C

NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

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CARLOS ARIAS SANCHEZ,

Plaintiff,

INDEX No. 300566/2009

-against-

LUSIOMAGU CORPORATION, LUSIOMAGO CORP., LUCIO MAGU CORP. and ELICER GUEVARA,

Defendants.

Present:
HON. BETTY OWEN STINSON
J.S.C.

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The following papers numbered 1 to 3 read on this motion for summary judgment
Noticed on 11-12-2010 and submitted as No. 67 on the Calendar of 02-18-2011

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits and Exhibits	2
Reply Affidavits and Exhibits	3
Stipulations	
Memorandum of Law	

Upon the foregoing papers this motion is decided per annexed memorandum decision.

Dated: January 20, 2012
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J. S.C.

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

----------X

CARLOS ARIAS SANCHEZ,

Plaintiff,

INDEX № 300566/2009

-against-

DECISION/ORDER

LUSIOMAGU CORPORATION, LUSIOMAGO CORP., LUCIO MAGU CORP. and ELICER GUEVARA,

Defendants.

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HON. BETTY OWEN STINSON:

This motion by defendants for summary judgment dismissing the complaint is granted.

On October 18, 2008, plaintiff was allegedly injured falling down a flight of stairs in a building owned by defendant Elicer Guevara ("Guevara"). Plaintiff sued Guevara and a corporate entity formed by Guevara, alleging plaintiff's fall was caused by a slippery, worn and uneven seventh step on the flight of stairs. After discovery was complete, defendants moved for summary judgment dismissing the complaint for plaintiff's failure to make a *prima facie* case of negligence on the part of Guevara.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

The owner of land or a building has a duty to exercise reasonable care to keep the premises in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of potential injury and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233 [1976]). What constitutes a hazardous condition is normally an issue of fact for the jury (*Greaves v Bronx YMCA*, 87 AD2d 394 [1982]). When, however, it is concluded that there is no reasonable view of the evidence upon which to assess liability, the question is one of law for the court (*id.*) The mere happening of an accident does not establish liability (*Lewis v Metropolitan Transportation Authority*, 99 AD2d 246 [1st Dept 1984] *aff'd* 64 NY2d 670 [1984]).

The fact, by itself, that a floor may be smooth or slippery does not support a cause of action for negligence, nor does it give rise to an inference of negligence (*Lincoln v Laro Service Systems*, 1 AD3d 487 [2nd Dept 2003]). A party is "under no legal duty to upgrade a structure, which was originally built in compliance with the law, by reason of subsequent changes in [building code] specifications" (*Merino v NYCTA*, 218 AD2d 451, *aff'd* 89 NY2d 824).

In support of the motion, defendants offered copies of the pleadings, the bill of particulars, the plaintiff's deposition testimony, the affidavits of Luis Velazquez and Vincent A. Ettari, the

report of Stanley H. Fein, City building permit records and emergency room records. The bill of particulars alleged, among other things, that the seventh step from the bottom of the stairs was worn, uneven, not constructed of non-skid materials and in violation of City and State building codes.

Plaintiff testified that he was a fourth-floor tenant of the subject building and was coming into the building from the outside at the time of his accident (deposition of Carlos Arias Sanchez, September 25, 2009 at 33). He went up the stairs carrying his dinner, purchased at a nearby restaurant, and a 6-pack of beer (*id.* at 53-54). He was not accustomed to drinking beer and only drank it at a social event, perhaps once a year, when he would usually consume about four beers (*id.* at 49). He did intend, however, to drink beer with his food this time (*id.* at 46). He was wearing black dress shoes with rubber soles at the time and holding the railing with his right hand (*id.* at 50-52, 60). The shoes were thrown out right after the next time he wore them (*id.* at 50-51).

When plaintiff reached the seventh step with his right foot, he encountered another tenant from the second floor, whose name he did not know, coming down (*id.* at 63-66, 77). The man still lives in the building (*id.* at 68). Plaintiff moved to the left with his left foot to let the man pass, but his left foot slipped and he fell all the way down to the bottom of the stairs (*id.* at 64-65, 77-79, 80, 83). The other tenant came down and asked him if he wanted an ambulance but plaintiff said, "no" (*id.* at 105).

