

**Lee v Widlanski**

2022 NY Slip Op 31626(U)

May 20, 2022

Supreme Court, New York County

Docket Number: Index No. 153371/2018

Judge: William Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

-----X

EVA LEE AS PROPOSED ADMINISTRATRIX OF THE  
ESTATE OF GRACE LEE,

Plaintiff,

- v -

PHILIP WIDLANSKI, WID REALTY CORP., 299  
COLUMBUS AVE LLC,

Defendant.

-----X

PHILIP WIDLANSKI, WID REALTY CORP.

Plaintiff,

-against-

299 COLUMBUS AVE LLC

Defendant.

-----X

INDEX NO. 153371/2018  
MOTION DATE 01/18/2022  
MOTION SEQ. NO. 003 004 005

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595004/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 92, 93, 94, 95, 96, 97, 103, 104

were read on this motion to/for JUDGMENT - SUMMARY.

This action was commenced on April 13, 2018 by Eva Lee, as the Proposed Administratrix of the Estate of Grace Lee, against Defendants Wid Realty Corporation and its owner, Philip Widlanski, for alleged negligence that caused Grace Lee to fall on the front staircase/stoop located at 227 Columbus Avenue, New York, NY on March 9, 2017, resulting in her death on April 13,

2017. (NYSCEF Doc No. 1.) Wid Realty Corporation is the owner of 227 Columbus Avenue (the “premises”), and Philip Widlanski is the owner of Wid Realty Corporation (collectively, “Widlanski”). Both Eva Lee and her mother Grace Lee (“decedent”) resided at an apartment within the premises.

By third-party summons and complaint dated January 2, 2019, Widlanski impleaded 229 Columbus Avenue LLC (“229 Columbus”),<sup>1</sup> the corporate owner of the building adjacent to the premises, with which it shares the same front staircase/stoop. (NYSCEF Doc No. 25, Third-Party Complaint; *see also* NYSCEF Doc No. 76, Staircase Photographs, at 1-7.s) Eva Lee filed an amended complaint adding 229 Columbus as a direct defendant. (NYSCEF Doc No. 27, Amended Complaint.) On July 11, 2019, the court so-ordered a stipulation amending the caption to reflect Eva Lee’s appointment as the actual administratrix of the estate of Grace Lee pursuant to letters of administration issued by Surrogate’s Court. (NYSCEF Doc Nos. 31, 34.) On March 9, 2021, the court granted Plaintiff’s unopposed motion sequence 002 to extend the time to file the Note of Issue to August 31, 2021. (NYSCEF Doc No. 48.)

Rather than file the Note of Issue on or before August 31, 2021, however, Plaintiff filed motion sequence 003 on that very date, seeking to “add 229 Columbus Avenue LLC as a necessary party-defendant” (NYSCEF Doc No. 51), despite the fact that 229 Columbus had been actively participating in the litigation for over two years. Plaintiff also sought leave to serve a second amended complaint, the only change being the correction of “299 Columbus” to “229 Columbus”,

---

<sup>1</sup> It appears that Widlanski made a typographical error in the caption of the third-party complaint, naming the third-party defendant “299 Columbus Avenue LLC” instead of “229 Columbus Avenue LLC”. (*See* NYSCEF Doc No. 25, Third-Party Complaint, at 1, 3.) Notwithstanding the error, service was made upon the correct entity, 229 Columbus, and the allegations contained in the third-party complaint directly address the correct entity. In any event, 229 Columbus has appeared (NYSCEF Doc No. 32, 229 Columbus Answer), acknowledged the error, and participated fully in this litigation.

and a further extension of time to file the Note of Issue after each Defendant filed responsive pleadings to the second amended complaint. (*Id.*)

Motion sequence 003 is unopposed and denied as moot, as Plaintiff belatedly filed the Note of Issue on September 30, 2021. (NYSCEF Doc No. 86.) Additionally, the proposed second amended complaint is without merit as the proper Defendant, 229 Columbus, has, as noted, already been participating in the litigation notwithstanding the typographical error.

In motion sequences 004 and 005, 229 Columbus and Widlanski move, respectively, for summary judgment dismissal of the amended complaint and all cross-claims. (NYSCEF Doc No. 70, Ms004 Memo; NYSCEF Doc No. 97, Ms005 Memo.) Both Defendants argue that dismissal is appropriate because Plaintiff did not see the decedent walk up the stairs and is unable to identify the cause of decedent's fall, as evidenced by her deposition testimony. In addition, Widlanski submits the affidavit of Dr. Robert Grunes, a professional engineer, who concludes in his report that, based on Plaintiff's allegation that decedent fell "backwards, head first," decedent had successfully reached the top of the staircase before falling, that no condition of the staircase had caused the fall, and that the staircase was not otherwise out of compliance of any code or regulation. (NYSCEF Doc No. 95, Grunes Affidavit, at ¶ 13.)

In opposition, Plaintiff submits the expert affidavit of Dr. William Marletta, a private safety consultant and certified safety professional. (NYSCEF Doc No. 98, Opposition; NYSCEF Doc No. 100, Marletta Affidavit.) Dr. Marletta opines that the staircase's lack of handrails is "contrary to good and accepted safe practice and represents a significant departure from the New York City Building Code and the Multiple Dwelling Law." (Marletta Affidavit at ¶ 13.) Dr. Marletta also opines that there should be a handrail in the middle of the staircase (*id.* at ¶ 35); that the treads are non-uniform (*id.* at ¶ 38); and that the treads are "seriously worn, damaged, uneven,

not level and true, and the second tread ascending is back pitched towards the street, making them extremely dangerous[.]” (*Id.* at ¶ 44.)

### Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Once a defendant has made a prima facie showing, the burden shifts to the plaintiff to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

“It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury.” (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011].) “However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred.” (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]; compare *Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012] [reversing order granting dismissal where, although defendants met their initial burden by citing to portions of plaintiff’s deposition wherein he “seemed unable to identify the cause of his fall,” plaintiff raised issue of fact with submission of expert affidavit

finding variety of defects and code violations at the top tread of the step which plaintiff identified, through an interpreter, “was bad”] *with Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006] [finding dismissal proper where plaintiff testified that he was unable to identify the cause of his fall down staircase, thus any finding of proximate cause would be based on speculation; expert opinion regarding staircase’s code violations was irrelevant in the absence of evidence connecting violations to the fall].)

Here, Defendants meet their burdens for summary judgment dismissal by demonstrating, through Plaintiff’s deposition testimony, that she is unable to identify the cause of decedent’s fall. Specifically, Defendants cite to the following testimony:

Q. So you didn't see your mother actually walk up the steps, before she fell?

A. No.

...

Q. When you saw -- after your mother fell, did you notice what, if anything, caused her to fall?

A. Did I see what?

Q. Did she slip, did she trip? What did she do?

A. Okay, when she's falling, her hand was, like, like, there was nothing to grab, so she was like this, and then she fell.

Q. But do you recall, as you sit here today, seeing what it was that caused her to fall?

...

A. No, I was taking a leg lift -- the footrest off the wheelchair.

Q. After she fell, did you notice anything on the steps that caused her to fall? Did she slip on something, did she trip on something? Do you know what caused her to fall?

A. Let's put it this way -- let's put it this way, if you care about your mother at all, as she is laying on the sidewalk, and she just hit her head on the pavement, you are not looking at the stairs, you are looking at your mother.

Q. So if I understand you correctly, as you sit here today, you do not know what caused your mother to fall?

...

A. Okay. As she was falling back, she was -- I think, she was trying to grab something, and I think the fact that there was nothing to grab was the problem. This is from my point of view. She was falling, and she went like this, and there was nothing there.

(NYSCEF Doc No. 77, Pl. Deposition Transcript, at 67:02 - 69:15.)

Plaintiff's opposition, which relies almost entirely on her expert's opinion, fails to raise a triable issue of material fact. "Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate, especially when the expert's observations in this case were made several [years] after the accident." (*Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190–91 [1st Dept 2004].)

Standing on its own, the expert affidavit is insufficient to defeat Defendants' prima facie showing considering Plaintiff's inability to identify the cause of decedent's fall. (*Sowa v Zabar*, 193 AD3d 664, [1st Dept 2021] [affirming dismissal where defendant relied on plaintiff's testimony "that she did not know what caused her to fall, could not recall if she had slipped or tripped, and did not remember where she was standing immediately prior to her fall"]; *Plowden v Stevens Partners, LLC*, 45 AD3d 659 [2d Dept 2007]; *Ridolfi v Williams*, 49 AD3d 295 [1st Dept 2008] [affirming dismissal where, "regardless of the existence of any alleged building code violations in the configuration of the handrails, such was not a proximate cause of plaintiff's fall, and to find that the presence of an alternative handrail configuration would have prevented the fall would be based on speculation"].) As such, it is hereby

ORDERED that Plaintiff's motion sequence 003 is denied as moot; and it is further

ORDERED that Defendant 229 Columbus Avenue LLC a/k/a 299 Columbus Avenue LLC's motion sequence 004 for summary judgment dismissal is granted in its entirety, and the amended complaint and all cross-claims are dismissed as against said Defendant, with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Defendants Philip Widlanski and Wid Realty Corporation's motion sequence 005 for summary judgment dismissal is also granted in its entirety, and the amended complaint and all cross-claims are dismissed as against said Defendants, with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

5/20/2022

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: