

**Rosales v ARO 150 Realty, LLC**

2013 NY Slip Op 30836(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 107655/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**LOUIS B. YORK**  
**J.S.C.**

PRESENT: \_\_\_\_\_  
Justice

PART 2

Rosales,  
-v-  
arc 151 Realty, et ano

INDEX NO. 107655/0

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

MOTION SEQ. NO. 01

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

**FILED**

**APR 24 2013**

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 4/17/10

L. York  
**LOUIS B. YORK** J.S.C.  
**J.S.C.**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 2

-----x  
AMELIA ROSALES,

Plaintiff,

Index No. 107655/10

- against -

ARO 150 REALTY, LLC and GALAXY  
HAIR SALON, INC.,

Defendants.  
-----x

**FILED**

**APR 24 2013**

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. LOUIS B. YORK, J.:**

Defendants ARO 150 Realty, LLC ("ARO") and Galaxy Hair Salon, Inc. ("Galaxy") move, pursuant to CPLR 3212, to dismiss the Complaint in this personal injury action. In the alternative, defendants move to preclude trial testimony from plaintiff's expert witness.

**BACKGROUND**

Plaintiff, Amelia Rosales, brings this action to recover damages for personal injuries she allegedly sustained when she slipped and fell on an outdoor stairway at the premises located at 150 Manhattan Avenue, New York, New York (the "subject premises"). The following facts are gleaned from the parties' submissions.

ARO owns the subject premises. Galaxy, a first floor tenant, operates a hair salon. Plaintiff claims that she slipped and fell on the broken outdoor stairway of the subject premises, sustaining serious injury.

The Complaint essentially alleges that defendants were negligent in the ownership and maintenance of the outdoor

stairway. Specifically, the Complaint alleges that defendants failed to provide a safe means of ingress and egress for the subject premises; maintained a dangerous and hazardous condition on the outdoor stairway for a long time after receiving action notice of said condition; failed to erect signs or handrails to protect users of the outdoor stairway; and violated codes, rules, and regulations pertaining to the ownership and maintenance of the outdoor stairway. The Bill of Particulars contains similar allegations, and adds that plaintiff suffered, *inter alia*, multiple fractures to her right shoulder.

Defendants filed separate answers, generally denying the allegations in the Complaint and alleging cross claims for contribution or indemnification against each other.

Defendants now seek summary judgment dismissing the Complaint. Plaintiff opposes the motion, essentially arguing that the motion is untimely and that, in any event, material issues of fact exist which require a trial.

**DISCUSSION**

Preliminarily, plaintiff's challenge to the timeliness of defendants' summary judgment motion lacks merit. The submissions reveal that parties appeared at a Status Conference on March 21, 2012. By Status Conference Order, issued the same day, this Court directed that the Note of Issue must be filed by April 25, 2012 (Affirm in Opp, Exh A). In addition, the Compliance Conference Directives of this Court states that "[m]otions for

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summary judgment must be made within 60 days of the Note of Issue date or will be denied" (*id.*). The Affidavit of service states that the summary judgment motion was filed on June 21, 2012. As such, the motion is timely (see CPLR 3212[a]; *Fainberg v Dalton Kent Sec. Group, Inc.*, 268 AD2d 247, 248 [1<sup>st</sup> Dept 2000]).

Turning to the merits, it is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

Here, as stated, the Complaint alleges a cause of action for negligence against defendants. Negligence is the breach of a duty of care, resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976]). It is well established that New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition (*Tagle v Jakob*, 97 NY2d 165, 168 [2011]). Moreover,

where the property is open to the public, the owner has a nondelegable duty to provide a reasonably safe premises and a safe means of ingress and egress (*Backiel v Citibank, N.A.*, 299 AD2d 504, 505 [2d Dept 2002]). In addition, landlords and permittees have a common-law duty to minimize foreseeable dangers on their property (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]).

Here, plaintiff claims that her injuries were caused by defendants' breach of their duty to maintain the subject premises in a safe condition, to provide safe means of ingress and egress for the subject premises, and to meet building codes, rules, and regulations.

In seeking summary judgment, however, defendants contend that plaintiff cannot specify the cause of her alleged injuries. To support their position, defendants point to purported shortcomings in plaintiff's testimony at an examination before trial held on July 7, 2011, and submissions from plaintiff's expert witness.

