

**Lastuvka v hauppauge Woodlands Assoc., LP**

2015 NY Slip Op 31832(U)

September 28, 2015

Supreme Court, Suffolk County

Docket Number: 11-22018

Judge: Daniel Martin

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INDEX No. 11-22018  
CAL No. 14-01750OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN

MOTION DATE 3-17-15 (#005)  
MOTION DATE 3-20-15 (#006)  
ADJ. DATE 4-21-15  
Mot. Seq. # 005 - MD  
# 006 - MD

-----X  
KIM LASTUVKA and JOSEPH C.  
LASTUVKA,  
  
Plaintiffs,

JOSEPH B. FRUCHTER, ESQ.  
Attorney for Plaintiffs  
140 Fell Court, Suite 301  
Hauppauge, New York 11788

- against -

FISHMAN MCINTYRE, PC  
Attorney for Defendants Hauppauge Woodlands &  
Sterling Equities  
44 Wall Street, 12th Floor  
New York, New York 10005

HAUPPAUGE WOODLANDS ASSOCIATES,  
LP, STERLING EQUITIES, INC. and  
RICHARD SECURITY, INC.,  
  
Defendants.

GOTTLIEB, SIEGEL & SCHWARTZ LLP  
Attorney for Defendant Richard Security  
180 East 162nd Street, Suite 1D  
Bronx, New York 10451

-----X  
Upon the following papers numbered 1 to 38 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12, 15 - 28; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 13 - 14, 29 - 30; Replying Affidavits and supporting papers 31 - 32, 33 - 34, 35 - 36, 37 - 38; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that these motions are hereby consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion by the defendants Hauppauge Woodlands Associates, LP and Sterling Equities, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is denied; and it is further

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**ORDERED** that the motion by the defendant Richard Security, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied.

This action arises out of a personal injury claim by the plaintiff Kim Lastuvka (Lastuvka) for injuries she allegedly sustained on March 25, 2010 when she was struck by a metal object which fell from the doorway of the office building located at 700 Veterans Memorial Highway, Hauppauge, New York (the premises). Lastuvka's husband, Joseph C. Lastuvka (Mr. Lastuvka) asserts a derivative cause of action for loss of services. In their complaint, the plaintiffs allege, among other things, that the defendants were negligent in allowing an unsafe and inherently dangerous condition to exist on the premises, failing to discover the inherently dangerous condition, and failing to properly maintain and repair the premises, resulting in her injuries. The plaintiffs further allege that the defendants Hauppauge Woodlands Associates, LP and Sterling Equities, Inc. (collectively HWA) are respectively the owner and the managing agent of the premises, and that the defendant Richard Security, Inc. (Security) installed the system which incorporated the aforesaid metal object and maintained the subject door system.

HWA now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds, among other things, that the plaintiffs cannot demonstrate that it had constructive notice of the alleged defective condition on the premises, and that Lastuvka cannot identify the cause of the accident. In support of the motion, HWA submits the pleadings and the transcripts of the deposition testimony of the parties. At her deposition, Lastuvka testified that she and her husband arrived at the premises at approximately 7:00 p.m. on March 25, 2009 intending to meet with their accountant, a tenant in the building. She described the entrance to the premises as consisting of a set of exterior doors leading to a vestibule and then a second set of doors. She stated that her husband was walking in front of her, and that he opened the exterior door and was through the doorway holding the door open for her when this accident occurred. She indicated that without warning a "metal block" fell and hit her on the top of the head while she was walking through the doorway, that she did not hear any noise from the door before the object fell, and that she was not touching the door as she walked into the building. Lastuvka further testified that she first saw the object when it hit the floor of the vestibule, that her husband retrieved the object and some hardware from the floor, and that she did not know what caused the object to fall. She identified two photographs of the metal block also showing a screw and two washers as being the object that hit her. She stated that she did not know if this type of accident had happened before, when the metal block was installed on the door, or if anyone had made a complaint about the door prior to her accident.

Jose Huevo (Huevo) was deposed on October 2, 2013 and testified that he is employed by WK Equities as head of maintenance, that his company was the property manager for the premises on the date of this incident, and that all of his paychecks come in envelopes from the defendant Sterling Equities. He stated that he was a maintenance worker assigned to a different building on the day of this incident, and that a Miguel Zine (Zine) was the only worker assigned to the premises and the two other buildings located in the complex at the time. He indicated that Zine's duties included "[checking] the buildings every day for any debris, broken glasses, bathrooms that didn't work ...," and daily inspections of the entrances and exits of the premises to make sure that they functioned properly. Huevo further testified that he received a telephone call on the evening of this accident telling him to go to the premises

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and lock the doors there because the magnetic locks were not working, that he was told that Zine was not answering his phone, and that he arrived at the premises at approximately 8:30 p.m. He stated that, while at the premises, he inspected the subject door and discovered that the magnet from the “top frame” was missing, that the metal block (magnet) shown in the subject photographs is the magnet from the subject door, and that he did not remember when the magnetic locks on the doors of the premises were installed. He indicated that he did not know if Security was ever called in to perform maintenance or to repair the subject doors, that he was not aware of any other magnets falling from a door, and that he did not know if anyone reported that the magnet on the subject door was broken before this incident.

