SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

WINKEYA WINDLEY,

Plaintiff,

- v -

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

(And a third-party action).

INDEX NO. 100182/05
MOTION DATE 1/23/12
MOTION SEQ. NO. 007

The following papers, numbered 1 to 4 were read on this motion to vacate

Notice of Motion; Affirmation — Exhibits A-C	No(s).	1; 2
Affirmation In Opposition	No(s).	3
Replying Affirmation–Exhibit A	No(s).	4

Upon the foregoing papers, it is ordered that this motion by defendant New York City Transit Authority to vacate the decision and order dated May 20, 2011, and entered May 26, 2011, is granted, and the decision and order and any judgment entered thereon are vacated; and it is further . .

ORDERED that the motion for summary judgment by third-party defendant 4761 Broadway Associates, LLC is restored and recalendared in the Motion Submissions Part (60 Centre St Room 130) to June 5, 2012 at 9:30 a.m. for submission of opposition and reply papers; and it is further

ORDERED that opposition papers shall be served by May 7, 2012; reply papers shall be served by June 4, 2012.

In this action, plaintiff alleges that, on November 5, 2003 at approximately 7:40 A.M., she slipped and fell down the subway staircase designated O2-A while walking to enter the A train subway station located at the northwest corner of Dyckman Street in Manhattan. Defendant New York City Transit Authority (NYCTA) impleaded third-party defendant 4761 Broadway Associates, LLC (Broadway Associates), alleging that was the owner of the staircase.

(Continued . . .)

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

Broadway Associates moved for summary judgment dismissing the third-party complaint (Motion Seq. No. 006). (Coffey Affirm., Ex B.) It argued that it did not cause or create any defective condition within staircase O2-A and it did not maintain, operate, control or repair staircase O2-A. The motion was unopposed.

In support of its motion, it submitted, among other things, the EBT transcript of Carmelite Cadet, a civil engineer employed by NYCTA, who testified that NYCTA does not own the O2-A stairway, and the EBT transcript of Irving Freilich, who worked in the real estate department of the MTA, who testified that, pursuant to a 1926 agreement between "Broadway Dikeman Building Corporation," the building owner, and the City of New York, "Broadway Dikeman" was responsible to maintain the stairway at issue. (Coffey Affirm., Ex B.)

However, Broadway Associates submitted an affidavit from Stanley Wasserman, a member of defendant Broadway Associates, who averred that Broadway Associates never maintained, operated, controlled or repaired the subject staircase. Wasserman also stated that all the maintenance and repair of the subject staircase had been performed by the Metropolitan Transportation Authority. Broadway Associates argued that the third-party action was barred by collateral estoppel. In *Sanchez v New York City Transit Authority*, which also involved stairway O2-A, this Court granted Broadway Associates's motion for summary judgment on default, stating, "Movants [4761 Broadway Associates LLC and SW Management LLC] have demonstrated that they do not own or control or maintain the subject stairway from street to subway and that they did not act so as to cause or create a defective or dangerous condition. (*Sanchez v New York City Tr. Auth.*, Sup Ct, NY County, June 6, 2010, Stallman, J.).

Finally, Broadway Associates also submitted copies of maintenance and repair records for the period of October 2005 through October 2006, which its counsel obtained during discovery in *Sanchez*. According to Broadway Associates, the records indicate that NYCTA personnel repaired and replaced staircase O2-A.

By decision and order dated May 20, 2011, this Court granted Broadway

(Continued . . .)

Associates's motion for summary judgment on default, severed and dismissed the complaint and any cross-claims as against it, and directed the Clerk to enter judgment accordingly. The Court stated in pertinent part,

> "Movant has sufficiently demonstrated entitlement to judgment as a matter of law. Movant has shown evidence that it does not own or control or maintain the subject stairway from street to subway and that it did not act so as to cause or create a defective or dangerous condition there. Neither plaintiff nor other defendants have opposed this motion."

Pursuant to CPLR 5015, NYCTA now moves (Motion Seq. No. 007) to vacate the Court's prior decision granting Broadway Associate's motion for summary judgment (Motion Seq. No. 006), contending that it did not timely oppose Broadway Associates' motion due to law office failure. NYCTA argues that it has a meritorious defense to the action, by virtue of an indenture dated December 28, 1926, between the City of New York and Broadway-Dyckman Building Corporation. Broadway Associates opposes this motion.

NYCTA's motion is granted. NYCTA has shown a reasonable excuse for not opposing the motion, based on law office failure, i.e., a failure of timely communication between NYCTA's outside counsel and in-house counsel who was served with the motion papers. NYCTA has also demonstrated a potentially meritorious defense based on the terms of the 1926 easement between the City of New York and Broadway-Dyckman Building Corporation. Article "First" states, in pertinent part:

> "The Owner [Broadway-Dyckman Building Corporation" hereby grants, conveys and releases unto the City, its successors and assigns, forever, except as provided herein, an exclusive right of way and easement, in through, over, and upon the Premises, and also in, through, over, and upon any future building or buildings erected in substitution therefor, for the purposes of constructing, maintaining and operating the means of access, ingress, and egress, (hereinafter called the "Approach") between the Station and the Street, and all necessary or appropriate appurtenances thereof shown on the substantially [*sic*] in accordance with the drawings annexed hereto and made a part of this Indenture . . ."

(Continued . . .)

(Coffey Affirm., Ex C.) Article "Eighth" states, in pertinent part,

> "The Owner covenants with the City, that whenever the Entrances provided for in Article Sixth[1] shall be open, *the Owner shall keep any means of access from such Entrances into the Premisses or through the premises to the street* and any portions of the premises immediately accessible from such Entrances or from such means of access *in a thoroughly clean, neat, dry, safe, and attractive condition, in thorough repair*, well-heated during cold weather, adequately lighted with electricity whenever artificial light is necessary. . . ."

(*Id.* [emphasis supplied].) NYCTA contends that it is the successor-in-interest to the City and that Broadway Associates is the successor-in-interest to Broadway Dyckman Building Corporation.

Contrary to Broadway Associates's argument, NYCTA is not collaterally estopped from asserting that Broadway Associates, the purported successor-in-Interest to Broadway-Dyckman Building Corporation, owns stairway O2-A, notwithstanding this Court's decision in *Sanchez v New York City Transit Authority.*

> "Under New York law, collateral estoppel effect will only be given to matters actually litigated and determined in a prior action. An issue is not actually litigated if there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation.
>
> . . . this Court has carved out a limited exception where the party against whom collateral estoppel is sought to be invoked has appeared in the prior action or proceeding and has, by deliberate

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[1] Article "Sixth" states, in pertinent part, "The City will permit the Owner, at the costs and expense of the Owner to construct and maintain entrances between the Premises and the Approach (hereinafter referred to as 'Entrances'). . .."

action, refused to defend or litigate the charge or allegation that is the subject of the preclusion request."

(*Matter of Abady*, 22 AD3d 71, 83-84 [1st Dept 2005]; *Academic Health Professionals Ins. Assn v Lester*, 30 AD3d 328, 329 [1st Dept 2006].)

Here, collateral estoppel does not apply because this Court's decision in *Sanchez* was granted on default, and therefore the issue of the ownership of stairway O2A was not a matter actually litigated. The limited exception recognized in *Matter of Abady* does not apply here, because Broadway Associates has not offered any evidence from the record in *Sanchez* to show that NYCTA failed to oppose its motion in *Sanchez* because it "willfully and deliberately refuse[d] to participate in those litigation proceedings, or abandon[ed] them, despite a full or fair opportunity to do so." (*Matter of Abady*, 22 AD3d at 85.) Moreover, the determination that Broadway Associates did not own staircase O2-A was not a determination rendered against NYCTA. Thus, *Sanchez* does not appear to be the situation where NYCTA willfully abandoned the litigation in the hopes of avoiding or minimizing the repercussions of adverse determinations.

Therefore, NYCTA's motion to vacate the decision and order dated May 20, 2011, and entered May 26, 2011, is granted. NYCTA is granted the opportunity to oppose Broadway Associates's previous motion for summary judgment, which is hereby restored and recalendared.

Copies to counsel.

Dated: 4/10/12

New York, New York

, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

HON. MICHAEL D. STALLMAN