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

PRESENT: O. PETER SHERWOOD Justice PART 61

JOHN SERNA and MICHELLE SERNA,

Plaintiffs,

-against-

898 CORPORATION, *et al.*,

Defendants.

INDEX NO. 103414/08

MOTION DATE May 14, 2010

MOTION SEQ. NO. 002

MOTION CAL. NO. 106

The following papers, numbered 1 to 8 were read on this motion for summay judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, defendants' motion for an order pursuant to CPLR § 3212 granting summary judgment in their favor and dismissing the amended complaint is decided in accordance with the accompanying decision and order.

Dated: 10/1/10

O. PETER SHERWOOD, 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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JOHN SERNA and MICHELLE SERNA,

Plaintiffs,

-against-

898 CORPORATION, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC and TERRA HOLDINGS, LLC,

Defendants.

----------X

DECISION AND ORDER

Index No. 1[illegible]4/2008

O. PETER SHERWOOD, J.:

This is an action to recover damages for personal injuries allegedly sustained as a result of an accident that occurred at 898 Park Avenue, New York, New York ("the premises"). Defendants 898 Corporation ("898 Corp."), Brown Harris Stevens Residential Management, LLC ("BHS") and Terra Holdings, LLC ("Terra") (collectively"defendants") move for an order pursuant to CPLR § 3212 granting summary judgment in their favor dismissing the complaint on the ground that they did not create the hazardous condition which caused plaintiff's injuries nor did they have actual or constructive notice of the condition. Plaintiff opposes the motion. For the reasons that follow, the motion is granted.

The amended verified complaint, as amplified by the verified bill of particulars, alleges that plaintiff John Serna ("plaintiff" or "Serna") sustained injuries on October 29, 2007, at approximately 11:15 a.m., when the landing of an external staircase at the premises collapsed. Plaintiffs further allege that the exterior staircase at the premises was in a dangerous condition and defendants had both actual and constructive notice of such condition (Affirmation of Robert K. Bates, Jr. in Support of Motion [Bates Affirm.], Ex. "B", Amended Verified Complaint, ¶¶ 23-27, Ex. "G", Verified Bill of Particulars ¶¶ 6, 8, 9-10, 15).

The premises, owned by 898 Corp. and managed at the time of the accident by BHS, is a sixteen story residential cooperative, located at the southwest corner of Park Avenue and East 79th Street, with twelve residential tenants and medical offices on the ground floor (Bates Affirm. ¶ 13;

Affidavit of Omer Bacovic in Support of Motion [Bacovic Aff.], ¶ 4). The premises' staff consisted of a superintendent, a handyman/porter and four doormen (Bacovic Aff. ¶ 4). At the time of the accident, the superintendent was Omer Bacovic ("Bacovic"), the handyman/porter was Esad Adrovic ("Androvic"), and the BHS account executive was Bruce Lebow ("Lebow") (Bates Affirm. ¶ 13; Bacovic Aff. ¶ 1; Affidavit of Esad Adrovic in Support of Motion [Androvic Aff.] ¶ 1). The premises faces Park Avenue with a service entrance on the left side consisting of a metal gate at the sidewalk that is unlocked from 7:00 a.m. to 4:00 p.m. and opens into a small alley (Bacovic Aff. ¶ 6). In October 2007, there was a set of diamond plate iron stairs that extended from the service ally to the basement of the premises (*id.*). There were seven stairs from the service alley to a three-foot-square landing. The landing was three feet above the ground and four stairs led from the landing to the basement level (*id.*). Next to the basement door, which was about fifteen feet from the base of the staircase, was a large metal box accessed only by Verizon employees (*id.*).

