

**Molinari v 167 Hous. Corp.**

2012 NY Slip Op 31647(U)

June 18, 2012

Supreme Court, New York County

Docket Number: 100658-07

Judge: Judith J. Gische

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

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

PART \_\_\_\_\_

Index Number : 100658/2007  
MOLINARI, PETER  
vs  
167 HOUSING  
Sequence Number : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

JUN 21 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: June 18, 2012

[Signature]  
HON. JUDITH J. GISCHE <sup>J.S.C.</sup>

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  
Peter Molinari,

Plaintiff (s),

**-against-**

167 Housing Corp. and Akam Associates, Inc.

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 100658-07  
Seq. No.: 003

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

**FILED**

JUN 21 2012

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Defs' n/m (3212) w/PFL affirm, exhs . . . . . NEW YORK	1
Pltf opp w/SC affirm, PM, DSB affids, exhs . . . . . COUNTY CLERK'S OFFICE	2
Defs' reply . . . . .	3
Various stips to adj . . . . .	4

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

**GISCHE J.:**

This is a negligence action for personal injuries. Defendants are jointly represented and they have answered the complaint. This motion was timely brought after plaintiff filed his note of issue (CPLR 3212; CPLR § 3212; Brill v City of New York, 2 NY3d 648 [2004]). Since this matter is properly before the court, it will be decided on the merits. The court's decision is as follows:

**Facts**

Certain facts are unrefuted, undisputed or established on this motion:

Plaintiff claims that on January 17, 2004, he fell on the sidewalk in front of and

abutting the building located at 167 Perry Street, New York, New York ("building" or "premises"). 167 Housing Corp. ("owner") owns the building and Akam Associates Inc. ("Akam" or "managing agent") was at that time the owner's property manager. This motion concerns how plaintiff's accident occurred. While plaintiff claims that he tripped and fell on the uneven surface of the sidewalk, defendants contend plaintiff does not actually know what caused his accident and that even if he tripped, he cannot prove that they had notice of or created the dangerous condition alleged.

Plaintiff has provided a verified bill of particulars and he was deposed. He testified at his deposition that he has been a coop tenant/shareholder of an apartment at the premises for the past 12 to 15 years. The accident occurred at midnight as he was exiting a vehicle. According to plaintiff, he had placed his right foot down onto the sidewalk and was in the process of lifting his left foot to take a step forward, when his right leg buckled out from under him so that his "knee was foot bottom" and he fell straight down.

At his deposition plaintiff stated that he was in such great pain after he fell that he did not examine the area where he fell until the next morning, when he went back to the scene of the accident. The area where he fell was lit by a street light a few feet away.

The next day he noticed that where he fell "the flag and metal curb [were] not even." His attorney provided four (4) photographs during discovery. At his EBT, the defendants showed the photographs (Exhibits A through D) to the plaintiff and asked him questions about them. One question was whether he knew who had taken the photographs and when. He stated that he did not know when they were taken or who

had placed the marks on the photographs, but he stated there were a true and accurate depiction of the area where he fell as it was on the day of the accident. Plaintiff was asked whether he had ever noticed or made any complaints about the uneven area before his accident and he replied that he had not.

Plaintiff has a construction background and at one time managed his own construction company. He testified that he was once the president of the coop board. At that time a new law came out and "the mayor's office said people [had] to fix [the] sidewalks in front of their buildings ..." Plaintiff testified at his EBT that when that occurred, he had "walked the whole building and found out which [part of the sidewalk] was bad and they repaired it..." Plaintiff described the repairs as cutting out irregular flagstones and pouring new concrete so the flags are level and "there is no deviation in levels." The "they" referred to was apparently plaintiff's "concrete guys" who did the work for the coop.

Plaintiff denies that he told doctors at the hospital that he had slipped on snow or ice. He states that it was his girlfriend who did the paperwork for him and all he did was sign it without reading it. According to plaintiff, had he "learned or overhead that Erica [his girlfriend] had made a statement stating that I slipped on ice, I would have immediately corrected her statement ..."

John Lopez, the superintendent of the building, was also deposed. He testified that when he notices a problem with the sidewalk, he notifies the managing agent who is supposed to take care of it. Akam was the managing agent in 2004. He testified that prior to the accident, he had noticed an area where, in the middle of the sidewalk, "the concrete slab or whatever was a little higher than the other..." He also stated that he

had noticed that "over the years the curb has become a little bit sunk..." and that this sinking occurred "in many areas" near the building. Lopez stated that when he first noticed this sinking, he notified Akam about it. He could not recall how many times he reported that condition, but he did remember pointing out the uneven flagstone and sinking curb to the managing agent during one of their regular visits. Lopez never made any kind of report, however, nor show these areas to any one on the board. Lopez stated that plaintiff told him that his accident happened when his foot got stuck in the "tree pit" as he was getting out of a car. Although he says he prepared a report about the accident, that report has not been located. Plaintiff denies he made that statement.

