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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

OLIVIA HERRERA,

Plaintiff,

- against-

LISINA INC., RAYMOND'S CUSTOM DESIGN STUDIO, INC., THIRD COMMONWEALTH CORP. and CHARLES H. GREENTHAL MANAGEMENT,

Defendants.

INDEX NO. 107150/09

MOTION SEQ. NO. 001



The following papers were read on this motion by defendant Raymond's Custom Design Studio, Inc., for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits (Memo) | |
| Replying Affidavits (Reply Memo) | |

Cross-Motion: ☐ Yes ■ No

Motion sequences 001 and 002 are hereby consolidated for purposes of disposition.

This is a personal injury action commenced by Olivia Herrera (plaintiff) on or about May 20, 2009 to recover damages for injuries allegedly sustained on May 25, 2006 at approximately 10:15 a.m., when a rolling mail cart to be used for mail distribution to tenants fell on plaintiff while she was walking in the lobby area of the cooperative apartment building located at 1160 Park Avenue, New York, New York (the building). Plaintiff was employed as a housekeeper by non-parties Mr. and Mrs. Gregory, who resided in an eighth floor apartment. The building was owned by Third Commonwealth Corp. (Third Commonwealth) and managed by Charles H. Greenthal Management (Greenthal Management). About five years prior to plaintiff's accident, Lisina, Inc. (Lisina) was hired to construct new mail carts for the building. Lisina designed the subject mail carts and Raymond's Custom Design Studio, Inc. (Raymond) manufactured and

built the subject mail carts. Plaintiff brought the herein action against Third Commonwealth, Greenthal Management, Lisina, and Raymond under the theories of negligent, careless, and unlawful design, building and manufacturing of the rolling mail carts.

Now before the Court is a motion by Raymond, pursuant to CPLR 3212, for summary judgment dismissing the complaint as asserted against it (motion sequence 001). Also before the Court is a motion by Lisina, pursuant to CPLR 3212, dismissing the complaint and cross-claims asserted against it on the basis that it owed no duty to the plaintiff and that it bore no responsibility for plaintiff's alleged injuries (motion sequence 002). Discovery in this matter is complete and the Note of Issue has been filed.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227,

228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

The principal of Lisina, Lisina Ceresa (Ceresa) is an interior designer who was hired by Third Commonwealth in 2001 to renovate the lobby of the building, and as part of the renovation, to design mail carts which would replace the existing mail carts (Raymond Notice of Motion, exhibit L, p. 8-11). Raymond and Lisina (collectively, moving defendants) claim that Ceresa was asked to design new mail carts due to aesthetic reasons and not due to any safety concerns or design defects (*id.* at p. 15-17), which she did by making them lower, wider and deeper than the original carts. Lisina claims that it relied on Raymond which built the carts, to make sure the carts were safe, and it was not until Third Commonwealth and Greenthal Management specifically approved the design of the new carts that they were built by Raymond.

In support of their motions, moving defendants proffer that plaintiff has not offered or elicited any evidence of a design defect of the mail carts as well as any evidence of negligence on the part of Raymond or Lisina. Furthermore, Raymond contends that the photographs taken after plaintiff's accident (*see* Raymond Notice of Motion, exhibit N) demonstrate that changes

were made to the mail carts by the building, prior to the accident at issue. Ceresa testified at her deposition that the wheels of the mail carts in plaintiff's photographs were larger than the wheels originally placed on the carts by Raymond pursuant to her design (Raymond Notice of Motion, exhibit L, p. 24). Additionally, inconsistent with her original design, the wheels/casters were positioned higher and spread further apart, and a wooden extension was added at the bottom of the cart (*id.* at 29, 31, 53). Ceresa further testified that upon returning to the building some four or five years after the mail carts were delivered for a different job, the building superintendent, Mr. Kells, informed her that he had made the changes to the wheels/casters (*id.* at 30). Furthermore, no complaints were made to Lisina or to Raymond with respect to the mail carts prior to plaintiff's accident.

