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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 116811/2006

DOLNICK, KEVIN

VS.

BORDERS GROUP

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 12 2009

COUNTY CLERK'S OFFICE NEW YORK

Dated: 3/9/09

LOUIS B. YORK J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

----------X

KEVIN DOLNICK, as Administrator of the
Estate of MILTON DOLNICK, Deceased,

Plaintiff,

INDEX NO.
116811/06

-against-

BORDERS GROUP, INC. d/b/a BORDERS BOOKS,

Defendant.

----------X

LOUIS B. YORK, J.:

Defendant moves for summary judgment pursuant to CPLR 3212.

Plaintiff, as administrator of the estate of his deceased father, Milton Dolnick ("Dolnick"), brought this action to recover damages for personal injuries suffered by Dolnick on May 31, 2004, when he fell in defendant's bookstore at 10 Columbus Circle in Manhattan, allegedly due to defendant's negligence. As a result of his fall, Dolnick sustained an open fracture in his left ankle and was taken by ambulance to New York Presbyterian hospital. Dolnick died of unrelated causes on March 8, 2005. Plaintiff commenced this action after Dolnick's death.

Defendant argues that plaintiff, who did not witness the accident, cannot prove that defendant was negligent because his claim is based exclusively on what his father told him about the accident, which is hearsay. Plaintiff counters that all the evidence submitted by defendant is also hearsay, and in addition certain statements attributed to Dolnick by defendant are barred by

the "Dead Man's Statute" (CPLR 4519). Plaintiff further argues that he should be held to the reduced standard of proof afforded by the *Noseworthy* doctrine (see *Noseworthy v City of New York*, 298 NY 76, 80-81 [1948]). His reliance is misplaced.

"The [*Noseworthy*] rule in essence is that in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.... The rule therefore is applied when there are no eyewitnesses to the occurrence, and the participant is incapable of testifying either because he is dead ... or amnesiac" (*Hager v Mooney Aircraft, Inc.*, 63 AD2d 510, 524 [1st Dept 1978], citations omitted). "In the first instance, this is not a wrongful death case. The complaint seeks recovery for personal injuries.... [Dolnick] survived the accident and died a year later of unrelated causes.... Plaintiff[] had ample opportunity to obtain an affidavit from [Dolnick] before his death, or [Dolnick could have commenced] ... the case ... to ensure that his version would be memorialized in a deposition or otherwise, but failed to do so" (*Holliday v Hudson Armored Car & Courier Service, Inc.*, 301 AD2d 392, 397-398 [1st Dept 2003], app den 100 NY2d 636 [2003]). "[G]iven the fact that the case at bar is not a wrongful death action and the death of the plaintiff's decedent was not caused by the accident, the plaintiff is incorrect in h[is] contention that the lower standard of proof established for victims who have died as a result of a defendant's negligence should be applied" (*Jordan v Parrinello*, 144 AD2d 540 [2d Dept 1988]). The proper standard in this case is the one applicable to all slip-and-fall actions.

The mere fact that Dolnick was injured in defendant's bookstore does not mean that defendant is liable (*Deblinger v New York Racing Association, Inc.*, 203 AD2d 169, 170 [1st Dept 1994]). "In a slip-and-fall case, a plaintiff must be able to demonstrate that the defendant

either created the defective condition or had actual or constructive notice of it" (*Schiano v TGI Friday's, Inc.*, 205 AD2d 407 [1st Dept 1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, plaintiff contends that Dolnick slipped next to the entrance where people came in with wet, dripping umbrellas, and immediately in front of several cashiers. Plaintiff argues that defendant had both actual and constructive notice that that area was wet and slippery, but did not put out mats or warning signs. Thus, to prevail in his claim plaintiff must establish either actual or constructive notice, and prove that defendant was negligent by showing it "fail[ed] to remedy the defective condition, or at least to warn others of the hazard" (see *Schiano v TGI Friday's, Inc., supra*).

