

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 12

OF THE STATE OF NEW YORK

X: \_\_\_\_\_X

ANCE

Index No. 0301060/2007

-against-

Hon. JOHN A. BARONE

2690 WEBB,LLC.

Justice.

\_\_\_\_\_X

Case Disposed   
 Settle Order   
 Schedule Appearance

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**  
 Noticed on **August 14 2008** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

|  | PAPERS NUMBERED |  |
|--|-----------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed |                 |  |
| Answering Affidavit and Exhibits   |                 |  |
| Replying Affidavit and Exhibits  |                 |  |
| _____ Affidavits and Exhibits  |                 |  |
| Pleadings - Exhibit  |                 |  |
| Stipulation(s) - Referee's Report - Minutes                              |                 |  |
| Filed Papers   |                 |  |
| Memoranda of Law   |                 |  |

Upon the foregoing papers this  
 memorandum decision.

motion is decided in accordance with the annexed

Dated:

Dated: 4, 20, 09

Hon.



JOHN A. BARONE, J.S.C.

-----x  
Prince Darkwa,

Plaintiff(s),

- against -

INDEX. NO.: 301060/07

2690 Webb, LLC,

Defendant(s).  
-----x

**HON. JOHN A. BARONE:**

The motion by defendant 2690 Webb, LLC for an order pursuant to CPLR Sec. 3212 granting summary judgment against plaintiff Prince Darkwa and dismissing the complaint is granted.

Plaintiff Prince Darkwa has brought this action seeking damages for personal injuries allegedly sustained on February 26, 2007 at approximately 1:15 a.m. when plaintiff slipped and fell on the front steps of 2690 Webb Avenue, Bronx, NY. It was snowing at the time of the accident. It is plaintiff's contention that the stairway was not properly maintained and that if there had been a handrail plaintiff would not have had the accident that caused his injuries.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY 2d 320. Once movant meets his initial burden, then burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 NY 2d 557. The Court of Appeals has stated in the case of Friends of Animals v. Associated Fur Mfrs., 46 NY 2d 1065:

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the Court as a matter of law in directing judgment' in his favor (CPLR 3212[b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a

trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case... .

In support of the motion defendant has provided the court with copies of the pleadings, plaintiff's Verified Bill of Particulars, the deposition of Prince Darkwa, the deposition of non-party witness Nydia DiMartini, photographs of the scene, climatological data for the date of the accident, and an expert report by Vincent A. Ettari, P.E.

The climatological data shows that it was snowing between 1 and 2 a.m. on February 26, 2007, and plaintiff stated in his testimony that it was snowing. It is the law that property owners have a reasonable period of time to clean up after snow stops falling. Valentine v. City of New York, 86 AD 2d 381. Data shows that in the instant case snow was falling for a period before the accident, at the time of the accident. Defendant through their expert Vincent A. Ettari, shows that the property in question was not required to have a handrail on the steps in question. The building was built in 1921 and labeled in the records as a tenement. Defendant's expert goes step by step through the various building provisions and law shows that the building in question was not covered by the 1968, 1938 or 1921 code provisions. Mr. Ettari says the steps/stoop was original to the building and as a tenement not required to have a handrail.

Plaintiff in opposition has submitted the report of their expert Nicholas Bellizzi. Mr. Bellizzi bases his report on defendant's failure to comply with the 1968 City Building Code, and the 1938 and 1921 predecessors. Mr. Bellizzi finds fault in there not being a handrail, and states that the step risers were of different measurements. In response to the opposition the defendants have resubmitted a reply and a further report by their expert Mr. Ettari. Mr. Ettari again goes through the building code history and shows that they were inapplicable to the stairway in question. Mr. Bellizzi states in his affidavit that defendants failed to follow the codes and that the defect was not in compliance with "...good and commonly accepted safe engineering, construction, and maintenance, practices in the industry." Mr. Bellizzi does not

set forth how defendant was not in compliance with practices in the industry. Many cases have rejected this empty statement and rejected opinions that have not identified the so called "industry standards" that were allegedly violated. An expert must show a factual basis for his statements, and Mr. Bellizzi has failed to do that. (See, Jones v. City of New York, 32 AD 3d 706; Sotamba v. City of New York, 2008 WL4225558; Buchola v. Trump 767 Fifth Ave., LLC, 5 NY 3d 1). Furthermore the difference of size as to the step risers is irrelevant as plaintiff states his accident was at the top. The report by Mr. Bellizzi is lacking in its interpretation of the various building codes and in failing to state the basis for his finding that defendant failed to comply with industry standards.

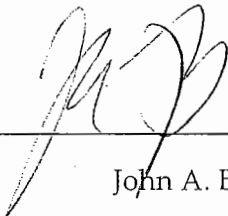
The motion for summary judgment is granted and plaintiff's complaint is dismissed.

This constitutes the decision of this Court.

Settle Order on Notice.

Date:

4/20/09

  
\_\_\_\_\_  
John A. Barone, JSC