

Griffin v 200 Assoc., L.L.C.

2009 NY Slip Op 30279(U)

February 5, 2009

Supreme Court, New York County

Docket Number: 106713-2003

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

Justice

PART 35

Griffen, Ethel

INDEX NO. 106713/03

MOTION DATE 10/31/2008

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -

200 Associates

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

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

In accordance with the accompanying Memorandum Decision, it is hereby

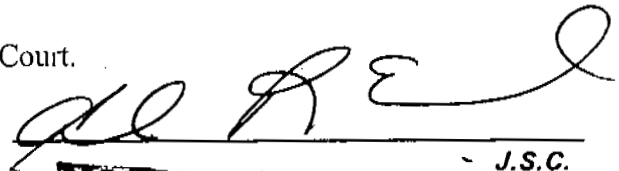
ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, in its entirety; and it is further

ORDERED that the cross-motion by plaintiff to strike defendants' answer, or in the alternative, to preclude defendants from controverting plaintiff's *prima facie* showing that plaintiff's injuries were caused by the material that fell from Mr. Rozio's ceiling, is denied, in its entirety; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 2/5/2009



HON. CAROL EDMEAD

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

PAPERS NUMBERED

FILED

FEB 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ETHEL J. GRIFFIN, Public Administrator of New York
County as Administrator of the Estate of
IVAN V. ROZOE, deceased,

Plaintiff,

Index No. 106713-2003

-against-

200 ASSOCIATES, L.L.C. and ORIN MANAGEMENT
CORP,

Sequence #005

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

FILED

FEB 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

In this wrongful death/negligence action brought by Ethel J. Griffin, Public Administrator of New York County as Administrator of the Estate of Ivan V. Rozoe ("plaintiff"), defendants 200 Associates, L.L.C. ("200 Associates") and Orin Management Corp. ("Orin") (collectively, "defendants") move for summary judgment pursuant to CPLR § 3212 on the ground that plaintiff cannot maintain a *prima facie* claim against them.

Factual Background

This action stems from an incident that occurred on March 3, 2002 when portions of a ceiling allegedly fell on Ivan Rozoe ("Rozoe" or the "decedent") while he was in the living room of his apartment (the "premises"), located at 200 West 161st Street, Apt. 19C, New York, New York (the "building"). Rozoe died more than a year after the incident from acute intoxication by prescription medications. The building is owned by 200 Associates and managed by Orin.

Defendants' Motion

Defendants argue that they are entitled to summary judgment with regard

to plaintiff's negligence cause of action given that there is no evidence that they had actual or constructive notice of the alleged defective condition, or proximately caused plaintiff's death. In support, defendants submit the depositions of defendants' employees, Ari Schreier ("Schreier") and Emiliano Torres ("Torres").

Schreier EBT

Schreier, an employee of Orin, visited the building approximately five times a week to walk the building with the superintendents and collect rents. With regard to any complaints, the tenants were directed to fill out a work order at the front desk and give it to the doorman or superintendent, Torres. The tenants could also call the management office directly. If a tenant filled out a work order, the superintendent would show it to Schreier; if it was something Schreier was already aware of, he would direct the superintendent to repair the condition. Otherwise, Schreier would go to the apartment and then direct the superintendent to fix it. The superintendent, handyman, or porter would then repair the condition. The tenant would then be given the work order to sign, which would be given back to Schreier to be filed in the tenant's folder.

Schreier had been in the decedent's apartment prior to the date of the accident to collect rent. According to Schreier, the living room of the decedent's apartment was directly below the bathroom of the apartment on the 20th floor. However, in March of 2002, the apartment above the decedent's was vacant and had been vacant for a couple of years. Prior to March 3, 2002, Schreier never received any complaints from anyone about the ceiling in the living room of the decedent's apartment, or about any flooding in the bathroom in the apartment above the decedent's.

Schreier first learned of the decedent's accident from the superintendent, who advised

[*4]

him that the person in the apartment said the ceiling fell. Schreier directed the superintendent to go to the apartment and retrieve whatever had fallen. Schreier inspected the apartment, possibly on the following day. Schreier observed some scrapings that had fallen off the ceiling and a little wet spot. He directed the superintendent to find the nature of the leak and repair it. The superintendent had never received any complaints about a leak. When Schreier spoke with the decedent's domestic partner, Daniel Burnette, Jr., ("Burnette") after the subject incident, Burnette did not advise of any prior leaks or ceiling pieces coming down. When Schreier spoke with Rozoe during the week following the March 2002 incident, Rozoe also did not advise him of any prior leaks. Schreier did not have any records reflecting or any recollection regarding any repairs made to either the decedent's apartment or the apartment directly above it.

