

**Velez v New York City Hous. Auth.**

2011 NY Slip Op 31623(U)

June 16, 2011

Supreme Court, New York County

Docket Number: 106352/08

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.

PART 10

Index Number : 106352/2008  
**VELEZ, DANNY**  
vs.  
**HOUSING AUTHORITY**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

JUN 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/16/11

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Danny Velez,  
Plaintiff (s),

**-against-**

New York City Housing Authority,  
Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 106352/08  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

**JUN 17 2011**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):  
NEW YORK  
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<b>Papers</b>	<b>Numbered</b>
NYCHA n/m (3212) w/affirm JPT, RL, JM, BP affids, exhs . . . . .	1
Pltf's opp w/DWB affirm, exhs . . . . .	2
NYCHA reply w/JPT affirm . . . . .	3
Pltf's sur-reply w/DWB affirm . . . . .	4

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action for personal injuries by plaintiff Danny Velez against defendant, the New York City Housing Authority ("NYCHA"). Issue was joined and discovery completed. NYCHA has brought a timely motion for summary judgment (CPLR 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]) which Velez opposes in all respects.

**Arguments and Facts**

Velez contends that on October 4, 2007, a Thursday afternoon, he slipped and fell on a flight of stairs at the building owned/operated by NYCHA. Velez testified at a 50-H hearing after he filed a Notice of Claim and was deposed, after which he

commenced this action.

According to Velez, he was midway between the first and second floor when the accident occurred. His uncle, Nicolas Rosario ("Rosario" or "uncle") was a few steps behind him. At the time, Velez was carrying a puppy in his right hand and holding onto the railing with his left hand. Velez testified at his 50-H hearing that when he reached the landing on the second floor he noticed it was "not dry" and that it looked like it "was humid. Possibly on its way to drying, but not drying." He did not, however, notice any accumulation of water on the steps.

As he continued from the second to the first floor, he slipped and fell. After he fell he noticed that his jeans and t-shirt were dirty and wet. When he looked back up the stairs, he noticed "track marks" and wetness. Although he did not touch the liquid he saw, he testified noticed it smelled like chlorine or Clorox. Velez also stated it did not appear that someone had spilled the liquid he slipped on but that "the staircase looked professionally mopped."

At his examination before trial, Velez was again called upon to answer questions about the substance he slipped on. He testified that he had not noticed any wetness before he fell but after he fell, he noticed there was a "dark. Like black" liquid on the stairs and it smelled like Clorox.

Velez's uncle was also deposed and asked questions about plaintiff's accident. Rosario testified that he noticed plaintiff's pants wet after he fell and had black streak marks although the water on the steps itself looked colorless against the gray steps. Rosario noticed a strong smell like "chlorine and ammonia mixed or something like that" as soon as he entered the first floor landing and that it was heavy towards the bottom of

the stairs. Rosario also noticed the area looked "freshly mopped." Although Rosario testified that it "always" smells that way when the custodial staff cleans, and he is a long term tenant of the complex where the accident occurred, defense counsel objected to his response. As Velez and Rosario made their way to the lobby to get to the hospital, Rosario saw a blue garbage can looking container with wheels on it. The container had a mop, cleaning supplies and a broom in it.

NYCHA contends that it is "impossible" that Velez slipped on excessive water caused by its employee mopping the floor or that the substance allegedly involved in his accident was any product used by NYCHA custodians to clean. NYCHA produced its custodian Robert D. Lewis ("Lewis"), for a deposition and he has also provided sworn affidavits in support of NYCHA's motion.

Lewis testified at his EBT that he took care of the building- "Building 50"- where the accident occurred and his hours were from 8:00 a.m. to 4:30 p.m. five (5) days a week. Among other things, he was responsible for mopping the floors. When shown a janitorial mopping schedule, he said that he followed that schedule. When asked whether he recalled mopping the stairs on the October 4, 2007 at 3:45 p.m. in the afternoon he said "I do not recall" and when pressed whether he remembered mopping the floor at all that day he responded "no." Lewis also answered that according to his schedule, the stairs were never mopped, only swept. However, if mopping was required, he did so.

Lewis also testified that if he mopped and it was not on the schedule for him to do so, he "would just do it." The product he used for cleaning is called "Microbio" which, Lewis stated, is a pink liquid with a perfume fragrance. He also stated, however, that it

has a "detergent" smell. Lewis could not recall the ingredients of the product such as whether it contains chlorine bleach. He did testify, however, that he did not think it smells like bleach. According to Lewis, he never uses anything but Microbio to clean the floors. Lewis also described a two-mop process that he uses to first wash then dry the area he mops. Lewis also testified that he mops the stairs between the 1<sup>st</sup> and 2<sup>nd</sup> floors more than once a day.

