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

PRESENT: HON. JUDITH J. GISCHE PART _____

Index Number : 104040/2007

DIAZ, TOGARMA

vs.

MADISON SQUARE GARDEN

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

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 ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: March 27, 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Togarma Diaz and Enrique Diaz,

Plaintiff (s),

-against-

Madison Square Garden, L.P., Rainbow Media Holdings, LLC, Cablevision Systems Corporation, and Ralph Marcado,

Defendant (s).

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DECISION/ ORDER
Index No.: 104040-2007
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/HNG affirm, exhs	1
Pltfs' opp w/TD, ED, ND affids, exhs	2
Defs' reply w/HNG affirm, exhs	3
Pltfs' supp affirm in opp w/ND affid	4
Defs' supp affirm in support w/HNG affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiffs Togarma and Enriquez Diaz who are husband and wife ("Mrs. Diaz" and "Mr. Diaz" or "plaintiffs"). They seek to recover monetary damages for personal injuries allegedly sustained by them as a result of defendants' negligence. The defendants have answered the complaint and now move for summary judgment dismissing the complaint against them. Since issue has been joined and defendants' motion was brought timely after plaintiffs filed their note of issue, the motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows:

Arguments

Plaintiffs claim they tripped and fell on a chipped step on interior stairs located at Madison Square Garden following a concert held there on May 28, 2005 ("date of accident"). Defendants contend that the plaintiffs cannot prove their case and they have created feigned issues of fact to avoid the dismissal of this action.

According to defendants, plaintiffs have provided inconsistent statements about how their accident happened and neither one of them really knows the proximate cause of their fall. Defendants rely upon statements made by the plaintiffs at their depositions, that neither one of them stopped to examine the stairs after they fell to see if there was some condition or substance on the steps that caused them to fall.

Defendants also contend that Mr. Diaz returned to the scene of the accident months after it happened (approximately 6 months) and it was only then he noticed a semi-circle shaped chip on the top step that he now claims caused the plaintiffs to fall and both plaintiffs have conformed their testimony to what Mr. Diaz later observed. Defendants allege that the plaintiffs attribute their respective falls down the stairs to this chip, even though there is no proof the chip existed at the time of their accident.

Discovery has been completed. The plaintiffs served a Bill of Particulars dated November 21, 2007, and a response to defendants' combined discovery demands (also dated November 21, 2007). The plaintiffs were each deposed on April 25, 2008. Each plaintiff testified with the aid of a Spanish language interpreter. After they were deposed, they served an amended Bill of Particulars dated November 10, 2008 to correct an error in their original Bill of Particulars.

In their complaint, plaintiffs attribute their fall to a dangerous condition on the

steps "to wit: cracks and/or chips on [them]." In their Bill of Particulars, plaintiffs identify the dangerous condition as being "a dangerous and defective condition existing thereat, to wit: holes, cracks and/or chips on the surface of the [stairs or steps] . . ." Mrs. Diaz testified at her deposition ("TD EBT __") that as she was walking down the stairs, but still near the "top portion" of them, her left foot got caught "on something." As she began to fall, she tried to grab onto the railing to her left but missed. She then twisted and fell, striking the left side of her body. When asked whether she noticed the condition that caused her to fall, Mrs. Diaz answered "no." When asked whether anyone witnessed the accident, Mrs. Diaz responded her daughters, her father and other family members were present with her when it happened. Nuria was also identified as an eyewitness in the plaintiffs' November 2007 response to defendants' combined discovery demands.

Mrs. Diaz was then shown photographs of the stairs at her EBT and asked to select three or four photographs that most adequately depicted the location of the accident. Mrs. Diaz selected two of them. She then circled the top step of one photograph (attached as exhibit "H" to defendants' motion). The area she circled shows a semi-circled shaped chip in the top step next to the railing on the left side.

Defendants' attorney then inquired of Mrs. Diaz whether that chip contributed to her fall and Mrs. Diaz answered: "Oh, yes." TD EBT p. 38 line 15-21. However, when he asked her whether she had noticed that chip on the day of the accident after she fell, Mrs. Diaz answered "No." TD EBT p. 38 line 22 - 24. When asked whether anyone else had witnessed the accident that day, she replied that her daughters and father were present, as was the co-plaintiff, her husband.

Mr. Diaz testified at his deposition ("ED EBT ___") that he was walking down the stairs behind his wife. When he saw she was about to fall, "I tried to grab on to her but I slipped with something there, she got loose from my hands and I continued going down on my buttocks three or four steps." According to Mr. Diaz, he looking forward as he descended the stairs and did not notice any condition on the steps that would have caused his fall. He also testified that he did not inspect the steps immediately after either one of them fell, because he was tending to his wife who was in so much pain. Mr. Diaz, did testify however, that several months later he returned to the scene of the accident and "found the crack and that's what made us think that's what made us fall."