Torres EBT

Torres was employed as the building superintendent of the premises for ten years. As the building superintendent, Torres addresses complaints by doing "whatever needed to be done." As to the procedure regarding tenant complaints, if a tenant has a problem, they fill out a maintenance request sheet in the lobby. Torres checks all the sheets and does whatever needs to be done. Torres did not receive any complaints about a water leak coming from the ceiling in the decedent's living room prior to the date of decedent's accident. Nor did he recall receiving any complaints about the bathroom in the apartment above the decedent prior to the date of decedent's accident.

In further support, defendants submit the deposition testimony of Jeffrey Boyle ("Boyle"), a friend of the decedent and Alfonso Rodriguez Vera ("Vera"), the decedent's brother. Boyle testified that in the weeks leading up to Rozio's death, the decedent had ended a ten-year relationship with his domestic partner, who is also deceased. Vera testified that in the

months leading up to his brother's death, when they would go out to dinner, he observed the decedent lose consciousness a couple of times. Vera testified that he and his brother would be talking and all of a sudden, the decedent would lose consciousness.

Based on the testimony above, defendants argue that plaintiff cannot establish that they created the hazardous condition, or had actual or constructive notice of the hazardous or defective ceiling condition prior to the ceiling's collapse. Specifically, since plaintiff claims that the ceiling collapsed because of a leak, plaintiff must show that the defendants had prior notice of the leak and that the leak was never repaired. However, plaintiff cannot come forward with any evidence suggesting that the defendants had actual notice of the alleged defective condition in decedent's ceiling, namely a leak. There is no evidence to establish that the decedent or his domestic partner advised the building manager or superintendent of the alleged condition, or that they filled out any work request with regard to the alleged condition.

As to constructive notice, defendants note that plaintiff cannot establish how long the alleged leak existed prior to the incident. As such, plaintiff cannot establish that a condition existed for an appreciable length of time so as to permit the defendants' employees to discover and remedy the alleged injurious condition. Thus, defendants argue, any finding in this respect would be based on mere speculation. As there is no evidence establishing that the defendants had any notice, actual or constructive, of the alleged condition, defendants are entitled to summary judgment.

Defendants also argue that because there is no evidence that defendants proximately caused the decedent's death, plaintiff's wrongful death cause of action should be dismissed. As the decedent's pharmacy records show, prior to the incident, as early as October 26, 1999, the decedent filled a prescription for Wellbutrin, an anti-depressant, Xanax, an anti-anxiety

6] medication, Ambien, a sedative, and Percocet, a pain killer. On May 23, 2001, the decedent filled prescriptions for Vicodin, as well as Tylenol with Codeine, both of which are pain killers. On June 5, 2001, the decedent filled another prescription for Vicodin. On November 2, 2001, the decedent filled a prescription for Effexor, an anti-depressant. On February 19, 2002, the decedent filled a prescription for Endocet, another pain reliever more commonly known as Oxycodone. On March 1, 2002, the decedent filled a prescription for Zyprexa, which is administered to treat schizophrenia and acute manic or mixed episodes of bipolar disorder.

The injuries allegedly sustained by the decedent upon being struck with the falling plaster from the ceiling, as diagnosed in his ER Records from St. Vincent's dated 3/3/02, were: a mild concussion, mild neck sprain and possible C5-6 radiculopathy. The neck x-ray taken that day indicates that the decedent had evidence of mild degenerative disc disease. His head CT scan was negative.

After the subject incident, the decedent continued to fill prescriptions for a variety of pain killers, anti-depressants, anti-anxiety medication and sedatives. And, in and around the time of his death, the decedent also filled a prescription for Viagra.

