

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-30-09
ADJ. DATE 6-11-09
Mot. Seq. # 001 - MG

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AMERICO PELLECHIA,	:	LAWRENCE P. BIONDI, ESQ.
	:	Attorneys for Plaintiffs
	:	81 Main Street, Suite 504
Plaintiff,	:	White Plains, New York 10601
- against -	:	
	:	
PARTNER AVIATION ENTERPRISES, INC.	:	ALIMONTI LAW OFFICE, P.C.
d/b/a EMPIRE AIRWAYS,	:	Attorneys for Defendant
	:	200 Mamaroneck Avenue, 3 rd Floor
Defendants.	:	White Plains, New York 10601
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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of cross-motion and supporting papers ; Answering Affidavits and supporting papers 15 - 20; Replying Affidavits and supporting papers 21 - 26; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by the then 76-year-old plaintiff, Americo Pellechia, on June 22, 2007, when he slipped and fell as he was walking down the steps of a chartered jet owned by defendant Partner Aviation Enterprises, Inc. d/b/a Empire Airways. By his bills of particulars, plaintiff alleges that the stairway from the plane was dangerous, defective, unsteady, lacked appropriate handrails, and did not extend sufficiently to the ground. He also alleges that defendant was negligent in failing to assist him while he disembarked from the plane.

Defendant now moves for summary judgment dismissing the complaint against it on the grounds that there is no defective or dangerous condition on the subject aircraft's stairway. Defendant further argues that plaintiff failed to establish that it created or had notice of the alleged defect. In support of its motion, defendant submits, among other things, a copy of the pleadings, a transcript of plaintiff's deposition testimony, and a transcript of the deposition testimony and an affidavit from David Dunlop, director of maintenance for defendant Empire. Mr. Dunlop's affidavit states that after a review of the maintenance records, he found no record suggesting that a defect existed to the stairs or handrails of the

subject aircraft. He states that before a flight departs, the crew performs a pre-flight check before the passengers are allowed to board. It further states that in addition to the pre-flight inspections, defendant inspects the aircraft every seven days, and that during the inspection, the steps and handrails are checked for proper configuration and operation. It states that other than plaintiff's injury, no passenger has been injured or has ever complained about the aircraft's steps and handrail.

In opposition, plaintiff argues that a triable issue of fact exists as to whether the design of the stairway and handrail was defective. In support, plaintiff submits a photograph of the aircraft's stairway, a transcript of the deposition testimony of plaintiff and of Alejandro Peterman, a non-party witness, who was employed as a pilot by defendant Empire Airways at the time of the subject accident. Plaintiff also submits an affidavit of Daniel S. Burdett, P.E., a licensed professional engineer. The Court notes that the photograph submitted by plaintiff with his opposition papers was not considered in the determination of the motion, as it was not authenticated (*see Labella v Willis Seafood*, 296 AD2d 382, 744 NYS2d 504 [2002]). Mr. Burdett's affidavit states that the negligent design and layout of the stairway, specifically its shaky nature, and the lack of a handrail associated with the extra step all contributed to plaintiff losing his balance.

At his examination before trial, plaintiff testified that he has taken chartered flights to Atlantic City five or six times prior to the subject accident. He testified that the aircraft he took the day of the accident included twenty passengers, and a pilot and co-pilot. He testified that after the aircraft landed, he was the fifth or eighth passenger to descend the steps. Plaintiff testified that as he descended the steps of the aircraft, he was holding onto the rail which was "shaky." He testified that when he was two steps from the ground, he "missed" a step and fell to the ground because of the "shakiness" of the handrail. He testified that he did not trip over any steps before he fell to the ground and that he landed on his hip. He testified that the co-pilot was standing at the bottom of the steps.

At his examination before trial, David Dunlop who is employed by defendant as the director of maintenance, testified that his duties include maintenance of the aircrafts and making sure it complies with Federal Aviation Administration (FAA) regulations. He testified that the handrail of the subject aircraft's stairway is made of aluminum, and that the stairway stays above ground when it is opened. He testified that he is not aware of any other passengers sustaining an injury as a result of getting on or off the plane.

