

Vasquez v City of New York

2013 NY Slip Op 30926(U)

April 29, 2013

Supreme Court, New York County

Docket Number: 104281/2009

Judge: Kathryn E. Freed

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

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 104281/2009
VASQUEZ, DALILA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
DISMISS *CAC # 116*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

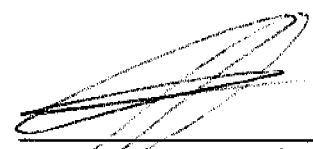
FILED

MAY 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4-29-13



_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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: PART 5

-----X
DALILA VASQUEZ, an infant by her mother and natural
guardian, CYNTHIA DUFFY and CYNTHIA DUFFY,
individually,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 104281/09
Seq. No. 00 **6**

THE CITY OF NEW YORK, HUMAN RESOURCES
ADMINISTRATION, DEPARTMENT OF HOMELESS
SERVICES, STADIUM FAMILY CENTER, DEEGAN
MOTEL CORP. and STADIUM HOTEL CORP.,

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Defendants.

-----X
HON. KATHRYN FREED:

RECITATION, AS REQUESTED BY CPLR§ 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

FILED

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	MAY 01 2013	1-2.....
ORDER TO SHOW CAUSE.....	
ANSWERING AFFIDAVITS.....	NEW YORK	3.....
REPLYING AFFIDAVITS.....	COUNTY CLERK'S OFFICE	4.....
EXHIBITS.....	
OTHER.....	

Defendants' the City of New York, the Human Resources Administration and the Department
of Homeless Services, move for an order pursuant to CPLR§ 3211 (a) (7), dismissing the complaint
for failing to state a claim upon which relief may be granted, or in the alternative, for an order,
pursuant to CPLR§ 3212, granting summary judgment, dismissing the complaint and cross claims
as against the City. Likewise, defendants Stadium Family Center, Deegan MC and Stadium HC
(together, Stadium defendants) jointly move, under motion sequence number 007, for an order,
pursuant to CPLR§ 3212, granting summary judgment and dismissing the complaint and all cross

claims as against them. These motions, under motion sequence numbers 006 and 007, are consolidated for disposition. Plaintiffs oppose.

After a review of the papers presented, all relevant statutes and case law, the Court denies the motions to dismiss.

Factual and procedural background:

Infant plaintiff Dalila Vasquez (Dalila), by her mother and natural guardian Cynthia Duffy (Duffy), commenced this action to recover damages for the allegedly serious physical injuries sustained by Dalila on September 28, 2008, when a door slammed shut on her left middle finger, resulting in a partial amputation of that finger and related injuries. It is undisputed that the accident occurred inside the defendant Stadium Family Center, a three-story homeless shelter designated for family residence, at 1260 Sedgewick Avenue, Bronx, New York, and that Duffy and the then seven-years-old Dalila were lawfully present on the premises at that time. Plaintiffs, together with Duffy's mother who was also homeless, had been assigned to unit 205 of the facility by the Bronx Prevention Assistance and Temporary Housing Office (PATH) for temporary housing, and all three had lived there continuously since February 14, 2008. The door at issue was a gray metal exit door located at the third floor stairwell "B" of the facility.

The action was commenced on March 27, 2009, and plaintiffs named The City, H.R.A., and D.H.S., (together, the City Defendants) and Stadium Family Center as defendants. Following joinder of issue via service of the City defendants' Answer and the Stadium Family Center's Answer, on April 13 and 16, 2009, respectively, the parties engaged in a period of discovery during which time the Deegan Motel Corp. (Deegan MC) and Stadium Hotel Corp. (Stadium HC) were added as defendants. After plaintiff filed the Note of Issue, the City Defendants served the instant motion,

under motion sequence number 006.

According to Duffy, The City of New York promised her that the Stadium Family Center would be a safe place for the family to live and that DHS would perform routine safety inspections of the facility. Duffy claims that she relied on these assurances and inspections when she permitted her young daughter to go without her, up to the third floor to visit with friends. Both Duffy and the infant plaintiff testified at the 50-H hearings and at the depositions in this action.