However, contrary to defendant's position, that is not plaintiff's burden on this motion. A plaintiff's burden to prove his claim at trial should not be confused "with the burden of any movant to demonstrate entitlement to summary judgment" (*Cadieux v D.B. Interiors, Inc.*, 214 AD2d 323 [1st Dept 1995]). "On a summary judgment motion [made by it], defendant has the initial burden of coming forward with evidence proving that plaintiff's cause of action has no merit" (*Cronin v Chrosniak*, 145 AD2d 905, 906 [4th Dept 1988], citations omitted). "[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). The moving party "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" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Only if the movant makes out

a *prima facie* case does the burden shift to the opposing party to reveal his proof and demonstrate that material issues of fact exist requiring a trial (see *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]). Normally, both the moving party and the opponent must make their showing "by producing evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), although this rule "is more flexible for the opposing party, [who] as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form" (*id.* at 563).

In support of its motion defendant proffers the deposition testimony of plaintiff (defendant's exhibit C) and of Michael D. Blakes ("Blakes"), the bookstore's general manager (defendant's exhibit D), and a copy of a security camera's video recording of Dolnick's accident (defendant's exhibit E).

Plaintiff testified that he learned of the accident from his brother Wayne, who called to tell him Dolnick had slipped and fallen, had broken his ankle and was having surgery (plaintiff's EBT, p 10). Dolnick had apparently called Wayne from the bookstore to tell him about the accident (*id.*, p 12). After Dolnick came out of surgery, he spoke with plaintiff, and told him he went to return a DVD (*id.*, p 15), walked into the bookstore and slipped and fell; people there called an ambulance and then put out mats so no one else would slip (*id.*, p 16). As to the cause of his slip, Dolnick told plaintiff that "it had just started to rain, the floor was wet, I slipped" (*id.*, pp 19, 13-14). Plaintiff, who was not there and has never been in that bookstore (*id.*, p 17), does not know if anyone actually witnessed Dolnick's fall (*id.*, p 22). At the time of the accident, Dolnick was in good health and the only medication he was taking was a blood thinner (*id.*,

p 62).

Blakes' testimony is virtually irrelevant. He did not begin working at that particular bookstore until September 2005, several months after Dolnick's accident (Blakes EBT, p 5), so he could not testify to anything from his own personal knowledge, although he did identify two individuals who witnessed the accident (*id.*, p 7) but are no longer employed by defendant (*id.*, p 13). His description of the accident, based on "how it was told to [him]" (*id.*, p 12) by an unspecified person in defendant's "legal department" (*id.*, p 14), differs from plaintiff's. Blakes testified that Dolnick "was either trying to skip the line or get in front of somebody and he tried to like step or hop over the stanchions to get in front of someone. And he tripped trying to do so. And then when he was helped up by a manager he had said, 'Oh, sorry. It's my fault. I didn't take my medication today and I felt dizzy" (*id.*, p 13).

It is not necessary to reach plaintiff's objection to this statement based on the Dead Man's Statute (CPLR 4519). Blakes' testimony is triple hearsay from an unidentified source, and will not be considered by the court; since it "is based upon hearsay rather than personal knowledge ... it is 'without evidentiary value'" (*Bielak v Plainville Farms, Inc.*, 299 AD2d 900 [4th Dept 2002], citing *Zuckerman v City of New York*, *supra*, 49 NY2d at 563). By relying on Blakes' testimony, what defendant is really asking the court to do in this motion is to give credence to its hearsay evidence instead of plaintiff's. This the court cannot and will not do. Any material inconsistency between plaintiff's version of the accident and other versions in the record present triable questions of fact (*Madinya v Consolidated Edison Company of New York, Inc.*, 202 AD2d 356 [1st Dept 1994]). "If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply

not be submitted" (*Ritt v Lenox Hill Hospital*, 182 AD2d 560, 562 [1st Dept 1992]).