Lewis provides his sworn affidavit in support of NYCHA's motion clarifying the procedures he followed in sweeping, mopping, etc., the stairs. According to his cleaning schedule, Lewis is required to "mop hallways, stairs, basement" on Thursdays between 12:30 p.m. and 3:00 p.m. In his affidavit, Lewis more vividly remembers the events of the day of the accident and states, emphatically, that he did not mop the stairs that day.

Lewis' supervisor, Joacim Mendez also provides his sworn affidavit stating that "based upon my knowledge and experience" NYCHA only uses Microbio to clean, it has a sweet perfume scent and does not give off any odor of ammonia, chlorine bleach or Clorox. Mendez concludes that plaintiff's fall "could not have been caused a NYCHA's caretaker's use of Microbio."

Billy Philips, NYCHA's caretaker provides a sworn affidavit stating that there is a log book kept by the caretakers and that it contains no record of a complaint about the procedures used at the building to clean the stairs.

### **Discussion**

It is well established law that a landowner has a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes

the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). This common law duty is, however, tempered by the requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it (Pappalardo, supra).

To prevail on this motion for summary judgment, NYCHA has the burden of make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [ Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]]. Only if this burden is met does it then shift to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

NYCHA has not met its burden on this motion of showing that it did not create a dangerous condition at the premises. Although Lewis denies mopping the stairs in a negligent manner, he remembers little about the events of that day. He could only state with certainty that he "follows" the schedules, but he also testified that he mops the stairs between the 1<sup>st</sup> and 2<sup>nd</sup> floors more than once a day.

Although NYCHA appeared at the oral argument of this motion<sup>1</sup> with a container of Microbio, the product it claims is used exclusively by its custodial staff to clean the stairs at the building, and requested that the court smell the product so it could decide whether or not it smells like chlorine, ammonia or Clorox, the court denied defendant's application to do so. It is hornbook law that the courts function in deciding a motion for summary judgment is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). Thus, the court must not make a factual determination on a motion for summary judgment, as this is the province of the jury. It is for the jury, not this court, to decide what the product NYCHA uses smells like. Moreover, despite the "perfumed" nature of Microbic, Lewis testified that it does have a detergent type smell.

Regardless of whether NYCHA uses or does not use a chlorine bleach or ammonia type smelling product, this does not resolve the issue of whether the stairs were improperly cleaned. Plaintiff raises a triable issue of fact whether someone else spilled a bleach type liquid on the steps that the custodian was negligent in cleaning.

The log maintained in the usual course of business does not resolve the issue of notice. While it may show that no complaints were recorded and that NYCHA did not have actual notice of a dangerous condition on the stairs that day, plaintiff has also raised issues about constructive notice.

The log also does not establish, as a matter of law, that the custodian had not

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<sup>1</sup>Actually, the product was temporarily confiscated by concerned court officers at the metal detectors who observed it was a toxic substance. Although defendant's counsel requested that the court intervene so they could bring the cleaning fluid upstairs, the court denied the application, without prejudice.

mopped the stairs shortly before plaintiff slipped and fell. As a long time resident of the building, plaintiff testified that he had seen someone cleaning the on at least 10 to 20 occasions between 1:30 - 2:30 p.m. as he was returning from work.

The "doctrine of impossibility" most commonly arises in contract actions and involves situations where the contract cannot be performed. Although NYCHA claims it is "impossible" for the accident to have happened as plaintiff describes this, once again, implicates issues of credibility. Unlike an elevator that cannot "fall" up, the incident that plaintiff describes is not "impossible" (Miller v. Schindler Elev. Corp., 308 AD2d 312 [1<sup>st</sup> Dept 2003]). The testimony of Velez and his uncle (an eye witness) is sufficient to raise a triable issue of fact that the stairs were wet and slippery.

NYCHA has failed to prove that it is entitled to summary judgment as a matter of law. There are triable issues of fact that require the denial of defendant's motion and it is denied.

### **Conclusion**

In accordance with the foregoing,

It is hereby

**ORDERED** that NYCHA's motion for summary judgment is denied in its entirety as there are triable issues of fact; and it is further

**ORDERED** that this case is ready to be tried after the upcoming scheduled mediation is completed; and it is further

**ORDERED** that plaintiff shall serve a copy of this decision and order on Mediator Vigilante and on the Office of Trial Support so the case can be scheduled for trial; and it

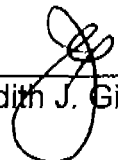
is further

**ORDERED** that any relief requested that has not been expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
June 16, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

JUN 17 2011

NEW YORK  
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