According to Dalila, the accident occurred while she was playing with friends who also lived at the Stadium Family Center. She testified that prior to her accident, she had been playing with two girls, Nyla and Daisha,¹ in Daisha's home unit on the second floor of the facility, and that the girls decided to go and get a third little girl, called "Moo Moo,"² whose family was living in a unit on the third floor. Dalila trailed the two girls as the three of them raced up to the third floor in stairwell "B." Dalila testified that "they was running and I was behind them and that's when they opened – then they went through the doors, that's when I went to go get the door with my hand and it just slammed on . . . my hand" (Dalila Dep., at 9). Dalila explained that Daisha pushed the door open first, and that in order to follow her friends through the doorway, she (Dalila) put her right hand out to keep the door from closing, but that the door was too heavy and it slammed shut, catching her fingers before she had a chance to go through. Her fingers got caught between the exit door's door jamb and door frame. Dalila acknowledged that she had used that stairwell before, sometimes with others and sometimes by herself, but that she had always found the door heavy and difficult to open.

¹ The deposition transcripts alternately identify the infant plaintiff's friend as "Daisha" and "Dasia."

² Duffy referred to "Moo Moo" by the name "Keishana."

At her deposition, Duffy described the door as a large heavy metal door with a square window but no door stopper. When questioned about the door and whether she had noticed any problems with it prior to her daughter's accident, Duffy testified that she had, on occasion, passed through the door, noticing only that "it doesn't close slow" (Duffy Dep., at 14) and that "[a]s soon as you let it go, it slams shut" (*id.* at 15). When asked if she had ever complained about the door and about how quickly it closed, Duffy responded at one point: "No, because you can't complain in that place. You complain to them, they - - it doesn't matter. They say go to welfare and complain" (*id.* at 15 - 16). At another point, Duffy reported that, prior to the accident, she did mention to a woman sitting at the front desk by the name of Afrika Terry, that the doors to the staircases slam shut as soon as one lets go. Duffy, who testified that she usually used the facility's elevator, rather than the stairs, to go between floors, went to examine the door two days after the accident, after which, she complained about its condition to the people at the front desk.

Plaintiffs' theory of liability is that the facility to which the City Defendants assigned them -- which was designated as a shelter for families with children, as opposed to a shelter for single adults -- was not safe for families in that it did not ensure that the heavy metal exit door on the third floor level of stairwell "B" was safe for passage by children. They assert that the door should have been fitted with a mechanism to slow down the rate of speed with which the door went from an open position to a closed position, thereby preventing it from slamming, with increasing force and speed, into the doorframe and reducing the likelihood of injury to residents, including children.

By order dated July 15, 2011, Justice Barbara Jaffe, before whom this matter was then pending, denied the prior motion of the City Defendants, under motion sequence 003, for an order, pursuant to CPLR§ 3211 (a) (7) and/or CPLR §3212, dismissing plaintiffs' claims and all cross

claims against them on the ground that the City Defendants did not own, operate, maintain or control the premises located at 1260 Sedgewick Avenue, or the homeless shelter located within the premises. Although the City Defendants provided evidence, based on a title search, that the premises was owned by Deegan MC on the day of the accident, the court determined that the motion was premature because discovery was needed to determine the roles of the respective defendants in both the operation of the homeless shelter and the control of the building. Accordingly, the parties engaged in further discovery, during which time, the parties pursued depositions and exchanged documents.

During this period of discovery, plaintiffs disclosed their expert witness's name, Robert Schwartzberg, P.E. (Schwartzberg), together with a reasonably detailed summary of his findings, opinion and expected testimony based upon the results of his visit to the accident site on August 31, 2011. In his report, Schwartzberg, noted, among other things, that when fully opened, the door would "shut in less than four seconds," that it "accelerated through the closing arc and would slam against the door stop" (Stadium Defendants' notice of motion, exhibit I at 2). He stated that the unsafe condition of the door was apparent and that, based upon his observations of chipped paint around the edges of the door, and of hinges which were worn, discolored, and covered with grease and dirt, it was his conclusion that the door had been permitted to remain in that state for a significant period of time prior to the accident. With respect to the movement of the door, Schwartzberg stated that in his professional opinion, the hinges were set to allow the door to close too fast and with excessive force, and that the door should have been fitted with an appropriately adjusted pneumatic or hydraulic type of door closure would have modulated the door's closing speed so that it slowed down, rather than sped up, during the closing arc.

The City Defendants now move, once again, for a dismissal of the complaint as against them on the ground that they are not proper parties to this action because they did not own, occupy, control or maintain the facility. In support of their motion, the City Defendants offer documentary and testimonial evidence, including the sworn affidavit and deposition testimony of David Schloss (Schloss), the senior title examiner with the New York City Law Department who conducted a title search for 1260 Sedgwick Avenue, Bronx, New York. Schloss's title search establishes that on September 28, 2008, Deegan MC was the owner of record of the property, which is designated on the tax map as Bronx Block 2530, Lot 9. The City Defendants also offer the affidavit of Christine Meyer (Meyer), an attorney employed by New York City and assigned to work with the Department of Homeless Services. Meyer's affidavit purports to deny that DHS "operated, owned, or contracted" with Stadium HC, while simultaneously acknowledging that DHA did, in fact, pay Stadium HC for the rooms it rented, on a per diem basis, for use by the City's homeless population.

