Perez v 2305 Univ. Ave., LLC
2010 NY Slip Op 33832(U)
April 1, 2010
Supreme Court, County of Bronx
Docket Number: 0008166/2007
Judge: Howard H. Sherman
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[* 1]
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NEW YORK SUPREME COURT - COUNTY OF BRONX

L.W.

PART 04

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

PEREZ,IRMA

Index №. **0008166/2007**

-against-

Hon..**HOWARD H. SHERMAN** ,

2305 UNIVERSITY AVE.LLC.

Justice.

---X

The following papers numbered 1 to 3A Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **August 21 2009** and duly submitted as No. ____ on the Motion Calendar of 12/2/09

	PAPERS NUMBERED	
Notice of Motion - ~~Order to Show Cause~~ - Exhibits A-G and Affidavits Annexed / Memo/Law	1	1A
Answering Affidavit and Exhibits H-M	2	
Replying Affidavit and Exhibits A,B / Reply Memo of Law	3	3A
______ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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PAID ❑ NO FEE ❑

Upon the foregoing papers this motion by defendant for an order awarding summary judgment dismissing the complaint is decided in accordance with the accompanying decision/order filed herein

Motion is Respectfully Referred to:
Justice: ______
Dated: ______

Dated: 4/1/10

Hon. ______
HOWARD H. SHERMAN, J.S.C.
HOWARD H. SHERMAN

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.NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
---x
Irma Perez as Administratrix of the Estate of
Juan Yanes, Deceased

Index No. 8166/2007

Plaintiff,

DECISION/ORDER

-against-

Present:

2305 University Avenue, LLC

Hon. Howard H. Sherman
Justice

Defendant
---x

Facts and Procedural History

Plaintiff administratrix seeks recovery for injuries allegedly sustained by the decedent on March 7, 2006 , when a portion of the ceiling in his bedroom collapsed on him. The decedent was a tenant in a building located at 2305 University Avenue in the Bronx owned by defendant. [1]

This action was commenced in February 2007 alleging the negligence of 2305 University Avenue LLC ("University ") in its ownership, management, operation, and maintenance of the subject premises [Verified Complaint¶ ¶7-10] . Specifically, it is alleged that defendant failed to maintain the bedroom ceiling and permitted it to become broken and in a state of disrepair , and failed to inspect or to repair it, or to give warning of its hazardous condition [Verified Bill of Particulars ¶ 5]. Plaintiff alleges that defendant created the condition and had both actual and constructive notice of the existence of the defect as it existed for a protracted period of time [Verified Bill of Particulars ¶¶5;10;23]. Addressing the issue of allegation of defendant's actual knowledge of the condition, plaintiff alleges that "[t]he person to whom, by whom and when such actual notice was given thereof is unknown

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[1] Juan Yanes died in March 2007.

at present." [Id. ¶10]. Finally, plaintiff alleges defendant was in violation of Multiple Dwelling Law § 78 (1).

Defendant served its answer in March 2007.

The Note of Issue was filed on May 28, 2009 and this motion timely made by notice dated July 24, 2009.

Motion

Defendant moves for an award of summary judgement dismissing the complaint. In support defendant submits copies of the pleadings and the verified bill of particulars [Exhibits A-D], as well as the examinations before trial testimony of the building superintendent (Exhibit E), plaintiff Irma Perez (Exhibit F), and the building manager (Exhibit G).

Contentions of the Parties

Defendant maintains that there is no material issue of fact as to its lack of liability for the underlying accident because: 1) there is no evidence that decedent was struck by a portion of the ceiling; 2) plaintiff does not allege or offer proof as to the cause of the ceiling collapse on the date of the incident, and 3) there is no evidence that defendant either created any defect in the ceiling or possessed either actual or constructive notice of it.

Plaintiff opposes the motion contending that there are material unresolved issues of fact precluding summary disposition. With respect to defendant's first contention, plaintiff argues that the testimony of defendant's superintendent concerning a telephone conversation with Mr. Yanes on the date of the accident and the superintendent's inspection of the apartment that night, as well as the contemporaneous emergency services and hospital reports raise material issues of fact that part of the ceiling had collapsed on the decedent.

