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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 104373/2009
WASHINGTON, TANYELLE

vs
CITY OF NEW YORK
Sequence Number : 002
DISMISS

INDEX NO. 104373/09
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

papers, numbered 1 to ____ were read on 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 is decided in accordance with the attached decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 6/25/10

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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TANYELLE WASHINGTON,

Plaintiff,

Index No. 104373/09

-against-

DECISION/ORDER

NEW YORK CITY BOARD OF EDUCATION,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	
Exhibits.....	2

Plaintiff commenced the instant action to recover damages for personal injuries that she allegedly sustained when she tripped and fell on the "A" staircase in the Bayard Rustin Complex building at 351 West 18th Street on January 18, 2008. Defendant New York City Board of Education (the "Board") now moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that the plaintiff cannot identify the cause of her fall. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. On January 18, 2008, plaintiff allegedly slipped and fell

on a staircase at 351 West 18th Street, a building operated by the Board where she worked as a school safety agent. At a 50-H hearing conducted on September 3, 2008, plaintiff repeatedly stated that she did not know what caused her to fall. After plaintiff stated that she "slipped and fell on something and proceeded to fall down," the examiner asked her if she knew what she slipped on and plaintiff replied "No." Plaintiff's 50-H Hearing at 13. She also responded "No" when asked if she ever learned what caused her to fall. *Id.* at 20. Later in the hearing, in response to the examiner asking "Do you have any idea what it was that caused you to fell?" plaintiff responded "Honestly, I have no clue." *Id.* at 31. The Board now moves for summary judgment dismissing the complaint on the ground that plaintiff cannot identify what caused her to fall.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The courts have consistently held that "[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment." *Tungsupong by Tungsupong v. Bronx-Lebanon Hosp. Center*, 213 A.D.2d 236, 238 (1st Dept 1995); *see also Kane v. Estia Greek Restaurant,*

Inc., 4 A.D.3d 189, 190 (1st Dept 2004). Accordingly, a defendant in a slip and fall case is entitled to summary judgment when a plaintiff testifies at a deposition that he or she is unable to identify the cause of the fall. *See Reed v. Piran Realty Corp.*, 30 A.D.3d 319, 320 (1st Dept 2006); *see also Kane v. Estia Greek Restaurant, Inc., supra* at 190. "Even if the plaintiff suffers memory loss as a consequence of the slip and fall, he still must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment." *Kane v. Estia Greek Restaurant, Inc., supra* at 190.

In the instant case, the City has established a *prima facie* right to summary judgment based on plaintiff's testimony at a 50-H hearing that she cannot identify the cause of her fall and does not have any clue what caused her to fall. Moreover, plaintiff has failed to meet her shifting burden of producing evidentiary proof in admissible form as to what caused her to fall. Plaintiff's affidavit, in which she identifies the cause of the accident as "unknown liquid, semi-liquid and unknown filth" based on the sensation she allegedly experienced when she stepped on it, does not constitute proof in admissible form sufficient to create an issue of fact. The law is well established that a plaintiff cannot submit a "self-serving affidavit, which directly contradicted her prior deposition testimony" to create an issue of fact sufficient to defeat summary judgment. *Kistoo v. City of New York,* 195 A.D.2d 403, 404 (1st Dept 1993); *see also Joe v. Orbit Industries, Ltd.*, 269 A.D.2d 121, 122 (1st Dept 2000). Plaintiff's statement in her affidavit in opposition to defendant's summary judgment motion and the statements in the bill of particulars that she fell because of liquid and filth directly contradict her prior testimony in the 50-H hearing that she does not have any clue what caused her to fall. They are therefore

insufficient to create a "genuine" issue of material fact.

Furthermore, plaintiff's argument that the motion should be denied as premature because the Board has not fully responded to plaintiff's discovery demands is without merit. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953-54 (2nd Dept 2009); *see also Brown v. Bauman*, 42 A.D.3d 390, 392-93 (1st Dept 2007). In the instant case, the records demanded by plaintiff would not change the outcome of the motion because the materials demanded would not remedy plaintiff's inability to identify what caused her to fall. Even if maintenance records that the Board has not yet provided to plaintiff were to show that the Board had actual and constructive notice of a dangerous condition on the staircase, plaintiff is not able to provide sufficient evidence to show that her injury occurred as a result of that condition and not another condition or event.

Finally, plaintiff's argument that the Board has not met the CPLR 3212(b) requirement to append a complete set of the pleadings to its motion is without merit. The Board has met the requirement by attaching the Notice of Claim, Summons and Complaint, Answer and plaintiff's 50-H transcript.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed. This constitutes the decision and judgment of the court.

Dated: 6/25/10

Enter: _____
J.S.C.

UNFILED JUDGMENT
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CYNTHIA S. KERN
J.S.C.