At the examination before trial, plaintiff testified that on the day of the alleged incident, she left her apartment to go to the supermarket, but that on the way, she stopped at Galaxy to get a business card (Motion, Exh I, p. 12). She stated that she walked up two steps on the outdoor stairway and into Galaxy, and that she walked carefully up the stairway because the steps were broken (*id.*, p. 29, 53-54). She also stated that she left Galaxy

after receiving the business card, and that she slipped on something while walking down the outdoor stairway (*id.*, pp. 12, 24). She stated that on her way down the stairway, she started with both feet on the top step; that she tried to step carefully because she saw that the steps were broken (*id.* at 47); that she stepped down with her right foot; and that when she went to move her left foot off of the top step, her foot went into the air and she fell (*id.* at 55). She further stated that she tried to hold on to something, but there was no handrail, and she fell (*id.*, p. 29).

Plaintiff also testified that her friend, Wifredo Garcia, took photographs of the outdoor stairway approximately one week after the alleged incident (*id.* at 31-33). The submissions include the photographs taken by Wilfred Garcia (Aff in Opp, Exh D). In an affidavit accompanying the photographs, Mr. Garcia states that he showed the photographs to plaintiff, who confirmed that they show the stairs where she fell (*id.*). Mr. Garcia further states that on the date that he took the pictures he observed that the top step, including the edge, was chipped, broken and deteriorated (*id.*).

In addition, plaintiff submits, *inter alia*, an Expert Affidavit from Richard Berkenfeld, P.E., a licensed engineer who conducted an accident analysis to investigate the cause of plaintiff's accident (see Expert Affid, Affid in Opp, Exh E). The Expert Affidavit noted that partial repair to the outdoor

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stairway was performed after the alleged incident (*id.*). The affidavit also stated that the outdoor stairway was deteriorated and spalled; that there was a height differential between the two steps; that there was no handrail; and that the condition of the stairway violated sections of the New York State Multiple Dwelling Law, New York City Building Code, and the National Fire Protection Association's safety standards (*id.*).

Defendants make much of plaintiff's inability to pinpoint where her right foot was while she was falling (Motion, Exh I, p. 49), and maintain that such testimony proves that she cannot establish what caused her accident. Indeed, a defendant establishes *prima facie* entitlement to summary judgment by submitting, *inter alia*, deposition testimony in which the plaintiff is unable to identify what caused her to slip and fall (see *Thompson v Commack Multiple Cinemas*, 83 AD3d 929, 930 [2d Dept 2011]).

Here, however, the affidavit by an expert engineer who inspected the stairway and found defects, particularly deterioration and height differential between the two steps, coupled with plaintiff's testimony that she tried to avoid a broken step and reached for something to hold on to as she fell, as well as the photographic and other evidence, raise triable issues as to whether a defective condition on the outdoor stairway caused plaintiff to fall (see *Antonia v Srour*, 69 AD3d 666, 666-667 [2d Dept 2010]).

Furthermore, the Court rejects the assertion that summary judgment is warranted because plaintiff's expert cites inapplicable codes, rules, and regulations is unavailing. Even assuming that defendants complied with all statutory and regulatory requirements, questions of fact still exist as to whether defendants breached the duty to maintain the subject premises in a reasonably safe condition (see *Basso v Miller*, 40 NY2d 233, 241 [1976]).

In addition, the Court finds no merit to the contention that plaintiff's expert be precluded from testifying at trial because he relies on inapplicable codes and standards and his anticipated testimony would usurp the jury's decision-making process. It is undisputed that plaintiff's expert inspected the subject premises and conducted further investigation of the facts. As stated, the expert noted, among other things, that the outdoor stairway was deteriorated and spalled, and that there was a height differential between the two steps. Such facts are not ususally within the knowledge and expertise of a lay jury.

The admission of expert opinion evidence is a matter which rests within the discretion of the trial Judge (*Duel v Green*, 84 NY2d 795, 797-798 [1995]). Generally, an expert should be permitted to offer an opinion on an issue which involves "professional or scientific knowledge or skill not within the range of ordinary training or intelligence" (*id.* [internal citations omitted]). "The test is one of need as applied to the

unique circumstances of each case" (*id.*). Thus, where, as here, the jury requires the benefit of the expert's specialized knowledge, the expert's opinion should be allowed, even when it bears on an ultimate question (*id.*).

Finally, plaintiffs' efforts to advance this case on the theory of *res ipsa loquitur* must fail as plaintiff cannot establish that her alleged slip and fall accident is of a kind that does not occur in the absence of defendants' negligence (see *Crawford v City of New York*, 53 AD3d 462 [1<sup>st</sup> Dept. 2008]).

Based on the foregoing, the motion for summary judgment is denied.

Dated: 4/17/13

**FILED**

APR 24 2013

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COUNTY CLERK'S OFFICE

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J. S. C.  
**LOUIS B. YORK**  
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