Charles Cerulli, a guard employed by Madison Square Garden, was present on the day of the accident and he was deposed ("CC EBT __"). Although Cerulli testified at his EBT that he heard the sound of someone falling, following by shouts ("oh my god!"), he did not actually see the accident happen. He also testified that he did not examine the steps after the accident to see if there was any dangerous condition on them. When asked whether there was some procedure he was supposed to follow after an accident, Cerulli responded that he was unsure, but he called his supervisor to report what had happened, but was not aware of anything in particular he was required to do. Cerulli also testified that much later (possibly a year after the acciden), he met with someone who worked for Madison Square Garden ("the man from Penn Plaza") who took Cerulli with him to look at the stairs and take pictures of them.

Plaintiffs offer their sworn affidavits in opposition to defendants' motion as well as the sworn affidavit of their daughter, Nuria Diaz ("Nuria" or "daughter") who is now an adult; she was 14 years old at the time of the accident. In her affidavit, Mrs. Diaz

states as follows:

> "4. As I stepped on the edge of the top step heading towards the next step below I felt my left foot go into what felt like a missing indented area at the edge of the step. My foot got caught in that indented area and twisted causing me to trip and fall...
>
> [* * *] [1]
>
> 6. Unfortunately, because I was in so much pain and unable to move I was not able to go over and look at what had caused me to fall ... I did not see the condition of the step on which I fell before my accident because I was looking forward and not down at the step. However, when my foot got caught in the indented portion of the top step as I tried to walk from that top step to the step below, I was able to feel that a piece of the edge of the top step was uneven and missing."

Mr. Diaz states in his sworn affidavit that on the day of the accident he was less than a foot away from his wife, just behind her, with their daughters Nuria and Francesca alongside him, but Nuria slightly behind:

> "4. [* * *] As my wife got to the edge of the top step and was about to go to the next step below, I saw her trip and start to fall. I tried to grab onto her, but as she moved forward and began to fall I stepped into the same place and my left foot slid into what felt like an indented area on the edge of the step. I was looking ahead of me as I was walking and did not see what caused my to fall, but it felt to me as thought there was a space where there should have been a step; like a piece of the edge of the step was missing. . . "

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[1]This indicates language that is present but the court has omitted for clarity or other reasons.

Nuria was not deposed by the defendants, although plaintiffs testified she was present with them at the time of the accident, and they provided her name and address in response to defendants' discovery demands. Nuria states in her sworn affidavit that she was walking down the stairs with her parents and that she was about "on arm's length away" from her mother, behind her. Her father was walking slightly ahead of her, but behind her mother. She also states that:

> "4. As my mother stepped onto the 1st step on her way towards the second step I saw her trip and fall. My father tried to catch my mother to keep her from falling and he too fell in the same place she had fallen . . ."
>
> [* * *]
>
> "5. After the accident, I looked at the place on the top step where both my mother and father had each tripped and/or slipped and I saw that the step on which they both tripped and/or slipped was broken and chipped at the edge. A piece of the edge of the step was broken off and missing and the edge of the step was indented in the shape of a semi-circle. The size of the area of the step that was missing was about the size of a wide heeled shoe. I also saw a piece of black tape partially covering the broken/chipped/missing/indented portion of the step. The tape was somewhat bunched up, possibly from the fall. In addition, I noticed that the missing/chipped/broken/indented portion of the step appeared darker than the rest of the step and also worn."

In reply, defendants raise several arguments, including that all three affidavits have a Bronx county jurat, but were notarized in New Jersey, and neither plaintiff's affidavit was translated into Spanish from English, although they testified at their respective depositions with the aid of an Spanish interpreter. Defendants contend that since Nuria lives with her parents, she is predisposed to making statements favorable to her parents and their case. Finally, defendants contend that Nuria's affidavit is

"unworthy of consideration" because it was written for her by an attorney and she cannot possibly recall the events of that day because she was only a teenager when it happened.

In response to that reply, Nuria provides another sworn affidavit explaining that she translated the affidavits which were written in English to Spanish so her parents could understand what they meant and make any changes. Nuria states she is herself fully conversant in the English language.

Discussion

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). It is only when the proponent of the motion makes a prima facie showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, supra at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 AD2d 161, 162 (1st Dept 1996). Moreover, the court cannot resolve issues of credibility for it is the jury to weight the and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 (1974).

Although the sworn affidavits of each plaintiff provide significantly more details

about their accidents than either of them testified about at their depositions, neither affidavit contradicts their earlier sworn testimony. Alvia v Mutual Redevelopment Houses, Inc. 56 AD3d 311 (1st Dept 2008).

