Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

SUA SPONTE ORDER

NANA POKUAA,

Plaintiff,

-against-

WELLINGTON LEASING LIMITED PARTNERSHIP and MID STATE MANAGEMENT CORPORATION,

Defendants.

Index No. 9725/09

Motion Date February 15, 2011
April 12, 2011

Motion Cal. Nos. 21 and 23

Motion Sequence Nos. 4 and 5

The Court sua sponte recalls its decision and order dated April 28, 2011 and enters the following in its place:

	Papers Numbered
Order to Show Cause #21-Affidavits-Exhibits...	1-5
Opposition.....	6-8
Notice of Motion #23-Affidavits-Exhibits.....	1-9
Opposition.....	10-12
Reply.....	13-14
Cross Motion.....	15-19
Opposition.....	20-22
Reply.....	23-25

Upon the foregoing papers it is ordered that defendants' Order to Show Cause for an order issuing a Judicial Subpoena to take the deposition of non-party witness, Brian Senajor and for an order extending defendants' time to file a motion for summary judgment, and defendants' motion for summary judgment dismissing plaintiff, Nana Pokuaa's Complaint and all cross claims pursuant to CPLR 3212 are hereby consolidated for purposes of disposition of the instant motions only.

That branch of defendants' Order to Show Cause for an order issuing a Judicial Subpoena to take the deposition of non-party

witness, Brian Senajor is hereby denied. It is undisputed that the Note of Issue in this case was filed on October 10, 2010. Pursuant to the "So-Ordered" Stipulation of Hon. Martin E. Ritholtz dated October 20, 2010, which Stipulation provides for Post-Note of Issue Discovery, non-party EBT's were to be completed by January 7, 2011. It is undisputed that the instant Order to Show Cause for the issuance of a Judicial Subpoena Ordering a non-party EBT of Brian Senajor was served on February 7, 2011. As such, this branch of the motion is denied as untimely.

That branch of defendants' Order to Show Cause extending defendants' time to file a motion for summary judgment is hereby rendered moot. Defendants have already filed their summary judgment motion on February 15, 2011, which date is prior to March 1, 2011 deadline set forth in the "So-Ordered" Stipulation of Hon. Martin E. Ritholtz dated October 20, 2010.

Defendants' motion for summary judgment dismissing plaintiff, Nana Pokuaa's Complaint and all cross claims pursuant to CPLR 3212 is hereby denied without prejudice with leave to renew.

On January 21, 2009, at 98-40 57th Avenue, Apartment 12J, County of Queens, State of New York, plaintiff was allegedly injured when a medicine cabinet, which was in a dangerous and defective condition, fell on her. Plaintiff maintains that as a result of the negligence of the defendants, she sustained severe and grievous injuries.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*,

49 NY2d 557 [1980]).

For defendants to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see id.*).

As the record reflects that the parties have not completed discovery, and that discovery remains outstanding defendant, defendants' motion for summary judgment is denied without prejudice as it is premature (*see*, CPLR 3212[f]; *Groves v. Lands End Housing Co.*, Inc., 80 NY2d 978 [NY 1992]; *Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v. Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendants' motion for summary judgment is hereby denied "with leave to renew when discovery . . . is complete" (*see, Ramos, supra*).

That branch of plaintiff's cross motion seeking an order compelling the defendants to produce defendant, Mid State Management Corporation's, M. Abugov for deposition is hereby granted solely to the following extent:

As it is undisputed that defendant, Mid State Management has agreed to produce M. Abugov for deposition, it is ordered that defendant, Mid State Management Corporation's witness, M. Abugov is to appear for an examination before trial on a date, time, and place mutually agreed upon by the parties, but no later than thirty (30) days from the date of service of a copy of this order with notice of entry.

That branch of plaintiff's cross motion seeking an order compelling the defendants to produce a witness with knowledge and employed by defendant Wellington Leasing Limited Partnership for an examination before trial on a date, time, and place mutually agreed upon by the parties, but no later than thirty (30) days from the date of service of a copy of this order with notice of entry. If there is no witness with knowledge from Wellington with knowledge of the accident or maintenance or repair records, than defendants shall submit an affidavit from one with personal knowledge of the facts in the matter, setting forth the lack of such witness.

That branch of plaintiff's cross motion seeking a self-executing order compelling defendants to fully comply with the October 20, 2010 So-Ordered Stipulation and all of plaintiff's December 17, 2010 Post-Depositions Discovery Demands by providing full and complete compliance with same by a date certain is hereby granted solely to the following extent:

It is undisputed that plaintiff served Post-Deposition Discovery Demands dated December 17, 2010 upon defendants, and that defendants provided a Response which Response plaintiff deemed to be insufficient. The Court finds as follows:

Requests #1 and #2 of the Post-Deposition Discovery Demands seek specific documentation. Defendants shall comply with this request within thirty (30) days after service of a copy of this order with notice of entry. If defendants cannot provide such documentation then, defendants shall provide an affidavit from someone with personal knowledge averring that such documentation is not in existence.

Request #3 requests the names of the two maintenance workers who removed the subject medicine cabinet in March of 2008. Defendants shall comply with this request within thirty (30) days after service of a copy of this order with notice of entry. If defendants cannot obtain said information, defendants are to provide an affidavit from someone with personal knowledge as to why it cannot be ascertained.

Request #6 requests the correct and full names and last known addresses if no longer employed by either of the defendants of eight employees. Defendants shall comply with this request within thirty (30) days after service of a copy of this order with notice of entry. If defendants cannot obtain said information, defendants are to provide an affidavit from someone with personal knowledge as to why it cannot be ascertained.

If defendants fail to comply with this order, plaintiff may move for sanctions within thirty (30) days from the last date that defendants were required to comply with plaintiff's discovery request. In the event that plaintiff fails to move timely, plaintiff's discovery demands shall be deemed waived and plaintiff shall not be entitled to any further discovery.

That branch of plaintiff's cross motion for an order levying substantial costs and sanctions against defendants and their attorneys is hereby denied. At this stage, the court finds that the plaintiff has not demonstrated that defendants' conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor has plaintiff

established sufficient cause to warrant sanctions (*see, Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the defendants has not risen to the level of frivolous. Accordingly, this branch of plaintiff's cross motion is denied.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: June 2, 2011

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Howard G. Lane, J.S.C.