SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOHN DARCY,

Plaintiff(s),

-against-

LIFTSIDE AT HUNTER MOUNTAIN CONDOMINIUM I, TS MOORE CONTRACTING CORP. d/b/a HUDSON RIVER CONTRACTING, BERRY BUILDERS INC., and GREENE ACRES REAL ESTATE AND MANAGEMENT, LLC,

Defendant(s).

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DCM PART 5

Present:
HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 100727/2008
Motion Nos. 002, 003, 004

The following papers numbered 1 to 8 were used on this motion this 25th day of May, 2010:

Notice of Motion (002) [Defendant Liftside](Affirmation in Support)	**1**
Notice of Motion (003) [Defendants TS Moore](Affirmation in Support).....	**2**
Notice of Motion (004) [Defendant Berry Builders](Affirmation in Support)	**3**
Affirmation in Opposition [Plaintiff]	**4**
Affirmation in Opposition [Berry Builders]	**5**
Reply Affirmation Defendant Liftside	**6**
Reply Affirmation Defendant TS Moore	**7**
Reply Affirmation Defendant Berry Builders	**8**

On August 20, 2006, the plaintiff allegedly sustained injuries while descending steps on the second floor of his rental unit of Building B at Hunter Mountain Resort in Greene County, New York. The plaintiff specifically alleges that while descending the steps the tread broke, causing the plaintiff's leg to extend through the step. Plaintiff sustained tears of the medial and lateral meniscus and underwent arthroscopic surgery on May 30, 2007. Defendant Liftside at Hunter MountainCondominium I [hereinafter known as "Liftside"] is the owner of Building B where the accident occurred and operates a resort on the premises.

In or about the Fall of 2002, the defendant Liftside, through its managing agent *at the time*, non-party Frosty Land, Inc., contracted with defendant Berry Builders Inc. [hereinafter

known as "Berry Builders"] to construct several condominium units on its premises. Liftside/Greene Acres requested that the new buildings resemble the existing structures at the property as closely as possible for aesthetic purposes. Defendant Berry Builders thereafter subcontracted the construction of Building B, which includes the staircase on which plaintiff fell, to defendant TS Moore Contracting Corp. d/b/a Hudson River Contracting [hereinafter known as "TS Moore"]. At the time of the accident, in August 2006, defendant Greene Acres Real Estate and Management LLC [hereinafter known as "Greene Acres"] had taken over as managing agent for defendant Liftside/Greene Acres.

On or about February 4, 2008, the plaintiff commenced this action for personal injuries sustained as a result of defendants' alleged negligence. Presently, discovery has been completed and the defendants are all separately moving for summary judgment seeking to dismiss the complaint as against each of them on the ground that, *inter alia*, they had neither created nor possessed notice of the alleged hazard that caused plaintiff's fall.

Initially the Court notes that the plaintiff raises claims under the doctrine of res ipsa which "permits an inference of negligence to be drawn when the nature of the accident is such that it 'would ordinarily not happen without negligence'" (Bodnarchuk v. State of New York, 49 AD3d 581, 582 [2d Dept., 2008]; Jappa v. Starrett City, Inc., 67 AD3d 968, 969 [2d Dept., 2009]). Further, it is well settled that

> **[t]he doctrine of res ipsa loquitur involves a common sense application of the rules pertaining to circumstantial evidence in negligence cases having particular characteristics. Recognizing from our everyday experience that certain accidents do not ordinarily happen in the absence of negligence, the doctrine permits, but does not require, the jury to draw an inference of negligence against the defendant as long as the following three**

> **elements exist: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (Finocchio v. Crest Hollow Club at Woodbury, Inc., 184 AD2d 491, 492 [2d Dept., 1992]; Garrido v. Int't Bus Mach.Corp., 38 AD3d 594, 595-596 [2d Dept., 2007]; Kichoroswky v. Kennedy Houses Owners, Inc., 31 AD3d 502, 503 [2d Dept., 2006]).**

In order to establish the first element of res ipsa loquitur the plaintiff must establish that "the accident is not of a type that would ordinarily occur in the absence of negligence in the maintenance or control of the [object]" (Levinstim v. Parker, 27 AD3d 698, 700 [2d Dept., 2006]; Jappa v. Starrett City, Inc., 67 Ad3d at 969). Further, "[i]n such a case, a jury might well be permitted to infer, from the mere happening of the accident, that it was proximately caused by the landowner's negligence" (Levinstim v. Parker, 27 AD3d at 700). However, "[t]he landowner, in turn, may defeat such inference by establishing that the accident was proximately caused by some defect in the instrument which he or she did not create and of which he or she had neither actual nor constructive notice" (id.).

