NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 22M

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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BALLERAM,DOLLY

Index №. **0307144/2012**

-against-

Hon..**NORMA RUIZ** ,

11P,LLC.

NORMA RUIZ, J.S.C. Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **April 16 2014** 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

AUG 1 0 2015

MOTION IS DECIDED IN ACCORDANCE WITH MEMORANDUM DECISION FILED HEREWITH.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/14/15

Hon. _____
NORMA RUIZ, J.S.C.

NORMA RUIZ, J.S.C.

NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-22

DOLLY BALLERAM,

Plaintiff,

-against

11P, LLC.,

Defendant.

MEMORANDUM DECISION/ORDER
Index No.: 307144/12

HON. NORMA RUIZ

Defendant 11P, LLC. moves for an order, pursuant to CPLR§3212, granting defendant summary judgment dismissing plaintiff's complaint. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on July 30, 2012, as a result of plaintiff's slipping and falling while standing in her bathtub taking a shower in her apartment (1E), located at 1105 Boyton Avenue, Bronx, New York, an apartment building owned by defendant.

Plaintiff's Bill (s) of Particulars allege, in essence, that: (1) defendant was negligent in failing to equip or install handrails or grab bars in plaintiff's bathtub, notwithstanding plaintiff's written request for same, allegedly made at least three months prior to her accident; and (2) NYCDOT Highway Rules, the New York City Building Code, the New York City DOT Highway Rules, the New York City Administrative Code, including but not limited to NYCDOT Highway Rules Section 2-09, New York City Code, Title 19 Transportation Section 19-152, and NYC Administrative Code Section 7-210, and other unspecified statutory violations and

codifications.

NYCDOT Highway Rule 2.09 (34 RCNY 2.09) pertains to the responsibility of an owner or builder with respect to installing or repairing roadway pavement, sidewalks and curbs. New York City Administrative Code §19-152 pertains to the duties and obligations of a property owner with respect to sidewalks and lots. New York City Administrative Code §7-210, pertains to an abutting property owner's responsibility to repair and maintain the sidewalk. These statutes are clearly inapplicable to the case at bar.

In opposition to the motion, plaintiff submits the affidavit of Vincent A. Ettari, P.E. Mr. Ettari states in his affidavit that plaintiff, who was 66 years of age at the time of her accident, was a Senior citizen and "a Member of a Covered Class of Handicapped Persons," and as such, she was entitled to have "a Handicapped Shower." Mr. Ettaru further states that plaintiff testified that she had a stroke which left her right hand impaired. (Lacking full strength). Plaintiff's letter to defendant requesting a handrail does not state that plaintiff suffered from any disability, and no records were submitted to support this contention, or that defendant has any knowledge of plaintiff's alleged disability. Assuming arguendo that defendant had knowledge of plaintiff's alleged disability, Mr. Ettari fails to cite any statutory authority or case law which required the installation of grab bars in plaintiff's bathtub. Mr. Ettari asserts that the 1968 New York City Building Code promulgates standards for grab bars. However, these rules merely provide standards when grab bars are installed and does not require their installation.

Plaintiff's failure to identify any common-law or statutory requirement imposing upon the owner the duty to supply grab bars in bathtubs warrants dismissal. *Lunan v. Mormile*, 290 A.D.2d 249 (1st Dept. 2002).

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: 7/14/15

NORMA RUIZ, J.S.C.

NORMA RUIZ, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

DOLLY BALLERAM,

Plaintiff,

-against-

11P, LLC.,

Defendant.

Index No.: **307144/2012**

NOTICE OF MOTION

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4/16

PLEASE TAKE NOTICE that upon the affirmation of William J. Balletti, dated March 6, 2014, the exhibits annexed thereto, and upon all prior pleadings, papers and proceedings heretofore had herein, defendants will move this Court at a Motion Support Part of the Supreme Court of the State of New York thereof, at the Courthouse located at 851 Grand Concourse, Room 217 Bronx, New York 10451, on the 16th day of April 2014 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 3212 granting defendant 11P, LLP. Summary Judgment dismissing plaintiff's complaint, together with such other and further relief as the Court deems just and proper.

SID
SUT

Pursuant to CPLR 2214(b) answering affidavits, if any, must be served upon the undersigned at least seven days before the return date of the motion.

Dated: New York, New York
March 6, 2014

Yours etc.,

Gannon, Rosenfarb, Balletti & Drossman
Attorneys for Defendant
11P, LLP.

100 William Street, 7th Fl.
New York, New York 10038
212-655-5000

By: _____
William J. Balletti

TO: Krentsel & Guzman LLP
Attorney for Plaintiff
17 Battery Place, 6th Floor
New York, New York 10004
(212)227-2900

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

DOLLY BALLERAM, Plaintiff, -against- 11P, LLC., Defendant.	Index No.: **307144/2012** **AFFIRMATION IN SUPPORT**

William J. Balletti, an attorney duly admitted to practice law before the Courts of the State of New York, affirms pursuant to CPLR 2106 and subject to the penalties for perjury, that the following facts are true:

1. I am associated with the offices of Gannon, Rosenfarb, Balletti & Drossman, attorneys of record for the defendants herein, and as such I am I am fully familiar with the facts and circumstances surrounding this litigation, based upon the file maintained in the defense hereof.

2. I make and submit this affirmation in support of the motion by defendant 11P, LLP. seeking an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint.

Nature of Action

3. In this action, plaintiff alleges she was caused to sustain injury when she fell in her bath tub located at the premises, 1105 Boyton Avenue, Bronx New York. Plaintiff alleges injuries were sustained as a result of a fall, while standing in her tub taking a shower. Plaintiff further alleges that at the time of her alleged accident she lost her balance and alleges she reached for a rail that was not there. As noted herein, plaintiff testifies the rail had never been there for the entire time she had resided there.

Grounds for relief

4. Based upon the record set forth herein, the court should grant defendant's motion for summary judgment as the alleged incident occurred as a result of the plaintiff's apparent loss of balance while she was showering and not by any condition created by the defendants. Furthermore, plaintiff claims the injuries sustained were the result of the absence of a bar or handrail within the tub area, which had never existed in that tub area and thus no claim exists for a failure to maintain an existing structure. Furthermore, as noted herein, defendant was not required to install any such bar or rail in the bathroom tub area and subsequent inspection of the apartment by municipal agencies controlling the maintenance of such spaces, issued no notice of violation despite a complaint by plaintiff. Plaintiff's reliance upon statutes cited is misplaced, as they do not apply to the condition alleged.

The pleadings

5. Plaintiff commenced this action by filing a Summons and Verified Complaint dated August 20, 2012.[1]

6. Defendant 11P, LLP. served an Answer to the Summons and Complaint on or about December 7, 2012. [2] On January 8, 2013 plaintiff served upon movant her Bill of Particulars alleging an accident on July 30, 2012 at approximately 4:50PM.[3] On June 18, 2013 plaintiff appeared for examination before trial wherein she testified as to her alleged accident and the circumstances of the incident claimed.[4] Thereafter defendant 11P, LLP appeared for examination by Ljumni Pelinkovic the managing agent and owner of the property in question, on June 18, 2013, regarding the premises and the plaintiff's apartment and plaintiff's claimed

[1] A copy of plaintiff's Summons and Complaint is attached hereto as Exhibit A
[2] Copy of defendant's Answer is attached hereto as Exhibit B
[3] Bill annexed hereto as Exhibit C
[4] Transcript of plaintiff's testimony annexed as Exhibit D.

accident. [5] Thereafter, defendant appeared again for examination by Balram Samnath, the building superintendent for the building in question, regarding his duties and the apartment in question. [6]

7. On January 18, 2013 plaintiff supplemented her Bill of Particulars alleging specifically a condition consisting of a bathtub without handrails to exist. [7] Plaintiff filed her Note of Issue, on November 8, 2013. [8]

8. As set forth herein, the alleged incident is claimed by plaintiff to have occurred as a result of the absence of a handrail, after she lost his balance while showering in her bath tub. No condition is alleged to have been created by defendant, which caused or contributed to the happening of the alleged accident.

The court should grant defendants summary judgment dismissing this action.

9. As set forth herein, defendant may not be held responsible for the alleged absence of a handrail in the bath tub area, absent a statute or rule requiring the installation of such a handrail. As noted herein, the plaintiff specifically states she lost her balance as she was washing herself. She further states there had never existed in her bathroom any such rail and therefore defendant did not fail to properly maintain, or replace, an existing handrail. As discussed below, the statutes alleged by plaintiff in her Bill of Particulars are inapplicable to the issue at hand and do not compel defendant to install such a handrail. Therefore, absent a breach of an established duty, defendant may not be held responsible for the plaintiff's accident.

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[5] Transcript of Ljumni Pelinkovic annexed as Exhibit E.
[6] Transcript of Balram Samnath annexed as Exhibit F.
[7] Supplemental Bill annexed hereto as Exhibit G.
[8] Note of Issue annexed as Exhibit H

TESTIMONY OF PLAINTIFF

10. Plaintiff previously testified that she has resided at 1105 Boyton Avenue, Apartment 1E, Bronx, New York for the past 26 years (See Exhibit D at 6-7). She indicated she has never resided in any other apartment in the building (D at 8), nor did she ever reside with anyone in her apartment during that time (D at 8, L18). She describes herself as 5 foot 1 inch tall and weighing 129 pounds (D at 9). During the period of time she has resided there, she has never had a live-in health care worker (D at 10). At this time she states she is retired (D at 10, L14). As it relates to the accident, she states it occurred on July 30, 2012 in her apartment , in the bathroom, between 4:30 and 4:40PM. (D at 11). She states she was alone at the time the accident occurred. (D at 12). At the time of the accident she was getting ready to take her shower and had already adjusted the water for that shower (D at 14). She was already undressed (D at 15), and inside the shower, having already applied soap to her body (D at 16). Specifically, she states she soaped her body and was putting shampoo in her hair (D at 16, L13-16). She identified photos marked at her examination as exhibit A as depicting her bathroom. (D at 17). (see photos annexed as Exhibit I). She indicates these photos were taken a week or so after her accident by the investigator (D at 35).

11. She further stated that the photos show the configuration of the bathroom, the tub and controls as they existed on the day of her accident. (D at 17, L22 – 18, L6). She noted that neither the location of the tub, nor the controls changed from the time of the accident to the taking of the photo. (D at 18). Asked about her accident she states that at the time of the accident she simply lost her balance. (D at 24, L15). Questioned further, she states she had been holding onto the controls and to wash the shampoo off, she let go for a split second and used both hands, and that was when the accident occurred. (D at 24). Prior to the accident she had been holding on with her left hand and at the moment of the accident, she was washing the shampoo out of her hair (D at 25). During this time she was standing up in the tub (D at 25,

L24). Asked which of the number of controls she was holding prior to the accident she indicated it was the one on top that controls the shower (D at 26), on the right hand side (D at 27).

12. Asked to describe the incident she stated she was washing off and the shampoo water is coming down her face (D at 27, L 24) and as she tried to brush the water off and in the process just lost her balance. (D at 28). Plaintiff confirmed at that time, that the handrail she says she reached for when she fell, was never there at any time while she lived there (D at 28). In summary, the plaintiff states at the time of the accident she was brushing water from her face with both hands, while standing upright and lost her balance, without feeling light headed, or dizzy, or faint or anything else. (D at 29).

13. Following the accident she states seconds went by and she got dressed, dried herself and went to her doctor's office 2 blocks away. (D at 38, L23 – 39, L2). Asked how she arrived there she indicated she walked there (D at 40). Regarding her overall medical condition prior to the accident she states she had never been determined to be handicapped in any way. (D at 59). Regarding the handrail which plaintiff has stated was never there, she states she had made a complaint about the absence of the handrail to DHCR on March 1, 2013 (D at 69). The inspector reportedly came to her apartment and inspected, based upon her complaint, on May 13, 2013 (D at 70) and at that time went into the bathroom (D at 71). Following the accident the plaintiff went to her doctor in September 2012 and he gave her a prescription form indicating a handrail for the shower for the first time. (D at 74). After receiving this prescription she contacted her insurance company and they promised to do it for her (D at 75).

Testimony of Ljumni Pelinkovic

14. Ms. Pelinkovic testified that he is an officer of LD Management a managing agent for properties (Exhibit E at 8). As such his duties are to run the properties on a day to day basis (E at 10). The property 1105 Boyton Avenue is one of the properties he manages (E at 12). As

it relates to the property 1105 he states it is owned by 11P, LLP and LD manages the property, and as it relates to the owner 11P, LLC he is a member of the LLC. (E at 15). Asked about employees of the LLC the witness identified "Charlie", a Guyanese gentleman. (E at 16). He identified Charlie as the superintendent for the building 1105 Boyton. (E at 17). Asked how Charlie maintains the building he stated he does mopping, cleaning and completes work orders and is on the premises daily as he lives there (E at 18). He has been the superintendent for the building for seven years (E at 19). Asked if Charlie does repairs the witness indicated he does work orders (E at 20). He described these work orders as leaky faucets, changing washers, outlets that don't work, pull chains that are pulled out and switches (E at 21). If Charlie had a work order to fix something he couldn't do, in order to hire someone else to do it he would have to get approval (E at 21, L23 – 22, L11).

15. To do this he would contact this witness and Mr. Pelinkovic would visit and if necessary would call someone they have on call to do the work (E at 22). As it related to the plaintiff, he states he had last spoken with Charlie about apartment 1E with regard to her front door (E at 32). He stated he knew the plaintiff Ms. Balleram as a tenant in the building (E at 32). He described the building as having six stories, fifty six tenants and seven stores. (E at 35). As it relates to his relationship with the plaintiff he states he has never been to housing court with regards to anything inside her apartment 1E (E at 38). No court has ever told him to make renovations, or repairs inside apartment 1E. (E at 39). The witness indicated that possibly DHCR may have instructed him to make repairs in the apartment and described how Ms. Balleram would file a written request with them (E at 44). Asked about complaints from Ms. Balleram regarding a handrail prior to July 30, 2012 the witness recalled that the last agency to visit her apartment was DHCR and he thought she may have filed a request with them (E at 50). He states that they mailed him something and he believed that the person who inspected told her that the landlord is not responsible for the handrail. (E at 52). He described this visit as

being a couple months before the deposition (E at 52). At the time of the examination he states they were still waiting for the report of the inspection from DHCR (E at 53). Finally, asked about handrails in the bathrooms in other apartments at 1105 Boyton, the witness sated no other apartments have handrails (E at 59, L2-4). Asked if a tenant wanted a handrail in the tub area, whose responsibility it would be to put one in, he indicated it would be the tenant (E at 59, L11-14). More importantly, he was asked if a tenant asked Charlie to put one in the procedure would be for him to ask the witness, but it was his understanding the landlord does not supply the handrail. If she chose to put one up she was welcome to do so (E at 60). However, he indicated that he had not been asked by tenants for handrails in the bathroom (E at 60 L3-6).

Testimony of Balram Samnath

16. Mr. Samnath testified that he resides at 1105 Boyton Avenue, Basement apartment, Bronx, New York 10472 (F at 5). He indicated he is also known as "Charlie" (F at 7). He is employed by 11P LLC and LD Property. (F at 7-8). He has been the super at the building for approximately five years (F at 9). He is on call 24 hours a day (F at 14) but his hours are between 9:00 and 5:00 (F at 14). As the superintendent he sweeps and mops and handles the garbage (F at 16). If there is a problem inside an apartment, the tenant reports it to the office and the office sends him a work order (F at 17). As it relates to determining what needs to be fixed he stated that if they ask him to go and inspect and see what the problem is, he does so and reports back to them (F at 20). If something needs to be fixed in the apartment he does not make that determination on his own (F at 20, L8-12). As it relates to the plaintiff here he states he has known her for about 8 years and she lives in apartment 1E (F at 27). He indicates he speaks with her about once a week, twice a week, socially such as "How are you doing" (F at 28). As it relates to her complaints he stated he did not recall her making any complaints to him about needing handrails in her shower and did not know if she had made any

to the office (F at 30). He indicated that he had never received a fax regarding putting handrails in her shower (F at 30, L22-24).

17. Since he has been the super for the building none of the tenants have required special equipment because they are handicapped or disabled or something else (F at 38, L 21-39, L4). Regarding the plaintiff's accident he states that he saw her the day of the accident, while he was outside doing the garbage and she passed by at about 4:30 – 5:00pm. (F at 41, L13 – 42, L11). As she passed by he saw blood on her clothes (F at 42). She indicated she fell in her bath tub but did not indicate how she fell (F at 43). As relates to complaints he states that the complaint that she made to Department of Housing was made after her accident (F at 48, L23 – 49, L11) The inspector came in June of 2013 (F at 49). At that time he states she discussed about the curtain rod and having bars in the bathroom, in the bath tub (F at 54, L15-23). He noted the inspector did not tell him what needed to be fixed and stated he was going to make his report and send it to the office, and all of his conclusions would be in the report (F at 56). Finally, to his knowledge no one else in the building uses shower grab handles (F at 73).

18. By service of defendants response to plaintiff's demand for a copy of the report received from the Department of Housing and Community Renewal, plaintiff received a copy of the report issued as a result of the inspection conducted May 13, 2013 (see response annexed as Exhibit J). As set forth therein, the inspector itemized those services found that were not maintained and those that were. It is noted from a review of same, no mention is made of the defendant being required to maintain bathroom handrails. It should be noted that the inspector did make particular reference to the fact the landlord did maintain the bathroom shower rod and head. Thus no violation was found there. As noted in the determination, the landlord was directed only to restore the services not maintained for the affected apartment. Thus by the report issued, there was no direction by the governing agency to install any handrail in the apartment bathroom.

NO DUTY EXISTS TO INSTALL A HANDRAIL

IN THE BATHROOM

19. Firstly the court will note the plaintiff does not allege any statute or rule violated by defendant regarding any alleged failure to install a handrail in the tub area of the plaintiff's bathroom. Review of the plaintiff's Bill of Particulars as it relates to statutes alleged violated, shows the plaintiff in paragraph 5 of her bill cites the New York City Building Code, the New York City DOT Highway Rules, The New York City Administrative code, including, but not limited to NYCDOT Highway Rules Sections 2-09, New York City Code Title 19 Transport section 19-152 and NYC Administrative Code Section 7-210. Clearly Section 7-210 deals with sidewalks and is not applicable here. Further any reference to Highway rules would likewise be not applicable. The general citation of the Building Code is insufficient to advise the court of any specific statute. However, the court will note, a review of the index of the NYC Building Code makes no reference to bathroom construction. Furthermore, plaintiff's submission of experts Alan Winship and Nicholas Bellizzi are devoid of any reference to any specific codes alleged violated, or even applicable to the matter alleged. (see plaintiff's expert disclosure collectively annexed as Exhibit K). The Administrative Code Section 27-2005 simply requires the owner of the multiple dwelling to maintain it in good repair. Section 27-2026 requires that owner simply to maintain and keep in good repair the plumbing and drainage system, including water closets, toilets, sinks and other fixtures. Section 27-2066 which makes specific reference to bathrooms and what they shall contain, refers only to water closets, sinks and tubs. None of these sections require the installation of handrails in the tub area.

20. The question of whether Building Code provisions apply to a structure is an issue of statutory interpretation that the court should determine (See *Lopez v Chan,* 102 A.D. 3d 625, 959 N.Y.S. 2d 67, NYAD 1st Dept 2013; *DeRosa v City of New York,* 30 A.D. 3d 323, 326, 817 N.Y.S. 2d 282 NYAD 1st 2006). Here it would appear that there exists no Building Code

applicable to the question of bathroom handrail installation, thus no requirement to install one. With reference to the Americans with Disabilities Act, as referred to by plaintiff's expert disclosure, said statute does not require the installation of such handrails in locations not of public accommodation. The court will note from a review of the provisions of said act:

> § 36.101 Purpose.
>
> The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

21. Nowhere in that act is it found that private apartment buildings, where each apartment is privately rented to individual tenants for personal use and not general public accommodation, are required to comply with any provision of this act relating to bathroom design or installation. This fact is further supported by the findings served upon defendant from the Division of Housing and Community Renewal, wherein, following an inspection by that office, in response to the plaintiff's complaints after her accident, no installation was directed of the handrail requested by plaintiff, despite directing other repairs be made within the apartment. It was specifically noted by that inspection that the bathroom shower rod and head were properly maintained. This inspection report again confirming no duty on the part of the defendant to install the requested handrail. Pursuant to Administrative Code 26-501 et seq, the DHCR is the administrative agency responsible for the administration of the Rent Stabilization Law. Since the DHCR has determined the defendant was in compliance with reference to the bathroom, at least as far as required items other than the flooring, in reaching their determination as to any violation and penalty to be assessed, this court should find no duty exists to install the handrail in question. As it relates to the DHCR the court has held, "Where a claim has been filed by the tenant of a rent-stabilized housing unit with DCHR, the question of rent overcharge and enforcement of the resulting orders

are matters wholly within the province of the administrative agency" *Crimmins v Handler & Co.*, 249 A.D.2d 89 (1st Dept. 1998). " If a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and therefore constitutes an abuse of discretion as a matter of law" *Featherstone v Franco*, 95 N.Y.2d 550, 554 (2000) The court will note here that the findings of the DHCR in this matter directed a penalty of a rent abatement as a result of the findings of the inspector that day. However, no direction was made for the installation of the handrail claimed by plaintiff, nor any penalty assessed as a result of one being missing.

ABSENT A DUTY OWED TO PLAINTIFF AND A BREACH OF THAT DUTY

NO LIABILITY MAY BE FOUND

22. A duty of reasonable care owed by a tortfeasor to a plaintiff is elemental to any recovery in negligence (*see Pulka v. Edelman,* 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019; *Palsgraf v. Long Is. R.R. Co.,* 248 N.Y. 339, 344, 162 N.E. 99). To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v. Edelman,* supra; *Gordon v. Muchnick,* 180 A.D.2d 715, 579 N.Y.S.2d 745; *see also Akins v. Glens Falls School Dist.,* 53 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 424 N.E.2d 531). Absent a duty of care, there is no breach, and without breach there can be no liability (*see Pulka and Gordon supra.*). In addition, foreseeability of an injury does not determine the existence of duty (*see Strauss v. Belle Realty Co.,* 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 482 N.E.2d 34; *Pulka v. Edelman,* supra). However, "[u]nlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v. State of New York,* 70 N.Y.2d at 187, 518 N.Y.S.2d 608, 511 N.E.2d

1128; *citing De Angelis v. Lutheran Med. Ctr.,* 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 449 N.E.2d 406). (see, also *Fox v. Marshall*, 88 A.D.3d 131, 928 N.Y.S.2d 317, N.Y.A.D. 2 Dept.,2011)

23. As set forth above, the plaintiff alleges she was caused to fall and sustain injury as a result of the absence of a handrail which was never installed in the plaintiff's bathroom tub area. Thus this is not a matter of a failure to maintain an existing structure within the bathroom. As further set forth above, no statute exists requiring the installation of a bath tub grab rail or handrail, in the private apartment of the plaintiff, owned by the defendant. Therefore absent a statutory duty to install that which not been there for the 20 years since before the plaintiff leased the premises, no liability may be found for any alleged accident claimed to have resulted from the absence of such handrail.

24. As further set forth above, the ADA requires only those places of public accommodation to install facilities which render those places accessible to those with disabilities.

WHEREFORE, Defendant 11P, LLC, respectfully requests that this court grant its motion in its entirety, granting summary judgment and dismissing plaintiff's action together with such other and further relief as this Court deems just, proper and equitable.

Dated: New York, New York
March 6, 2014

William J. Balletti

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

DOLLY BALLERAM, Plaintiff, -against- 11P, LLC., Defendant.	Index No.: **307144/2012** **REPLY AFFIRMATION IN FURTHER SUPPORT**

William J. Balletti, an attorney duly admitted to practice law before the Courts of the State of New York, affirms pursuant to CPLR 2106 and subject to the penalties for perjury, that the following facts are true:

1. I am associated with the offices of Gannon, Rosenfarb, Balletti & Drossman, attorneys of record for the defendants herein, and as such I am I am fully familiar with the facts and circumstances surrounding this litigation, based upon the file maintained in the defense hereof.

2. I make and submit this Reply Affirmation in Further Support of the motion by defendant 11P, LLP. seeking an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint and in response to the opposition submitted by plaintiff.

3. As the court will note from a review of the plaintiff's opposition, counsel relies upon an affidavit from a purported expert witness, not previously disclosed to the defendant. Nor was that expert exchanged in any other submission by plaintiff, either through a bill of particulars or a response to defendants demand for expert witness information. Thus, from the outset, the court should disregard any statements made by that witness in his affidavit. The court will also note from a review of that purported expert affidavit, sworn to on May 14, 2014

by Mr. Ettari in paragraph 4 thereof that his most current license expired in May 2011. Thus by his own admission the witness lacks qualification to author the submitted affidavit in support of plaintiff's opposition. It is also noted that counsel does not submit any further affidavit from plaintiff herself in support of her opposition to defendant's motion.

4. Should the court for some reason accept the affidavit of Mr. Ettari the court will further note upon review of that affidavit, that he fails to allege any specific statute it is alleged the defendant violated or failed to comply with in this action.

5. As was previously set forth in the moving affirmation of William J. Balletti, the plaintiff alleges she was caused to sustain injury when she fell in her bath tub located at the premises, 1105 Boyton Avenue, Bronx New York. Plaintiff alleges injuries were sustained as a result of a fall, while standing in her tub taking a shower. Plaintiff further alleges that at the time of her alleged accident she lost her balance and alleges she reached for a rail that was not there. As was noted previously, plaintiff testifies the rail had never been there for the entire time she had resided there and thus claimed to be reaching for a railing that was never there.

6. Based upon the record as previously set forth and not refuted by plaintiff's opposition submitted, the court should grant defendant's motion for summary judgment as the alleged incident occurred as a result of the plaintiff's apparent loss of balance while she was showering and not by any condition created by the defendants, nor any failure to comply with any stated statutory regulation by which defendant was compelled to follow. Furthermore, plaintiff claims the injuries sustained were the result of the absence of a bar or handrail within the tub area, which had never existed in that tub area and thus no claim exists for a failure to maintain an existing structure. Furthermore, as noted herein, defendant stated he was not required to install any such bar or rail in the bathroom tub area and subsequent inspection of the apartment by municipal agencies controlling the maintenance of such spaces, issued no

notice of violation despite a complaint by plaintiff. Plaintiff's reliance upon statutes cited is misplaced, as they do not apply to the condition alleged.

7. It was noted that on January 8, 2013 plaintiff served upon movant her Bill of Particulars alleging an accident on July 30, 2012 at approximately 4:50PM. Also noted within said bill were blanket allegations the defendant violated, the New York City Building Code, the New York City DOT Highway Rules, the New York City Administrative Code, including but not limited to NYCDOT Highway Rules Sections 2-09, New York City Code Title 19 Transportation Section 19-152 and NYC Administrative Code Section 7-210. (see moving Exhibit C paragraph 5). The purported affidavit of Mr. Ettari does no more to clarify any alleged specific statute upon which plaintiff relies. Clearly the failure to state a specific statute is the result of no statute requiring the defendant to so act.

8. Nowhere is it stated in any sentence of the purported affidavit of Mr. Ettari, that any specific statute required the defendant to actually install a grab rail in the tub area of the plaintiff's apartment. While the plaintiff submits there are ANSI Codes dictating the capability of such a device, nowhere is it stated by Mr. Ettari that these sections require the defendant to install such a device. Furthermore, it is noted that plaintiff has abandoned his two previously disclosed experts, Mr. Winship and Mr. Bellizzi, neither of whom previously stated the defendant had violated any specific statute which purportedly required the defendant to install a grab rail in plaintiff's tub area. (see moving exhibit K).

9. While Mr. Ettari and plaintiff's counsel refer to plaintiff as a member of a covered class, counsel and Mr. Ettari fail to cite firstly to what section the plaintiff would be found to be within a covered class as it relates to grab bars and further that the statute thus required the defendant to install such a bar.

10. As previously stated in the moving affirmation, the Administrative Code Section 27-2005 simply requires the owner of the multiple dwelling to maintain it in good repair. Section 27-2026 requires that owner simply to maintain and keep in good repair the plumbing and drainage system, including water closets, toilets, sinks and other fixtures. Section 27-2066 which makes specific reference to bathrooms and what they shall contain, refers only to water closets, sinks and tubs. None of these sections require the installation of handrails in the tub area. Furthermore it was also noted, The question of whether Building Code provisions apply to a structure is an issue of statutory interpretation that the court should determine (See *Lopez v Chan,* 102 A.D. 3d 625, 959 N.Y.S. 2d 67, NYAD 1st Dept 2013; *DeRosa v City of New York,* 30 A.D. 3d 323, 326, 817 N.Y.S. 2d 282 NYAD 1st 2006). Here plaintiff has failed to show defendant incorrect, in that there exists no Building Code applicable to the question of bathroom handrail installation, thus no requirement to install one. With reference to the Americans with Disabilities Act, as referred to by plaintiff's initial expert disclosure, and not stated by Mr. Ettari as having been violated in any way by defendant, said statute does not require the installation of such handrails in locations not of public accommodation. The court will again note from a review of the provisions of said act:

§ 36.101 Purpose.

The purpose of this part is to implement title III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12181), which prohibits discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part.

