

**Awal v Samaritan Vil., Inc.**

2012 NY Slip Op 32760(U)

September 28, 2012

Supreme Court, Queens County

Docket Number: 9704/10

Judge: Timothy J. Dufficy

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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

-----X  
**ALAN AWAL,**

**Plaintiff,**

**-against-**

**Index No.: 9704/10**  
**Mot. Cal. Date: 5/17/12**  
**Mot. Cal. No. 3**  
**Mot. Seq. 1**

**SAMARITAN VILLAGE, INC. and**  
**SAMARITAN FOUNDATION, INC.,**

**Defendants.**

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The following papers numbered 1 to 10 to read on this motion by defendants **SAMARITAN VILLAGE, INC. and SAMARITAN FOUNDATION, INC.** for an order granting summary judgment in their favor and against plaintiff **ALAN AWAL** and dismissing the plaintiff's negligence claim and the cross-motion by plaintiff for an order dismissing the defendants' summary judgment motion and an order pursuant to CPLR 3124 and 3126 striking the defendants' answer for failure to provide discovery or in the alternative compelling the defendants to provide discovery on a date certain and for an order consolidating the instant matter with the medical malpractice action, under Index No. 7000407/12.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affirmation-Affidavit of Service-Exhibits.....	1-4
Memorandum of Law In Support of Motion.....	5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-8
Reply Affirmation.....	9-10

Upon the foregoing papers, it is ordered that the motion by defendants **SAMARITAN VILLAGE, INC and SAMARITAN FOUNDATION, INC.** for an order granting summary judgment in their favor and against plaintiff **ALAN AWAL** and dismissing the plaintiff's negligence claim and the cross-motion by plaintiff for an order dismissing the defendants' summary judgment motion and an order pursuant to CPLR

3124 and 3126 striking the defendants' answer for failure to provide discovery or in the alternative compelling the defendants to provide discovery on a date certain and for an order consolidating the instant matter with the medical malpractice action under Index No. 7000407/12, are decided as follows:

This is a general negligence action brought by plaintiff Alan Awal who was a resident of Samaritan Village who was voluntarily participating in the Methadone-to-Abstinence Residential Detoxification Program at Samaritan Village. Plaintiff has brought the instant action for injuries he sustained when he allegedly slipped and fell from the top bunk bed that he was assigned to sleep in during his residency at Samaritan Village. The defendants now move for summary judgment claiming that the plaintiff has failed to make out a *prima facie* case of negligence as a matter of law.

It is axiomatic that the summary judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes on papers alone that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *see, Barr v County of Albany*, 50 NY2d 247 (1980). Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists summary judgment should be denied."

In support of their motion for summary judgment, the defendants have submitted the pleadings in this case, the deposition testimony of plaintiff Alan Awal held on January 24, 2011, the uncompleted deposition testimony of Gerald Heaney, who was deposed on behalf of Samaritan Village on April 27, 2011, as well as the affirmation of Dr. Judith Branch, dated December 15, 2011.

The defendants contend that they had no duty to place the plaintiff in a lower bunk bed even though the plaintiff had informed the defendants that he had knee pain because the plaintiff's knee injury was not severe enough to merit an immediate transfer to a bottom bunk.

As the proponent of the motion, the defendants have the initial burden of establishing that they did not create the dangerous condition that caused the plaintiff to

fall and that the defendants did not have actual or constructive notice. Schmitz v Alpha House, Inc., 26 AD3d 805 (4<sup>th</sup> Dept. 2006); Quinn v Holiday Health and Fitness Centers of NY, Inc., 15 AD3d 857 (4<sup>th</sup> Dept 2005).

The defendants also claim that a bunk bed, in and of itself, is not a dangerous condition and that the plaintiff has not set forth any evidence establishing a defect in the bed nor has the plaintiff offered any evidence that the bed failed to comply with applicable standards. Thus, the defendants contend that the plaintiff cannot prove that the defendants owed a duty of care to him and that they breached their duty. The defendants also claim that the plaintiff's injury was not the proximate cause of the defendant's negligence because it was not foreseeable that the plaintiff would fall from the upper bunk bed.

