

**Markov v 712 Fifth Ave., L.P.**

2012 NY Slip Op 31772(U)

July 2, 2012

Supreme Court, New York County

Docket Number: 107061/2010

Judge: Eileen A. Rakower

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

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_  
*Reading*

PART 15

Index Number : 107061/2010  
MARKOV, VLADIMIR  
vs  
712 FIFTH AVENUE  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is

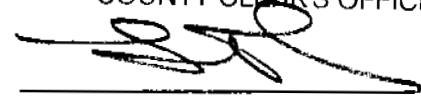
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

NOTICE: PLEASE REVIEW ALL DOCUMENTS WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

# FILED

JUL 09 2012

NEW YORK  
COUNTY CLERK'S OFFICE

 J.S.C.

Dated: 7/2/12

**HON. EILEEN A. RAKOWER**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
VLADMIR MARKOV and LIDIYA MARKOVA,

Plaintiff,

Index No.  
107061/2010

**FILED**

**DECISION**  
JUL 09 2012 **and ORDER**

712 FIFTH AVENUE, L.P. and PARAMOUNT  
GROUP, INC.,

NEW YORK Motion Seq. 002  
COUNTY CLERK'S OFFICE

Defendant.

-----X  
HON. EILEEN A. RAKOWER:

This negligence action is brought by Vladmir Markov ("Markov") for compensation for personal injuries and by Lidiya Markova ("Markova") for loss of spousal services. Defendants 712 Fifth Avenue, L.P. ("712 Fifth") and Paramount Group, Inc. ("Paramount Group"), bring this motion for summary judgment to dismiss the action against them.

This action stems from a slip and fall accident that occurred while Markov was descending the staircase between the 54<sup>th</sup> and 53<sup>rd</sup> floors at 712 Fifth Avenue in New York County on March 18, 2010. Markov was working in the building as an elevator mechanic employed by Otis Elevator. When he was injured, he was in the process of moving cans of paint to a freight elevator via decent of the subject staircase, and was carrying one or more one-gallon paint cans in his left hand. He alleges that a broken part of a step caused his injury. Defendants collectively owned and managed the commercial building at the time. Markov's complaint asserts that defendants negligently maintained the incident location, in not fulfilling an alleged obligation to correct the chipped stair.

Defendant allege that this case should be dismissed (1) upon a finding that plaintiff has not established the cause of his fall with sufficient certainty; (2) even

if plaintiff could establish that he fell due to a defect in the stairway, defendants lack negligence because they did not have notice of the alleged defect, and (3) the doctrine of non-actionable "trivial defect" applies.

Plaintiff responds that defendants' motion for summary judgment should be denied because (1) there is a large defective condition on the steps that caused plaintiff's fall; (2) according to an independent witness, the defective condition caused the plaintiff to fall and had been there for years, which constitutes constructive notice, and there was a previous fall on the same steps a few weeks earlier; and (3) defendants' breached their duty to the plaintiff, an invitee, to keep the premises reasonably safe.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. ( *See, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. ( *See, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). ( *See, Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In support of their motion, defendants submit an Affidavit of Frank Olsen, the Chief Engineer at Paramount Group, Inc., deposition testimony of plaintiff, and of Jeffrey Caimi, the general asset manager at Paramount Group who allegedly inspected the staircase, an affidavit of Michael Castella, an engineer at 712 Fifth Avenue who allegedly fell on a similar staircase at the same building, deposition testimony of Luci Cali, who was employed by Otis Elevator and was plaintiff's helper and observed the incident, and photographs of the staircase where the alleged incident occurred.

Defendants contend that Markov is unable to establish the cause of his fall with sufficient certainty to qualify for trial. In his deposition, Markov states that he was on the lower half of the staircase when he fell. However, Frank Olsen's Affidavit points out that when asked to circle the part of the staircase where he

4] fell, Markov circled the seventh stair below the floor 54 landing, which is actually within the upper half of the staircase. Defendants also claim that the circled chip is too centered to have affected Markov's right foot, since he states that he was holding onto the railing with his right hand. Defendants also indicate that Luci Cali states in her deposition testimony that she was not looking at Markov when he slipped, and therefore, defendants assert that Cali could not know what it is that caused him to fall.

Defendants also assert that as to constructive notice, the purported defect must be "visible" and "apparent" for them to be liable. Jeffrey Caimi states in his deposition that he did not know how long the "imperfection" existed, did not notice it before plaintiff was injured, and he had not been informed of it. Contrary to Markov's assertion in his deposition that Michael Castella previously fell on the same part of the staircase, Castella provides an Affidavit that although he slipped in the same stairwell on March 18, 2010, he fell above floor 54, not between floors 53 and 54. Castella also states that his slip did not involve a broken part of the stair surface, or a staircase imperfection or chip.

Additionally, defendants provide Frank Olsen's affidavit which provides his measurements of the dimensions of the chip in the staircase as evidence that it is a non-actionable trivial defect.

In opposition, plaintiffs submit the depositions of Markov and Luci Cali, plaintiff's claim with the worker's compensation board, as well as photographs of the chip in the staircase. The photographs provided by plaintiffs have circles around the allegedly defective part of the staircase where Markov purports to have fell. Markov's claim with the Workers Compensation Board also provides a statement that he slipped and fell inside the 53<sup>rd</sup> floor staircase.

Plaintiffs have provided proof in admissible form, the photographs of the staircase, as evidence that there was a chip in the staircase. Photographs of the staircase are introduced as evidence in deposition testimony and indicate that there was a chip in the staircase between the 54<sup>th</sup> and 53<sup>rd</sup> floor. There is no evidence that the chip was a transient condition or one that recently appeared. Specifically, when Jeffrey Caimi was asked in deposition whether it was new, he stated "I would say it is probably not a brand-new imperfection." He also described how it was painted the same grey as the rest of the staircase, indicating that it must have been there when the staircase was painted. Furthermore, the issue of whether the defect

was trivial is one for the jury to decide.

Wherefore, it is hereby,

ORDERED that defendants motion to for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

7/2/12  
Dated: ~~June 28~~, 2012



EILEEN A. RAKOWER, J.S.C.

**FILED**

JUL 09 2012

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