11. Nowhere in that act is it found that private apartment buildings, where each apartment is privately rented to individual tenants for personal use and not general public accommodation, are required to comply with any provision of this act relating to bathroom design or installation. Nor does plaintiff's counsel, or her purported expert, show otherwise. As

also set forth by movant and not refuted by plaintiff in opposition, this fact is further supported by the findings served upon defendant from the Division of Housing and Community Renewal, wherein following an inspection by that office, following the plaintiff's complaint, no installation was directed of the handrail requested by plaintiff, despite directing other repairs be made within the apartment. It was specifically noted by that inspection that the bathroom shower rod and head were properly maintained. This inspection report again confirming no duty on the part of the defendant to install the requested handrail. Pursuant to Administrative Code 26-501 et seq, the DHCR is the administrative agency responsible for the administration of the Rent Stabilization Law. Since the DHCR has determined the defendant was in compliance, at least as far as required items other than the flooring, in reaching their determination as to any violation and penalty to be assessed, this court should find no duty exists to install the handrail in question. As it relates to the DHCR the court has held, "Where a claim has been filed by the tenant of a rent-stabilized housing unit with DCHR, the question of rent overcharge and enforcement of the resulting orders are matters wholly within the province of the administrative agency" *Crimmins v Handler & Co.,* 249 A.D.2d 89 (1st Dept. 1998). " If a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and therefore constitutes an abuse of discretion as a matter of law" *Featherstone v Franco*, 95 N.Y.2d 550, 554 (2000). Therefore, that agency having determined by their inspection that no action need be taken by defendant, by its findings, defendant cannot be found by this court to have failed to comply with any existing statute, not stated by that agency or plaintiff here. It is curious to note that in paragraph 18 of the Ettari affidavit, he notes that because of a renovation done between 1949 and 1956 the building was then required to comply with a 1968 Building code that had not existed at the time of the claimed alteration, which would include the installation of grab bars, still does not state to what section of this 1968 building code he refers that requires the actual installation by defendant of such bars. In stead counsel and her purported expert make general

non specific statements about defendant's responsibility to comply with a code, without ever citing a specific section not complied with. Thus no evidence is submitted in opposition to defendant's motion upon which the court may rely to deny defendants relief.

12. The law applicable here has been previously set forth in the moving affirmation, but bears repeating here; A duty of reasonable care owed by a tortfeasor to a plaintiff is elemental to any recovery in negligence (*see Pulka v. Edelman,* 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019; *Palsgraf v. Long Is. R.R. Co.,* 248 N.Y. 339, 344, 162 N.E. 99). To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v. Edelman,* 40 N.Y.2d 781, 390 N.Y.S.2d 393, 358 N.E.2d 1019; *Gordon v. Muchnick,* 180 A.D.2d 715, 579 N.Y.S.2d 745; *see also Akins v. Glens Falls School Dist.,* 53 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 424 N.E.2d 531). Absent a duty of care, there is no breach, and without breach there can be no liability (*see Pulka v. Edelman,* 40 N.Y.2d 781, 390 N.Y.S.2d 393, 358 N.E.2d 1019; *Gordon v. Muchnick,* 180 A.D.2d 715, 579 N.Y.S.2d 745). In addition, foreseeability of an injury does not determine the existence of duty (*see Strauss v. Belle Realty Co.,* 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 482 N.E.2d 34; *Pulka v. Edelman,* 40 N.Y.2d 781, 390 N.Y.S.2d 393, 358 N.E.2d 1019). However, "[u]nlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v. State of New York,* 70 N.Y.2d at 187, 518 N.Y.S.2d 608, 511 N.E.2d 1128; *citing De Angelis v. Lutheran Med. Ctr.,* 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 449 N.E.2d 406). Fox v. Marshall 88 A.D.3d 131, 928 N.Y.S.2d 317 N.Y.A.D. 2 Dept.,2011. Therefore, absent a statutory duty of the property owner to the plaintiff, defendant may not be held liable for plaintiff's claimed injuries. Since this alleged accident was by plaintiff's own admission the result of her falling

in the shower when she simply lost her balance, and not by any other cause, the absence of a handrail, not required to be installed by defendant, may not be found to be negligence on the part of the defendant upon which to base recovery.

Therefore, as clearly set forth by the courts where there exists no duty there can be no breach and defendant may not be cast in damages. Here there exists no duty to install the grab bars plaintiff claims the absence of which caused her injuries. Thus defendant may not be held liable for plaintiff's purported accident and injuries claimed.

WHEREFORE, Defendant 11P, LLC, respectfully requests that this court grant its motion in its entirety, granting summary judgment and dismissing plaintiff's action together with such other and further relief as this Court deems just, proper and equitable.

Dated: New York, New York
July 14, 2014

William J. Balletti

AFFIDAVIT OF SERVICE
BY MAIL

State of New York) ss:
County of New York

Donna Charles, being duly sworn, deposes and says, that deponent is not a party to this action is over 18 years of age and resides at Kings, New York. That on the _14 day of July 2014 deponent served the within:

REPLY AFFIRMATION IN FURTHER SUPPORT

Upon the following party(ies) addressed as follows:

Krentsel & Guzman LLP
Attorney for Plaintiff
17 Battery Place, 6th Floor
New York, New York 10004
(212)227-2900

The address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Donna Charles

Sworn to before me this
_14 day of July 2014

NOTARY PUBLIC

Christine M. Callahan
Notary Public
State of New York
Suffolk County, Lic. #01CA6036940
My Commission Expires 4-22-2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

DOLLY BALLERAM

Plaintiff(s),

Index # 307144/2012

-against-

11 P, LLC

Defendant(s).

----------X

NOTICE OF OPEN MOTION

TO: Hon: NORMA RUIZ

PLEASE TAKE NOTICE, that the above-captioned matter was conferenced in the Pre-Trial Part on April 24, 2015 and adjourned to Sept. 18, 2015 because there is an outstanding motion which was submitted to you on _____.

PLEASE MAKE YOUR BEST EFFORTS to have this motion decided before the above-stated adjourned date so that the settlement conference may be conducted without further adjournment, and, if necessary, the case can proceed to trial.

By Authority granted by Hon. Douglas E. McKeon, Administrative Judge

Dated: April 24, 2015

_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

BALLERAM, Dolly

Plaintiff(s),

Index # 307144/2012

-against-

11P, LLC

Defendant(s).

----------X

NOTICE OF OPEN MOTION

TO: Hon: Norma Ruiz

PLEASE TAKE NOTICE, that the above-captioned matter was conferenced in the Pre-Trial Part on Jan 22, 2015, and adjourned to April 24, 2015 because there is an outstanding motion which was submitted to you on July 2014.

