[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15
Justice

Index Number : 115509/2010
DASHAWN BROWN, AN INFANT
vs
BEAUTIFUL VILLAGE
Sequence Number : 001
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). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUL 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/18/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... [X] 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

DASHAWN BROWN, an infant by his Mother and Natural Guardian, CHIVONNE WIGFALL, and CHIVONNE WIGFALL,

Plaintiffs,

-against-

BEAUTIFUL VILLAGE REDEVELOPMENT ASSOCIATES,

Defendant.

----------X

Index No. 115509-2010

DECISION AND ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Plaintiff brings this action to recover for personal injuries that occurred as a result of an accident inside 22 East 108th Street, New York, NY, on March 29, 2010. Plaintiff, who was seven years-old at the time, attempted to climb onto the staircase railing, and accidentally fell over the bannister and down the stairwell five flights to the first floor. As a result of the fall, he sustained personal injuries including a fractured skull. Plaintiff's complaint alleges that Defendant was negligent in failing to properly design and maintain the interior staircase. Beautiful Village Redevelopment Associates ("Defendant") now moves for summary judgment pursuant to CPLR §3212, to dismiss the complaint herein.

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*See, Solomon v. City of New York*, 66 N.Y.2d 1026 [1985]). A landowner is not liable for injuries caused by conditions that do not pose a reasonably foreseeable hazard. (*See, DiPonzio v. Riordan,* 89 N.Y.2d 578, 679 NE2d 616 [1997]). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence." (*See, Rivera v. Nelson Realty, LLC*, 7 NY3d 530, 858 NE2d 1127 [2006])

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. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In support of its motion for summary judgment, Defendant attaches testimony of Plaintiff Dashawn Brown, Plaintiff's mother Chivonne Wigfall, and Plaintiff's brother Jason Egan. Defendant also annexes an affidavit and deposition testimony of field supervisor David Cruz, engineering consultant and managing director of Affiliated Engineering Laboratories, Inc., Jerry J. Shwalje P.E., and Secure Watch 24 employee, Jerry McAvoy

David Cruz, who is employed by the building's management company, states in his affidavit that he checks the stairwell for loose handrails, debris and graffiti at least once a week and in the week before the incident, he did not find any problems in the stairwell. He says that there were no complaints prior to the date of Plaintiff's accident about the steps in the subject stairwell. Furthermore, Jerry J. Schwalje P.E., who inspected the stairwell after the incident, determined that the handrail system did not violate the New York City Building Code, and that the railings were safely maintained.

Defendant also annexes testimony of Plaintiff's mother Chivonne Wigfall, which admits that neither she nor any other adults were present when Plaintiff was descending the staircase.

In opposition, Plaintiff attaches a Notice of Expert Exchange of Daniel S. Burdett, P.E., P.C., an expert expected to testify at the time of trial. He is expected to conclude that the subject staircase was unsafe, lacked reasonable safety devices, and that Defendant was negligent in creating the dangerous condition by way of

violating various statutes and ordinances. However, the statutes identified in the Bill of Particulars are too broad to notify defendant how the instant handrail is deficient. There is no allegation that it is an improper height, for example. Rather, Mr. Burdett's testimony will allegedly propose several alternative designs which, he suggests, would have rendered the staircase reasonably safe, and prevented the accident.

Plaintiffs evidence fails to establish how Defendants breached a foreseeable duty to Plaintiff. Plaintiff, a seven-year old boy, traveled down the staircase unsupervised. He used the stairway railing as a ladder in order to ride the bannister. This is not a foreseeable use of the handrail. When the railing was used in the way that it was designed to be used, there is no allegation that it was unsafe.

Plaintiff attempts to demonstrate that the staircase was defective merely by stating that an expert will testify at trial that there were alternative ways to design the staircase. However, just because a staircase can be designed in a different manner does not mean that its current design is necessarily unsafe. Nowhere in their complaint, bill of particulars, or affidavits and testimony, do Plaintiffs indicate how the railing violated New York safety code, or how it was defective. Defendant annexes testimony indicating that it had inspected the staircase in the week before the incident and that there was nothing wrong with it. To the extent that Plaintiff claims that the staircase was negligently designed to create an "attractive nuisance" or an "invitation to climb up on", New York has discredited the doctrine of attractive nuisance. *(See, Schwartz v. Armand Erpf Estate*, 255 A.D.2d 35 [1st Dept 1999]). Thus, Defendant has sufficiently demonstrated its entitlement to summary judgment as a matter of law.

Wherefore, it is hereby,

ORDERED that Defendants motion for summary judgment is granted and the Clerk is directed to enter judgement in favor of Defendant, dismissing the action in its entirety, together with costs and disbursements to the Defendant, as taxed by the Clerk upon presentation with a bill of costs.

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

DATED: July 18, 2012

EILEEN A. RAKOWER, J.S.C.