At his deposition, William Richard (Richard) testified that he is the president of Security, that his company installed the door locks at the premises pursuant to an estimate dated December 29, 2009, and that he did not know if the work was done before or after that date, but he believes the work was done in December 2009. He stated that he did not remember which of his employees actually performed the installation, that the subject photographs appear to show an “armature plate off a magnetic lock” with the hardware which holds it in place, and that he did not know where the washers in the photographs “came from.” He indicated that a typical installation of magnetic locks includes, among other things, the use of a rubber washer and a nylon washer. Richard further testified that, after the installation was complete, he met with the superintendent of the premises because “positive air pressure” from the heating, ventilation and air conditioning system was causing the doors at the premises to become “rigid” and preventing them from closing properly, and that the rigidity of the doors could affect the armature plates on the doors. He stated that he “believes” that this meeting was in March 2010, that he inspected the “plate and armature,” and that it did not require any adjustment. He indicated that he received a telephone call and traveled to the premises on the evening of this incident, and that the armature plate was missing from the subject door. Richard further testified that, if the armature was installed with the hardware shown in the subject photographs, he would have “no way of knowing” if it would eventually “fall out,” and that his company did not have a maintenance contract with the property manager of the premises.

Generally, owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see Peralta v Henriquez*, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; *Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see Herman v Lifeplex, LLC*, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; *Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]). However, the party moving for summary judgment in a premises liability action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (*see Herman v Lifeplex, LLC*, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; *Petersel v Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]).

Here, HWA has failed to establish its prima facie entitlement to summary judgment as its showing is devoid of any evidence regarding inspection of the subject area and, therefore, is insufficient to establish the absence of notice. The deposition testimony of Huevo only refers to the procedures of

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inspection of the premises in a general fashion; and it provides no evidence as to any particularized or specific inspection of the entrance doors on the date of the accident (*see e.g. Schiano v Mijul, Inc.*, 79 AD3d 726, 912 NYS2d 134 [2d Dept 2010]). Where no evidence of the last inspection is offered, a defendant fails to establish its prima facie burden, and summary judgment is properly denied without regard to the sufficiency of the plaintiff's submission on the issue of notice (*Marchese v St. Martha's R.C. Church, Inc.*, 106 AD3d 881, 965 NYS2d 557 [2d Dept 2013]; *Jackson v Jamaica First Parking, LLC*, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]).

In addition, HWA's contention that Lastuvka cannot establish the cause of this accident is without merit. A plaintiff is not required to prove the exact nature of the defendant's negligence (*see Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166), or to exclude every other possible cause for the injury-producing event to meet his or her burden of showing that the defendant's negligence was a substantial cause of his or her injury (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139 [1998]; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908 [1987]). To establish a prima facie case of negligence based on circumstantial evidence, a plaintiff must show facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95; *Bettineschi v Healy Elec. Contr., Inc.*, 73 AD3d 1109, 902 NYS2d 597 [2d Dept 2010]). Moreover, a defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (*Coastal Sheet Metal Corp. v Martin Assoc., Inc.*, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]).

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, HWA's motion for summary judgment dismissing the complaint and all cross claim against it is denied.

Security now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds, among other things, that it had no duty to inspect or repair any alleged defect in the subject door, and that it did not create or have notice of the allegedly defective condition at the premises. In support of its motion, Security submits, among other things, the transcripts of the deposition testimony of the parties including Mr. Lastuvka, and the estimate dated December 29, 2009 for the installation of the magnetic locks at the premises. At his deposition, Mr. Lastuvka testified that he accompanied his wife to the premises on the evening in question, that he approached the right side entrance door, pulled it open, and held it open so that his wife could enter the building. He stated that he heard a bang, heard his wife scream, and saw her fall, and that she was hit in the head by an eight inch long by one inch thick piece of steel which fell from the "top of the outside door frame." He indicated that he picked up the object "and the attaching hardware" and placed in the file folder that he and his wife had with them to bring to their accountant.

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It is well settled that “[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects” (*Merchants Mut. Ins. Co. v Quality Signs of Middletown*, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013], quoting *Daniels v Kromo Lenox Assoc.*, 16 AD3d 111, 791 NYS2d 17 [1st Dept 2005]; see also *Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 895 NYS2d 347 [1st Dept 2010]). It is undisputed that Security did not have a maintenance or services contract regarding the doors at the premises. Thus, it had no duty to inspect or repair said doors. Regardless, Security has failed to establish its prima facie entitlement to summary judgment herein. The testimony of its president, Richard, raises the question whether Security’s installation of the magnetic lock system, including the item known as the magnet, armature or plate, was completed in a workmanlike manner thus creating the alleged defective condition on the premises and “launch[ing] a force or instrument of harm” (see *George v Marshalls of MA, Inc.*, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]; *Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652, 848 NYS2d 230 [2d Dept 2007]). Accordingly, Security’s motion for summary judgment is denied.

Dated: September 28, 2015

  
A.J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION