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

PRESENT: EMILY JANE GOODMAN PART 17
Justice

0111292/2001

BAEZ, RAUL ORTIZ
vs
JMM AUDUBON, INC.

SEQ 2

— DISMISS ACTION

IDEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No and cross motion for sanctions

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the attached decision and order

FILED
MAR 21 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/14/05

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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RAUL ORTIZ BAEZ, Administrator of the Estate of CELIA BAEZ, Deceased, and LUIA DUCHESNE, Administratrix of the Estate of AIDA PICHARDO, Deceased,

Plaintiffs,

Index No. 111292/01

-against-

JMM AUDUBON INC.,

Defendant.

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Emily Jane Goodman, J.:

This action is brought to recover for the pain and suffering, and wrongful death, of the two decedents, Celia Baez (Celia) and Aida Pichardo (Aida), as a result of a fire which occurred in their apartment on December 9, 2000.[1] In this motion, defendant JMM Audubon Inc. moves for summary judgment. Plaintiffs cross-move for costs and sanctions, purportedly pursuant to CPLR 3124 and 3126.

As a procedural matter, this court will permit defendant to make the present motion, despite the fact that a so-ordered stipulation required defendant to make any dispositive motion by August 21, 2004, and the present motion was not made until August

[1]The complaint does not actually contain separate claims for wrongful death on behalf of any party.

24, 2004. As defendant points out, August 21, 2004 was a Saturday, making defendant's motion only a day late. Plaintiffs have failed to establish any prejudice to themselves as a result of this delay, and the motion will be considered. Allowing the motion to be made late does not, alter in any way, the other obligations contained in the stipulation.

The decedents were two of the persons living in apartment 2-2 at 165 Audubon Avenue, New York, New York (the apartment) on December 9, 2000, when a fire broke out in the apartment at around 11:00 P.M. Both women were found, overcome by smoke, in the hall of the apartment by New York City firefighters. Celia died at New York Presbyterian Hospital on January 1, 2001. Aida died at New York Presbyterian Hospital on January 9, 2002.

While plaintiffs list numerous reasons in their bill of particulars why defendant, the building's owner, is responsible for the decedents' deaths, the parties focus only on the presence or absence of smoke detectors in the apartment in the current motions. Defendant also maintains that candles burning in the apartment were the proximate cause of the decedents' injuries and deaths.

> This court has repeatedly held that in order to obtain summary judgment, movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.

Gilbert Frank Corporation v Federal Insurance Company, 70 NY2d 966, 967 (1988)(citations omitted). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." *Id.*, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'." *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968)(citation omitted).

Defendant admits that, as the owner of the building, it was required to provide and install one or more smoke detectors in the apartment, pursuant to New York City Administrative Housing Code § 27-2045. Defendant provide the following proofs to establish that the apartment had a smoke detector: an interview of Aida taken by a Fire Marshall on December 12, 2000, shortly after the fire, in which she stated that there was a smoke detector in the apartment, but that it did not go off during the fire; the deposition of John Milevoi (Milevoi), an employee of M&L Milevoi Realty, real estate manager for the apartment building, who stated that there were smoke detectors in the building in 1995, when defendant took over the building; and Milevoi's allegation that Aida never complained about the lack of a smoke detector. To show lack of proximate cause, defendant refers to the investigation conducted by the FDNY, contained in

an initial Report from the FDNY (Notice of Motion, Ex. E), and the FDNY's "10-45 Reports," which point to the burning of candles in the apartment as the cause of the fire. *Id.*, Ex. F.

In response, plaintiffs submit the deposition testimony of Raul Ortiz (Ortiz), who lived in the apartment with his mother, Celia, from 1977 to the date of the fire. Ortiz states that there was a smoke detector in the apartment (although he does not indicate who installed it, when it was installed, where it was installed, and whether it was operational upon installation). However, after a fire in September 2000, the apartment was repaired and the smoke detector was never reinstalled. Ortiz and Aida both allegedly complained to the superintendent on several occasions about the lack of a smoke detector after the September 2000 fire, and the superintendent allegedly agreed to replace it. April Sawyer and Manuel Feliz (Feliz), also residents of the apartment, testified as to the lack of a smoke detector in the apartment prior to the fire at issue.