With respect to defendant's second contention, plaintiff counters that the administratrix filed a complaint with New York City Housing Preservation and Development ("HPD") concerning the incident and there is ample evidence in the record that the collapse was caused by the failure of defendant to repair water damage in the apartment building. Finally, concerning the argument that there is no evidence in the record to support a finding that defendant had either notice of the condition of the ceiling in the bedroom, plaintiff maintains that the testimony of Ms. Perez concerning ongoing problems with water leaks in the building and from the apartment directly above that of the decedent, as well as prior observations of a ceiling collapse, peeling paint, water stains and discoloration raise material issues of fact concerning notice of the defective condition. In addition, plaintiff points to the fact that defendant's property manager was aware of the existence of an illegal washing machine in the apartment directly above that of the decedent,

Plaintiff submits the affidavit of Lidia Palacios a home health attendant who cared for Mr. Yanes for the period 2000-2005. In addition, the motion is supported by the affidavit of Richard Delfino (Exhibit M) , who reviewed the transcripts of the depositions, the bill of particulars , Ms. Palacios' affidavit and a color photograph submitted as Exhibit H .

In reply, defendant contends that the post-accident complaint of Ms. Perez is insufficient to establish the cause of the incident . In addition, defendant argues that neither the uncertified ambulance call report , nor the uncertified hospital records, nor the affidavit of the health care attendant should be considered nor should the affidavit of Mr. Delfino. It is argued that the medical records are inadmissible as uncertified and unsworn, and with respect to the affidavits, that neither unnoticed affiant witnessed the accident. In addition, it is argued that plaintiff offers no proof to qualify Defino as an expert. It is defendant's contention that there is no proof of either a pre-existing water condition at the premises or that a water condition caused the ceiling to fall. Lastly, defendant argues that

there is no showing that any type of inspection would have uncovered a water condition at any time prior to the occurrence.

Testimonial Evidence

Juan Lopez [2]testified that for a period of twelve years he was employed by the building owner, Finkelstein & Morgan , as the resident superintendent of the 53 unit- building at 2305 University Avenue [LOPEZ EBT: 7;28], his job duties including cleaning of the common areas and the front of the building, and picking up the garbage [Id. 8]. He also testified that he was the one who did the repairs in the building [Id.]. There were no other workers assigned to the building [Id. 11]. He reported directly to Richard Timberger [Id. 12].

When he received complaints from the tenants in the building , he would visit the apartment and inspect the problem and then schedule an appointment for repair and perform the necessary work [Id. 13]. He also received from Mr. Timbereger complaints , which had been made to his boss directly, and he would go to the apartment and check to see the problem [Id.]. Mr. Lopez also testified that he filled out work orders describing the complaints and he would fax a copy of the completed work order to his boss [Id. 14]. He kept books in his home "with orders in them", but he did not recall if he still had the 2006 work orders.

On the night of the incident he received a phone call from M. Yanes who "told [him] that an accident had occurred, that the ceiling in his room had fallen - - . . . [a]nd he told me since I've always had a key from his apartment and if I could please do him the favor of opening the door for the paramedics that were at the door." [Id.15:21-16:4]. When he received the call , Lopez was working at another building that he takes care of "for the office." He left immediately and arrived at the Yanes' apartment within 15 to 20 minutes to find the paramedics at the apartment door [Id. 16-17]. He opened the apartment and found Mr. Yanes in his pajamas sitting in the kitchen [Id. 17]. The paramedics removed Mr. Yanes in

[2] The deposition took place on 01/06/09.

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a chair and Mr. Lopez went to look in Mr. Yanes' bedroom to "clean the area where all the pile was of the falling ceiling."[Id. 19:10-12]. When he arrived in the bedroom he observed the following.

> Right now the only way that I can explain is that it was a big chunk, big piece that hit against the bedpost and from there it shattered into a million pieces on the ground.
>
> Id. 19:19-23

Lopez testified that he also observed that part of the ceiling above the bed, the size of which he estimated to be "like a big piece of sheetrock " or "96x48" was missing [Id. 20-21:16;21]. He testified as follows concerning the fallen material .