The plaintiff cross-moves for an order dismissing the defendants' summary judgment motion and submits his own affirmation and the uncompleted disposition of Gerald Heaney, dated April 27, 2011. The plaintiff contends that on December 14, 2009, Dr. Judith Branch, Director of the Medical Clinic at Samaritan Village, determined that the plaintiff met the medical qualifications to be assigned a bottom bunk bed due to the plaintiff's knee problems and Dr. Branch signed an order that the plaintiff be assigned the next available bottom bunk bed due to the plaintiff's knee pain and prior medical history. Plaintiff was then placed in a bottom bunk bed.

On December 18, 2009, the plaintiff was informed that a patient referred to as John Doe was unable to use his arm so the bottom bunk bed that the plaintiff had been assigned to was given to John Doe. The plaintiff then complained to the nurse and Staff-in-Charge stating that plaintiff had problems using the ladder on the upper bunk bed due to the extreme pain in his knee. The plaintiff also informed the staff that he was afraid he would fall off the ladder and asked to be assigned to a lower bunk.

The plaintiff alleges that, in response to his complaint, the staff members told him that he would be moved to the bottom bunk bed if the paperwork from Dr. Branch could be found in the plaintiff's file, but apparently, the staff members told the plaintiff that the paperwork he referred to could not be found in his file. Despite his continuous complaints, the plaintiff was then moved to a top bunk bed and John Doe moved into the bottom bunk bed that the plaintiff had been sleeping in.

The Plaintiff states that three days later, as he was attempting to navigate his way down the ladder of the bunk bed. He fell off the ladder and severely injured his foot. As a result, the plaintiff was taken to Jamaica Hospital where plaintiff claims the doctor improperly failed to interpret his x-rays. The plaintiff states he was diagnosed at Jamaica Hospital and was told that the examination revealed that he was negative for any fractures. The plaintiff was sent back to the Samaritan facility.

The plaintiff claims that throughout the rest of his stay at the defendants' facility, he continuously complained of severe pain in his foot and inquired on multiple occasions to be allowed to obtain a second opinion for his injuries. The plaintiff claims that his requests were always denied and that the defendants Samaritan merely treated him with opiates.

After several weeks of suffering, the plaintiff states that he left Samaritan and went to Bellevue Hospital Center where he was diagnosed with a left foot Lisfranc fracture, dislocation of his second, third and fourth tarsometatarsal joint which required plaintiff to undergo open reduction and internal fixation for the left Lisfranc fracture.

The plaintiff claims that the defendants negligently failed to place him in a lower bunk bed after he requested a lower bunk bed due to the problems he had with his knee and as a result of the defendants' failure to provide a lower bunk bed for him, he sustained serious injury when he slipped and fell from the top bunk bed as he was climbing down from the upper bunk bed ladder.

The Court finds that the plaintiff has raised an issue of fact as to whether defendants had notice of his damaged knee and had not addressed it by failing to contact the doctor or find Dr. Branch's order in a timely manner or whether it was foreseeable that the plaintiff would injure himself due to a fall from the bunk bed. Thus, the plaintiff has raised an issue of fact to defeat the defendant's motion

Moreover, the Court finds that plaintiff has raised an issue of *prima facie* negligence in that the defendant's owed the plaintiff a duty of reasonable care, that there was a breach of duty and that the plaintiff suffered a resulting injury proximately from that breach. Therefore, the defendants' motion for summary judgment is denied.

With respect to the branch of the plaintiff's cross-motion to strike the Note of Issue and the defendants' Answer, or in the alternative, to compel the defendants to provide discovery is denied, as untimely.

The branch of the plaintiff's cross-motion for an order consolidating this personal injury action with his pending malpractice action brought against Jamaica Hospital, under Index No. 7000407/12, is also denied. Where common questions of law or fact exist a motion to consolidate should be granted absent a showing of prejudice to the opposing party and consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expenses and prevent an injustice that would result from divergent decisions based upon the same facts. Kally v Mount Sinai Hospital, 44 AD3d 1010 (2d Dept. 2007); Best Price Jewelers Com, Inc. v Internet Data Storage & Systems, Inc., 51 AD3d 839 (2d Dept. 2008); Flaherty v RCP Assocs., 208 AD 2d 496 (2d Dept. 1994). Here, it is clear that there are that there are no common questions of law or fact and there has been no showing that there will be any prejudice of a substantial right to the opposing parties.

**Dated: September 28, 2012**

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**TIMOTHY J. DUFFICY, J.S.C.**