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

PRESENT: HON. PAUL WOOTEN Justice PART 7

ROSALIE CARDALENA,

Plaintiff,

- against-

LORD & TAYLOR LLC and LT PROPCO LLC,

Defendant.

INDEX NO. 106184/2008

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ☒ No

Plaintiff Rosalie Cardalena ("plaintiff") brings this action against defendants Lord & Taylor LLC ("Lord & Taylor") and LT Propco LLC ("LT") (collectively "defendants"), to recover damages for injuries she allegedly sustained when she fell on the stairs while exiting a Lord & Taylor department store in Garden City, New York, purportedly due to the absence of a handrail in the area where she fell. The parties have completed discovery and the Note of Issue was filed on March 19, 2010. Defendants now move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that there are no triable issues of fact as to their liability. Plaintiff has responded in opposition to the motion, and defendants have filed a reply.

BACKGROUND

Defendants submit in support of their motion, *inter alia*, depositions of plaintiff and Lord & Taylor employee Wendy Johnson ("Johnson"); photographs of the accident location; and

discovery demands and responses. Plaintiff relies upon her own deposition testimony in opposition, as well as submits photographs of the accident location and an affidavit of a licensed engineer, Herbert W. Braunstein. The following facts are undisputed.

A. The Incident

This action arises out of a fall that occurred on March 14, 2008, at approximately 11:15 a.m., while plaintiff was exiting a Lord & Taylor department store located at 1200 Franklin Avenue, Garden City, New York. According to plaintiff's deposition testimony, plaintiff exited the store through a door at the back entrance, which she identified in photographs depicting the site of the accident. She walked to a set of two stairs located to the right of center. As she stepped down with her right foot onto the first step, she fell forward to the ground and was allegedly injured. She did not know what caused her to fall and was unable to break the fall by grabbing onto something, and described the accident as follows:

> "A. I don't know if I slipped on something or what, I felt myself going down and I tried to grab something, and I was on the ground.
> Q. There's nothing to grab at that location, correct?
> A. Correct.
> * * *
> Q. Was there anything there in particular that you recall that you can identify, as we sit here today, that you tripped over?
> A. No.
> Q. When asked the same question with respect to slipping, was there anything present on the stairs on the date and time of the accident that you recall you slipped on?
> A. No. Only thing was the paint on the steps.
> Q. You said you felt yourself falling forward as you led with your right foot stepping down?
> A. Yes.
> Q. And you fell forward. Did you attempt to break your fall--
> A. Yes.
> Q. -- by putting your hands out?
> A Like this (indicating), trying to grab on to something." (Not. of Motion, Ex. L at p.35, 38).

Plaintiff had shopped at that same store about 25 times per year for about 25 years and was thus familiar with the location. At the time of the accident, the weather was warm and

sunny and the ground was dry. Plaintiff was not aware of any objects on the stairs that did not belong there. Although there were handrails located under the awning, plaintiff did not attempt to use any of those handrails prior to her fall. There were no eyewitnesses to the accident.

Johnson, a manager of loss prevention at Lord & Taylor, was told of the incident immediately after it occurred. She found plaintiff sitting on the bottom step and waited with her until an ambulance arrived. Johnson also took digital photographs of the accident scene which do not depict any visible defects on the steps. Johnson had not previously received any complaints about the steps.

Plaintiff commenced the present action against Lord & Taylor and LT, the alleged owners and lessees of the premises, alleging that they negligently allowed an unsafe, hazardous, dangerous, defective and/or trap-like condition to exist on the premises by, *inter alia*, failing to provide handrails at the location of the fall. Plaintiff has not cited any applicable building code or regulations that she claims defendants violated. Plaintiff also failed to give prior notice of any expert witnesses.

B. The Engineer's Report

Plaintiff submits an affidavit of Braunstein, a purported expert, in support of her opposition to summary judgment. Apart from indicating that he is a licensed professional engineer, Braunstein does not submit a curriculum vitae or otherwise indicate his qualifications or areas of specialization.

In his affidavit, Braunstein indicates that he reviewed plaintiff's deposition transcript and three color photographs depicting the accident location. His review of the photographs revealed that a person must descend two steps upon exiting the Lord & Taylor store. The only handrails that exist are handrails that are directly straight forward from the exit doors, which are under an awning and spaced approximately one flagstone part. As a person walks out the exit door and walks to the left, the same set of two steps do not have handrails. The distance of the

left handrail to the end of the steps on the left is approximately three flagstones. There are no handrails from the left-most handrail to the left end of the steps. Braunstein's review of the deposition testimony revealed that plaintiff exited the doors and walked to the left, and fell in the area of the last two flagstones on the left.

Braunstein concludes that the absence of handrails on the part of the steps where plaintiff fell constituted an unsafe, hazardous and dangerous condition that was a substantial factor in causing and/or contributing to plaintiff's accident. In his opinion, a handrail would have provided plaintiff a place to hold onto as she was descending the steps, which would have averted her falling down in the first instance. Although Braunstein indicates that his opinion is based upon generally accepted engineering safety standards that require that a handrail be present at the location where the accident occurred, he does not identify any applicable building code, regulations or other standards that defendants purportedly violated.

DISCUSSION

Defendants contend that they are entitled to judgment as a matter of law dismissing the complaint because the facts do not support a cause of action for negligence. They argue that plaintiff's deposition testimony establishes that she has no knowledge as to what caused her to fall on the steps, and that their photographs demonstrate that there was no dangerous or defective condition on the steps at the time of the accident.