Defendants point out that plaintiff's expert, Dr. John Wurpel, opines that the decedent died as a result of a combination of the effects of Oxycodone and the anti-depressants he was taking. Dr. Wurpel states that the decedent was taking these medications as a result of his March 3, 2002 accident thus, causally relating Mr. Rozoe's death to his March 3, 2002 accident. However, the decedent's prescription records indicate that he had been taking various pain killers and anti-depressants for years before the incident. Yet, Dr. Wurpel makes no mention of the decedent taking these medications prior to the date of his accident, and fails to mention that in the months just preceding his accident, the decedent filled a prescription for Oxycodone as well

7]

as Zyprexa, which is administered to treat schizophrenia and acute manic or mixed episodes of bipolar disorder. While the decedent may have been prescribed Oxycodone and anti-depressants after the subject incident, it is clear that he had been taking such medication for years prior to the date of his accident and of his subsequent death. Dr. Wurpel also fails to consider that the decedent had a history of taking various drugs to treat mental illness, or the possibility that the decedent intentionally overdosed on the prescribed medication due his breakup with his domestic partner. Dr. Wurpel also failed to consider that in the months leading to his death, the decedent frequently lost consciousness for no apparent reason. As discussed in the expert report of defendants' expert Dr. Richard Blum, decedent's loss of consciousness may have been evidence of a cardiac event caused by the use of Viagra which is known to cause falls in blood pressure. The decedent filled a prescription for Viagra in the months preceding his death.

Dr. Blum also states that the statements made by Dr. Wurpel are medically impossible to prove: although Dr. Wurpel stated that the decedent had toxic levels of Oxycodone circulating through his body at the time of his death, Dr. Blum points out that there is no way to measure the amount of any drug that had been in a person's blood by measurements taken post-mortum in decomposition fluid. Defendants argue that one will never know what events lead to the decedent's death. Decedent may have intentionally overdosed, or suffered from some sort of undiagnosed cardiac problem or low blood pressure which was causing him to frequently lose consciousness. However, it is clear that decedent was taking various pain killer, anti-depressants, anti-anxiety medication as well as sedatives long before the March 2002 incident. As such, to now state that decedent died as a result of being prescribed *those same medications*, after the date of his accident, is completely speculative and unfounded based upon the evidence.

In any event, plaintiff's wrongful death claim should be dismissed because the decedent's

death was caused by his own superseding intervening conduct. Here, the decedent's death by acute intoxication was clearly unforeseeable to the defendants herein. Even if the decedent's death is not attributable to his own conduct, it could certainly be viewed as attributable to the intervening conduct of his treating physician by the continued prescription of such highly potent medications in conjunction with one another. Thus, the decedent's treating physicians should be viewed subsequent tortfeasors, barring defendants from any liability for his death.

Opposition and Cross-Motion for Sanctions

Plaintiff opposes dismissal, arguing that (1) defendants had actual notice of the dangerous condition by both verbal and written complaints, and (2) the defective condition caused plaintiff's underlying injuries, necessitating medication to combat his symptoms, and it is foreseeable that a physician would prescribe medications to treat the injuries sustained by plaintiff.

Several letters indicate that Rozoe and Burnette advised Schreier of problems with the ceiling in their apartment prior to the incident. In June 2001, Rozoe and Burnette sent a letter addressed to Schreier informing him that "there are extensive problems with the ceilings and the walls, as have been brought to both your attention via phone conversations and also verbally to Mr. Flores, the Superintendent for months. It seems the building management isn't willing to fix the problems. To date nothing has been done. . . ." (the "June 2001 letter").

On May 15, 2002, after the incident, Rozoe and Burnette sent a letter to Schreier, attaching the June 2001 letter. In this letter, Rozoe complained to Schreier "quite a few times, in over a year (I say over a year, because these issues were discussed many times even before the attached letter was written.) Nothing really was done to the extent the day after I got hurt, March 03, 2002." The letter continues to state that nothing was done until after deceased plaintiff was

9]

injured and that, as a result, Rozoe has suffered “emotion[al] and[] physical damage due to the collapsing of the ceiling over my upper body. . . .” Plaintiff argues that such letters prove that defendants had actual notice of the defective condition, and, despite numerous complaints, nothing was done to fix the problem.

As to the issue of proximate cause, such issue is one best reserved for the jury. Plaintiff maintains that Mr. Rozoe died as a result of taking an improper combination of pain-control medications that were prescribed to him following the accident of March 3, 2002. The Autopsy Report specifies the cause of the death as "acute intoxication due to the combined effects of Oxycodone, Alprazolam and Olanzapine.”