Raymond and Lisina point to the expert report of Scott Silbermann, P.E. (Silbermann) exchanged by plaintiff pursuant to CPLR 3101(d), wherein they argue that it fails to demonstrate any evidence of negligence on the part of Raymond or Lisina. Furthermore, they contend that Silbermann did not examine the subject mail carts as they were designed by Lisina and delivered by Raymond before the alterations were made to the wheels and cart by Mr. Kells. Silbermann examined the mail carts for the first time approximately five years after they were delivered to the building. As such, it is on this basis Raymond and Lisina maintain they are entitled to summary judgment dismissing the complaint and all cross-claims against them.

In opposition plaintiff proffers that the herein motions should be denied as neither Raymond or Lisina put forth expert testimony rebutting Silbermann's report. Additionally, plaintiff maintains that only one of the mail carts was altered and it is not known which cart fell on the plaintiff. In their opposition, Third Commonwealth and Greenthal Management maintain that Raymond and Lisina owe a clear duty to the plaintiff and that they offer no evidence in support of the claim that they did not negligently create a defective condition that was a foreseeable and proximate cause of plaintiff's injuries. Furthermore, Third Commonwealth and

Greenthal Management maintain that the mail cart that fell on plaintiff was not the mail cart that was altered by the building, but rather it was the mail cart that had not been altered. In support of this claim, Third Commonwealth and Greenthal Management point to the deposition testimony of the builidng's doorman Walter Ponickly (Ponickly) who was on duty the day of plaintiff's accident. Ponickly stated that one of the wheels had been replaced on one of the mail carts, but it was the other cart and not the one that fell on plaintiff (*see* Raymond Notice of Motion, exhibit J, p. 21-22). Additionally, in his report Silbermann noted that one of the two mail carts had been repaired or modified at the bottom where the wheels/casters are mounted. Although Third Commonwealth and Greenthal Management state that both Raymond and Lisina had express notice that there was a problem with the mail carts insofar as they were wobbling, unsteady and falling over, there is no evidence or testimony before the Court that these complaints were communicated to the moving defendants to put them on notice of same.

The Court finds that Raymond as the manufacturer of the mail carts has met its initial burden of establishing its entitlement to summary judgment as a matter of law. In opposition, plaintiff, Third Commonwealth and Greenthal Management fail to raise any triable issues of fact as to Raymond's negligence in manufacturing and building the carts as specifically designed by Lisina and approved by Third Commonwealth and Greenthal Management.

However, as to Lisina's motion for summary judgment, there are questions of fact that preclude summary judgment. Firstly, there is an issue of fact as to whether both mail carts had been altered by the building from their original design. Ceresa testified that upon returning to the building approximately four and five years after the carts were delivered that both mail carts had been altered by the building superintendent. However Ponickly testified that only one of the carts had been altered and Silbermann in his expert report states that only one of the mail carts was altered. "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S.J.*

*Capelin Assoc.., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [internal citations omitted]; *see also Castillo v New York City Tr. Auth.*, 69 AD3d 487 [1st Dept 2010] [holding that issues of credibility are to be resolved at trial and not by motions for summary judgment]). "This is so because the granting of such a motion is the procedural equivalent of a trial" (*S.J. Capelin Assoc.., Inc.*, 34 NY2d at 341, citing Falk v Goodman, 7 NY2d 87, 91 [1959]). Furthermore, there is a question of fact as to whether the mail cart that fell on plaintiff had been altered, and if not, whether there is an issue with the design of the carts. Accordingly, Raymond's motion for summary judgment dismissing the complaint is granted and Lisina's motion for summary judgment is denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that Raymond Custom Design Studio, Inc.'s motion, pursuant to CPLR 3212, seeking summary judgment dismissing of the complaint is granted (motion sequence 001) and the complaint is dismissed in its entirety as against Raymond without costs; and it is further,

ORDERED that Lisina, Inc.'s motion, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint and cross-claims asserted against it is denied (motion sequence 002); and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

**Dated:** 1/16/14 **Enter:**

**PAUL WOOTEN, J.S.C**

**Check one:** ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

**Check if appropriate: :** ☐ **DO NOT POST** ☐ **REFERENCE**