("the subject apartment" or "the premises"). According to plaintiff Amanda Marte ("Amanda"), the infant's mother, Marilyn was sitting alone in a chair in the kitchen when Amanda heard a loud crash. Amanda rushed into the kitchen and found Marilyn lying on the floor with a cut on her face. A piece of glass that had ostensibly fallen out of the window was allegedly lying next to Marilyn. Plaintiffs allege that from September 2004 through January 2005, Amanda's husband, Roberto Marte, made several verbal reports to the superintendent and

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<sup>1</sup> Plaintiffs consent to that branch of the motion which seeks summary judgment dismissing the complaint as against 450 West 162<sup>nd</sup> Management LLC, an entity that has no ownership interest or any involvement with the building where the accident occurred.

\* 3 ]  
the management office, about two problems with the window: (1) that the window would close on its own; and (2) that the glass in the window was cracked. Plaintiffs contend that, despite these complaints, neither the superintendent, nor anyone from management came to inspect or repair the window.

#### PRIOR PROCEDURAL HISTORY

In 2000, Jachar commenced proceedings in New York City Housing Court against Roberto Marte and his mother, who was then co-tenant in the apartment, for their alleged refusal to permit the landlord to enter the apartment to make necessary repairs. On August 14, 2001, the housing court judge issued an *ex parte* order that states, in relevant part:

UPON the determination that the Respondents have failed to permit the Petitioner access to the subject apartment for the purposes of making repairs in contravention of the New York City Housing Maintenance Code and this Courts's Order dated May 31, 2001.

NOW, IT IS HEREBY ORDERED, that the Petitioner-Landlord is relieved of any obligation to make any repairs to any part of the Respondent's apartment . . . .

(Malang Aff., Ex. G)

#### CONTENTIONS

Jachar argues that the complaint must be dismissed because the 2001 Housing Court order relieved it of any duty to undertake repairs in plaintiff's apartment. Alternatively, it argues that it is not liable for the infant's injuries because, as evidenced by a letter dated January 10, 2005<sup>2</sup>, plaintiffs have continued to deny Jachar access to the apartment to make repairs (Malang

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<sup>2</sup> The letter, denominated a "Notice to Cure" from Jachar to Roberto Marte states in pertinent part, "1. You have refused to allow access to the landlord to your apartment on numerous occasions; including but not limited to Dec. 16 and/or 23, 2004 for the landlord's contractor to conduct a lead paint test as a result of your complaint to DHPD regarding repairs and lead paint."

[\* 4 ]  
Aff., Ex. G), and thus, they did not have a reasonable opportunity to make the repairs.

In opposition to the motion for summary judgment dismissing the complaint, plaintiffs claim that there are questions of fact because Amanda testified, at her deposition, that between September 2004, the date Roberto Marte first reported the problem with the window, and January 21, 2005, when the accident occurred, Jachar was not denied access to the apartment. They also argue that Jachar had a nondelegable duty to maintain the apartment and that the 2001 housing court order has no relevance to this proceeding.

#### DISCUSSION

In order to prevail on a motion for summary judgment, the movant must present a *prima facie* case demonstrating that there are no triable issues of fact and he or she is entitled to judgment as a matter of law. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *Prince v. DiBenedetto*, 189 A.D.2d 757, 759 [1993]). Once the movant has established a *prima facie* case, the party opposing the motion for summary judgment bears the burden of “produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980])

Here, Jachar has failed to present a *prima facie* case that it is entitled to judgment as a matter of law. Jachar’s argument that the August 14, 2001 Housing Court order relieved it, in perpetuity, of its responsibility to make repairs in the subject apartment is without merit. The 2001 *ex parte* Housing Court order relates only to repairs specified in the underlying petition and that court’s underlying May 31, 2001 order. (*See e.g. D’Emilia v. Greer*, Index #600536/05 [N.Y. County Sup. Ct., July 31, 2007]). Such *ex parte* order cannot be read to relieve Jachar of its obligation to repair defective conditions that did not exist on the date of the order and were not

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5 ]  
the subject of the landlord's petition.

Indeed, Jachar has tacitly acknowledged that it had a continuing responsibility to inspect and repair the premises; in its January 10, 2005 Notice to Cure, it states that on December 16<sup>th</sup> and 23<sup>rd</sup>, 2004 it attempted to gain access to the subject apartment to make repairs and a January 13, 2005 work order issued by Jachar directs the superintendent to replace the kitchen window glass in the subject apartment. In addition, in a January 24, 2005 letter from Jachar to Roberto Marte, Jachar states that, "[w]e have been trying to reach you in order to make an appointment to continue repairs in your apartment. The super scheduled appointment [sic] on 1/18/05 and 1/21/2005 to repair your apartment and you did not allow the workman to make repairs."

(Malang Aff, Ex G)

Moreover, Section 78(1) of the Multiple Dwelling Law provides that owners of multiple dwellings "shall" be responsible for keeping their buildings in good repair. (*Carlos v. 395 E. 151<sup>st</sup> Street, LLC*, 41 A.D.3d 193, 195 [1st Dept 2007]; see NY Practice, Landlord and Tenant Practice in New York, Section 12:58 [under the MDL the owner of a building is ultimately responsible for defective conditions and maintaining the dwelling in good repair])

In addition, although the landlord presents some evidence that it attempted to gain access to make unspecified repairs (Malang Aff., Ex. G), Amanda's deposition testimony raises a question of fact as to whether, between September 2004 and January, 2005, Jachar was denied access to the subject apartment to repair the kitchen window. According to Amanda, during the relevant time period, no one from the building ever came to inspect the window. (Malang Aff., Ex. D, p. 21, ll. 24-25, p. 22, ll. 2-10) and the January 13, 2005 work order indicates that it was not until January 21, 2005, the date of the accident, that "Octavio ask Marte to take out window Mr Marte said is too cold. do it another [sic]". (See, *Saladino v. 7<sup>th</sup> Ave. and Grove St. Corp.*, 2 A.D.3d 149 [1<sup>st</sup> Dept. 2003][deposition testimony of plaintiff and her friend and photographs

6 ]  
were sufficient to raise questions of fact]; *Schneider v. Ardsley Tenants Corp.*, 191 A.D.2d 265 [1<sup>st</sup> Dept 1993][deposition testimony sufficient to raise questions of fact])

Accordingly, because there are questions of fact about when Jachar had notice of the allegedly dangerous condition and whether it had a reasonable opportunity to repair that condition (*see, Juarez v. Wavecrest Mgmt. Team*, 88 N.Y.2d 628, 642-43 [1996][the burden is on plaintiff to prove not only that the dangerous condition existed on the premises but also that the landlord had notice of the condition and a reasonable opportunity to repair it]), it is

ORDERED that defendant Jachar's motion for summary judgment is denied; and it is further

ORDERED that the branch of the motion which seeks to dismiss the complaint against defendant 450 West 162<sup>nd</sup> Management LLC is granted without opposition and the complaint is hereby severed and dismissed as against that defendant and the Clerk of the Court is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry; and it is further

ORDERED that the remainder of the action shall continue.

DATE: October 6, 2008

**FILED**

*[Signature]*  
**DORIS LING-COHAN**  
J.S.C.

Doris Ling-Cohan, J.S.C.

OCT 09 2008

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