> Since these buildings are old, what fell was not sheetrock,it was concrete, it's like concrete. When it falls to the ground, It disintegrates , it pulverizes, it breaks up.
>
> Id. 22:3-6

Lopez testified that the material was not wet [Id. 22]. He made no observations of other parts of the ceiling [Id.31]. Subsequently, he filled out a work order and repaired the ceiling using sheetrock of the size indicated [Id.]. Mr. Lopez also testified that he called his boss and told him that a portion of the ceiling had fallen [Id.].

Lopez testified that prior to the date of the incident, Mr. Yanes had never made any complaints to him about the walls or ceilings in his apartment, and that he had never made "any types of repairs" to the Yanes apartment [Id. 26-27;30]. In addition, Mr. Lopez testified that during the period prior to March 7, 2006, no one in the apartment directly above , apartment 3G, had made any complaints about conditions in that apartment and he had never made any repairs in that apartment [Id. 26-27]. Mr. Lopez testified that prior to the date of the accident he never observed any evidence of water leaks, or of breaking, cracking or sagging in any of the ceilings of the building's apartments [Id. 31-32]. He also testified that in April 2006 the fire department responded to the scene of the building in connection

with a water leak from a toilet stoppage in a fifth floor apartment [Id. 29].

Richard Timberger [3] testified that he had been employed by Finkelstein- Morgan Real Estate for four or five years as a manager of ten to twelve Bronx buildings including 2305 University Avenue [TIMBERGER EBT: 7-9]. His duties were to make sure the buildings were rented and that the superintendents did their jobs [EBT: 7]. Mr. Timberger testified that Finkelstein-Morgan would contract out any required work that was beyond the expertise of the superintendent [Id. 10]. He also testified that in 2006 no written complaints[4] nor records or logs of verbal complaints were maintained by management [Id. 10-11;12]. However, he testified that Mr. Lopez was provided with a work-order book and instructed to use it to record repairs "he wants to get paid for[ ]" [Id. 24:25-25:2], with carbon copies sent to management. That book was kept by the superintendent [Id. 25]. He testified that generally tenants would tell the super if there was a problem in their apartment and Mr. Lopez would fix the "small" items and he would verbally request permission of Timberger to purchase materials or to perform a more extensive repair [Id. 11]. There was no "set policy" for general inspections of apartments by management , nor was he aware of either any violations in the building, or of a fire department emergency call there [Id. 32].

Timberger testified that he had been in the Yanes apartment on two occasions [Id. 13]. The first visit was to inspect a leak in the ceiling of the small bathroom that he concluded had resulted from the use of an illegal washing machine in the above apartment [Id. 13-14]. He did not remember whether any part of the bathroom ceiling was noticeably damaged or sagging or had peeling paint or broken plaster [Id. 26]. Timberger recalled that he may have

[3] The deposition took place on 05/15/09

[4] Timberger also testified that upon receipt of written complaint, he would call the tenant and "maybe the paper would go in the file [ ] [c]hances are it would not ." [Id. 12:5-7].

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had a conversation with Ms. Perez concerning the bathroom leak, and that this was the only conversation he had with her before the incident [Id. 20]. He testified that to his knowledge there were no other leaks from or affecting the apartment and that he did not otherwise notice any problems with the condition of the apartment's ceiling [Id. 14].

The second visit to the apartment was with Ms. Perez after the death of her father to arrange for the removal of items from the apartment [Id. 14-15].

Timberger testified that very soon after the incident, Mr. Lopez had called him to tell him that the ceiling in the Yanes' apartment had fallen [Id. 15]. Mr. Lopez inquired if it was "something you can fix" and Timberger replied "Yes" , and " [he] fixed it," [Id. 16:9-10]. No written record of the request/work order or the purchase of supplies for the repair was kept [Id. 17-18].

Timberger testified that before the incident he was not aware of any complaints in the building concerning ceiling collapses or of any collapses having occurred [Id. 20-21]. Upon review of the photo of the ceiling , Timberger testified that the ceiling was composed of plaster [Id. 21]. Finally, he testified that he had personally never made any repairs in the building [Id. 21-22].

Irma Perez testified that she was the daughter of Juan Yanes, who passed away on March 19, 2007 at the age of eighty-seven , as the result of a heart attack [IRMA PEREZ EBT: 8;14-15]. Ms. Lopez testified that her father had resided in an apartment at 2305 University Avenue for more than thirty years [EBT: 16], and that she had never resided there with him as she had left home in 1975 [Id. 9]. Her mother resided in the apartment until her death in 2005 [Id. 17]. As of 2005, Ms. Perez normally made weekly visits to her father [Id. 44-45].

Concerning repairs in the apartment, Ms. Perez testified that her father arranged for

the superintendent to make minor repairs [Id. 23-24].

With respect to particular items, Ms. Perez testified that in 1999 or 2000, or in 2001, when her father was hospitalized , she received a call from the superintendent to advise that water to the building was being shut off due to a water leak from an unknown source, and that those repairs included a need to "rip up the whole wall in the living room..." of the apartment [Id. 24:23-24]. The living room wall and "part of the ceiling" was removed [Id. 35:4] for repairs during a period when Mr. Yanes was hospitalized Ms. Perez also arranged then for the entire apartment to be painted [Id. 24-26; 55-57].

Ms. Perez testified that she called the superintendent on more than two occasions concerning water leaks in her father's apartment, but she never called the management office with this specific complaint [Id. 27-28]. Her more than five complaints to the latter lodged after her father returned to the apartment in 2001 related to noise and banging emanating from the apartment above as well as the sound of "throwing water down." [Id. 28:5-13] She was advised that the upstairs tenants were " in court to move her out." [Id. 32:14-15]. However, Ms. Perez testified that the noise never ceased [Id. 32]. She also testified that she never observed water "actually coming down" in the apartment, nor did she "feel the ceiling ", but she did observe on more than two occasions "the ceiling almost time to collapse, really puffy [ ] [i]t was a door between the kitchen and one bathroom that we had to fix it a few times [ ] [t]hat door at the end didn't close, that's how bad it was the frame." [Id. 33:8-14; 35:14-15]. Ms. Perez testified that the door was never replaced and she could not recall if it was repaired, but the door remained unable to be closed [Id.; 38-39]. She also testified that the ceiling of the living room on which she observed the "puffiness" fell more than once [Id. 35]. She testified as follows concerning these specific observations.

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> Q. Where else did you see what you believed to be puffy inside the apartment?
>
> A. Actually water leaking would be in the living room that living room that we had to fix the ceiling and the wall completely and then the water leak most of the time that it was frequently it was between the top of the door between the dining room and half a bathroom and that door at the end didn't close.
>
> Q. Did you ever talk to anyone from the office about the condition of the door ?
>
> • • •
>
> A. Not the door. I didn't specifically mention the door . I just told them to come and see the complaint. They did come and I met them there. I showed them all the things that the tenant upstairs kept constantly doing to my father's . . apartment , the damage . . .

Ms. Perez explained that she was advised by the person who inspected that the cause pf the problem was the "neglect" of the tenant above " to leave water down, running." [Id. 38:2-5] While Ms. Perez could not recall observing peeling or chipped paint or stains on the ceiling , she did observe that portions of the ceiling and wall were of a darker color [Id. 40-41]. To her knowledge that condition was never repaired [Id. 41].

Ms. Perez testified that the super and the manager inspected the apartment when she went to complain about the ceiling above the door and they advised at that time that "the tenant upstairs was very negligent , she threw water out." Ms. Perez explained.

> A. Like she have kids. She lets the kids running around the tub or something upstairs. Something they did the water come down.
>
> Q. And this was a conversation that you had with the superintendent ?
>
> A. And the manager.
>
> Q. And this conversation happened inside the apartment?
> A. Yes it did.

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• • • •

> Q. It had to be after 2005, but I don't remember exactly
> If it was before or after the accident.
>
> Id. 43:9-44:2

Ms. Perez testified that she estimated the date to be after 2005 as the condition was "getting worse and worse [.]" [Id. 44:6], and she had taken on some of the responsibilities as her father was "getting disappointed" that his complaints weren't "getting anywhere." [Id. 44:11;10]

Ms. Perez testified that a year before the incident, "the ceiling in one of the [other] bedrooms fell [ ]" and she complained to the superintendent. [Id. 51:3].