Plaintiff argues that the motion should be denied because there are triable issues of fact regarding whether the absence of a handrail at the accident location constituted a dangerous condition that was a proximate cause of her injuries. Plaintiff cites to her own testimony indicating that she tried to break her fall by grabbing onto something but that there was nothing to grab onto at the location where she fell. She also relies upon Braunstein's affidavit setting forth his opinion that the absence of a handrail in the area where plaintiff fell was a departure from generally accepted engineering safety standards requiring that handrails be present in that

area.

In reply, defendants maintain that plaintiff has failed to raise an issue of fact since no building code violations or defects in the stairs has been alleged, and no competent expert affidavit has been submitted by plaintiff. They argue that Braunstein's affidavit should be disregarded since he was never noticed as an expert and was disclosed for the first time in plaintiff's opposition. If the Court considers Braunstein's affidavit, defendants argue that the affidavit fails to raise a triable issue of fact because it does not identify any specific industry standards or code violations, and is vague, conclusory and unsupported.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all

reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Court finds that defendants have demonstrated their prima facie entitlement to judgment as a matter of law through the deposition testimony of plaintiff establishing that she was unable to identify the cause of the accident (*see Daniarov v New York City Transit Auth.*, 62 AD3d 480, 481 [1st Dept 2009] ["Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence including, *inter alia*, plaintiff's testimony that although there was no handrail to break her fall, she did not know how she fell or what caused her to slip"]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006]; *Yefet v Shalmoni*, 81 AD3d 637, 637 [2d Dept 2011]; *Kaplan v Great Neck Donuts, Inc.*, 68 AD3d 931, 931 [2d Dept 2009]).

In opposition, plaintiff has failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). Although the gravamen of plaintiff's claim is that she would not have fallen had a handrail been present to break her fall, she has offered nothing more than mere speculation as to what caused her to fall on the steps (*see Wilson v New York City Transit Auth.*, 66 AD3d 602, 603 [1st Dept 2009]; *Patrick v Costo Wholesale Corp.*, 77 AD3d 810, 810 [2d Dept 2010]). "While plaintiff's evidence need not positively exclude every possible cause of [her] fall other than the alleged staircase defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation" (*Reed*, 30 AD3d at 320).

Here, the record indicates that plaintiff failed to previously disclose the identity of her purported expert (*see* CPLR 3101 [d]).[1] In any event, even considering this evidence,

[1]The Court elects to consider Braunstein's affidavit as there is no showing of wilfulness in or prejudice caused by the failure to disclose earlier (*see Downes v American Monument Co.*, 283 AD2d 256, 256 [1st Dept 2001]; *Ocampo v Pagan*, 68 AD3d 1077, 1077 [2d Dept 2009]).

Braunstein's affidavit fails to raise a triable issue of fact on the issue of causation (*see Jones v City of New York*, 32 AD3d 706, 706-07 [1st Dept 2006]). Notably, plaintiff submits no evidence qualifying Braunstein as an expert, as no "vitae was submitted and his affidavit is devoid of any statement of his qualifications" (*Naulo v New York City Bd. of Educ.*, 2008 WL 3009960, at *2 [Sup Ct Kings County 2008], *aff'd*, 71 AD3d 651 [2d Dept 2010]). Braunstein additionally fails to "indicate his area of specialization, nor [does] he identify any professional or industry standard to substantiate his assertions" (*id.*; *see also Jones*, 32 AD3d at 706-07). The Court also finds Braunstein's affidavit speculative and conclusory, as Braunstein never visited the scene of the accident and his opinion is based solely on plaintiff's deposition and the three photographs (*see Chieffet v New York City Transit Auth.*, 10 AD3d 526, 527 [1st Dept 2004]).

Furthermore, although plaintiff argues that her cause of action is premised upon a lack of a handrail, it remains undisputed that plaintiff has cited to no applicable building code or other regulations that defendants purportedly violated by failing to install a handrail at the location of the fall (*see Jung v Kum Gang, Inc.*, 22 AD3d 441, 442-43 [2d Dept 2005]). Nor may a reasonable inference as to causation be drawn in the absence of evidence connecting any such violations, even if alleged, to plaintiff's fall (see *Daniarov*, 62 AD3d at 481 [plaintiff's failure to testify as to what caused her accident was fatal to her cause of action and could not be cured by her expert's opinion that handrails present at accident location "violated the Building Code, even if applicable, in the absence of any evidence connecting the alleged violations to plaintiffs fall"]; *Reed*, 30 AD3d at 320).

Plaintiff's bare assertion that she reached for a handrail as she was falling but that there was not one to grab onto, standing alone, fails to raise an issue of fact sufficient to defeat summary judgment (*cf. Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008] [finding triable issue of fact raised by plaintiff's averment that "she slipped and tried to grab onto a handrail with her right hand, but there was no right-sided handrail, *combined with*

plaintiffs' expert's unchallenged statement that the absence of a handrail on the stairway's right wall was a significant and dangerous departure from accepted standards and the applicable building code"] [emphasis added]; *Viscusi v Fenner*, 10 AD3d 361, 361 [2d Dept 2004] [ruling that the absence of a handrail that the plaintiff may have held onto as he descended the stairs upon which he fell, "*if required by law*, would seem to be a proximate cause of the accident"] [emphasis supplied]).

Since defendants have demonstrated entitlement to judgment as a matter of law, and plaintiff has failed to establish the existence of genuine issues of fact requiring a trial, summary judgment dismissing the complaint is warranted. Accordingly, defendants' motion for summary judgment is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing the complaint in its entirety; and it is further,

ORDERED that defendants shall serve a copy of this Order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: June 17, 2011

Paul Wooten J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**