Lastly, the City Defendants produced for deposition the DHS inspector, Irving Grant (Grant), who, along with another individual, performed the last inspection of Stadium Family Center prior to Dalila's accident. That inspection took place on April 22, 2008. According to Grant, DHS inspectors conduct City-wide, bi-annual inspections of each shelter in the system. The inspections include evaluations of each shelter facility's cleanliness, structural integrity and management, and the inspectors' findings are noted on site review inspection forms. With respect to the section of the form dedicated to doors, Grant explained that that section refers only to a shelter's exterior doors. He stated that stairwell doors are covered under the section of the form dedicated to hallway stairs, and that his inspection of a facility's stairwell doors pertains to their alignment and the condition of their hardware. The only notations he made on the April 22, 2008 inspection form about Stadium

Family Center's stairwell doors was: "[a]lignment needed at stair B to outside exit door. Loose lock at stair A second floor" (Grant Dep., at 26). When asked whether a door is measured for the time it takes for it to go from a fully open position to a closed position, Grant responded that he does not measure a door's pressure and that the door inspection is visual only. He stated that he is not provided with equipment to measure the force of a closing door, nor is he provided with any rules, regulations or other requirements regarding either the force or the speed with which a door closes. Grant testified that his job is to see that a door is intact and functioning properly, and that he relies on his own experience when making his evaluations. When asked specifically about slamming doors, Grant responded that, if a door is found to slam closed, it would need adjustment, and he would note that problem on the inspection form and the City would pursue its remediation with the operator of the facility.

Grant described the stairwell doors at the Stadium Family Center as "fire rated." He stated that, based on his experience, all stairway doors have to be fire rated, but acknowledged that he had no particular recollection as to the door at issue. Grant could not recall the door's size or color, nor could he recall the type, size, or adjustability of the hinges, or any other physical features of the door or its functionality. He was also unaware of any differences between regulations for family shelters and regulations for shelters designated for singles.

As to procedure, Grant explained that if he determined that a particular repair or adjustment was needed at a facility, the facility would be provided with a copy of a corrective action plan identifying the area or areas needing attention. The facility was then required to fill out and return the plan to DHS, indicating whether the work was completed or when the work was expected to be completed. Grant was not able to provide more detailed information about the City's relationship

with Stadium Family Center. He denied knowing about any agreements or arrangements, financial or otherwise, between DHS and Stadium Family Center, or who at DHS might possess this knowledge.

Relying on the above proof, the City Defendants conclude, and ask this court to conclude that, because they did not own the facility on the date of the accident, and it was the Stadium Defendants' responsibility (*see* City Defendants' exhibit T, lease between Deegan MC and Stadium HC, § 8), and not theirs, to maintain the facility in reasonably safe condition, they did not owe a duty of care to plaintiffs and cannot be held liable in negligence for the injuries sustained by Dalila.

While the evidence establishes that Deegan MC, and not the City Defendants, was the owner of the facility on September 28, 2008 and had been since Deegan MC recorded title to the property on March 28, 1980, neither Schloss nor Meyer provided any information as to the nature of the relationship between the City Defendants (DHS in particular) and the Stadium Defendants (Stadium Family Center in particular) and how that relationship affects their legal liability to the population they serve. With respect to Grant's testimony, while it is informative in some respects, it does not illuminate the relationship between co-defendants.

Despite Justice Jaffe's directive to the City Defendants to address these and other pertinent issues, they, once again, offer proof only as to title, and acknowledge, through Grant's testimony, that the City Defendants arrange for bi-annual inspections and mandate corrective action where and when needed. Other than the DHS inspections, the City Defendants neglect to explain, among other things, how the shelter system works, which entities are responsible for accepting a particular facility into the shelter system, what criteria are used for accepting a facility, whether and to what extent the criteria differ for shelters housing families with young children, and how the various City Defendants

communicate with, and provide payment to, the shelters within its system, including Stadium Family Center.