Dr. Wurpel opines that plaintiff’s death is causally related to the subject accident. Dr. Wurpel is an Associate Professor of Pharmaceutical Sciences at St. John’s University and holds a Master’s of Science in Physiology and a Ph.D. in Pharmacology. Dr. Wurpel relied upon the Report of Autopsy, Certificate of Death, St. Vincent’s Hospital records, and notes from plaintiff’s treating physicians, as well as his qualifications and experience in the areas of Neurology, Toxicology, Pharmacology and Neurotoxicology. Dr. Wurpel also opined that plaintiff’s physicians prescribed a highly potent opiate drug, Oxycodone, to treat his neck pain sustained in the subject incident. In addition, Rozoe’s physicians prescribed two anti-depressants, Olanzapine and Zlprazolam, to treat his depression, which was caused as a result of the incident. Dr. Wurpel opined that the pain reducing drug prescribed to plaintiff, when taken together with anti-depressants such as those also prescribed to plaintiff, can cause a person to suffer cardio-respiratory depression that will likely result in death. Based on the Certificate of Death findings that Mr. Rozoe’s death was attributable to "acute intoxication due to the combined effects of Oxycodone, Alprazolam and Olanzapine,” and the Report of Autopsy which did not demonstrate

any cardiac damage, myocardial infarction, pulmonary congestion or edema, Dr. Wurpel opined that the plaintiff died as a result of losing consciousness, followed by a decline in respiration, blood pressure, heart rate and neural function, all of which are attributable to his ingestion of Oxycodone, in combination with Alprazolam and Olanzapine.

On the other hand, Dr. Blum's letter, which was not signed or affirmed, is inadmissible as evidentiary proof to support defendants' summary judgment motion. As defendants did not offer any admissible evidence to rebut the findings of plaintiff's expert, this branch of defendants' summary judgment motion must also be denied.

In the event the court overlooks this deficiency, Dr. Blum only attacks Dr. Wurpel's opinion, and plaintiff has submitted sufficient evidence to raise material issues of fact as to proximate cause.

The foundation of Dr. Blum's opinion was not presented in his letter, nor is his background for formulating his opinion. Dr. Blum's opinion that plaintiff was tolerant to narcotics, and did not die from a mixture of chronically consumed drugs is nothing more than mere speculation, and in direct conflict with the Certificate of Death, Report of Autopsy, and Affidavit of Dr. Wurpel. As such, Dr. Blum's deficient, unsigned, unsupportable, "letter" cannot be considered expert or authoritative in any respect, and alone is insufficient to support summary judgment. Further, Dr. Blum's assertion that one of plaintiff's medical conditions could be a "cardiac event" is unfounded.

In any event, since the parties' experts disagree as to the existence, nature, and scope of the plaintiffs injuries and cause of death, such issues of fact can only be decided at trial.

Further, caselaw holds that the original tortfeasor is liable for all the proximate results of their own negligence, including aggravation of injuries by a physician or hospital.

11]

In support of plaintiff's cross-motion for sanctions, plaintiff argues that defendants were in possession of the material that fell from the plaintiff's ceiling. However, such material, which was a key piece of evidence regarding the existence and severity of a dangerous condition, has been disposed of, before plaintiff had an opportunity to inspect it. Defendants had immediate notice of the accident and reported it to an insurance carrier, aware that Rozoe would likely assert a claim. Yet, according to defendants' testimony, the materials were thrown away. Therefore, defendants' answer should be stricken, or in the alternative, defendants should be precluded from controverting plaintiff's *prima facie* showing that plaintiff's injuries were caused as a result of the material that fell from Rozio's ceiling.

Defendants' Reply and Opposition to Cross-Motion

The letters purportedly sent to Schreier were not disclosed by the defendants as part of the decedent's tenant file because they were not contained in said tenant file. Interestingly, these letters were not previously disclosed by plaintiff throughout the course of discovery. Nor was Schreier, the alleged recipient of said letters, questioned with regard to the same during his deposition. Nor were said letters mentioned during the deposition of the building superintendent Torres. The individuals who allegedly wrote the letters are deceased, and the sudden appearance of these letters which cannot be authenticated, is highly suspect. Thus, the letters should not be considered by the Court in deciding this motion.

Further, said letters were each addressed to someone by the name of Ari Schuac, not Ari Schreier as stated in plaintiff's opposition. The June 2001 letter, which is unsigned, does not mention what specific issue or what area/areas of the apartment were allegedly presenting a problem. Although said letter mentions phone calls to "Mr. Schuae," and conversations with a "Mr. Flores" about the "problems," Schreier was never even asked about these phone calls during

[* 12]

his deposition. Rather, Schreier testified that he was never made aware of any problems with the decedent's ceiling. Torres also testified that he never received any complaints.

The letter dated May 15, 2002 makes no mention of any problems with the apartment. Further, the remaining letters are dated after plaintiff's accident, and thus cannot impute notice on the defendants.

