

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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MEYER WAKNEEN

Plaintiff(s),

Index No. 28207/04

Motion Date 01/09/07

- against -

Motion Cal. No. 38

JAMES McMULLEN REAL ESTATE, LLC.

Defendant(s).

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The following papers numbered 1 to 10 read on this motion by the defendant for an order granting summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by the plaintiff on October 31, 2003 when he fell on a cellar staircase located at a building owned by the defendant. At the time of the accident, plaintiff was employed as a chef at a restaurant that leased the ground floor and kitchen of the subject building. Plaintiff asserts that he took one or two steps down the staircase descending from the sidewalk, and fell due to moisture on the staircase.

Defendant now moves, pursuant to CPLR §3212, for an order granting summary judgment and dismissal of the complaint. It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing

requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment it must determine that the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

The court's function, when presented with a summary judgment motion, is not to determine credibility or engage in issue determination, but rather to determine whether there are material issues of fact for the court to determine. (See, *Quinn v. Krumland*, 179 A.D.2d 448 [1st Dept. 1992]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (See, *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]).

In the instant action, plaintiff alleges that he fell on the staircase leading to the defendant's basement kitchen. In order to impose liability upon the defendant, there must be evidence tending to show the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time. (see, *Brown-Phiifer v. Cross County Mall Multiplex*, 282 A.D.2d 564 [2d Dept. 2001], *appeal denied* 96 N.Y.2d 721 [2001]; *Christopher v. N.Y.C.T.A.*, 752 N.Y.S.2d 76 [2d Dept. 2002]; *Gloria v. MGM Emerald Enterprises, Inc.*, 298 AD2d 355 [2d Dept. 2002]).

In support of its motion, defendant relies on the pleadings, the Bill of Particulars, the deposition testimony of the parties, and a sworn affidavit of James McMullen, the principal of the defendant corporation. Mr. McMullen states that the company had no notice or knowledge of the condition on the stairway prior to the plaintiff's fall. In his deposition testimony, plaintiff asserts that he saw moisture on the stairs prior to his fall, but did not report it to anyone, nor did he know whether anyone else had reported the moisture. Plaintiff's testimony also reveals that he is unsure as to the cause of the moisture. Plaintiff speculates that the moisture may have been caused by deliveries coming to the store which used ice, however, he did not witness any deliveries. Plaintiff also speculates that the moisture could have been caused by a leaky sink in the basement, but he has no knowledge that the moisture came from the sink. It is well-settled that speculation is insufficient to defeat summary judgment. (See *Elder v. Elder*, 2 AD3d 671 [2d Dept. 2003]).

In opposition to the motion, plaintiff also brings forth the affidavit of Richard Trieste, an engineer who states that the lack of a handrail was a substantial factor in causing plaintiff's fall. However, plaintiff's testimony indicates that he traversed this staircase every day on his way into work. Clearly, plaintiff was aware of the absence of a handrail. Additionally, plaintiff did not testify that he would have ever used such a handrail if one had existed on the stairway. Thus, it is mere speculation on the part of the plaintiff's engineer as to the cause of plaintiff's fall. However, the speculation of an engineer as to the cause of plaintiff's fall is not enough to defeat summary judgment. (See *Jenkins v. New York City Housing Authority*, 11 A.D.3d 358 [1st Dept. 2004]; and *Hyman v. Queens County Bancorp.*, 307 A.D.2d. 984 [2d Dept. 2003]). Accordingly, summary judgment is granted and the complaint is dismissed.

Dated: March 8, 2007

JANICE A. TAYLOR, J. S. C.