Plaintiffs refer to two reports created by the parties' experts. Plaintiffs' expert, Frank Valenti, C.F.I., who is, among other things, a New York State Certified Fire Investigator, indicates in an affidavit that Fire Department records show that the apartment did not contain any smoke detectors, and that the failure to install smoke detectors was a proximate cause of the

decedents' injuries and deaths.[2] Notice of Cross Motion, Ex. O. Secondly, plaintiffs produce a report purportedly obtained by defendant, from a company called Kelly Fire-Life Safety Analysis Inc., which, while finding that the fire was probably caused by burning candles, also states that "we observed no evidence of battery operated smoke detectors ... ." *Id.*, Ex. G. Finally, plaintiffs proffer the same FDNY 10-45 Reports upon which defendant relies, which indicate the absence of smoke detectors in the apartment. Notice for Summary Judgment Motion, Ex. F.

On the issue of proximate cause, both Feliz and Ortiz claim that, before leaving the apartment on December 9, 2000 for the evening, they checked in on Aida and Celia, and saw no candles burning.

"[N]egligence cases by their vary nature do not lend themselves to summary dismissal ... ." *McCummings v New York City Transit Authority*, 81 NY2d 923, 926 (1993). In this case, questions of fact exist as to both the issue of whether defendant installed an operational smoke detector in the apartment in accordance with the provisions of New York City Administrative

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[2]In his report, Valenti reviewed records indicating that the fire started in the front bedroom and that Aida was in the living room (towards the back of the apartment) when she smelled smoke. Aida was able to retrieve her mother from the bedroom, but both of them were overcome by smoke several feet from the front door. Valenti concludes that a fire detector would have alerted Aida to the fire sooner, and therefore, allowed the women to escape before they were overcome by smoke.

Housing Code § 27-2045, and whether the lack of a smoke detector was a proximate cause of the injuries. Since violation of New York City Administrative Housing Code § 27-2045 may be considered by a jury as some evidence of negligence (*see Elliott v City of New York* [95 NY2d 730 (2001)]; *Cruz v City of New York*, 13 AD3d 254 [1st Dept 2004]), summary judgment would be improper.

The case of *Acevedo v Audubon Management, Inc.* (280 AD2d 91 [1st Dept 2001]), raised by defendant, does not call for a different result. In *Acevedo*, the Appellate Division, First Department, found that there was conclusive evidence that the building's owner had complied with its duty under New York City Administrative Housing Code § 27-2045 to provide and install a smoke detector in the apartment in which the fire started. Here, there is an issue of fact as to whether Defendant ever installed an operational smoke detector in accordance with the provisions of New York City Administrative Housing Code § 27-2045.[3] Further, in *Acevedo*, there was no evidence that the lack of a

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[3]Even if Defendants had proved, as a matter of law, compliance with New York City Administrative Housing Code § 27-2045, the record suggests that the superintendent may have voluntarily assumed a duty to provide a second smoke detector (see McIntosh v Moscrip, 138 AD2d 781 [3rd Dept 1988][even when no duty exists, once a person voluntarily undertakes to act he must do so with due care and liability may attach to gratuitous conduct if plaintiff establishes reliance to plaintiff's detriment]). However, as this argument was not briefed by either party, it is not considered in this motion.

smoke detector was a proximate cause of the injury. Here, Plaintiffs submit the expert report of Valenti.

Plaintiffs' cross motion for sanctions is denied, as the defendant's motion has not been shown to be frivolous.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: March 14, 2005

ENTER:

Emily Jane Goodman

EMILY JANE GOODMAN

FILED

MAR 21 2005

NEW YORK
COUNTY CLERK'S OFFICE