Mark Weil, an Akam vice president, was also deposed. He stated that when Akam was the property manager he would visit the property once every 5 to 10 days. On those visits he would meet with the super (Lopez) and then do a walkthrough of the property inside and outside.

Plaintiff's girlfriend, Erica Terwillegar, was also deposed. She was present when plaintiff fell, but did not actually see him fall. She only say him lying on the ground, "splayed" out. She stated that she and the doorman helped plaintiff into the building because he was in a great deal of pain. According to Terwillegar, plaintiff fell because the sidewalk was "all wonky... all crooked, the slabs." When asked whether there was any snow in the area where plaintiff fell, she answered "No. I mean there was snow. It was late at night."

Terwillegar testified that she completed the forms at the hospital. She states that she wrote plaintiff had slipped on ice because she presumed that is what had happened

because "it [was] winter time [and] there was snow on the street..." She also testified that although there was no snow on the sidewalk because the super was very careful about cleaning it up, she noticed some piles of snow in the roadway a few feet away. When asked why she had changed her mind about how the accident happened, Terwillegar replied that "people fall down for a reason. There had to be a reason [why plaintiff fell] . . ." According to Terwillegar, it was not until later that she learned that plaintiff had not fallen because of snow or ice. She also testified that they had not stopped to examine the sidewalk that night after plaintiff fell because they were more concerned with getting him into the building and the pressure off his foot. She states that although plaintiff signed the form after she completed it, she filled it out while he was being examined and they did not discuss its contents. Plaintiff signed the document without reading it.

### **Arguments**

Defendants maintain that plaintiff does not know why or how he fell and there is no evidence that he fell because of some defect in the sidewalk. They point out that defendant only noticed the uneven sidewalk the day after the accident, but he completed a Patient Data Base form at the hospital stating he had slipped on ice. They also claim that plaintiff's testimony is not that he tripped or slipped at all, but that his leg "buckled out from under him" suggesting that his fall was more likely due to a misstep or loss of balance. Thus, according to defendants, plaintiff is merely speculating that he fell because of the uneven sidewalk.

Defendants contend that they did not have notice of the dangerous condition alleged because no one complained about it and despite routine maintenance

inspections of the area, no one noticed it. They claim the photographs are not evidence in admissible form because plaintiff does not know who took them or when.

Alternatively, defendants argue that if plaintiff tripped or slipped on the curb, they have no duty to maintain and repair the curbs, only the sidewalks adjacent to their property. They deny creating the defective condition alleged or making any special use of the sidewalk.

Plaintiff provides a sworn affidavit in opposition to defendants' motion in which he states the following:

"I exited the vehicle and took several steps on the roadway. I stepped up onto the sidewalk with my right foot and my right ankle rolled sideways as I was lifting my left foot to take the next step. My ankle rolled because the sidewalk felt uneven, my legs buckled and I fell landing on my right side. I looked to see why my ankle rolled but I was very dark and I could not see the portion of the sidewalk that I just stepped upon because the only lighting came from the spotlights located under the canopy of the entrance which was approximately 20 feet away."

According to plaintiff, it was not until the next day that he noticed "that what [had] caused me to fall was the uneven, not leveled, sidewalk. I noticed that the curb was flushed against other portions of the sidewalk, but not where I fell. I also noticed that the curb had not sunk into the road. The concrete flag by the tree where I fell was uneven, elevated and raised approximately 2 - 3 inches. The photograph labeled Defendants' Exhibit "B" shows the area where I fell." He states that he did not fall because of snow or ice.

Plaintiff provides the deposition of Susan Trauner who is employed by non-party Tudor Realty Services, Corp., the current managing agent for the building. She was

shown the same photographs that were shown to plaintiff. She stated that they were a fair and accurate depiction of what the sidewalk looks like today but could not recall any uneven areas. She also stated that she could find no accident reports regarding this incident.

Plaintiff has retained Daniel S. Burdett, a professional engineer, as his expert. Burdett states he reviewed the four photographs, the bill and supplemental<sup>1</sup> bill of particulars and the transcripts of the individuals who were deposed. He did not, however, do a site inspection. He states, based on looking at the photographs, that the concrete flags are not flush on all sides with the curb and the sidewalk. He opines that the sidewalk is no longer in contact with the curb and has lifted. He states further that this condition is "a clear textbook hazard." He opines that this hazard has the characteristics of a trap and/or snare. Although he has not inspected the area of the accident, he opines that the tree trunk would have obstructed what little light there was in the area and made the concrete unnoticeable. Finally, he opines that the alleged defect did not arise suddenly, but developed over the course of several months, if not years. Burdett cites a number of codes sections he contends were violated, including Admin Code § 7-210 [b], more commonly known as the "sidewalk law."