Further, defendants maintain that the decedent being struck by pieces of falling plaster over a year prior to his death was not the proximate cause of decedent's ultimate death. It is impossible to establish a causal connection between the decedent being struck with pieces of plaster and sustaining a possible concussion and neck sprain, to his ultimate death brought upon by acute intoxication of prescription medicines. The various independent successive tortfeasors, including possibly the decedent himself, as well as his treating physician, make it impossible for the plaintiff to establish liability on the part of the defendants herein.

In opposition to plaintiff's cross-motion, defendants argue that sanctions for spoliation are inappropriate since plaintiff had a full opportunity to inspect the material prior to its destruction. After the accident, plaintiff remained in his apartment and had ample opportunity to retain the material himself. Further, the plaintiff never asked the defendants to inspect the material while it was in defendants' possession, and plaintiff never demanded the production of the subject material, until after the note of issue in this matter was filed.

Moreover, defendants do not refute that an incident occurred wherein portions of the ceiling fell down. Defendants' witnesses testified that they observed paint and plaster that had fallen from the decedent's ceiling after they were notified of the incident. And, defendants accidentally threw away the materials during a construction project. Therefore, the sanctions sought herein are unwarranted.

ANALYSIS

Defendants' Motion for Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390[U] [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765

NYS2d 326 [1st Dept 2003]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

“It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected” (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5). A property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]).

Initially, defendants established that both the building manager and superintendent of the premises never received any complaints from the decedent or his domestic partner with regard to the ceiling of decedent's apartment before the subject incident. There is no record of the decedent or his domestic partner filling out any such work maintenance work request. They both testified that prior to March 3, 2002, they did not receive any complaints about any flooding in the bathroom in the apartment directly above the decedent's, which had been vacant for a couple of years at the time of the incident. In addition, the building manager testified that he had been at the decedent's apartment on several occasions to collect rent, and neither the decedent nor his domestic partner made any complaints about the subject ceiling during those visits.

However, the June 2001 letter represents a complaint of “problems with the ceilings” in the decedent’s apartment. The May 2002 letter also refers to numerous complaints the decedent made concerning the apartment regarding the ceiling made prior to the incident. According to the May 2002 letter, “the ‘leak problem’ was not solely in our apartment (#19C) . . .” and that after complaining to Scheuer “quite a few times, in over a year,” nothing was done. Notwithstanding that such letters were not produced by defendants from the decedent’s tenant folder, such letters raise an issue of fact as to whether defendants had actual notice of the leak or dangerous condition of the subject ceiling prior to the date of the incident. As the letters addressed to Schreier submitted by plaintiff sufficiently raises an issue of fact as to whether defendants had actual notice of the leaking ceiling and failed to take any action to correct this alleged dangerous condition, the branch of defendants’ motion for summary judgment dismissing the complaint on the ground that there is no evidence that defendants received notice of the alleged dangerous condition is denied.

Further, the branch of defendants’ motion for summary dismissal of the complaint on the ground that there is no evidence that ceiling collapse was the proximate cause of plaintiff’s death is unwarranted. The unsigned, unsworn, unaffirmed letter by Dr. Blum, on which defendants’ rely to establish that the decedent’s death was not the proximate cause of the ceiling falling, is insufficient to support summary judgment (*Charlton v Almaraz*, 278 AD2d 145, 718 NYS2d 52 [1st Dept 2000] [unsworn reports of the plaintiffs examining doctor or chiropractor insufficient to defeat a motion for summary judgment]; *Graham v Shuttle Bay, Inc.*, 722 NYS2d 541 [1st Dept 2001] [same]).

In any event, plaintiff’s expert Dr. Wurpel opines in his affidavit, with a reasonable degree of pharmaceutical certainty, that Rozoe had toxic levels of Oxycodone circulating through his body at the time of his death, that he died as a result of losing consciousness, followed by decline in respiration, blood pressure, heart rate and neural function, and that all of such conditions were the result of his

ingestion of Oxycodone, Alprazolam and Olanzapine. Dr. Wurpel further opines, with a reasonable degree of pharmaceutical certainty that Rozoe was taking Oxycodone to reduce the pain associated with a cervical herniation that resulted from the incident in question. Dr. Wurpel's opinion was based on the Autopsy Report, Death Certificate, Emergency Room and Outpatient medical records, and reports from Drs. Lawrence Ottaviano and Paul-Marie Brisson. Thus, it cannot be said that Dr. Wurpel's conclusion was based on material facts not in evidence.