The primary evidence relied on by defendant is the recording made by one of the bookstore's security cameras. Plaintiff argues that the video recording is inadmissible because it is offered by defendant without authentication. Whatever validity may be ascribed to this argument (***see,*** *CFC International v McKesson Corporation*, 134 Misc2d 834, 513 NYS2d 319 [Sup Ct NY Cty]; Mod 120 AD2d 221, 507 NYS2d 984 [1st Dept 1986]; Mod 70 NY2d 268 [1981]), The affidavit of Andy Palomino ("Palomino"), the bookstore's auditor at the time of Dolnick's accident, authenticated the recording (***see***, *Read v Ellenville National Bank*, 20 AD3d 408, 409 [2d Dept 2005]). Generally, a party moving for summary judgment may not submit new evidence in reply papers to cure a deficiency in the initial moving papers (***see***, *Migdol v City of New York*, 291 AD2d 201 [1st Dept 2002]) nor "introduce new arguments in support of the motion" (*Lumbermens Mutual Casualty Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]). However, "[t]he prohibition against accepting material in reply papers ... is directed at the introduction of 'new arguments in support of, or new grounds for the motion' ... at a point in the proceedings when the opposing party has no opportunity to respond" (*Sanford v 27-29 W. 181st Street Association, Inc.*, 300 AD2d 250, 251 [1st Dept 2002]). Here, no new evidence pertaining to the underlying facts is involved, no new theories are advanced by defendant in support of the motion, and plaintiff had full opportunity to respond to the video recording on the merits, so the problem of prejudice to plaintiff due to lack of opportunity to respond does not arise (***see***, *Rose Development Corp. v Nagi*, 2 Misc 3d 130(A) [App Term, 2d & 11th Jud Dists, 2004]). Under these circumstances, Palomino's affidavit may be considered to authenticate the recording even though it was offered in reply (see *Kennelly v Mobius Realty Holdings LLC*, 33

AD3d 380, 381-382 [1st Dept 2006]).

Turning to the merits of the video recording, the court notes at the outset that the copy submitted by defendant in support of this motion is approximately three minutes long and not of great quality. The pertinent portion of the bookstore is seen only in the top left corner of the video, which cannot be recentered. The image can only be centered or magnified in still shots, and when magnified the resolution, at its best adequate, becomes very poor. Given such limitations, it is not surprising that despite defendant's contention that the recording "clearly contradicts the allegations made by plaintiff," the video is inconclusive. Several things are evident: the entrance to the bookstore abutted the cashier area; various stanchions connected by cords steered the customers into the path taken by Dolnick; there were no mats on that path, which had a tile floor, although the aisle next to it seems to have either a mat or a different surface or design on it; several customers, including Dolnick, were carrying umbrellas which had previously been opened; and, the area where plaintiff fell was in full view of various cashiers stationed nearby, who were in a position to notice whether the tiles were wet. With respect to the cause of Dolnick's fall, the video can support both sides' versions of events, as well as a composite one: that Dolnick's feet had started to slip and he was thrown off-balance when the little girl, who seems to appear out of nowhere, collided with him. He sought to support himself on a nearby stanchion, but that collapsed under him and he fell down, hard and awkwardly.

In short, the court finds that the video recording submitted by defendant raises more questions than it answers, all of which are to be decided by the trier of facts, not by the court as a matter of law. Where "competing inferences may reasonably be drawn as to whether defendant's conduct constituted negligence" the jury must be the ones to draw them (*Myers v Fir Cab Corp.*,

64 NY2d 806, 808 [1985]). The function of summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957], rearg den 3 NY2d 941 [1957]).

Finally, Palomino states in his affidavit that two of the store's 27 security cameras "were positioned to monitor and record activity at the main cash register area located to the left as you entered the store" (¶ 5) – *i.e.*, the area where plaintiff fell. Yet, only a 3-minute recording from one of those two cameras has been furnished to the court, and presumably to plaintiff, which casts doubt as to defendant's compliance with CPLR 3101[i], which provides that "there shall be full disclosure of any films ... [or] videotapes.... There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."

Based on the foregoing, the court finds that defendant has failed to submit evidentiary proof in admissible form sufficient to warrant judgment in its favor as a matter of law. "Since defendant['s] showing was insufficient to demonstrate [its] entitlement to judgment, the burden never shifted to plaintiff to raise a triable issue of fact" (*Cadieux v D.B. Interiors, Inc., supra*, 214 AD2d at 323), and it is not necessary for the court to decide whether plaintiff's submissions in opposition to the motion (meteorological data showing rain on May 31, 2004 [exhibit B], the ambulance call report/hospital record noting "74 y/o male found sitting on floor of bookstore bleeding from left ankle c/o left ankle pain secondary slip and fall on floor" and stating that Dolnick's chief complaint was "I slipped and fell" [exhibit C], and defendant's own incident report form stating that "Dolnick slipped on [illegible] wet tile. Fell into [illegible] stantions[sic] and went down on his ankle" [exhibit D]) suffice to raise a question of fact. "[T]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 demonstrate the absence of any material issues of fact.... Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324-325 [1986], citations omitted).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied in its entirety, and upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

DATED: ~~February~~ March 9, 2009

Enter:

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK