At IAS Part 22 of the Supreme Court of the State of New York, held in and for Bronx County, on the 18th day of November, 2021.

PRESENT: HON. THERESA M. CICCOTTO
Justice of the Supreme Court

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ANIBAL ESPINAL,

Plaintiff,

-against-

GBR CRESTON AVENUE LLC, and FRIEDMAN MANAGEMENT CORP.,

Defendants.

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Index No. 25315/2017E

Motion Sequence #2

DECISION /ORDER

RECITATION, AS REQUIRED BY CPLR§ 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2
ANSWERING AFFIDAVITS	3-5
REPLY AFFIDAVITS	6-7

UPON THE FOREGOING CITED PAPERS, THE COURT FINDS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR §3212, granting summary judgment on the issue of liability.

Defendants GBR Creston Avenue LLC, (hereinafter "GBR"), and Friedman Management Corp., (hereinafter "Friedman"), oppose.

Background:

The instant matter arises out of an incident occurring on August 27, 2016, wherein Plaintiff allegedly sustained injuries when the living room ceiling in his apartment collapsed on him. Said

apartment is located at 2542 Creston Avenue, Bronx, New York. GBR is the owner of the subject apartment and Friedman is the manager of same.

Positions of the Parties:

Plaintiff argues that he is entitled to summary judgment because the uncontroverted evidence establishes that Defendants breached a duty to him by failing to properly maintain and repair the premises. Plaintiff also argues that Defendants had actual notice of the defective ceiling, yet failed to repair it, despite having more than one week to do so. Plaintiff asserts that he and his relatives complained to the Superintendent of the building about a bubble protruding from the subject ceiling about two weeks prior to the incident. Thereafter, the Superintendent's cousin, who had assumed the duties of Superintendent at the time, inspected said ceiling three days prior to the accident. Plaintiff further asserts that after said inspection occurred, the Superintendent's cousin informed Plaintiff that the ceiling was solid and would not collapse.

Defendants argue that upon learning of the defect in the ceiling, the building's Superintendent instructed Plaintiff to avoid being in the area of the defect. In support of their position, Defendants annex the affidavit of Superintendent Louis Milton Ojeda. In his affidavit, he avers that he was notified of a crack forming in the subject ceiling on August 24, 2016, three days prior to the incident (see Ojeda Aff., p. 1, ¶2). Mr. Ojeda also avers that he had informed Plaintiff that he wanted to replace the entire ceiling (*id.*). Additionally, Mr. Ojeda avers, "[i]t is apparent that someone in the apartment had made a hole in the ceiling, probably in an attempt to pull it down" (*id.*, at p. 2, ¶4). Defendants annex three photographs to Mr. Ojeda's affidavit depicting the purported hole (see *id.*, Exh. A-C).

On the day of the incident, Defendants argue that they were prepared to begin repairing the

subject ceiling when it suddenly collapsed. As such, Defendants argue that based on their documented efforts to repair the defective ceiling, they cannot justifiably be held liable for summary judgment purposes.

Conclusions of Law:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324-325 [1986]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 [1979]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman,* 49 N.Y.2d at 562). It is the duty of the court not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues of fact from immaterial ones (see *Wanger v. Zeh*, 45 Misc.2d 93, 94 [Sup. Ct. Albany Co. 1965]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (see *Gaines v. City of New York*, 8 Misc.3d 968, 971, 2005 N.Y. Slip Op. 25246 [Sup. Ct., Bronx Cty. 2005]; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

"To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury

proximately caused by the breach" (*Huth v. Allied Maintenance Corp.*, 143 A.D.2d 634, 635 [2d Dept. 1988], citing, *Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 619-620 [1986]; *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027-1028 [1985]). It is well-settled that a landowner has a common-law duty to "maintain its premises 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (*Kellman v. 45 Tiemann Assoc.*, 87 N.Y.2d 871, 872 [1995], quoting, *Basso v. Miller*, 40 N.Y.2d 233, 241-242 [1976]; see also *Sussman v. MK LCP Rye LLC*, 164 A.D.3d 1139, 1140 [1st Dept. 2018]). Furthermore, "except where the defendant created the condition, a plaintiff must prove actual or constructive notice of the dangerous or defective condition and that the defendant had 'a sufficient opportunity, within the exercise of reasonable care, to remedy the situation' after receiving such notice"(*Harrison v. New York City Transit Authority*, 113 A.D.3d 472, 473 [1st Dept. 2014], quoting, *Lewis v. Metropolitan Transp. Auth.*, 99 A.D.2d 246, 250 [1st Dept. 1984]; see also *Aquino v. Kuczinski, Vila, & Assoc., P.C.*, 39 A.D.3d 216, 219 [1st Dept. 2007]).

In the case at bar, the Court finds that a question of fact exists as to whether Defendants had a sufficient opportunity to remedy the defective ceiling. Indeed, there are conflicting statements regarding when exactly Defendants had notice of the defective condition. While Plaintiff asserts that Defendants knew about the defective condition two weeks prior to the incident, Defendants assert that they were informed about said defective condition three days prior to the incident. Defendants further argue that they were in fact prepared to repair said ceiling on the day the incident occurred. Additionally, Defendants annex photographs depicting alleged poke holes in the subject ceiling, arguing that some action perpetrated by Plaintiff was the proximate cause of the incident. The Court notes that it cannot determine with any semblance of certainty, whether Plaintiff was a proximate

cause of the ceiling collapse.

As such, there are multiple issues of fact that are best reserved for a jury's determination. Moreover, a jury will have the benefit of observing witnesses, which will assist them in determining their credibility and veracity.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that Plaintiff's motion for summary judgement is denied.

This constitutes the decision and order of the Court.

DATED: November 18, 2021

ENTERED:

Hon. Theresa M. Ciccotto
JSC