She testified that she learned of her father's accident through the medic alert system he had triggered [Id. 59]. She instructed the service to send an ambulance to the apartment and she called the superintendent to ask him to check on Mr. Yanes while she proceeded to the apartment [Id.60-63]. Mr. Lopez told her he would do so and when he called her later he advised her that "[t]he ceiling fell on top of my father and he was not able to speak and that he would stay with my father until the ambulance got there [Id. 64:6-9]. When Ms. Perez arrived at the building her father was already in the ambulance that she followed to the hospital [Id. 64-65]. After x-rays were performed , Mr. Yanes told his daughter what had transpired.

> That he already had went to bed and he was already asleep and he felt this thing on top of him. He didn't know what it was in the beginning, but since he was not able to open his eye, he felt something on his head, his chest, he pressed the button.
>
> Id. 66:2-7

He also told her that he was having pains on one side of his head and all his chest [Id.66]. She observed that the right side of his face was "black and blue." [Id. 70] . The treating

physicians advised Ms. Perez that all of her father's ribs were broken on the right side of his body and that he had a big contusion on his head [Id. 67]. Mr. Yanes was treated in the ICU for five days because he had gone "into shock." [Id. 68]. He remained in the hospital for about two additional weeks after which he was transferred to a rehabilitation center for approximately two months, and then he returned home [Id. 71-72].

The morning after the incident, Ms. Perez went to her father's apartment to take photographs of the "ceiling of the bedroom" and of pieces missing from the walls of other areas of the building , including chipping paint on the ceiling of the main entrance [Id. 103:19; 104]. When in her father's bedroom, Ms Perez observed "[h]ow big a piece [of the ceiling] fell[.] " [Id. 105:12], and she observed "[j]ust wood behind the ceiling ." [Id.:21]. Her father's bed was positioned underneath that hole in the ceiling [Id. 105:25].

Ms. Perez had conversations with the superintendent after the incident "complain[ing] to him that [she] had a feeling that this was going to happen."[Id. 109:8-9]. While her father was in the hospital, the ceiling was repaired, but Ms. Perez testified that she did not observe the repair, or how it was done, or by whom [Id. 109-110].

Ms. Perez testified that she was never advised why the ceiling fell nor did she know the cause [Id. 112-113].

Applicable Law

Summary Judgment

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). To support the granting of such a motion , it must

clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008]) . Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]).

Once this burden is met, the opposing party may defeat the motion with proof "sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The court is required at this stage to discern whether any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., op.cit at 404). Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (Navarez v NYRAC, 290 AD2d 400, [1st Dept. 2002]; see also, Briggs v 2244 Morris,L.P., 30 A.D.3d 216 [1st Dept. 2006]).

Premises Liability

It is settled that landowners have a general duty to exercise reasonable care under the circumstances to maintain their property in a safe condition (see, Basso v. Miller, 40 NY2d

233,241 [1976] , and " [d]efining the nature and scope of the duty and to whom the duty is owed requires consideration of the likelihood of injury to another from the dangerous condition or instrumentality on the property; the severity of potential injuries; the burden on the landowner to avoid the risk; and the foreseeability of a potential plaintiff's presence on the property [internal citations omitted]." (Kush v. City of Buffalo, 59 N.Y.2d 26,29-30 [1983]; see also, Golden v. Manhasset Condominium, 2 A.D.3d 345,346-347 [1st Dept. 2003])

No liability for failure to maintain premises can be found absent proof that the owner or party charged with that duty of care[5], created the specific dangerous condition or had actual or constructive notice of its existence, the latter being found upon a showing that the specific defective condition[6] was visible and apparent and existed for a sufficient length of time prior to the accident to permit its discovery and correction (see, Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967 [1994]; Gordon v. American Museum of Natural History, 67 N.Y.2d 836 [1986]). Thus, as here, in the case of an action based upon the specific allegation of the collapse of a ceiling , to prevail at trial, a plaintiff must prove defendant's knowledge of a defect before the collapse (see, Pulley v. McNeal, 240 A.D.2d 913 [1st Dept. 1997]), and if the claim is that the collapse was due to water leakage, " a plaintiff must show that the defendant had prior notice, actual or constructive, of the leak and that the leak was never repaired." (Figueroa v. Goetz, 5 A.D.3d 164,165 [1st Dept. 2004]; see also, Gomez v. 192 East 151st Street Assocs., L.P., 26 A.D.3d 276 [1st Dept. 2006]; Ellisy v. Eklecco, LLC, 56