Plaintiff testified at his deposition that on the date of the accident he was employed by Verizon as a field technician responsible primarily for the installation and repair of telephone lines (Bates Affirm., Ex. "J", p. 11). On October 29, 2007, he went to the premises, a building he had been to on 10 to 20 prior occasions, to repair a telephone line for a customer located on 78th Street (*id.*, pp. 19-20, 31). The main feeder box for the entire block was located on the exterior of the premises next to the basement door (*id.* pp. 17, 31). Access to the feeder box was through an unlocked service gate on the Park Avenue side of the premises and by means of an external staircase (*id.* pp. 17, 22-23). Plaintiff described the staircase as painted black metal with a hand rail along the right side (*id.* pp. 26-27). As plaintiff was descending the stairs, he stepped with both feet on a landing located about five or six steps from the bottom of the stairs (*id.* pp. 25-26). As he did so, the landing collapsed "like a trap door" causing him to fall backwards and hit his shoulder and back (*id.* pp. 25, 42). He landed on the cement floor located about three to four feet below, with the landing itself hitting his left knee (*id.* pp. 25-28). Plaintiff testified that he had never made any complaints about the condition of the external stairs nor did he notice on his prior visits that the stairs shook or creaked (*id.* pp. 23-24).

Defendants produced Bacovic, Adrovic and Lebow for depositions. Bacovic testified that his duties as superintendent consisted of the day-to-day operation of the premises and supervising the premises' staff (Battes Affirm., Ex. "L", Deposition Transcript, pp. 12-13). Complaints or repair requests would be directed to him if he was present at the premises; otherwise they would be directed to the premises' doormen or manager (*id.*). Once a year, the premises manager would engage a building engineer to inspect both the inside and outside of the premises (*id.* 15-17). Bacovic would accompany such engineer during the inspection, but the engineer reported directly to the premises' manager (*id.*, pp. 16-19). The inspection would include the external stairway leading to the basement (*id.* p. 23). The last inspection prior to the accident occurred on or about August 23, 2007 (*id.* p. 63). On that date, Bacovic did not notice any problems with the external stairway nor did the engineer mention any problems concerning the condition of the stairs (*id.* p. 65).

Bacovic denied receiving any complaints from tenants or anyone else about the external stairway (*id.* p. 27). About two years before plaintiff's accident, Bacovic supervised premises' staff who scraped, primed and painted the stairs (*id.* pp. 24-25, 32). At that time, he did not notice any rust or corrosion on the landing of the stairway (*id.* pp. 26-27). Although Bacovic was not working on the date of the accident, when he was working he walked on the stairway about 20 times a day because it was easier to access the basement, where he maintained an office, from the outside than waiting for the elevator (*id.* pp. 30-31). In October 2007, Bacovic weighed 260 pounds (*id.* p. 30). At the time of the accident, a construction company was performing brick replacement work at the premises and also used the external stairway to access the basement where materials and tools for the project were being stored (*id.* pp. 56-58). The construction project had commenced about a month or two before the accident (*id.* p. 59).

Both Androvic and Lebow notified Bacovic by telephone of plaintiff's accident (*id.* pp. 34-36). Bacovic proceeded to the premises, arriving about one and one-half hours after receiving the calls (*id.* p. 39). His inspection of the stairway revealed that parts of the underside of landing platform and the frame around the platform were rusty and corroded (*id.* pp. 42-43, 49-50). However, Bacovic stated that the view of the top of the stairway did not reveal that anything was

wrong with the stairway (*id.*). The stairway was repaired about one to two months after the accident (*id.* p. 45). In the interim period, the stairway was temporarily repaired by replacing the landing with a piece of wood which rested on a frame (*id.* pp. 46-47).

Androvic's responsibilities at the premises included cleaning the inside of the premises and performing small maintenance tasks such as changing light bulbs (Battes Affirm., Ex. "M", Deposition Transcript, pp. 9, 12, 14). Androvic frequently used the external stairway, sometimes as often as fifteen times in a day, to access the basement where there was a table and telephone for his use (*id.* pp. 18-19). At no time prior to the date of the accident did Androvic notice any problem with the stairway that required repair nor did anyone complain to him about the condition of the stairway (*id.* pp. 19-20). Androvic also remembered someone painting the stairway about two to two and one-half years prior to the accident (*id.* pp. 22-23). He identified Lebow as the manager of the premises and recalled seeing Lebow using the external stairway on occasions when he visited the premises (*id.* pp. 24-26).