Here, therefore, plaintiff must prove that the step would not have broken in the absence of defendant's negligence; that the accident was caused by an instrumentality in the exclusive control of the defendants and that the plaintiff did not contribute to the accident (Garrido v. Int'l Bus Mach.Corp., 38 AD3d 594, 595-596 [2d Dept., 2007]). The stair at issue in this case was in Building B, a building which guests at defendant's resort stay, and was traversed by many people during any given day. This fact establishes that the stairs were not under the exclusive control of the defendant Liftside/Greene Acres and the plaintiff has failed to establish

otherwise (Tyndale v. St. Francis Hosp., 65 AD3d 1133, 1133-1134 [2d Dept., 2009][holding res ipsa inapplicable where no evidence was presented that defendant had exclusive control of a chair in the waiting room of a hospital]; Molina v. State of New York, 46 AD3d 642, 643 [2d Dept., 2007][finding res ipsa inapplicable where the tray which allegedly spilled hot coffee on the plaintiff was in a hospital where many people had access to it and thus did not establish exclusive control]; Loiacono v. Stuyvesant Bagles, Inc., 29 AD3d 537, 538 [2d Dept., 2006][finding defendant did not have exclusive control over chair that collapsed in their bagel shop]). As a result, the plaintiff has failed to establish the applicability of the doctrine of res ipsa loquitor as they failed to establish that any defendant had control "of sufficient exclusivity to fairly rule out the chance that the [alleged defect] was caused by some agency other than defendant[s'] negligence" (Molina v. State of New York, 46 AD3d at 643).

Turning to defendants summary judgment motions, it is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

I. Defendant Liftside and Greene Acres Motion for Summary Judgment

[Motion 002]

It is well settled that "an owner of real property has a duty to maintain the property in a reasonably safe condition" (Basso v Miller, 40 NY2d 233, 241 [1976]). Plaintiff must present "evidence that the defendants created the dangerous condition which caused the accident, or that they had actual or constructive notice of that condition and failed to remedy it within a reasonable time" (Perlongo v. Park City 3 & 4 Apts., Inc.,31 AD3d 409, 410 [2d Dept., 2006]). Constructive notice requires that the condition is "visible and apparent and existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (id.).

Here, defendant Liftside/Greene Acres has presented sufficient evidence to establish a prima facie entitlement to summary judgment dismissing the complaint as against them (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Perlongo v. Park City 3 & 4 Apts., Inc.,31 AD3d 409, 410 [2d Dept., 2006]). Defendant Liftside/Greene Acres presented evidence that it did not create the condition as it was not directly involved in the construction of the stairs. Further, defendant Liftside/Greene Acres contends it did not possess constructive notice of the condition as the stairs did not require maintenance or repair and no prior accidents/incidents with respect to the stairs had ever previously occurred. Defendant Liftside/Greene Acres also contends that plaintiff's argument

that a knot in the stairs caused it to break does not provide the requisite notice to impose liability. The evidence also indicated that plaintiff had traversed the area for two days prior to the date of the accident and did not notice and/or report any alleged defect.

In opposition, the plaintiff has successfully raised triable issues of fact with respect to whether the defendant Liftside/Greene Acres had constructive notice of the alleged defect (id.). Plaintiff has presented the expert report of Herbert W. Braustein, a licensed professional engineer, who inspected the stair at issue in this case and determined that several factors caused the stair to be a hazardous and dangerous condition, *inter alia*, the failure to stain the stairs, the appearance of knotholes and the incorrect dimensions leading to diminished loan bearing capacity. The plaintiff and his expert, Mr. Braustein, have presented evidence raising questions of fact as to whether defendant Liftside/Greene Acres failed to maintain the stairs in a reasonably safe condition by failing to inspect, stain or generally maintain the stairs. As result, there are questions of fact which exist which require a jury's determination and are inappropriate for summary judgment in favor of defendant Liftside/Green Acres (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Perlongo v. Park City 3 & 4 Apts., Inc.,31 AD3d 409, 410 [2d Dept., 2006]).