The basis of the Stadium Defendants's motion is that there is no evidence that the door was in a dangerous or defective condition at the time of the accident, precluding a finding of negligence against them. They assert that the door closed on the infant plaintiff's fingers because she was not strong enough to hold it in an open position so that she could go through it and should not have been wandering around without adult supervision, and not due to any defect in the door, its hinges, or in its operation or maintenance.

The Stadium Defendants support their motion with the affidavit of their own professional engineer, David A. Guido, P.E. (Guido), who, like Schwartzberg, visited the facility several years after the accident for the purpose of examining the stairwell "B," third floor exit door. While their physical descriptions of the door are fairly similar (except that Guido identifies it as a "fire door" and Schwartzberg does not use that term), the engineers disagree about the adequacy of the door's hinges, whether the door's rate of closure is excessive, and whether it is, and was, on the day of the accident, unsafe for persons, children in particular, to pass through that doorway.

Guido points out that Schwartzberg has not cited to any code violation with respect to the use of hinges or to the speed with which the door closes. He also points out that the National Fire Protections Association (NFPA) expressly permits the use of spring hinges on fire doors (section 4.6.3.1), that the New York City's Fire Code requires fire doors to be self-closing (section 703.2.3). Guido reports that his own tests on the door, which he performed on February 14, 2012, did not reveal a "slamming" door, as it took just under three seconds for the door to go from fully open to fully closed, which is slightly less than Schwartzberg found when he timed the door's closing speed,

and that both his findings and that of Schwartzberg are slower than the minimum closing speed for hinged fire doors set at 1.5 seconds by the American National Standards Institute (ANSI), at section 404.2.7 of the New York City Building Code's Accessibility Subcode ICC/ANSI A117.1-2003.³

The Stadium Defendants produced for deposition, the individual who managed the Stadium Family Center at the time of the accident, Yoel Fuld (Fuld). Despite an apparent hesitancy to answer questions, Fuld explained that at all relevant times, he was employed by Stadium HC to manage the homeless shelter which Stadium HC owned and operated under the name Stadium Family Center. The facility housing Stadium Family Center was owned by Deegan MC. By lease dated November 1, 1991, Deegan MC leased the facility to Stadium HC for a period of 20 years, with the lease term set to expire on October 31, 2011.

Although he used the terms "the City" and "the Department of Homeless Services" interchangeably, Fuld testified that the way the approved families would be sent to Stadium Family Center was that "the City of New York gave reservations to the Stadium Family Center. We didn't do much choosing. We just took pretty much whatever the City sent . . . The City would call up and say we would like this person to stay and should have an empty room and that was it" (Fuld Dep., at 96). He explained that in September 2008, all the tenants residing in the facility were provided by DHA and paid for by DHS. "The City rented [the units] from me and then they gave them to tenants, to homeless families . . . They gave it to homeless families. So I guess that's kind of a sublet kind of thing . . . There was no official written contract" (*id.* at 99). He stated that tenants must sign a form directing the City to pay Stadium Family Center for their accommodations.

³ Stadium Defendants also point out that Schwartzberg incorrectly described the accident as occurring on the hinged side of the door.

Fuld testified that as part of his job, he conducted weekly inspections of the building, noted any problems he found on a pad and gave it to maintenance for their attention. He did not hold onto his notes longer than a week, but would follow up to see if the problem was corrected. Fuld stated that DHS did not require him to make inspections on a periodic basis, nor did they require him to keep maintenance or repair records.

With respect to the subject door, Fuld was unable to recall the last time any maintenance was performed on it or if and when a door company had been called for with respect to its operation. He was also unaware of any complaints about a "slamming door," or about the speed with which it closed, or whether anyone had made complaints to any of the desk clerks about the door. Although it was the desk clerk's job to follow up a complaint with a work order, such work orders were not kept as part of the facility's records, but again, Fuld was unaware of any complaints or work orders about this or any other exit door in the facility's stairwell, and he denied making any requests to anyone at Deegan MC about repairing the stairwell doors. As for its being a family shelter, Fuld was aware that most tenants had children of varying ages with them. As for safety issues, he testified that if and when a family checked in with an infant, he would provide them with a crib and stated that there were safety gates on every window on each of the three stories.

