

**Gonzalez v 45-35 Realty LLC**

2013 NY Slip Op 30070(U)

January 7, 2013

Supreme Court, Queens County

Docket Number: 25300/10

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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ANA GAMARRA GONZALEZ,

Plaintiff,

-against-

45-35 REALTY LLC and SLADE INDUSTRIES  
INC.,

Defendants.  
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Index No. 25300/10

Motion  
Date December 11, 2012  
and November 20, 2012

Motion  
Cal. No. 3 and 87

Motion  
Sequence No. 5 and 6

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Notice of Motion No. 87-Affidavits-Exhibits.. 1-4  
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Upon the foregoing papers it is ordered that the motion by defendant, Slade Industries Inc. ("Slade") for summary judgment dismissing plaintiff's Complaint and any and all cross claims and the motion by defendant 45-35 Realty LLC ("45-35") for an order dismissing the Complaint pursuant to CPLR 3212 due to a lack of actual or constructive notice by the defendant 45-35 are hereby consolidated solely for the purposes of dispositions of the instant motions and are both denied.

On January 13, 2009, plaintiff, Ana Gamarra Gonzalez was allegedly injured when she fell while attempting to enter the North elevator of the apartment building in which she was a resident. Plaintiff maintains that as a result of the negligence of the defendants, she sustained severe and permanent 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.*).

Defendant Slade established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of its motion, defendant Slade submits, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testifies that: as she entered the elevator, the elevator started to go up and she became "tangled," as she entered the elevator, it moved upward five to six inches, the elevator unexpectedly jumped up, causing her to lose her balance, as a result, her back came into contact with the wall of the elevator, after her back came into contact with the wall of the elevator, she hit the corner and fell causing her left arm to hit the floor, prior to the alleged incident, she had never reported any issues with the alleged subject elevator, prior to the incident, she observed that the floor of the elevator was level with the sixth floor hallway, she was not exactly sure what caused the incident to occur, but that she lost her balance and fell; the examination before trial transcript testimony of Julio Salamea, who testified on behalf of co-defendant 45-35 Realty LLC

that: he is currently employed by Pinnacle Management, Pinnacle Management owns buildings and his current position at Pinnacle is building superintendent, responsible for the subject located at 45-35 44th Street, Sunnyside, New York, he had never previously experienced the elevator moving up or down before the elevator doors finished closing at the subject location, in his nine years as superintendent at the building, he has never received any complaints, written or verbal noting the elevator moving up or down while someone was attempting to enter it, and he had never observed the elevator moving up and down while the door was still open; and the examination before trial transcript testimony Willie Seiz, who testified on behalf of defendant Slade that: he is an engineer who was compliance manager at Slade and has worked there since April 2009, and that it would not be likely for the elevator to move upward four to six inches as plaintiff stated and did not believe that could occur on this type of equipment.

Defendant 45-35 established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). In support of its motion, defendant 45-35 provides, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testifies that: while she did make complaints to the Building Superintendent, she did not make any complaints about he elevator moving up while the two elevator doors were open prior to the date of the accident, she used the elevator at least two times on the date of the accident prior to the accident and the elevator did not move up while the doors were open and she did not experience any problems with the elevator earlier that day, she does not know of anyone who wrote down a complaint about the subject elevator prior to the accident date, and she does not know what caused her to fall; the examination before trial transcript testimony of Julio Salamea, the Building Superintendent, who testified on behalf of defendant 45-35 that: his duties and responsibilities do not include maintaining or repairing the subject elevator, he did not make any repairs to the subject elevator, the only maintenance he performs is on the elevator is to mop and sweep the floor inside it, in a given month he will use the subject elevator 10-20 times, at no time when he went to use the subject elevator did he experience a problem with it, he had ever experienced the elevator moving up or down while the doors were still open, during his nine years working at this building he has never received a complaint that the subject elevator had moved up or down while someone was attempting to enter it, nor was he aware

of the elevator operating in such a manner, he has never been notified that the subject elevator had moved up or down before the doors had finished closing, if there was a problem with the elevator he would call Slade Elevator and request they service the elevator, and he was not aware of any other individuals claiming to have been injured in the north elevator at any time during his employment; and the examination before trial transcript testimony of Willie Seiz, who testified at a deposition on behalf of Slade Industries, Inc., that: Mr. Seiz testified that every customer call to Slade Industries requesting service, maintenance, or repair is entered as a separate computer log entry in the Building Dispatch Statement, all calls for service, every communication, and every time a Slade employee is in the building, are all memorialized in the Building Dispatch Statement, if Slade had received a complaint that the subject elevator was misleveling, it would have been documented in the Building Dispatch Statement, after reviewing the Building Dispatch Statement, he did not locate any complaints about the subject elevator misleveling, and he did not see any complaints that either door of the subject elevator started to close before the person was inside the elevator.

In opposition to both motions, plaintiff presents a triable issue of fact. In opposition, plaintiff submits, inter alia: an affidavit of expert Patrick Carrajat who avers that: he is an elevator consultant, plaintiff was using the elevator in a proper manner, the performance of the elevator violated applicable Code which requires an elevator to be substantially level with the outside floor, the failure of the property owner to modernize the elevator was a proximate cause of the accident; and the affidavits of three tenants in the subject building, one of which Anna Ramos avers that: as a long term resident of the building, she has used and observed the elevator involved in plaintiff's accident, the operating condition of the elevator malfunctioned on a regular and continuing basis, prior to the plaintiff's accident, the elevator would typically arrive at the 6<sup>th</sup> floor and every other floor in a misleveled manner, and prior to the date of plaintiff's accident, she discussed the condition of the elevator and its constant malfunctioning with Julio Salamea.

In reply, defendants argue, inter alia, that plaintiff did not disclose her expert pursuant to CPLR 3101(d), and therefore, the affidavit of Patrick Carrajat should not be considered by this court. To the contrary pursuant to a recent decision by the Appellate Division, Second Department, in the case of *Rivers v. Birnbaum*, 2012 NY Slip Op 6935 (2d Dept 2012), the court held that a party's failure to disclose its experts pursuant to CPLR

3101(d) (1) prior to the filing of a note of issue does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment. "Here, like in *Rivers*, this court in the exercise of its discretion chooses to consider the affidavit of expert Patrick Carrajat.

Accordingly, plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. There are triable issues of fact in connection with, inter alia, whether a defective condition existed and whether defendants had either actual or constructive notice of a defective condition. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendants' motions for summary judgment are denied.

This constitutes the decision and order of the Court.

Dated: January 7, 2013

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**Howard G. Lane, J.S.C.**