Plaintiff argues that defendants' motion should be denied because he identified the cause of his fall and demonstrated that the sidewalk area between the flag and the metal curb were defective, uneven and, therefore, negligently maintained. He maintains that although at the time of the accident he did not know what caused him to

---

<sup>1</sup>The supplemental bill of particulars was not provided by either side to the court.

fall this was because it was too dark for him to see and he was in pain. He contends that his testimony about the manner in which he fell, coupled with photographs of the location where he fell, raises a genuine issue of fact for the jury to decide.

Plaintiff urges the court to reject and not consider the Patient Data Base sheet from the Hospital for Special Surgery where he was treated. He contends the form is unaffirmed and uncertified and, therefore, not evidence in admissible form. He also claims that the statements made by Trewilleger on that form about his falling on ice are incorrect, not made by him and, therefore, lack probative value.

Plaintiff contends that defendants had actual notice of the defective condition alleged because of Lopez's statement that he reported mis-leveled flagstones to Akam but they did not make any repairs.

### **Applicable Law**

A movant seeking summary judgment in its favor must 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]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then 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]).

### **Discussion**

One argument advanced by defendants is that plaintiff actually slipped on ice,

but is seeking to hold them liable for their alleged negligent maintenance of the sidewalk. A related argument is that even if plaintiff did not slip on ice, they have no obligation to maintain the area where plaintiff fell because he fell or tripped on the curb.

In 2003, the New York City Council enacted Admin Code § 7-210 (the "sidewalk law"), which states in part:

- a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
- b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk ...
- c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks ... in a reasonably safe condition.

However, Admin Code § 19-101 [d] defines sidewalk as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (Ascencio v. New York City Housing Authority, 77 A.D.3d 592 [1<sup>st</sup> Dept 2010]). A "gap" between the metal portion of the curb and the concrete portion of the curb has been held to not be a part of the sidewalk (Garris v. City of New York, 65 A.D.3d 953 [1 Dept. 2009]).

Plaintiff has not alleged that he fell or tripped on the curb or that his foot got caught in a gap between the curb and the concrete portion of the curb. His claim, as laid out in the bill of particulars, his testimony and sworn affidavit, is that he stepped up off the roadway and had one foot on the sidewalk when, as he was lifting his left foot, his leg buckled and he fell down. He has never stated that his foot went in the gap between the curb and concrete. He has consistently described his accident as happening when he stepped onto an uneven surface on the sidewalk. Even there are inconsistencies in his statement, such inconsistencies are for the trier of fact to resolve (Psihogios v. Stavropoulos, 269 A.D.2d 295 [1<sup>st</sup> Dept. 2000]). Therefore, defendants have not proved that the accident occurred on the curb or that plaintiff's foot became trapped in any gap between the curb and the concrete such that they would have no liability for his injuries. In any event, there are genuine issues about how the accident occurred that preclude the grant of summary judgment.

Defendants point out that Patient Data Base form states that plaintiff slipped on ice and, therefore, they claim plaintiff's recent sworn affidavit presents a feigned issue of fact. The form states that it was completed by Terwillegar. Both Terwillegar and plaintiff state that she filled the form out while he was being examined by the doctor at the hospital. When the examination was completed, he signed the form without reading it.

An entry in a hospital record comes within the statutory business records rule only if it is relevant to the diagnosis or treatment of the patient's ailment (Del Toro v. Carroll, 33 A.D.2d 160, 165 [1969]). Any statement made by the patient "detailing the circumstances of an accident, where it is immaterial to and was never intended to be

relied upon in the treatment of the patient, and which serves no medical purpose, may not be regarded as having been made in the regular course of the hospital's business" (Williams v. Alexander, 309 N.Y. 283, 288 [1955]; *see also* Del Toro, 33 A.D.2d at 165) (*internal quotation marks and citations omitted*).

Plaintiff's injury was diagnosed as a broken ankle. The statement in the Patient Data Base sheet about how the accident happened was not made by him under the penalty of perjury nor is the form notarized. The statement was made by someone else who stated her impression. The statement about how plaintiff's accident happened was not, under the particular facts of this case, material to plaintiff's diagnosis and treatment. Whether it was by slipping on ice or twisting his ankle on an uneven surface, the ankle was broken. Therefore, the Patient Data Base sheet is not a hospital record under the business records exception to the hearsay rule (see CPLR 4518). It is, therefore, inadmissible hearsay and cannot support defendants' motion for summary judgment because a motion for summary judgment must be supported by evidence in admissible form (Williams v. Alexander, *supra*; *see also* Del Toro, *supra*).