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[5] Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (Gibbs v Port of Auth. of N.Y., 17 AD3d 252, 254, [1st Dept. 2005]; Balsam v Delma Eng'g Corp., 139 AD2d 292, 296-297, [1st Dept. 1988], lv dismissed and denied 73 NY2d 783,[1988]). Jackson v. Board of Education of the City of New York, 30 A.D.3d 57,60 [1st Dept . 2006] ; see also, Butler v. Rafferty, 100 NY2d 265, 270 [2003]

[6] A "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall (see, Gordon v American Museum of Natural History, 67 NY2d 836, 838 ; see also, Madrid v City of New York, 42 NY2d 1039)" Piacquadio , 84 NY2d 967,969 [1994]

A.D.3d 517 [2d Dept. 2008]). However, it is settled, that for purposes of this dispositive motion , defendant bears the initial burden to show the absence of such notice (see, Mitchell v. City of New York, 29 A.D.3d 372,374 [1st Dept. 2006]; Manning v. Amercold Logistics, 33 A.D.3d 427 [1st Dept. 2006]; George v. New York City Tr. Auth., 306 A.D.2d 160, 161, [1st Dept. 2003] ;295 A.D.2d 86, 91,; Giuffrida v. Metro N. Commuter R. R. Co., 279 A.D.2d 403, 404, [1st Dept. 2001].

With respect to leased premises, it is settled that "[g]enerally, a landlord may be held liable for injury caused by a defective or dangerous condition upon the leased premises if the landlord is under a statutory or contractual duty to maintain the premises in repair and reserves the right to enter for inspection and repair (see, *Guzman v. Haven Plaza Hous.Dev.Fund Co.*, 69 NY2d 559, 565-566; *Worth Distribs. V. Latham*, 59 NY2d 231,238)." (Juarez v. Wavecrest Mgmt.Team Ltd., 88 N.Y.2d 628,642[1996]; see also, Chapman v. Silber, 97 NY2d 9,19 [2001]). Plaintiff "bears the burden of proving that the landlord had notice of the dangerous condition and a reasonable opportunity to repair it." (Juarez, op.cit. at 642-642; see also, Litwak v. Plaza Rlty Investors, Inc., 11 N.Y.3d 820,821 [2008]). As the Court observed in Juarez, at common law, with the exception of common areas, landlords had no duty to maintain leased premises. This duty was extended by legislative enactment of the Tenement House Act [7] at the beginning of the last century, and by its present day successor, the Multiple Dwelling Law which "directs that '[e]very multiple dwelling. . . and every part thereof and the lot upon which is situated shall be kept in good repair'[§78[1])." Juarez, at 643

> This statute thus imposes upon a landlord a "duty to persons on its premises to maintain them in a reasonably safe

[7] L 1091,ch.334

> condition" (Mas v. Two Bridges Assocs., 75 NY2d 680, 687; *see also, Altz v Leiberson*, 233 NY 16 at 17-18). New York City landlords are further charged under the Administrative Code with the responsibility for safe maintenance of their buildings and facilities [internal citation omitted].
>
> Juarez, at 643

Discussion and Conclusions

It is settled that upon trial , "while a plaintiff need not refute remote possibilities, plaintiff must show facts and circumstances from which defendant's negligence may be reasonably inferred" and " need only prove that it was 'more likely' or 'more reasonable' that the alleged injury was caused by the defendant's negligence than by some other agency."(1 NY PJI 3d 1:70, at 105 (2010); quoting Gayle v. New York, 92 NY2d 936, 680 NYS2d 900,703 NE2d 758 [1998]). Moreover, as noted above, a moving party does not shoulder its initial burden by referencing the gaps in the proof of a claim or defense, but must affirmatively demonstrate its grounds for summary relief as a matter of law.