The Stadium Defendants argue that there is no evidence that the Stadium Family Center was out of compliance with any applicable statutes, codes, rules and other regulations, and no evidence that they had prior actual or constructive notice that the door was "slamming" shut, or that it operated in a defective manner. They rely on Guido's report to establish that the subject door is self-closing, as is required of a fire door, and that it, including its spring hinges, complies with all applicable codes, standards and regulations. They argue that Schwartzberg's analysis relies on a preference for

pneumatic or hydraulic door closing mechanisms over spring hinges and concludes that the use of such hinges constitutes negligence, without citing one rule or regulation mandating his preferred door closing hardware or prohibiting the use of spring hinges. They point to the fact that Fuld had no prior notice that there was a problem with the door, that the bi-annual inspection failed to report a problem with the rate of speed with which it closed or with any other aspect of the door, that the results of both engineers's tests were slower than ANSI required, and that the hinges are regulation compliant.

In opposition to the motions, plaintiffs rely on the City Defendants' promise that Stadium Family Center would be a safe place for the family, including the young child, to reside, and that DHS would conduct regular inspections to insure the facility's safety. They also rely on the fact that one or more oral complaints had been made to desk personnel about a "slamming door" prior to the accident and that Schwartzberg's report establishes that the heavy door was negligently allowed to operate with excessive speed and force, creating a dangerous condition at stairwell "B." Plaintiffs argue that both the City Defendants and the Stadium Defendants were, at a minimum, on constructive notice of the "slamming" problem based upon the presence of chipped paint at the edges of the door and door stop/frame, which a diligent and thorough inspection of the door by DHS and/or Fuld prior to the accident, would have revealed. Plaintiffs conclude that defendants were negligent in choosing to ignore this problem instead of remedying it prior to the infant plaintiff's accident.

Conclusions of law:

It is well settled that the proponents of a motion for summary judgment "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. Failure to make such showing requires denial

of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Neither the City Defendants nor the Stadium Defendants have made this showing, nor have the City Defendants demonstrated that they have no control with respect to the operation of the facility, entitling them to a dismissal under CPLR§ 3211 (a) (7).

While an examination of both parties’s submissions fails to reveal any mechanical defect or code/regulatory violation with respect to the door’s operation (rendering the issue of notice irrelevant), the courts have long recognized that compliance with applicable statutes and regulations is not necessarily dispositive of a negligence action involving premises liability. Under common law, landowners and business proprietors have a duty to maintain their properties in a reasonably safe condition in light of all the circumstances “including the likelihood of injury to others, the seriousness of the injury, and burden of avoiding the risk” (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995] [internal quotation marks and citation omitted]; see also *Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). This duty to maintain premises in a reasonably safe condition in order to prevent foreseeable injuries, includes consideration of the well-known propensity of children to roam, climb and play, and to do so regardless of warnings from their parents and others (*Holtlander v Whalen & Sons*, 70 NY2d 962, 963 [1988]; *Collentine v City of New York*, 279 NY 119, 125 - 126 [1938]; *Sarbak v Sementilli*, 51 AD2d 1001, 1002 [2nd Dept 2008]; *Morr v County of Nassau*, 22 AD3d 728, 728-729 [2nd Dept 2005]; *Diven v Village of Hastings-On-Hudson*, 156 AD2d 538, 539 [2nd Dept 1989]; *Lewin v United Skates of Am., Inc.*, 24 Misc 3d 1226[A]*2, 2009 NY Slip Op 51627[U] [Sup Ct, Kings County 2009]).

The parties to this action do not meaningfully dispute where or how the infant plaintiff sustained her injuries, nor do they meaningfully dispute that the use of spring hinges on fire doors

such as the door at issue, is permitted by code. Rather, what they dispute are issues pertaining to: (1) whether the Stadium Family Center was a safe facility for use by the City Defendants as a shelter for families with children; (2) whether it was foreseeable that children assigned to live at that facility would move about the facility, and in doing so, attempt to pass through the third floor door at stairwell "B"; (3) whether this type of accident was foreseeable, and if it was, what preventive measures should, within reason, have been taken to provide for a safer, more controlled closure of the door; and (4) whether the failure to provide a more controlled closing mechanism constituted a breach of duty to keep the property in a reasonably safe condition.

Having failed to demonstrate, as a matter of law, that the Stadium Family Center, and in particular, the third floor exit door at stairwell "B" was maintained in a reasonably safe condition in view of the circumstances, including the young age of some of the residents that the facility houses, the motions of the City Defendants and the Stadium Defendants must be denied.

Accordingly, it is

ORDERED that the motions, under motion sequence numbers 006 and 007, are denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: April 29, 2013
 APR 29 2013

FILED
 ENTER:
 MAY 01 2013
 NEW YORK
 COUNTY CLERK'S OFFICE

Hon. Kathryn E. Freed
 HON. KATHRYN FREED
 JUSTICE OF SUPREME COURT