

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30560
O/prt

_____AD3d_____

Argued - March 4, 2011

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RUTH C. BALKIN
SHERI S. ROMAN, JJ.

2010-05437

DECISION & ORDER

Ezra Rajwan, respondent, v 109-23 Owners Corporation, appellant-respondent, Commercial Building Maintenance Corporation, respondent-appellant.

(Index No. 8744/08)

Jacobson & Schwartz, LLP, Rockville Centre, N.Y. (Henry J. Cernitz of counsel), for appellant-respondent.

Weiner, Millo, Morgan & Bonanno, LLC (Gannon, Rosenfarb & Moskowitz, New York, N.Y. [Lisa L. Gokhulsingh], of counsel), for respondent-appellant.

Hoberman & Trepp, P.C., Bronx, N.Y. (Adam Raclaw of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant 109-23 Owners Corporation appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Queens County (Rosengarten, J.), entered May 26, 2010, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant Commercial Building Maintenance Corporation cross-appeals, as limited by its brief, from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is reversed, on the law, with one bill of costs to the defendants payable by the plaintiff, and the motion and cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against the defendants are granted.

March 29, 2011

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The plaintiff allegedly was injured when he slipped and fell while attempting to descend an interior staircase in a building owned by the defendant 109-23 Owners Corporation (hereinafter 109-23 Owners). At his deposition, the plaintiff was asked if he slipped because the step was slippery or because of a crack in the step. The plaintiff responded, "I really wouldn't know to tell you. I just put my foot forward and stepped on something and I flew in the air. So, I don't recall seeing or feeling anything." When the plaintiff was asked whether his right foot ever touched the second step, he replied, "I don't know exactly. I don't recall what happened. I think it did. I don't know." 109-23 Owners moved, and the defendant Commercial Building Maintenance Corporation, which provided janitorial services in the building (hereinafter together the defendants), cross-moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The Supreme Court denied the motion and the cross motion. We reverse.

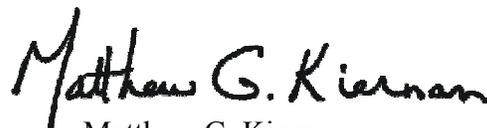
"In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 810; *see Boudreau-Grillo v Ramirez*, 74 AD3d 1265, 1267; *Louman v Town of Greenburgh*, 60 AD3d 915, 916). Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, the plaintiff's deposition testimony, which demonstrated that the plaintiff could not identify the cause of his fall (*see Patrick v Costco Wholesale Corp.*, 77 AD3d at 810; *Scott v Rochdale Vil., Inc.*, 65 AD3d 621; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435).

In opposition, the plaintiff failed to raise a triable issue of fact as to the cause of the accident. "Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (*Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478; *see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d at 435). Although the engineer's report alleged that unsafe conditions in the staircase where the plaintiff fell violated various provisions of the building code, the plaintiff presented no evidence connecting these alleged violations to his fall (*see Costantino v Webel*, 57 AD3d 472; *Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015). Accordingly, the Supreme Court should have granted the motion and cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against the defendants.

In light of our determination, we need not reach the parties' remaining contentions.

MASTRO, J.P., SKELOS, BALKIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan

Clerk of the Court