Plaintiff stayed the way he was on the floor for about twenty minutes waiting for the pain to subside (*id.* at 106-107). When it did, he went up to his room, but started to feel worse somewhat later (*id.* at 109). He went down the stairs, outside and into a Mexican restaurant, that

he had seen the other tenant enter, to find him and ask him to call an ambulance after all (*id.* at 110). Plaintiff felt very dizzy, sat down outside a grocery store and eventually someone called an ambulance for him (*id.* at 112-113, 120). In the hospital, plaintiff was found to have a ruptured spleen, which was removed, and he was released 8 days later (*id.* at 123).

About two weeks after his fall, plaintiff spoke to the tenant from the second floor (*id.* at 69). Plaintiff intended to tell the man he had heard rumors that he was drunk at the time of his accident and "threw" himself down the stairs. Plaintiff did not want the man to be making up things that did not happen. (*Id.*). Before plaintiff could say that, however, the man told him he did not want any problems with the landlord because, if the building's insurance went up, he would be paying higher rent (*id.* at 69-70). Plaintiff knew about the rumors because "everyone" had asked (*id.* at 70). He couldn't remember the names of the persons who had reported the rumors to him except for one "Miguel" (*id.* at 72). Plaintiff could not possibly provide any more information about names because "[i]t's just not correct" to be "going around trying to find out people's names" (*id.* at 74-75).

At that same time (two weeks after the accident), plaintiff said the un-named tenant pointed out the step from which plaintiff fell after plaintiff asked him (*id.* at 167-168). Plaintiff testified that, had the man not shown him which step he fell from, he would not have known which one it was (*id.* at 192). When asked what caused his fall, plaintiff said the steps were slippery because they were worn and they were also uneven:

> They're worn. That's the main thing. I mentioned that they are uneven. It's just to say it. But it was the fact that they were worn that caused me to be unable to put my foot down (*id.* at 95).

Plaintiff did not notice any liquid or foreign substance on the stairs at the time of his fall (*id.* at

92). He had previously been employed by the owner to clean that building and had done so between1994 and 1997 (*id.* at 18).

Luis Velazquez stated in his affidavit dated October 14, 2010, that he had lived on the second floor for more than two years. On October 18, 2008, he was coming out of his apartment and heard something in the lobby. He looked down and saw plaintiff lying on the floor of the lobby. Plaintiff appeared to be very drunk. He was talking but not making sense. Velazquez believed plaintiff had fallen because of being drunk, but Velazquez did not see the fall. He helped plaintiff up and plaintiff picked up his 6-pack of beer. Velazquez then left the building. Two weeks later, plaintiff approached him and asked him to be a witness and say that he was passing plaintiff on the stairs when plaintiff moved to the left, slipped and fell down the stairs. Velazquez replied that he thought the reason plaintiff fell was because he was drunk.

The emergency room report from Lincoln Medical and Mental Health Center records that plaintiff was admitted on October 19, 2008 at 1:00 A.M. because he had been "[k]icked in the [a]bdomen". A "Comprehensive Assessment" by case worker Bierka DeJesus, who interviewed the patient in Spanish, reported that he was admitted due to being kicked in the abdomen and admitted to drinking alcohol, but declined referral to "crime victim services" or "drugs rehab program". His "Problem List" mentioned "[a]ccidental fall on or from other stairs or steps".

Plaintiff's expert, Stanley Fein, reported that he examined the subject stairs and made reference to photographs which were attached to his report. The steps were of pre-cut marble and 31 inches wide. The seventh step sloped sideways, with the left side higher by one inch than the right side, so the riser height was not level. Fein concluded the step had been replaced at some point and not placed properly into the frame that held it. He concluded that the steps did not

comply with various building codes for that reason, because the lighting was not adequate and because the marble steps were "inherently slippery". He reported measuring the coefficient of friction of the steps and finding them to be 0.41, "well below the 0.5 required for a minimum slip-proof condition". Fein did not say how he measured the coefficient of friction or where he obtained the 0.5 figure. He concluded the stairway was not maintained in a safe condition as mandated by the New York City Building Construction Code.

