

**Dubin v Time Warner Realty, Inc.**

2010 NY Slip Op 30137(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 111323/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 111323/2007  
**DUBIN, HARVEY**  
 vs.  
**TIME WARNER REALTY**  
 SEQUENCE NUMBER : 003  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE 1/5/10  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

n this 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

**FILED**  
 JAN 25 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

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

The instant motion (sequence 003), is decided in accordance with the accompanying Memorandum Decision. It is hereby

**ORDERED** that the motion of defendants Time Warner Realty, Inc. ad A/R Retail, LLC, move for an Order pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiffs Harvey Dubin (plaintiff) and Bari Dubin **is denied**; and it is further

**ORDERED** that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of the Court.

Dated: 1/22/2010

  
**HON. CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
HARVEY DUBIN and BARI DUBIN, x

Plaintiffs,

Index No. 111323/07

**DECISION/ORDER**

-against-

TIME WARNER REALTY, INC., and  
A/R RETAIL, LLC.,

Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C. x

**MEMORANDUM DECISION**

Defendants Time Warner Realty, Inc. and A/R Retail, LLC (defendants) move for an Order pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiffs Harvey Dubin (plaintiff) and Bari Dubin (collectively, plaintiffs).

Plaintiff contends that he was injured as a result of falling while using a revolving door located at the Time Warner building located at 10 Columbus Circle, in the City of New York (the Premises).

According to the affidavits of Mr. Wayne Smith (Mr. Smith) and Willie Pollen (Mr. Pollen) of the McKenzie Door Company, the subject doors were inspected by on June 9, 2006, just two weeks prior to the subject incident. Mr. Smith and Mr. Pollen found the speed was "okay" on all of the revolving doors that they inspected. Moreover, they made notations of work that had to be done on the doors that had no impact on the speed of same.

There is no evidence that there was any defect in the subject door. Moreover, assuming *arguendo* that there was such a defect ( a concession that is not made), there is absolutely no evidence that the defendants had either actual or constructive notice of the defect.

In opposition, plaintiffs argue that plaintiffs have evidence that the defendants had actual notice of the defective condition of the revolving door. The evidence is a legible Revolving Door Inspection Report dated June 9, 2006 which was received from the defendants on or about September 2, 2009. That report indicates that the tension of the subject door, referred to as the north entrance door was "not good." This clearly demonstrated that the defendants had actual notice of the defect of the revolving door and failed to repair it. They allowed a defective condition to remain for a considerable period of time.

Mr. Stanley H. Fein, P.E., a Consulting Engineer, inspected the subject revolving doors on May 9, 2007. His inspection revealed that the subject revolving doors were not functioning in accordance with the New York City Building Construction Code. Specifically, Mr. Fein opined that the defendants were in violation of various City of New York Building Construction Codes, including, but not limited to, Section 27-371 (m)(2)(d), which requires that the freely operable maximum rate of revolving speed of a door be no greater than 15 revolutions per minute. Mr. Fein's inspection revealed that one of the doors was revolving at approximately 18 revolutions per minute and the other door was revolving at approximately 16 revolutions per minute. Based on the foregoing, Mr. Fein concluded that the accident and the injuries sustained by plaintiff on June 23, 2006 were caused by the negligence of defendants, in their operation, control and maintenance of the revolving doors that were dangerous and hazardous to its users.

Defendants held the responsibility of making sure that the tension of the revolving door was operating properly. Defendants clearly breached that duty to the general public and to the plaintiff in particular, who had no warning that by using the revolving door, it was so dangerous.

In reply, defendants argue that the affidavit of Mr. Fein should be ignored because his

inspection took place on May 9, 2007, almost one year after the inspection performed by the McKenzie Door Company. Mr. Fein's inspection was not probative of the door speed at the time of the incident since it occurred 11 months after the subject inspection of the McKenzie door mechanics and 10 ½ months after the plaintiff's incident. Moreover, Mr. Fein gives no explanation as to how the speed of the door 10 ½ months after plaintiff's incident would have been exactly the same as they were on the date of the plaintiff's incident. Further, Mr. Fein's affidavit makes no connection between the alleged tension condition of the revolving door and the plaintiff's incident.