II. Defendant TS Moore Contracting Corp. d/b/a Hudson River Contracting's Motion for Summary Judgment

[Motion 003]

"As a general rule, a builder or contractor is justified in relying upon the plans and

specifications which he has contracted to follow. Thus, a contractor who performs its work in accordance with contract plans may not be held liable unless those plans are 'so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous'" (Hartofil v. McCourt & Trudden Funeral Home, Inc., 57 AD3d 943, 945 [2d Dept., 2008]; Peluso v. ERM, 63 AD3d 1025, 1026 [2d Dept., 2009]).

In support of its motion for summary judgment defendant TS Moore established that it installed and constructed the stairs in a workmanlike manner and complied with all applicable statutes/codes/regulations and performed its work in accordance with the plans and specifications it was contracted to follow (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Hartofil v. McCourt & Trudden Funeral Home, Inc., 57 AD3d at 945). Specifically, defendant TS Moore has established that it constructed the stairs to match the plans drawn up by the architect and that the stairs were in conformance with the requests of co-defendant Liftside/Greene Acres matching the new buildings to the old ones on the resort premises.

In opposition the plaintiff has failed to raise triable issues of fact as to whether the contractors plans were so "defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous" (Hartofil v. McCourt & Trudden Funeral Home Inc., 57 AD3d at 946). In other words, the plaintiff has not presented any evidence that the plans drawn up by the architect were so defective to place defendant TS Moore on notice that constructing the stairs pursuant to such specifications was, in and of itself, a dangerous condition. As a result, summary judgment is appropriate in favor

of defendants TS Moore (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Hartofil v. McCourt & Trudden Funeral Home, Inc., 57 AD3d at 945).

III. Defendant Berry Builders's Motion for Summary Judgment

[Motion 004]

> **Generally "'a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.' However, [there are] three exceptions to the general rule, pursuant to which 'a party who enters into a contract to render services may be said to have assumed a duty of care - - and thus be potentially liable in tort - - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (Foster v. Herbert Slepoy Corp., ___ AD3d ___, NY Slip Op. 5510 [2d Dept., 2010]; Wilson v. Hyatt Corp. 72 AD3d 939, 940-941 [2d Dept., 2010]; Castro v. Maple Run Condominiums Assoc., 41 AD3d 412, 412-413 [2d Dept., 2007]).**

Here, the defendant Berry Builders has established his prima facie entitlement to summary judgment by establishing that plaintiff was not a party to the contract and further, establishing that it exercised reasonable care; that plaintiff did not detrimentally rely on its performance and it did not displace the landowners duty to maintain the stairs (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; id.).

In opposition, the plaintiff has failed to raise triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Wilson v. Hyatt Corp., 72 Ad3d at 940). There is no dispute that the plaintiff was not a party to the

contract between defendants Berry Builders and Liftside. Further, the plaintiff has failed to establish that any of the three exceptions enumerated by the Court of Appeals would apply to the instant matter. Plaintiff did not present any evidence to indicate that, (1) defendant Berry Builders (who did not actually construct the staircase) launched a force of harm; (2) that plaintiff detrimentally relied on Berry Builders duties (unknown to the plaintiff at any time before the accident); or (3) that Berry Builders displaced the landowners duty to maintain, as the contract required no continued maintenance on behalf of Berry Builders. As a result, summary judgment is appropriate in favor of defendant Berry Builders.

Accordingly, it is

ORDERED that the defendant Liftside at Hunter Mountain Condominium I and Greene Acres Real Estate and Management, LLC's motion for summary judgment is hereby denied, and it is further

ORDERED that the defendant TS Moore Corp. d/b/a Hudson River Contracting's motion for summary judgment is hereby granted, and it is further,

ORDERED that the complaint and all cross claims are hereby dismissed as against defendant TS Moore Corp. d/b/a Hudson River Contracting, and it is further

ORDERED that the defendant Berry Builders Inc.'s motion for summary judgment is hereby granted, and it is further

ORDERED that the complaint is hereby dismissed as against defendant Berry Builders Inc., and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further

ORDERED that the remaining parties proceed directly to trial, and it is further

ORDERED that the Clerk enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 21, 2010 **E N T E R,**

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Hon. Judith N. McMahon

Justice of the Supreme Court