Androvic found plaintiff in the premises basement shortly after his fall (*id.* p. 31). After plaintiff was removed from the premises by ambulance, Androvic took a look at the stairs and found that the landing platform was broken in half with one part still attached to the frame (*id.* pp. 35-37). He did not see any rust or corrosion on the platform or frame for the platform (*id.* p. 37). When shown a photograph of the stairway after the accident, Androvic acknowledged that he saw some rust on the stairway, but reiterated that he had not observed any rust prior to the accident (*id.* p. 43).

Lebow testified that at the time of the accident he was a BHS account executive with a portfolio of about nine or ten buildings (Battes Affirm., Ex. "N", Deposition Transcript, pp. 10, 13). The responsibilities of a property manager included managing the physical plant and staffing of the buildings, while the account executive would handle budgetary, legal and stock issues and some issues concerning the physical aspects of the buildings (*id.* p. 11). The premises, which was in Lebow's portfolio, was considered a one-tier premises, which means that one person, an account executive, managed all aspects of the building (*id.* pp. 13, 16). Lebow visited the premises every couple of weeks (*id.* p. 17). On those occasion, he would generally stay about an hour during which

time he would visit the common areas, such as the basement, sub-basement and alleyway, and address any shareholder issues brought to his attention (*id.* pp. 18-19). Lebow usually accessed the basement by the service elevator (*id.* pp. 27-28), but sometimes he used the external stairway (*id.* pp. 28-29). Prior to the date of the accident, he did not notice any problems with the stairway that needed to be repaired (*id.* p. 30). Nor was he aware of any of the premises' staff making any repairs to the stairway prior to the date of the accident (*id.*). Shareholders' complaints were usually directed to the superintendent and the superintendent would relay to Lebow anything he considered to be a "serious issue", such as water seepage in the building or a broken elevator (*id.* p. 20).

Lebow confirmed that the premises was inspected annually by New York Fire Consultants, Inc., an outside consulting firm, which would then issue a report (*id.* pp. 33-34). BHS would keep the report on file and if there was anything that required attention Lebow would send a letter to the premises' superintendent identifying the problems that needed to be rectified (*id.* p. 34). Reports of inspections performed by New York Fire Consultants on July 15, 2004, August 22, 2005, August 10, 2006 and August 23, 2007 (annexed as Exhibit "R" to the moving papers) indicate that, upon inspection, no violations were found in the exterior of the building or basement area.

Lebow was notified of plaintiff's accident by either the superintendent or the handyman at the premises who told him the stairway had collapsed (*id.* p.39). He immediately went to the premises, arriving about a half hour after receiving the call (*id.* pp. 40-41). Upon inspection, Lebow saw that the landing had collapsed and that the underside of the landing, identified as the frame, was rusted (*id.* pp.43-44). He had the superintendent cordon off the stairway and the area (*id.* pp. 44-45). Lebow then retained a contractor who completely replaced the stairway (*id.* pp. 45-46). Lebow was shown photographs, which he identified as depicting the old stairway at the premises after the accident. He acknowledged that he saw surface rust on the stairway and on the far end of the platform frame (*id.* pp. 48-49). He did not notice any corrosion on the stairs or platform (*id.* pp. 50-51).

Lebow prepared a written incident report within two to three days of the accident (*id.* pp.53-54). In such incident report the cause of the injury is stated to be: "Landing on stairwell (metal)

collapsed from what appears to be corrosion" (*id.* p. 54; Battes Affirm., Ex. "Q"). Lebow denied that anyone else had been injured using the external stairway prior to plaintiff's accident or that any part of the stairway had broken and needed to be repaired (*id.* p.56).

Defendants now move for summary judgment arguing that they did not have notice of the dangerous condition that caused plaintiff's injuries and did not create it. Plaintiffs oppose the motion on the grounds that rust and corrosion of the stairway, which was visible in the photographs taken after plaintiff's accident, put defendants on constructive notice of the dangerous condition that caused the stairway platform to collapse and injure the plaintiff.