Dr. Blum's statements, that Dr. Wurpel's opinions were false and that Rozoe's death was not "associated with the" incident, were not made with a reasonable degree of medical or pharmaceutical certainty. Thus, even accepting Dr. Blum's statements as true, such statements merely create an issue of fact as to proximate cause (*see Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208, 651 NYS2d 518 [1st Dept 1996] [summary judgment unwarranted where conflicting affidavits raise factual issues regarding the extent of a plaintiff's injury]).

Nor is defendants' assertion that the prescription of pain killers by doctors treating the plaintiff was a superceding event sufficient to break the chain of proximate cause as a matter of law. An initial tort-feasor may well be liable to the plaintiff for the entire damage proximately resulting from his own wrongful acts, including aggravation of injuries by a successive tort-feasor, but only for the separate injury or the aggravation his conduct has caused (*Ravo by Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533 [1987]). The record contains sufficient evidence, from which a jury may infer, that plaintiff's physician's prescription of medications, taken together, over an extended period of time, caused acute intoxication, resulting in plaintiff's death, was not an intervening act, but part of a continuum of events initiated by the defendants' original negligence (*see Wiseman v Md Realty Corp.*, 54 AD2d 119, 387 NYS2d 612 [1st Dept 1976]). As defendants failed to establish that plaintiff's wrongful death claim lacks merit, dismissal of this cause of action is denied.

Plaintiff's Cross-Motion for Sanctions for Destruction of Material

Courts have broad discretion to fashion a remedy for spoliation in the interest of justice (*Ortega v City of New York*, 9 NY3d 69 [2007]), generally finding that sanctions are warranted when prejudice is severe (*see e.g., Kirkland*, 236 AD2d at 175; *Squitieri v City of New York*, 248 AD2d 201, 204 [1st Dept 1998]). Courts have defined spoliation as the intentional or negligent destruction of “key” or “crucial” evidence, and have held that sanctions are warranted when “crucial items of evidence” are destroyed (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]; *see also Atlantic Mutual Insurance Co. v Sea Transfer Trucking Corp.*, 264 AD2d 659, 660 [1999]; *see DeKenipp v Rockefeller Center, Inc.*, 856 NYS2d 23, 23 [S Ct NY Cty 2007] [holding that “[s]poliation is the loss, destruction, or alteration of key evidence to a lawsuit”]; *see also Squitieri, supra*); *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Condition Corp.*, 221 AD2d 243 [1st Dept 1995]). The destruction of the allegedly defective, or defectively installed, product warrants the remedy of a dismissal (*e.g., Kirkland, supra*), summary judgment (*e.g., Amaris v Sharp Electronics Corp.*, 304 AD2d 457 [1st Dept 2003]) or preclusion of evidence (*e.g., Strelow v The Hertz Corp.*, 171 AD2d 420 [1st Dept 1991] [precluding defendant from offering evidence concerning the condition of the car parts that had been negligently destroyed]).

CPLR § 3126 also provides penalties for a party’s refusal to comply with a court order *or* for their willful failure “to disclose information which the court finds ought to have been disclosed.” While courts have held that wilfulness, or “bad faith,” is required for penalties under section 3126 (*e.g., Sage Realty Corp.*, 275 AD2d 11 [2000]), the section is applicable even when the spoliation occurred prior to commencement of the action (*see Mylonas v Town of Brookhaven*, 305 AD2d 561 [2d Dept 2003]).

Defendants do not dispute that material fell from the ceiling of plaintiff's apartment and struck the plaintiff. The medical records reveal the gravity of the initial harm to the decedent caused by the impact of the ceiling material. Defendants failed to demonstrate sufficient prejudice caused by the destruction of the material. Furthermore, in light of the evidence presented, including the prescription and medical history of Rozoe predating and postdating the incident, it cannot be said that defendants cannot sufficiently defend this action on the merits. Therefore, the plaintiff's cross-motion to strike defendants' answer or for an order precluding defendants from offering evidence to rebut a showing that plaintiff's injuries were caused as a result of the falling ceiling material is denied

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, in its entirety; and it is further

ORDERED that the cross-motion by plaintiff to strike defendants' answer, or in the alternative, to preclude defendants from controverting plaintiff's *prima facie* showing that plaintiff's injuries were caused by the material that fell from Rozio's ceiling, is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court. the decision and order of the Court.

February 5, 2009

FEB 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD