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Supreme Court, Appellate Division, Second Department, New York.

Earle COX, Respondent,

v.

FOSTER APARTMENT GROUP, L.P., et al., Appellants.

Oct. 29, 2001.

Plaintiff brought personal injury action arising from fall from fire escape. Following jury trial, the Supreme Court, Kings County, [Dowd, J.](#), entered judgment in favor of plaintiff. Defendants appealed. The Supreme Court, Appellate Division, held that evidence was insufficient to support finding that fire escape was defective, or that defendants had actual or constructive notice of any defect.

Reversed.

West Headnotes

Landlord and Tenant ↪ 169(6)

[233k169\(6\) Most Cited Cases](#)

Tenants

Evidence was insufficient to support jury's finding that fire escape from which plaintiff fell was defective, or that defendants had actual or constructive notice of any defect, where plaintiff testified that fire escape "seemed perfect," photograph of fire escape indicated it was painted orange rust color, and there was no evidence that fire escape was rusty or defective in any way or that defendants should have discovered and remedied any defect.

*96 Dubow & Smith (**Israelson & Gold**, Plainview, N.Y. [Jeffrey B. Gold], of counsel), for appellants.

Rubenstein & Rynecki (Scott Rynecki and Pollack, Pollack, Isaac & DeCicco, New York, N.Y. [[Brian J. Isaac](#) and [Julie Mark](#)] of counsel), for respondent.

CORNELIUS J. [O'BRIEN](#), J.P., [GLORIA GOLDSTEIN](#), [ROBERT W. SCHMIDT](#) and [NANCY E. SMITH](#), JJ.

In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Kings County (Dowd, J.) dated July 31, 2000, which, upon a jury verdict finding *97 them 100% at fault in the happening of the accident, is in favor of the plaintiff and against them in the principal sum of \$220,000 (\$85,000 for past pain and suffering and \$135,000 for future pain and suffering).

ORDERED that the judgment is reversed, on the law, with costs, and the complaint is dismissed.

The plaintiff failed to present legally sufficient evidence that the fire escape from which he fell was defective, or of actual or constructive notice of any defect. Indeed, the plaintiff testified at the trial that the fire escape "seemed perfect". The photograph of the fire escape introduced into evidence indicates that the fire escape was painted an orange rust color. There is no evidence in the record that the fire escape was rusty or defective in any way or that the defendants should have discovered and remedied any defect (*see, [Batton v. Elghanayan](#), 43 N.Y.2d 898, 901, 403 N.Y.S.2d 717, 374 N.E.2d 611; [Stumacher v. Waldbaum](#), 274 A.D.2d 572, 716 N.Y.S.2d 573*). Therefore, the complaint must be dismissed.

287 A.D.2d 679, 732 N.Y.S.2d 96, 2001 N.Y. Slip Op. 08376

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