The photographs show the seventh step slightly un-level as Fein described it. There is no step wear apparent in the pictures, however, no dips, chips or indentations, even in the close-up views.

Vincent Ettari stated in his affidavit that the 1968 code sections cited by Fein are inapplicable to the subject building because it was in compliance with the code in existence in 1916 and the stairway's construction was grandfathered into compliance with subsequent versions of the code, as long as the stairway was not altered or reconstructed at some later date. Building permit records dating from as early as 1916 show other building permits, none of which refer to changes made in the stairway. A coefficient of friction measurement is an assessment of the amount of friction between two surfaces and cannot exist in relationship to one surface only. Testing coefficient of friction would have required testing plaintiff's shoes as well, but they are unavailable since plaintiff discarded them. "Slip resistance" is not the same thing as a coefficient of friction. There is no agreement in the construction industry as to a minimum coefficient of friction for a surface to be classified as "slip resistant".

The building records attached to the motion date from January 1916 and show the building was in compliance with the effective building code in 1916 and record no alteration or

reconstruction of the subject stairs at any time after that date.

In opposition to the motion, plaintiff offered the deposition testimony of Elicer Guevara, a printout of the dictionary definition of "bolita", an affidavit by Stanley Fein and more hospital records. "Bolita" is a term in Spanish referring to illegal gambling, specifically, numbers running. Guevara testified in Spanish with a translator that he owns the building, never repaired the steps in question and has spoken to Velazquez because Velazquez is a numbers runner and sometimes Guevara plays the numbers (deposition of Elicer Guevara, October 19, 2009 at 9, 79, 92-95). They did not speak about the plaintiff (*id.* at 94-95). Plaintiff himself told Guevara only that he had an operation and showed Guevara his "injury" (*id.* at 96). Plaintiff asked Guevara if he could provide him with some documentation showing plaintiff was unable to work (*id.*). Lusio Mago is a corporate entity formed by Guevara (*id.* at 9).

Stanley Fein stated in his affidavit that, in his opinion, plaintiff's accident and injuries were caused by the negligence of the building owner in not properly maintaining the subject stairway in a safe manner. The seventh step was not level in that it had a varying riser height. Marble treads are "inherently slippery". The New York City Building Construction Code (1968) requires better lighting than that available over the stairs. It also appeared to Mr. Fein that Mr. Ettari's report seems to address the exterior stairs, not the interior subject stairway. There was "cupping" in the center of the tread surfaces of the interior stairway and they were sloped both from side to side and along the travel of the tread. Mr. Fein said it could be assumed the subject stairway was in compliance with the building code in effect at the time it was constructed. Over time, however, the stairs became "worn, slippery" and "no longer code compliant". He stated that his measurement of the coefficient of friction was obtained by "simulating" plaintiff's footwear at

the time of the occurrence. It is Mr. Fein's opinion that the coefficient of friction he obtained was below the minimum slip-proof condition to be safe. He did not cite any authority for the minimum safe slip-proof condition.

The additional medical records include an ambulance report showing plaintiff complained he had fallen on stairs and hurt his side. There is no mention of being kicked in the abdomen to ambulance personnel. The comprehensive discharge summary from the hospital refers to a lacerated spleen secondary to a fall on stairs. The operative report refers to the same. An "Event Result Report" shows plaintiff admitted he "[d]rinks on weekends". A "Chart Review Print" also repeats his assessment by the case worker with "High Risk Factors" identified as "current alcohol/substance use or overdose" and "Mod Risk Factors" identified as "crime victim" with the source of that information being the patient.