At her EBT, Mrs. Diaz testified she had tripped on something and that her left foot had gotten caught. She then circled the chipped step on the photograph she was shown at the deposition. She also testified the accident happened while she was still at the top of the stairs. Mr. Diaz also testified that he slipped "with something there," and he described the sequence of events that resulted in him falling on his buttocks down the steps as he tried to help his wife.

Although defendants allege that both plaintiffs have changed their testimony to avoid the consequences of having their case dismissed, the court disagrees. Their present affidavits may amplify what they testified about previously, but it does not change their theory of the case. The issue of whether there was a dangerous condition on the stairs on the day of the accident and if so, whether it was the proximate cause of either or both plaintiffs' fall is not feigned, but for the jury to decide at trial. Harty v Lenci, 294 AD2d 296, 298 (1st Dept 2002).

In support of their motion, defendants have not come forward with any admissible evidence that the step was not chipped/cracked/broken etc., on the day of the accident or that even if it was in such condition, that this was not the proximate cause of plaintiffs' accident. Thus, the allegations with respect to said issues (*i.e.* was the step chipped on the day of the accidents? If so, was it the cause of their accidents?) are genuine, not feigned. Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 441 (1968); Bank of N.Y. v 125-127 Allen St. Assoc. __AD3d __; 2009 NY Slip Op 01013

(1st Dept, 1/10/09)(citing Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439 [1968]).

The court has also considered defendants' argument, that plaintiffs' sworn affidavits in opposition to defendants' motion must be rejected because they are not evidence in admissible form. CPLR § 2101 (b) requires that documents in a foreign language be properly translated into the English language and accompanied by an affidavit by the translator setting forth his or her qualifications and attesting that the translation is accurate. Polish American Immigration Relief Committee, Inc. v. Relax, 172 AD2d 374 (1st Dept 1991).

Although one trial court has decided that this statutory provision not only governs the form of papers served or filed in civil judicial proceedings, but also requires that the affidavit by a non-English speaking person which is in English be accompanied by the affidavit of the person who translated the affidavit into their native language (see Pisarcik v. Triboro Bridge and Tunnel Authority, 17 Misc.3d 1126(A) [N.Y. Sup, Queens Co 2007]), that is not what CPLR § 2101 (b) expressly requires. More commonly, CPLR 2101 (b) is triggered where the affidavit is originally in the person's native language, but then translated into English and filed with the court. See: Martinez v. 123-16 Liberty Avenue Realty Corp., 47 AD3d 901, 902 (affidavit translated from Korean to English by deponent's daughter; no affidavit by that daughter).

Here, the affidavit was read to the plaintiffs by their daughter. Nuria has provided her sworn affidavit about the steps she took to make sure her parents understood what they were signing. Ultimately, the affidavits that were signed by them and filed were in English. Thus, not only are the requirements of CPLR 2101 (b)

satisfied, but also the salutary goal of a translation, which is to make sure the person signing an affidavit under oath knows its contents. The contents of the affidavits are not discordant with the plaintiffs' sworn testimony.

Other arguments by defendants, that Nuria is "working closely" with her parents' lawyers, lives with her parents, and has an incentive to tailor her statements (and theirs) to avoid dismissal of this case, only insinuates that she is being untruthful and their lawyers unethical which are very serious allegations.

The court has considered defendants' argument, that Nuria's own affidavit about what she observed on the date of the accident must be stricken because her statements are feigned attempts to create issues of fact. This argument presents a fundamental misunderstanding about what "feigned" evidence is. Nuria was not deposed by defendant, there is no indication that the defendants sought to depose her or subpoenaed her but she did not allow herself to be deposed. Thus, her current affidavit cannot possible present "feigned" evidence since there is no prior sworn testimony by her to contradict. Alvia v Mutual Redevelopment Houses, Inc., *supra*. No one disputes Nuria was present at the time of the accident, and at age 14 (in 2005, when the accident occcured), she was old enough to accurately relate her observations.

Defendants have not proved their defense, which is that plaintiffs have raised a feigned issue of fact. Nor have they proved that the dangerous condition alleged by plaintiff did not exist on the date of the accident. Therefore, defendants have not proved they are entitled to summary judgment. Even were the court to find that defendants have put forth evidence sufficient to shift the burden to plaintiffs on this motion, plaintiffs have raised material issues of act that have to be decided at trial.

Conclusion

Defendants' motion for summary judgment in their favor, dismissing the complaint is denied in its entirety for reasons set forth in this decision and order. Since the note of issue has been filed, this case is ready to be tried. Plaintiffs shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 27, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.