Moreover, as per the affidavit of defendants' expert, George Pfreunds Schuh, P.E., ("Pfreunds Schuh") the tension as it is applicable to the subject doors only relates to the amount of pressure that is necessary to collapse the panels/wings that are contained within the revolving doors. This pressure is considerably more than is necessary for the normal rotation of the door. And, Mr. Pfreunds Schuh cogently explains why the subject doors were not revolving at a speed greater than 15RPM based upon his review of all of the relevant photographs, affidavits, motion papers, deposition transcripts and other relevant materials.

And, it is questionable whether Mr. Fein even inspected the correct doors based upon the deposition testimony of the security supervisor, Felix Taveras, and the alleged location of the incident contained in the plaintiffs' complaint.

In sur-reply, plaintiffs argue, *inter alia*, that defendants did not disclose their expert witness, George Pfreunds Schuh until the submission of plaintiffs' reply papers, in violation of CPLR 3101. Plaintiffs contend that Pfreunds Schuh never inspected the subject revolving door. Further, Pfreunds Schuh's opinion, that the tension of the revolving door is related to the amount of

pressure needed to collapse the panels/wings within the revolving doors and not related to the speed of the door, is in direct conflict with Fein's opinion that there is a direct connection of the tension of the door and the speed of the revolving doors. Thus, there is an issue of fact in this case.

### *Discussion*

#### CPLR 3212: 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 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must 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.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> 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, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). 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]).

Notice: Actual and Constructive

“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).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383,

702 NYS2d 275 [1<sup>st</sup> Dept. 2000]; *Gutierrez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1<sup>st</sup> Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1<sup>st</sup> Dept. 2005]). A defendant/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 [1<sup>st</sup> Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; see also *Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

#### Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (see *Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1<sup>st</sup> Dept], *lv. dismissed* 97 NY2d 677, 738

NYS2d 292 [2001]).

In the instant case, triable issues of fact exist as to whether the defendants had actual notice of the alleged dangerous condition of the revolving doors based on the evidence of a legible Revolving Door Inspection Report dated June 9, 2006 indicating that the tension of the subject door, referred to as the north entrance door was “not good.”

With respect to the experts, initially, this court rejects defendants' argument that plaintiffs' expert's opinions lack evidentiary support and are speculative (*see Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 [2006]; *Farkas v Saary*, 191 AD2d 178, 180-181, 594 NYS2d 195 [1993]).

Further, the conflicting expert affidavits ultimately raise an issue of fact as to the import of the speed and tension of the revolving door. There is a divergence of opinion between the experts concerning the import of the speed and tension of the revolving doors to require that this issue be decided at trial.

Thus, in view of the “conflicting expert affidavits, issues of fact and credibility are raised that cannot be resolved on a motion for summary judgment” (*Bradley v Soundview Healthcenter*, 4 AD3d 194, 194, 772 NYS2d 56 [2004]; *Lewis v Capalbo*, 280 AD2d 257, 258-260, 720 NYS2d 455 [2001]).


*Conclusion*

In light of the fact that “[a] defendant's motion for summary judgment opposed by the plaintiff must be decided on the version of the facts most favorable to the plaintiff” ( *Mullin v 100 Church LLC*, 12 AD3d 263, 264 [1st Dept 2004] ), and that “foreseeability and causation ... are issues generally and more suitably entrusted to fact finder adjudication” ( *Palka v Servicemaster Management Services Corporation*, 83 N.Y.2d 579, 585 [1994] ), and “the very question of negligence is itself a question for jury determination” ( *Ugarriza v Schmieder*, 46 N.Y.2d 471, 474 [1979] ), defendants’ motion for summary judgment is denied. Based on the foregoing, it is hereby

**ORDERED** that the motion of defendants Time Warner Realty, Inc. ad A/R Retail, LLC, move for an Order pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiffs Harvey Dubin (plaintiff) and Bari Dubin **is denied**; and it is further

**ORDERED** that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated: January 22, 2010



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDM EAD**

**FILED**  
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