It is well established that "[a] landowner owes a duty to another on [its] land to keep [the land] in a reasonably safe condition, considering all of the circumstances including the purpose of the person's presence and the likelihood of injury" (*Macey v Truman,* 70 NY2d 918, 919 [1987], citing *Basso v Miller,* 40 NY2d 233 [1976]). In order to recover damages for breach of this duty, a plaintiff must establish that the defendant created the condition that caused the accident or that the defendant had actual or constructive notice of the dangerous or defective condition (*see Gordon v American Museum of Natural History,* 67 NY2d 836, 837 [1986]; *Mullin v 100 Church LLC,* 12 AD3d 263, 264 [1st Dept 2004]). To demonstrate constructive notice, plaintiff must show that the accident-causing condition was visible and apparent and existed for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it (*see, Gordon,* 67 NY2d at 837). Constructive notice may not be imputed when a defect is latent and would not be discoverable upon a reasonable inspection (*see Applegate v Long Is. Power Auth.*, 53 AD3d 515, 516 [2d Dept 2008]; *Lal v Ching Po Ng,* 33 AD3d 668 [2d Dept 2006]). "If a defect could not have been discovered by a layman, even by inspection, it is considered a latent defect" (*Rapino v City of New York,* 299 AD2d 470, 471 [2d Dept 2002], *lv denied* 100 NY2d 506 [2003]).

Where a defendant moves for summary judgment, it has the initial burden of making a prima facie showing that it did not create the condition or have actual or constructive notice of its existence (*see, Scott v Beverly Hills Furniture,* 30 AD3d 577, 578 [2d Dept 2006]). Once this threshold burden has been satisfied, the court will examine the sufficiency of the plaintiff's opposition to

determine whether a triable issue of fact exists (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851,853 [1985]; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410 [2d Dept 2004]).

Here, defendants have established their entitlement to judgment as a matter of law by demonstrating that they neither created nor had actual or constructive notice of the latent defect which caused the stairway landing to collapse. The evidence submitted by defendants indicates that the alleged defect was neither visible nor apparent, that plaintiff and defendants' employees responsible for the operation and maintenance of the building were unaware of the alleged defective condition, and that annual inspections of the premises failed to detect the defective condition of the external stairway.

Plaintiffs oppose the motion and assert that evidence demonstrates that the stairway was in a rusted, corroded and deteriorated condition and that anyone conducting a reasonable inspection of the stairway would have discovered it. Plaintiffs submit an affidavit of an engineer, Stanley Fein, who "reviewed the photographs, accident reports and testimony regarding the accident" and concluded that the rust and corrosion of the stairway platform and frame made the stairway unsafe for ordinary use and caused the platform to collapse under plaintiff. Mr. Fein states further that the rust, corrosion and deterioration of the platform and frame were conditions that developed over time and would have been discernible upon inspection. He further avers that the presence of such condition indicates a failure on the part of the premises' owner and managing agent to inspect and maintain the stairway. Lastly, Mr. Fein contends that sections 27-127, 27-128, 27-375 and 27-2005 of the New York City Building Construction Code and Housing Maintenance Code and sections 52 and 78 of the Multiple Dwelling Law require an owner to be responsible for the safe maintenance of a building, including stairways and all means of ingress and egress (*see* Ex. "F" to Affidavit of Christopher P. Spina, Esq. In Opposition to Motion).

Mr. Fein's conclusions are speculative and insufficient to rebut defendants' prima facie showing and raise a triable issue of fact as to constructive notice. Mr. Fein does not assert that he ever actually visited the site of the accident or that he inspected or conducted any sort of tests on the allegedly defective platform. Nor does Mr. Fein state any industry standards regarding the stairway

strength or durability of the materials that he applied to support his conclusion that the stairway was unsafe for ordinary use (*see, Williams v Church Homes Assocs.*, 49 AD3d 386 [1st Dept 2008]; *Garcia v Northcrest Apts. Corp.*, 24 AD3d 208 [1st Dept 2005]; *Curiale v Sharrots Woods, Inc.*, 9 AD3d 473, 475 [2d Dept 2004]; *Rapino,* 299 AD2d at 471). "[T]he appearance of rust, standing alone, is insufficient to establish constructive notice of the alleged defect" (*Garcia,* 24 AD3d at 209; *see Williams,* 49 AD3d at 387 [extensive rust of the bottom rail and vertical support stop of a parking lot gate failed to raise an issue of fact as to constructive notice]; *Rapino,* 299 AD2d at 471 [presence of rust on a drain cover on a locker room floor insufficient to give defendants constructive notice of the defect]).

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 10/1/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.