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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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WILFREDO SANTIAGO and ELENA SANTIAGO,

Plaintiffs,

-against-

JOHN MARTINO, BEVERLY MARTINO, and VINCENT CHIAVARONE BUILDERS, LLC,

Defendants.

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TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 019741-07

MOTION SEQ. NO:4,5

SUBMIT DATE:03/31/11

The following papers having been read on this motion:

Notice of Motion.....1
Cross Motion.....2
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Opposition.....5
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Motion (seq. no. 4) by the attorneys for the defendants John Martino and Beverly Martino (the Martino defendants or Martino) and cross-motion (seq. no. 5) by the attorneys for defendant Vincent Chiavarone Builders, LLC (Chiavarone) for an order pursuant to CPLR § 3212 granting summary judgment in favor of the defendants and dismissing the complaint are both denied.

On August 25, 2006, plaintiff Elena Santiago resided at 22 McIntosh Court, Malverne, New York (the premises) pursuant to a HUD Section 8 lease between the plaintiff Elena Santiago as tenant and defendant Beverly Martino as landlord. The premises was owned by defendant Chiavarone. Plaintiff Wilfredo Santiago, the husband of plaintiff Elena Santiago, who also resided at the premises alleges that on August 25, 2006, while walking on the walkway ". . . he was caused to be precipitated to the ground when a certain slate panel broke beneath him, thereby causing him to sustain severe and serious personal injuries" (Complaint ¶ 17). Mr. Marino testified that from

1986 through the date of the accident he never hired anyone to perform work or repairs and never inspected the walkway. It is alleged that Mr. Martino is the only officer of defendant Chiavarone Builders, LLC. Defendants Martino live at 30 McIntosh Court, Malverne, New York, next door to the property leased to Mr. Santiago and the location of the accident.

In support of their motion for summary judgment, the Martinos argue that the plaintiffs failed to show that the Martinos exercised any control over the subject property. However, Martino testified that the subject property was rented pursuant to a written lease that listed defendant Beverly Martino was a landlord. Since the lease was pursuant to a HUD Section 8 rental, inspectors were annually sent to inspect the property. An inspector from HUD determined that the walkway needed repair. Pursuant to HUD regulations, the Town of Hempstead Department of Urban Renewal sent an inspector to the premises and issued a written report dated **October 27, 2006** stating that: "On a recent inspection . . . [of the premises[. . . a Town of Hempstead Building Inspector noted . . . [that the] front stoop and walkway need repairs." The alleged accident occurred on **August 15, 2006.** Mr. Santiago testified that the only time he discussed the alleged need for repair of the walkway was by way of a conversation with John Martino, in which Mr. Santiago claims that he informed Mr. Martino that a Section 8 housing inspector had been to the house and stated that the walkway, "needed to be repaired." Mr. Santiago testified that he "thinks" this alleged "notice conversation" occurred a year before the accident. (Transcript from EBT of Wilfredo Santiago, dated January 13, 2010, page 33, lines 19-21 attached defendants to moving papers.) Ms. Martino testified at her deposition that if the tiles were broken around August 2006, it would have been the landlord's responsibility to replace them (B. Martino transcript pg. 32, 1.11). Mr. Santiago testified that when it snowed he did the shoveling. He also testified that after he informed Mr. Martino about the "inspection," Mr. Martino told him there were some slates in the garage and it was going to be taken care of (Mr. Santiago's deposition, pg. 38, lines 18-20). The attorneys for the defendants argue that it was impossible for Mr. Santiago to have had the conversation a year before the accident since HUD would not have permitted the renewal of the lease in 2005 if the inspector found that the walkway was defective when the 2005 inspection was made prior to the lease renewal. In proving

their *prima facie* case, the defendants could have performed a F.O.I.L. request and obtained the complete HUD Section 8 file directly from the housing authority, including the inspection reports for prior years. Either party could also have conducted a non-party deposition of the inspector to verify the dates and findings. A party does not carry its burden in moving for summary judgment by pointing to gaps in the plaintiff's proof, but must affirmatively demonstrate the merits of its defense. *Fromme v Lamour*, 292 AD2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart,* 185 AD2d 614. In order to make a *prima facie* case, the defendants must submit "evidentiary proof in admissible form." *Zuckerman v City of New York*, 49 NY2d 557, 597-598; *Glasso v Angerami*, 79 AD2d 813. On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The defendants have not made an adequate *prima facie* show of entitlement to summary judgment on the issue of actual notice.

In addition to the issue of actual notice, there is a question of fact as to whether the defendants had constructive notice of any alleged defect in the walkway. To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy the alleged defect. *Gordon v American Museum of National History*, 67 NY2d 836. The defendants failed to establish as a matter of law that they did not have constructive notice of the condition as they failed to proffer any evidence as to when the subject area was last inspected by the defendants before the plaintiff's fall or that the alleged condition existed for an insufficient length of time for the owner to discover and remedy it. *Porco v Marshalls Dept. Stores,* 30 AD3d 284; *Pearson v Parkside Ltd. Liability* Co., 27 AD3d 539. As previously indicated, the premises was inspected annually in connection with the HUD Section 8 program and there is a question of fact as to whether or not the condition of the sidewalk was mentioned until an inspection occurring after the date of the accident in August 2006. Regardless

of when the HUD inspectors determined the alleged condition in relation to the time of the accident, the defendants failed to establish in the submissions now before the court when and how often they inspected the walkway prior to the accident. Failure to make such a *prima facie* showing requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. *See, Winegrad v New York University Medical Center, supra.*

Notwithstanding anything to the contrary, leave is granted for counsel to depose the non-party HUD inspectors and F.O.I.L. the HUD inspection reports prior to trial.

This constitutes the decision and order of this Court.

ENTER

DATED: April 18, 2011

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J. S.C.

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