At his examination before trial, Alejandro Peterman testified that at the time of the subject accident, he was employed as a first officer for defendant Empire Airways. He testified that his duties included pre-flight visual inspection of the plane, greeting passengers, weighing the bags, and serving as the main partner to the captain. He testified that after the flight is complete, he would go to the back of the airplane, open the door, take out the luggage from the baggage compartment, and then stand by the bottom of the stairway to assist passengers who are exiting the airplane. Mr. Peterman testified that at the time of the subject accident, plaintiff was descending the stairs normally until his foot reached the ground when it appeared that he was losing his balance and he grabbed the handrail. He testified that at that point, he grabbed plaintiff on the arm and helped him safely to the ground. He testified the aircraft that was involved in the subject accident has a handrail on one side of the staircase and a cable on the other side. He testified that the clearance between the bottom step to the ground was one foot high and

that many elderly passengers have difficulty descending the stairs. He testified that if the elderly passengers had difficulty descending the stairs, he would assist them by holding their hand. He further testified that it did not appear plaintiff was having trouble descending the stairway prior to the accident.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility. In determining a motion for summary judgment, therefore, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

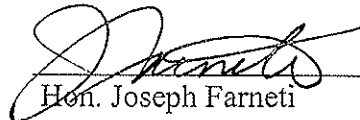
To prove a *prima facie* case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of defendant to remedy the danger after actual or constructive notice of the condition (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, a defendant with actual knowledge of an ongoing and recurring dangerous condition may be charged with constructive notice of each specific recurrence of the condition (*see Brown v. Linden Plaza Hous. Co., Inc.*, 36 AD3d 742, 829 NYS2d 571 [2007]; *Fundaro v City of New York*, 272 AD2d 516, 708 NYS2d 149 [2000]).

Based upon the adduced evidence, defendant has demonstrated *prima facie* that it maintained the subject aircraft in a reasonably safe condition and it neither created nor had notice of the alleged defective condition (*see Mokszyki v. Pratt*, 13 AD3d 709, 786 NYS2d 222 [2004]; *Daria v Beacon Capital Co.*, 299 AD2d 312, 749 NYS2d 79 [2002]). Mr. Dunlop's affidavit and deposition testimony asserts that a review of the maintenance records found nothing suggesting a defect in the stairway or the handrails. Therefore, the burden shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

Plaintiff's submission of his own deposition testimony and an expert affidavit of Mr. Burdett is insufficient to raise a question of fact as to whether the handrail and stairway were defective. An expert is qualified to proffer an opinion if he or she possesses the requisite skill, training, education, knowledge or experience to render a reliable opinion (*see Matott v Ward*, 48 NY2d 455; 423 NYS2d 645 [1979]; *de Hernandez v Lutheran Med. Ctr.*, 46 AD3d 517, 850 NYS2d 1460 [2007]). While the affirmation of

Mr. Burdett states that he is a licensed engineer, there is no further information to establish any specialized knowledge, experience, training, or education with regard to aircraft stairway design (*see Jahier v Jahier*, 50 AD3d 966, 857 NYS2d 196 [2008]; *Hofmann v Toys R Us, NY Ltd. Partnership*, 272 AD2d 296, 707 NYS2d 641 [2000]). Moreover, the affirmation failed to identify any violation of industry-wide standards or accepted practices by defendant (*see Hofmann v Toys R Us, NY Ltd. Partnership, supra*). Therefore, the expert's conclusions regarding the safety of the stairway, handrail and the lack of assistance by the co-pilot were insufficient to raise a triable issue of fact. Plaintiff's assertion that the handrail is defective because it does not reach the bottom of the stairway is unavailing, as plaintiff's deposition testimony does not cite that as a cause of his fall. Additionally, there is no evidence that defendant ever received complaints regarding the handrail or stairway. Accordingly, defendant Empire's motion for summary judgment is granted.

Dated: September 16, 2009



Hon. Joseph Farneti
Acting Justice Supreme Court

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