

**Rosner v 140 E. 28th St. Owners Corp.**

2013 NY Slip Op 31872(U)

August 9, 2013

Sup Ct, New York County

Docket Number: 107716/11

Judge: Shlomo S. Hagler

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

PRESENT: SHLOMO HAGLER  
J.S.C. Justice

PART 17

Index Number : 107716/2011  
ROSNER, DIANE  
vs.  
140 E. 28TH STREET OWNERS  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2  
Replying Affidavits \_\_\_\_\_ No(s) 3

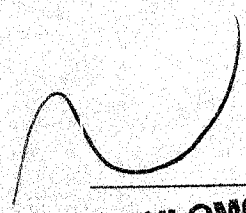
Upon the foregoing papers, it is ordered that this motion is *decided in accordance with*  
*the attached order*

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

## FILED

AUG 13 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/9/13

  
SHLOMO HAGLER, 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

**FILED**

AUG 13 2013

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

COUNTY CLERK'S OFFICE  
NEW YORK

-----X

DIANE ROSNER,

**Plaintiff,**

**Index No. 107716/11**

**-against-**

140 E. 28th STREET OWNERS CORP.,

**DECISION/ORDER**

**Defendant.**

-----X

**SHLOMO S. HAGLER, J.S.C.:**

Defendant 140 E. 28<sup>th</sup> Street Owners Corp. (“defendant” or “28th Street Owners Corp”) moves, pursuant to CPLR § 3212, for an order granting it summary judgement dismissing the complaint. Plaintiff Diane Rosner (“Rosner” or “plaintiff”) opposes the motion.

**BACKGROUND**

Plaintiff brought this action to recover damages for personal injuries when she tripped and fell on an interior two-step staircase in the vestibule of residential premises owned by defendant located at 140 East 28th Street, New York, NY (“subject building”). Plaintiff was ascending the steps to leave the subject building in which she resides. The steps lead from the lobby up to a street level landing where the front door of the subject building is located. The street floor vestibule serves as the subject building’s exit passageway. A small six-inch handrail is bolted to the wall on one side of the stairs. There is no handrail on the other side of the stairs. In fact, plaintiff avers that as she slipped, she reached out, but the handrail on the left side of the staircase was too far away to reach, and there was no handrail on the right side. (See Affidavit of Diane Rosner, sworn to on December 3, 2012, attached as Exhibit D to the opposition papers).

### SUMMARY JUDGMENT

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 eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The “[f]ailure 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]). Once this showing has been made, however, 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. “[M]ere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Defendant has a duty to maintain its premises in a reasonably safe condition (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871 [1995]). Defendant owed a duty of reasonable care to keep the stairway safe (*Tavis v 885 Third Ave. Corp.*, 43 AD3d 691 [1st Dept 2007]). Defendant, as lessor, remains responsible for common passageways in an apartment building including stairways (*Cook v Rezende*, 32 NY2d 596 [1973]; *Lievano v Browning School*, 265 AD2d 233 [1st Dept 1999]). However, in order to recover damages, a plaintiff must establish that the defendant created or had actual or constructive notice of the condition the precipitated the injury (*Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]).

## DISCUSSION

In support of its motion, defendant argues that plaintiff is unable to identify the cause of her accident and that there was a handrail that the plaintiff chose not to use. Plaintiff argues that the absence of handrails on both sides of the stairway in the lobby of defendant's building was the proximate cause of her injuries. Plaintiff also claims that the stairs were slippery. However, she does not recall seeing any liquid on the floor. (See EBT of Diane Rosner, attached as Exhibit C to the Motion ("Rosner EBT") at 35). Plaintiff also averred that she does not know what caused her to fall, that she "just slipped." (Rosner EBT at 52). "It is well settled that absent proof of the reason for plaintiff's fall other than the 'inherently slippery' condition of the floor, no cause of action for negligence can properly be maintained." (*Kruimer v Natl. Cleaning Contractors, Inc.*, 256 AD2d 1 [1st Dept 1998]).

In opposition to the motion, plaintiff also alleges that pursuant to the Administrative Code, the stairway was required to have a handrail on both sides, and the lack of the required handrail was the proximate cause of her injuries. Administrative Code § 27-375 provides, in relevant part, that interior stairs shall comply with the following requirements:

(f) Guards and handrails. Stairs shall have . . . handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width.

(l) Stairs more than eighty-eight inches wide shall have intermediate handrails dividing the stairway into widths that maintain the nominal multiples of twenty-two inches, but the widths shall not be greater than eighty-eight inches nor less than forty-four inches.

However, neither plaintiff nor defendant proffered any evidence as to whether Administrative Code § 27-375 is applicable to the subject building or if it is exempt from the

code. Also, there is nothing in the record indicating the width of the subject stairway. In addition, the complete Verified Bill of Particulars was not attached to the motion.<sup>1</sup> Accordingly, there are insufficient facts for this Court to decide the motion.

**CONCLUSION**

Accordingly, it is

ORDERED that the defendant 140 E. 28<sup>th</sup> Street Owners Corp.'s motion for summary judgment is denied without prejudice with leave to renew this motion upon providing the absent factual information and missing papers.


Dated: August 9, 2013

ENTER:

**FILED**

AUG 13 2013

COUNTY CLERK'S OFFICE  
NEW YORK

  
\_\_\_\_\_  
J.S.C. SHILOW HAGLER  
J.S.C.

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<sup>1</sup>Page 2 of the Verified Bill of Particulars was omitted.