Upon review of the record and the applicable law, it is submitted that defendant fails to sustain its burden to prove as a matter of law that the decedent was not struck by a portion of the ceiling.

The record includes the testimony of defendant's superintendent concerning his interaction with Mr. Yanes on the night of the incident as well as his nearly contemporaneous observations of both the decedent and the condition of the ceiling of the bedroom he knew to be used by Mr. Yanes . These observations include debris described as a big piece of concrete from the bedroom ceiling having hit the bedpost and having shattered "into a million pieces" onto the ground [LOPEZ: 19] . In addition, Lopez observed the location of the exposed ceiling to be directly above Mr. Yanes' bed. The record also incorporates the testimony of Ms. Perez concerning her conversation with her father during the course of his

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emergency room evaluation and care. Ms. Perez testified not only to her father's report of the incident, but of her own observations of his injuries and the diagnosis and treatment of those injuries , all of which are consistent with the incident as described by the decedent , and as here alleged. Upon consideration of all of this evidence direct and circumstantial and the logically compelling inferences therefrom, as well as the favorable inferences to be afforded , it is clear that the defendant has failed to shoulder its initial burden to demonstrate as a matter of law that decedent was not stuck by the debris of the bedroom ceiling collapse.

Moreover, with respect to the remaining contentions, upon review of the record, and consideration of the applicable law , this court cannot conclude that there are no unresolved issues of fact that the ceiling collapse was not occasioned by a defective condition in the ceiling of decedent's apartment resulting from the use of an illegal washing machine in the apartment directly above, or that in 2005, the defendant did not have actual knowledge of this condition. Moreover, with respect to defendant's undisputed knowledge of not only the leak condition apparent in the Yanes apartment, but of its source, the defendant fails to come forward with any evidence of the steps taken to remedy the condition in the year preceding the accident.

Defendant's building manager testified that he visited the Yanes apartment for the express purpose of inspecting a leak that he unequivocally attributed to the use of an illegal washing machine by the occupants of the apartment above. Ms. Perez also testified of this inspection, and while the transcript of Mr. Timberger's testimony is silent as to the date of his only pre-accident visit to the apartment, the administratrix's testimony is not. Ms. Perez testified that she arranged for the inspection in 2005 as the result of her observations of a worsening ceiling condition . She also confirms the building manager's conclusion of the cause of the condition as imparted to her . Upon review of the testimony of defendant's

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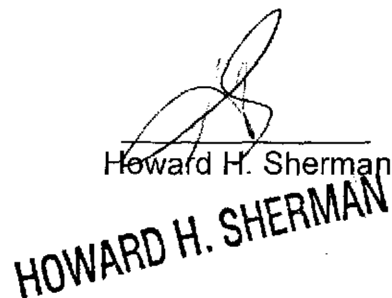
witnesses, it is clear that the building manager did not perform repairs at the building site [TIMBERGER EBT: 21-22], and the superintendent was neither in receipt of complaints concerning the condition of either the Yanes apartment or of the apartment above, and that he had never made any repairs to either apartment [LOPEZ EBT: 26-27]. In addition, the superintendent testified that prior to the accident, he never had occasion to speak to the owners concerning the repair or replacement of any of the ceilings of the building [Id 27]. As a result, the defendant fails to offer any testimony that it repaired the leaky condition after the inspection . Clearly, due to the nature of the defect, such a repair would have to address not only the leak in the ceiling of Mr. Yanes' apartment, but the source of it in the other apartment. No showing is made of any post-inspection repairs. Nor does defendant come forward with any other evidence sufficient to support a finding that as a matter of law, the condition of the "washing machine" induced leak even if not remedied, was unrelated to the collapse of a ceiling in the Yanes apartment within a year of the inspection.

Defendant having failed to establish its prima facie entitlement to the relief requested, the court need not address the sufficiency of the papers submitted in opposition thereto , including the issues of the admissibility of the affidavits of the previously undisclosed notice witness and that of Mr. Delfino, as well as the copy of the photograph tendered as an exhibit thereto.

This constitutes the decision and order of this court.

Dated: April 1, 2010



Howard H. Sherman

HOWARD H. SHERMAN