

 KeyCite Yellow Flag - Negative Treatment  
Called into Doubt by [Rivers v. Birnbaum](#), N.Y.A.D. 2 Dept., October 17, 2012

80 A.D.3d 740  
Supreme Court, Appellate Division, Second  
Department, New York.

Americo PELLECHIA, appellant,  
v.  
PARTNER AVIATION ENTERPRISES, INC.,  
doing business as Empire Airways, respondent.

Jan. 25, 2011.

### Synopsis

**Background:** Passenger brought action against owner and operator of charter jet, seeking to recover damages for injuries he allegedly sustained when he slipped and fell as he was walking down steps of the jet. The Supreme Court, Suffolk County, [Farneti, J.](#), granted summary judgment in favor of owner. Passenger appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] federal law preempted the action to extent it was based on claims that owner's disembarking procedures and services were inadequate;

[2] trial court properly rejected passenger's expert summary judgment affidavit; and

[3] summary judgment affidavit of passenger's expert was insufficient to raise a triable issue of fact.

Affirmed.

West Headnotes (4)

- [1] **Carriers**  
    🔑 Rights of action and defenses  
**States**  
    🔑 Carriers; railroads

To extent passenger's action against owner and operator of charter jet, seeking to recover damages for injuries he allegedly sustained when he slipped and fell as he was walking down steps of the jet, was based on claims that owner's disembarking procedures and services were inadequate, they were preempted by federal law.

[Cases that cite this headnote](#)

- [2] **Appeal and Error**  
    🔑 Organization and Jurisdiction of Lower Court  
**Appeal and Error**  
    🔑 Reply briefs

Aircraft owner's argument, that passenger's claims in slip and fall case based on owner's disembarking procedures and services were preempted by federal law, involved subject matter jurisdiction, and thus could be raised for first time in owner's reply papers on appeal.

[Cases that cite this headnote](#)

- [3] **Judgment**  
    🔑 Persons who may make affidavit  
**Judgment**  
    🔑 Defects and objections  
**Pretrial Procedure**  
    🔑 Facts taken as established or denial precluded; preclusion of evidence or witness

Trial court properly rejected plaintiff's expert summary judgment affidavit, where plaintiff never complied with any of the disclosure requirements, and only first identified his expert witness in opposition to defendant's summary judgment motion, after plaintiff filed the note of issue and certificate of readiness, and the expert failed to demonstrate that he was qualified to render an opinion. [McKinney's CPLR 3101\(d\)\(1\)\(i\)](#).

[7 Cases that cite this headnote](#)

[4]

**Judgment**

🔑Matters of fact or conclusions

**Judgment**

🔑Torts

Summary judgment affidavit of passenger's expert was speculative and conclusory, and was not based on accepted industry standards, and, thus, was insufficient to raise a triable issue of fact in passenger's action against owner and operator of charter jet, seeking to recover damages for injuries he allegedly sustained when he slipped and fell as he was walking down steps of the jet.

3 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*131** Lawrence Perry Biondi (Lisa M. Comeau, Garden City, N.Y. of counsel), for appellant.

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RUTH C. BALKIN, J.P., RANDALL T. ENG, ARIEL E. BELEN, and PLUMMER E. LOTT, JJ.

**Opinion**

**\*740** In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Farneti, J.), dated September 16, 2009, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

This is an action to recover damages for injuries allegedly sustained by the then-76-year-old plaintiff on June 22, 2007, when he allegedly slipped and fell as he was walking down the **\*741** steps of a charter jet owned and operated by the defendant, Partner Aviation Enterprises, Inc., doing business as Empire Airways. The Supreme **\*\*132** Court granted the defendant's motion for summary

judgment dismissing the complaint, and we affirm.

[1] [2] To the extent the plaintiff's action is based on claims that the defendant's disembarking procedures and services were inadequate, they are preempted by federal law (*see Air Transport Assn. of America, Inc. v. Cuomo*, 520 F.3d 218; *Rombom v. United Air Lines, Inc.*, 867 F.Supp. 214). Although, as the plaintiff points out, preemption was first raised by the defendant in its reply papers, it involves subject-matter jurisdiction, which may be raised at any time (*see Mitaro v. Medtronic, Inc.*, 73 A.D.3d 1142, 900 N.Y.S.2d 899; *Matter of MHS Venture Mgt. Corp. v. Utilisave, LLC*, 63 A.D.3d 840, 881 N.Y.S.2d 452).

[3] [4] To the extent the plaintiff's claims against the defendant are not preempted by federal law, in opposition to the defendant's prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact (*see Scoppettone v. ADJ Holding Corp.*, 41 A.D.3d 693, 694, 839 N.Y.S.2d 116; *Hagan v. P.C. Richards & Sons, Inc.*, 28 A.D.3d 422, 813 N.Y.S.2d 167; *Earle v. Channel Home Ctr.*, 158 A.D.2d 507, 551 N.Y.S.2d 271). The plaintiff's expert affidavit was properly rejected by the Supreme Court because the plaintiff never complied with any of the disclosure requirements of CPLR 3101(d)(1)(i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness (*see King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851, 852-853, 870 N.Y.S.2d 103). Further, the expert failed to demonstrate that he was qualified to render an opinion (*Hofmann v. Toys "R" Us, N.Y. Ltd. Partnership*, 272 A.D.2d 296, 707 N.Y.S.2d 641). Moreover, the expert's opinion which was speculative and conclusory, and was not based on accepted industry standards, was insufficient to raise a triable issue of fact (*see Rabon-Willimack v. Robert Mondavi Corp.*, 73 A.D.3d 1007, 1009, 905 N.Y.S.2d 190; *Pappas v. Cherry Cr., Inc.*, 66 A.D.3d 658, 888 N.Y.S.2d 511; *Rivas-Chirino v. Wildlife Conservation Socy.*, 64 A.D.3d 556, 883 N.Y.S.2d 552).

Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint.

**All Citations**

80 A.D.3d 740, 916 N.Y.S.2d 130, 2011 N.Y. Slip Op. 00496

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