PLEASE MAKE YOUR BEST EFFORTS to have this motion decided before the above-stated adjourned date so that the settlement conference may be conducted without further adjournment, and, if necessary, the case can proceed to trial.

By Authority granted by Hon. Douglas E. McKeon, Administrative Judge

Dated: Jan 22, 2015

_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x **Index No.:** 307144/12

DOLLY BALLERAM,

Plaintiff, **AFFIRMATION IN OPPOSITION**

-against-

11 P, LLC.,

Defendant.

----------x

JASON HERBERT, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following under the penalties of perjury:

1. That I am an Associate of **KRENTSEL & GUZMAN, LLP**, the attorneys for the Plaintiffs herein, and I am familiar with the facts and circumstances of this action. This Affirmation is made upon information and belief, your Affiant's source of knowledge being the file in this matter maintained by the attorneys for the above-mentioned plaintiff **DOLLY BALLERAM** (hereafter "Plaintiff").

2. This Affirmation is submitted in opposition to defendant **11 P, LLC.**'s (hereafter "Defendant") motion for an Order: (1) pursuant to CPLR 3212 granting summary judgment dismissing the complaint against Defendant **11 P, LLC.**, and for such other relief as to this Court may as to this Court may deem just and proper.

FACTUAL HISTORY

3. Plaintiff was caused to sustain serious physical injuries on July 20th 2012 as a result of a fall while standing in her tub taking a shower, due to the negligence of the Defendant. Plaintiff was caused to fall at the premises of 1105 Boyton Avenue, Bronx New York and she sustain serious physical injuries when she could not stop herself from falling as there was no rail for her

to grab onto as she lost her balance.

4. Ms. Balleram was born on January 19, 1946 (Balleram Deposition: Page 8, Lines 21 - 22). Therefore, at the time of her accident, she was 66 years old. That is, she was, at that time, a Senior Citizen and a Member of the Covered Class of Handicapped Persons. She was, therefore, entitled to have a Handicapped Shower.

5. Moreover, she had previously had a stroke, which left her right hand impaired (Balleram Deposition: Page 25, Lines 11 - 17). Therefore, for this second reason, she was, at the time of the accident, a Member of the Covered Class of Handicapped Persons. She was, therefore, entitled to having a Handicapped Bathroom.

6. Plaintiff has testified that on numerous occasions, she had previously requested that the Defendant install a handrail in her bathtub as she had previously fallen in it. (See Exhibit 1, pgs. 52-55). Additionally, Plaintiff gave prior written notice to the Defendant in the form of a letter dated May 1, 2012, specifically requesting that the Defendant install a hand rail in her shower. (See prior written notice attached as Exhibit 2)

PROCEDURAL HISTORY

7. Plaintiff commenced this action by filing a Summons and Complaint on August 20th 2012. Defendant served its Answer to the Summons and Complaint on or about December 7th 2012. On January 8th 2013, Plaintiff served upon the Defendant her Bill of Particulars and on June 18th 2012, Plaintiff appeared for an examination before trial wherein she testified as to the slip and fall and the circumstances surrounding the incident. Defendant produced Ljumni Pelinkovic, the managing agent and owner of the premises on June 18th 2013 and testified regarding the premises and the Plaintiff's apartment and Plaintiff's fall. Additionally, Defendant produced Balram Samnath, the superintendent of the building in question regarding his duties and the apartment in question.

8. On January 18th 2013, Plaintiff supplemented her Bill of Particulars noting that her bathtub had no handrails and claimed that as a result of the absence of a handrail, she was not able to stop herself from falling in the bathtub after she lost her balance. Defendant has noted numerous times that it did not ever install a handrail in Plaintiff's bathtub.

SUMMARY JUDGMENT CANNOT BE GRANTED FOR THE DEFENDANT DUE TO THE FACT THAT DEFENDANT OWED A DUTY TO PLAINTIFF TO PROVIDE A HANDRAIL IN PLAINTIFF'S SHOWER

9. Summary Judgment cannot be granted for the Defendant due to the fact that it owed a duty to the Plaintiff to install a handrail or grab rail in Plaintiff's bathtub and therefore breached its duty to the Plaintiff. Under the New York City Building Codes, when a member of a covered class of handicapped persons, such member is entitled to have a handicap bathroom in their residence. Plaintiff, being a member of this covered class requested the building to install to accommodate her condition by installing a grab bar in her shower. Defendant, owner and operator of the subject building, owed a duty under various building codes to install a grab bar in Plaintiff's bathtub and breached its duty by failing to install a hand rail or grab rail in Plaintiff's bathtub.

10. Plaintiff has testified as she lost her balance in the shower, she reached for the handrail that was not there when she fell and that no such rail has ever been present in her bathroom since the time she has lived there. (Exhibit 1. Pgs. 27-28) However it was not Plaintiff's choice or within her control as to why there was no grab rail in her shower. Plaintiff had requested numerous times that a grab bar be installed in her shower, months prior to the date of the incident. (Exhibit 2) Defendant failed to comply with this request and such failure caused Plaintiff to sustain various serious injuries.

11. Plaintiff has contacted Vincent Ettari, a Licensed Professional Engineer in the State of New York, who has created a Affidavit in Opposition to this motion (Exhibit 3) and thru the information in this exhibit coupled with the legal research completed by Plaintiff's legal representation, it is clear that the Defendant owed a duty to the Plaintiff to install a hand rail or grab rail as prescribed by numerous building codes and regulation and, by choice, has decided to breach this duty.

12. Looking to Mr. Ettari's Affidavit, (Exhibit 3), there is no question as to whether any alterations done to the subject building would have been done in conformity with the standards and requirements of the 1968 New York City Building Code.

Defendant Violated Multiple New York City Building Codes

13. When Plaintiff requested that a handrail or grab bar be installed in her shower, in order to accommodate her handicap and physical condition, that the installation of that hand rail or grab bar would have conformed to the standard and requirements of the 1968 Building Code. The Certificate of Occupancy further shows that the Building was subject to a major renovation which was conducted between 1949 and 1956. That work was done pursuant to the filing of Alteration Application ALT 347-49 (**Exhibit 15**).

14. Therefore, the BIS shows that any Alteration Work which would now be effected to the Building would have to be done in conformity with the standards and requirements of the 1968 New York City Building Code. This would include the installation of grab bars and other handicapped bathroom appurtenances.

15. Therefore, when Ms. Balleram requested that a "handrail" be installed in her shower to accommodate her handicapped condition, that handicapped grab bar would have to have conformed to the standards and requirements of the 1968 Building Code.

16. Under the New York Landlord and Tenant Practice in New York, section 2.90, a landlord's maintenance and repair obligations are nondelegable and cannot be shifted to the tenant.

17. Additionally, as noted in Mr. Ettari's Affidavit, under the 1968 New York City Building Code, any structural and load-bearing items and components of buildings are required to be installed by the owner of the building. Under this code and the 2008 New York City Building Code, the 1986 ANSI A117.1 Code the 2003 ICC/ANSI Code and the 2009 ICC/ANSI Code, grab bars are structural items. (Exhibit 3)

18. The above listed codes all provide that grab bars must be designed to resist a single concentrated load of 250 pounds applied in any direction at any point. Clearly grab bars are load bearing devices as they are required to hold at least 250 pounds exerted at any point on the bar. Since these devices must support such a large concentrated point load, it was the obligation of the defendant to install the requested and required grab bar.

19. It must also be noted that the Plaintiff was less than 250 pounds at the time of the accident and if a grab rail would have been installed in her shower, as requested by the Plaintiff, such grab rail would have stopped the Plaintiff from falling. Such a grab rail would not have been a substantial or unbearable expense by the Defendant to incur.

20. The definitions described by such codes uniformly describe requirements for the installation of a grab bar that no lay person could understand without referencing an engineering guide. Furthermore any attempt by the Plaintiff to install such grab bar would be itself a violation of the various building codes. Only the Defendant could have effected the complex procedures required to install a proper grab-bar.

21. Finally, if the defendant had met its duty to install the grab bar, as prescribed by various

Building Codes, this instant incident would not have occurred.

Summary Judgment is a Drastic Remedy and All Inference Should be Granted Toward the Opposition

22. The body of case law handed down upon the issue at bar defines the function of the Court in deliberating upon applications for Summary Judgment to be one of issue finder -- rather than issue determination, Esteve v. Abad, 68 N.Y.S.2d 322 (1st Dept. 1947). The case law in fact admonishes that the entry of Summary Judgment as "[a] drastic remedy and should not be granted where there was any doubt as to the existence of a triable issue of fact." Moskowitz v. Garlock, 259 N.Y.S.2d 1003 (3rd Dept. 1965).

23. The reticence of the Courts to grant Summary Judgment is premised upon the principles which are eloquently set forth in the Opinion for Wagner v. Zeh, 256 N.Y.S.2d 227. In its Opinion, the Court stated them as follows:

> A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for it's mere existence tends to alter our jurisprudential concept of a "day in Court. . . Summary Judgment is a harsh remedy and the requirement of the rule should be shortly complied with in order to entitle a party to that relief. . . To grant Summary Judgment, it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues. Id.

24. In accordance with settled case law confining the scope of CPLR relief to "issue finding," it has been held that issues of credibility are not to be resolved or determined by the Court upon motions for Summary Judgment. Michelson v. Babcock, 593 N.Y.S.2d 657 (4th Dept. 1993); and M.W. Zack Metal Co. V. Federal Ins. Co., 430 N.Y.S.2d 179 (4th Dept. 1980).

25. It is well settled that Summary Judgment is a drastic remedy which is the

procedural equivalent of a plenary trial. Falk v. Goodman, 7 N.Y.2d 87 (1959). In order to obtain such drastic relief, the movant must unequivocally demonstrate that there are no triable issues of fact and that as a matter of law the Court is warranted in directing judgment in its favor. Nicholas Dimenna & Sons, Inc. v. City of New York, 301 N.Y. 118 (1950); Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968); and Piecyk v. Otis Elevator Co., 164 A.D.2d 816 (1st Dept. 1990).

26. In exercising that function, the non-moving party's pleadings and opposing papers must be accepted as true and the decision must be made on the version of the facts most favorable to the non-moving party. Creighton v. Milbauer, 191 A.D.2d 162 (1st Dept. 1991); McLaughlin v. Thaima Realty Corp., 161 A.D.2d 383 (1st Dept. 1990). The non-moving party is entitled to every favorable inference which can be fairly drawn from the papers. Chiarello v. Harold Sylvan, P.C., 161 A.D.2d 948 (1st Dept. 1988), and the Court must construe the evidence in the light most favorable to the non-moving party. Waldron v. Wild, 96 A.D.2d 190 (4th Dept. 1983); Weiss v. Garfield, 21 A.D.2d 156 (3rd Dept. 1964).

27. The drastic remedy of Summary Judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable. Cohen v. Herbal Concepts, Inc., 100 A.D.2d 175 (1st Dept.), aff'd, 63 N.Y.2d 379 (1959); Gale v. Kessler, 93 A.D.2d 744 (1st Dept. 1983); Hollender v. Fred Cammann Productions, Inc., 78 A.D.2d 233 (1st Dept. 1980). Similarly, Summary Judgment must be denied where there exists questions of law which turn upon questions of fact. Meadowbrook National Bank of Freeport v. Ferkin, 303 N.Y. 853 (1952). Additionally, if different inferences can be drawn from the facts, Summary Judgment is appropriately denied. Supan v. Michelfeld, 97 A.D.2d 755 (2nd Dept. 1983).

CONCLUSION

Based upon the forgoing, it is my opinions, which I hold to a reasonable degree of engineering certainty, that, the Plaintiff was a member of the Covered Class and, upon her request, was entitled to the installation of a proper Grab-Bar in her Bath Room. Furthermore,it was the obligation of the Owner / Defendant to install the requested Grab-Bar.

WHEREFORE, it is respectfully requested that Defendant **11 P, LLC.** Motion for Summary Judgment be denied in its entirety, and for such other, further and different relief as to this Court may deem just and proper.

Dated: New York, New York
May 1, 2014

Jason Herbert, Esq.