The sidewalk violation law does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable (Harakidas v. City of New York, 86 A.D.3d 624 [2<sup>nd</sup> Dept 2011]). Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Admin Code § 7-210, the property owner has the initial burden of demonstrating, *prima facie*, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (James v. Blackmon, 58 A.D.3d 808 [2<sup>nd</sup> Dept 2009]; *see also* Vucetovic

v. Epsom Downs, Inc., 2006 WL 4804734, 2006 N.Y. Slip Op. 30210 [Sup Ct., N.Y. Co. 2006] aff'd 45 A.D.3d 28 [1<sup>st</sup> Dept. 2007] aff'd 10 N.Y.3d 517 [2008]; Perez v. New York City Transit Authority, 2010 WL 2023343 [Sup Ct., N.Y. Co. 2010] *n.o.r.*).

Defendants deny having notice of the alleged defect. It is the super's testimony, however, that he notified Akam that there was a problem with the concrete near the curb and that he had noticed the curb itself was sinking. Although the super could not recall how many times he brought these defects to the attention of the managing agent, he indicated it was more than once. Plaintiff was the president of the board and he testified that repairs were made to the sidewalk after the newly enacted sidewalk law. Terwillegar has also testified that the sidewalk has been "wonky" for a long time. Cumulatively, these statements not only raise genuine issues of whether the defendants had notice of a defective condition but also whether such condition was visible, apparent and existed for a sufficient length of time prior to plaintiff's accident that they could have discovered and remedied the condition (Piacquadio v. Recine Realty Corp., 84 NY2d 967, 969 [1994]; Irizarry v. 15 Mosholu Four, LLC, 24 AD3d 373 [1<sup>st</sup> Dept 2005]).

Defendants argue that the photographs plaintiff produced in discovery are inadmissible to establish constructive notice of the alleged defect because plaintiff does not know who took those photographs red marks on them. The accident took place in 2004 and plaintiff was deposed in 2008. Photographs are of no probative value unless they substantially depict the scene at the time of the accident (Kaplan v. Einy, 209 A.D.2d 248 [1<sup>st</sup> Dept. 1994]). However, photographs introduced by plaintiff taken at an unspecified time the month after the accident may be admissible at trial for the limited

purpose of demonstrating that the defective condition alleged is substantially the same as that depicted in the photos Dubec v. New York City Housing Authority, 39 A.D.3d 410 [1<sup>st</sup> Dept 2007]). Since there is testimony by the plaintiff, Weil and Lopez that the condition at the time of the accident was substantially as shown in the photographs (Bolloli v. Waldbaum, Inc., 71 A.D.3d 618 [2<sup>nd</sup> Dept 2010]), they raise triable issues of fact.

Defendants maintain that the opinion of plaintiff's expert is speculative, conclusory and should be rejected by the court because he did not perform a site inspection or compare his findings to the photographs. Defendants also contend that the expert has mischaracterized the evidence because he states that Lopez brought the defect alleged to attention of the managing agent.

Ironically, had the expert done a site inspection of the premises at or about the time he issued his opinion, defendants might have argued that his observations should be disregarded due to the passage of time (see Figueroa v Haven Plaza Hous. Dev. Fund Co., 247 A.D.2d 210 [1<sup>st</sup> Dept 1998]). The expert's opinion and observations are based upon photographs that have been identified as being a true and accurate depiction of the defect alleged (see, supra). Although Burdett's opinion, that the raised flagstones happened over a period of time may state the obvious, his other statements about why and how that may have occurred are relevant (Oboler v. City of New York, 31 A.D.3d 308 [1<sup>st</sup> Dept 2006]). The court has compared Burdett's summary of Lopez's testimony to what Lopez stated. Lopez stated that he notified Akam about problems with the sunken curb and uneven flagstones. Burdett has not mischaracterized Lopez's testimony. Therefore, the motion to reject Burdett's opinion on this motion is denied.

In sum, defendants have failed to meet their burden on this motion but even if they have, plaintiff has presented material issues of fact that warrant the denial of summary judgment. Therefore, defendants motion is denied and this case must be tried. Since the note of issue was filed, plaintiff shall serve a copy of this decision/order upon the office of trial support so the case can be scheduled for trial. Plaintiff shall do so within 30 days of this decision/order appearing on SCROLL (the Supreme Court Record On line Library).

### Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the defendants' motion is denied in all respects; and it is further

ORDERED that this case is ready to be tried; Plaintiff shall, within 30 days of this decision/order appearing on SCROLL (the Supreme Court Record On line Library), serve a copy of this decision/order upon the office of trial support so the case can be scheduled for trial; and it is further

ORDERED that any relief requested but not specifically 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 18, 2012

**FILED**

So Ordered: JUN 21 2012

Hon. Judith J. Sica, JSC  
NEW YORK  
CLERK'S OFFICE