| **Rivera v 75-85 Ellwood LLC** |
| --- |
| 2026 NY Slip Op 31930(U) |
| May 4, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 157026/2017 |
| Judge: Judy H. Kim |
| 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. JUDY H. KIM** **PART** **04**

***Justice***

----------X

DAKENNY DIAZ RIVERA, as Administrator of the Estate of JUANA RIVERA, deceased,

Plaintiff,

- v -

75-85 ELLWOOD LLC, WEST 163RD REALTY LLC, 533 41ST REALTY LLC,

Defendants.

----------X

**INDEX NO.** 157026/2017

**MOTION DATE** 01/31/2023

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendants' motion for summary judgment is denied.

## FACTUAL BACKGROUND

This action arises out of plaintiff Juana Rivera's alleged slip and fall in the bathroom of her apartment at 611 West 163rd Street, New York, New York (the "Building"). Plaintiff alleges that as she was finishing a shower, she took hold of the metal grab bar affixed to one of the shower walls, which came loose, causing her to lose her balance and fall, sustaining injuries. Plaintiff brings this action against defendants 75-85 Ellwood LLC, West 163rd Realty LLC, and 533 41st Realty LLC, the alleged owners and managers of the Building, asserting that the grab bar was a defective and dangerous condition that they negligently failed to fix.

Defendants now move for summary judgment dismissing plaintiff's complaint on the grounds that they had no duty to maintain the grab bar, did not install it, and did not have actual or constructive notice of the allegedly unsafe condition. In support of their motion, defendants rely

on the examination before trial ("EBT") testimony of the Building's property manager, Benjamin Schwadel, in which he stated, inter alia, that he inspected the Building "as often as possible" to ensure that it was clean and that tenant repair requests were addressed (NYSCEF Doc No. 106, Schwadel EBT at 11, 15) and plaintiff's EBT testimony that she never complained about the grab bar to the Building's Superintendent or property manager (NYSCEF Doc No. 104, Rivera EBT at 39-40; NYSCEF Doc No. 105, Rivera EBT at 235).

In opposition, plaintiff argues that defendants failed to meet their burden to demonstrate that they lacked actual notice of the dangerous condition, insofar as Schwadel testified that he did not review the property manager's work order or repair records or speak to the Superintendent before testifying (NYSCEF Doc No. 106, Schwadel EBT at 20-22). Plaintiff also argues that an issue of fact as to defendants' notice of the grab bar is raised by David Fernando Navia's affidavit, in that he states that plaintiff repeatedly asked the Building's management to replace it (NYSCEF Doc No. 117, Navia aff). Plaintiff further argues that defendants failed to establish that they did not create the condition but, to the contrary, an issue of fact exists as to whether they negligently installed same in light of her deposition testimony that she was told that defendants had installed the grab bar for a prior tenant (NYSCEF Doc No. 105, Rivera EBT at 236-237), and the affidavit of Vincent Pici, P.E., attesting that the grab bar was improperly installed with undersized wall anchors to an area of the wall without sufficient structural support (NYSCEF Doc No. 114, Pici Aff.).

In reply, defendants argue that Navia's affidavit raises only a feigned issue of fact, in light of plaintiff's testimony that she never complained to defendants about the grab bar. Defendants also argue that Pici's affidavit is of no probative value because it is based on photographs of the grab bar rather than an inspection of same. Finally, defendants argue, for the first time, that

plaintiff's failure to shower with the assistance of a home health care aide or a shower chair, both of which were required under the plan of care prepared by her home care services agency, were the proximate cause of her fall.

**DISCUSSION**

"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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [but] [o]nce 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" (*id.*).

Defendants have not met their burden. To establish their entitlement to summary judgment defendants must "establish that [they] maintained [the] premises in a reasonably safe manner and that [they] did not create a dangerous condition that posed a foreseeable risk of injury to individuals expected to be present on the property" (*Matos v Azure Holdings II, LP*, 181 AD3d 406 [1st Dept 2020] [internal citations omitted]). To the extent defendants note, correctly, that they have no common law or statutory duty to install a grab bar (*see Lunan v Mormile*, 290 AD2d 249 [1st Dept 2002]), this misses the point: once such a fixture has been installed, it falls within defendants' duty to maintain the premises in a reasonably safe manner (*see Balleram v 11P, LLC* 2015 WL 4993650 [Sup Ct, Bronx County 2015 [noting that the New York City Building Code promulgates standards where grab bars have been installed], *affd*, 143 AD3d 432 [1st Dept 2016]). Accordingly, on this motion, defendants have "the initial burden of making a prima facie showing that [they]

neither created nor had actual or constructive notice of the unsafe condition" (*Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017] [internal citations and quotations omitted]). "Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident" (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011] [internal citations omitted]).

Even assuming, for the sake of argument, that the deposition testimony cited by defendants establishes that they did not receive actual notice of the grab bar's condition via plaintiff, they failed to meet their prima facie burden to establish that they did not create the defective condition, as their witness "had no personal knowledge of how the subject [grab bar] [was] actually installed" (*Frees v Frank & Walter Eberhart L.P. No. 1,* 71 AD3d 491, 491-92 [1st Dept 2010] [internal citations and quotations omitted]; *see Santana v Kardash Reality Corp.*, 158 AD3d 595, 595-96 [1st Dept 2018] [defendant failed to make prima facie showing that it did not improperly install cabinet in light of, inter alia, contradictory evidence as to whether defendant superintendent previously attempted to repair cabinet that subsequently fell from wall]). Finally, defendants' argument that the grab bar was not the proximate cause of plaintiff's accident, raised for the first time in reply, cannot be considered (*see Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]) but is, in any event, without merit (*see Moe-Salley v Highbridge House Ogden, LLC*, 214 AD3d 722, 723 [2d Dept 2023] [although defendant established that plaintiff's fall was precipitated by her loss of balance when her knee buckled, but "failed to eliminate triable issues of fact as to whether the vanity should not have moved away from the wall when grabbed and whether the vanity shifting was a proximate cause of the plaintiff's fall"]). In light of the foregoing, it is "unnecessary to consider plaintiff's opposition to the motion" (*Frees v Frank & Walter Eberhart L.P. No. 1*, 71 AD3d 491, 492 [1st Dept 2010] [internal citations omitted]).

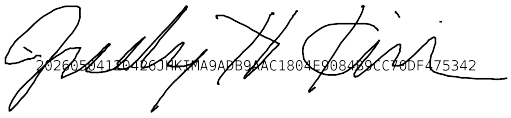
Accordingly, it is

**ORDERED** that 75-85 Ellwood LLC, West 163rd Realty LLC and 553 41st Realty LLC's motion for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that plaintiff shall, within ten days of the date of this decision and order, serve a copy of same with notice of entry on defendants; and it is further

**ORDERED** that service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the Court.



**5/4/2026**
**DATE**

**HON. JUDY H. KIM, J.S.C.**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | | **CASE DISPOSED** | | [X] | **NON-FINAL DISPOSITION** | | |
| | | **GRANTED** | [X] **DENIED** | | **GRANTED IN PART** | | **OTHER** |
| **APPLICATION:** | | **SETTLE ORDER** | | | **SUBMIT ORDER** | | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | **FIDUCIARY APPOINTMENT** | | **REFERENCE** |