Defendants have demonstrated their entitlement to judgment which plaintiff has not refuted with admissible evidence. Plaintiff testified that he did not know which step he slipped on until the tenant from the second floor gave him that information. Velazquez, the tenant from the second floor, denied witnessing plaintiff's fall at all. Rather he stated in an affidavit that he found plaintiff on the floor at the foot of the stairs. Even disregarding the hearsay nature of the exact location of the step, and assuming the truth of plaintiff's testimony, plaintiff also testified that he fell because the seventh step was worn and therefore slippery, not because it was uneven. The photographs offered by Stanley Fein, however, do not show significant wear, if any, on the subject steps. Characterizing them as "inherently slippery" merely because they are made of marble, or in violation of the building code because they are "worn", is not enough to support a cause of action for negligence by the landlord (*see Lincoln*, 1 AD3d 487). It is clear from the building's records

with the City that the subject stairway does not require reconstruction in order to come into compliance with the City's building code (*see Merino*, 218 AD2d 451). Mr. Fein concedes the steps were code compliant when they were built. There is no evidence the lighting on the stairs is inadequate or had any role in plaintiff's fall. Plaintiff testified that he was able to see the other tenant approaching before stepping to the left side on the seventh step.

Plaintiff's submissions in opposition do not raise an issue of fact for trial. Mr. Fein's conclusions are not supported by reference to actual facts or to any engineering or industry authority. His measurement of the coefficient of friction by "simulating" plaintiff's footwear is completely inadequate. His conclusion that the subject stair tread was replaced is entirely speculative.

Movants are directed to serve a copy of this order on the Clerk of Court who shall enter judgment dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: January 20, 2012
Bronx, New York

BETTY OWEN STINSON, J. S.C.

STATE OF NEW YORK, COUNTY OF BRONX ss.:

I, Michael D. Karnes, being sworn, say: I am not a party to the action, am over the age of 18 years and maintain my office at Bronx, New York

On January 27, 2012 I served the within Notice of Entry; Decision and Order

X	Service By Mail	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:
___	Personal Service on Individual	by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as a party therein:
___	Service by Electronic Means	by transmitting the papers by electronic means to the telephone number listed below, which number was designated by the attorney for such purpose. I received a signal from the equipment of the attorney served indicating that the transmission was received. I also deposited a true copy of the papers, enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service, addressed to the attorney at the address set forth after the name:
___	Overnight Delivery Service	by depositing a true copy thereof, enclosed in a wrapper addressed as shown below, into the custody of the U.S. Postal Service for overnight delivery, prior to the latest time designated by that service for overnight delivery.

Sacco & Fillas LLP
141-07 20th Avenue, Suite 506
Whitestone, NY 11357

Sworn to before me on
day of January, 2012

Michael D. Karnes

PHILIP NEWMAN
Notary Public, State of New York
No. 02NE4748993
Qualified in Nassau County
Term Expires Dec. 31, 2013

NOTICE OF ENTRY

Sir: Please take notice that the within is a true copy of a Decision and Order duly entered in the office of the clerk of the within named court on January 27, 2012.

Dated, January 27, 2012

Yours, etc.,
PHILIP NEWMAN, P.C.
Attorney for Defendant

Office and Post Office Address
860 Grand Concourse
Bronx, NY 10451
To: Sacco & Fillas, LLP

Attorney(s) for Plaintiff

NOTICE OF SETTLEMENT
Sir: - Please take notice that an order
of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at

on 19
at M.
Dated,

Yours, etc.,
PHILIP NEWMAN, P.C.
Attorney for

Office and Post Office Address
860 Grand Concourse
Bronx, NY 10451
To:

Attorney(s) for

Index No.: 300566/09

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

CARLOS ARIAS SANCHEZ,

Plaintiff

-against-

LUSIOMAGU CORPORATION, LUSIOMAGO CORP., LUCIO MAGU CORP. and ELICER GUEVARA,

Defendant

NOTICE OF ENTRY
DECISION AND ORDER

Signature (Rule 130-1.1a)

Print name beneath - Michael D. Karnes

PHILIP NEWMAN, P.C.

Attorney(s) for
Office and Post Office Address
860 Grand Concourse
Bronx, NY 10451
(718) 585-3512

To

Attorney(s) for

Service of a copy of the within
is hereby admitted.
Dated.,

Attorney(s) for