| **Yarmush v Boston Props. Ltd. Partnership** |
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| 2011 NY Slip Op 31930(U) |
| June 9, 2011 |
| Sup Ct, NY County |
| Docket Number: 100358/2008 |
| Judge: Saliann Scarpulla |
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SCANNED ON 6/14/2011

[* 1]

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

SALIANN SCARPULLA

PART 19

Index Number : 100358/2008

YARMUSH, AVITAL

vs

BOSTON PROPERTIES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following 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 accompanying memorandum decision.

**FILED**

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/14/11

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
-----------------------------------------------------------------X
AVITAL YARMUSH,

Plaintiff,

Index No. 100358/2008

-against-

BOSTON PROPERTIES LIMITED PARTNERSHIP, CITIGROUP CENTER CONDOMINIUM, BP/CG CENTER I LLC, BP/CG CENTER II LLC, ST. PETER'S LUTHERAN CHURCH OF MANHATTAN, TEMCO SERVICE INDUSTRIES, INC.

Defendants.
-----------------------------------------------------------------X

FILED

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

For the plaintiff: Palmeri & Gaven, Esqs.
80 Maiden Lane
New York, NY 10038

For the defendants: Quirk & Bakalor, P.C.
845 Third Avenue
New York, NY 10022

Papers Reviewed on This Motion for Summary Judgment Dismissing the Complaint:

Notice of Motion and Supporting Exhibits . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .1
Affirmation in Opposition and Supporting Exhibits . . . . . . . . . . . . . . . . . . . . . . . . . .2
Affirmation in Reply and Supporting Exhibit . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .3

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PRESENT: HON. SALIANN SCARPULLA, J.:

This is a negligence action arising out of plaintiff Avital Yarmush's ("Yarmush") fall down steps on property allegedly owned, operated, managed, and maintained by Boston Properties Limited Partnership, Citigroup Center Condominium, BP/CG Center I LLC, Citigroup Center Condominium, BP/CG Center II LLC, and/or St. Peter's Lutheran Church of Manhattan (collectively, "defendants").[1] Defendants move for an order

[1] The action has been discontinued against the sole remaining named defendant, Temco Service Industries, Inc.

striking the errata sheet relating to Yarmush's deposition testimony and granting them summary judgment dismissing the complaint.

**Background**

Yarmush's accident occurred on the evening of August 22, 2007, on the exterior granite stairs of the building at which she worked. These stairs led down to the subway entrance at the corner of 53rd Street and Lexington Avenue in Manhattan. The wide staircase was divided down the middle by a handrail, and had a handrail on either side. Yarmush was, at the time of her fall, descending the stairs, while to the left of the right handrail. Yarmush alleges that she was holding the handrail while descending the stairs. That handrail was adjacent to a waterfall, which ran along that side of the staircase.

The day after the accident, Kevin Buell ("Buell"), a security supervisor and the deputy fire officer employed at the premises by defendant Boston, the premises' management company, telephoned Yarmush and obtained her statement, which formed the basis of the incident report he prepared that day. Buell, according to his deposition testimony, asked Yarmush how the accident occurred, and she replied that she was walking down the steps and slipped. Buell "believe[d]" that she said she had slipped because it was wet; he also "believe[d]" that the wetness resulted from rain. (Buell Examination Before Trial, at 20.)

Buell testified that the incident report indicated that it was raining at the time of the incident and that the conditions were wet. Yarmush, according to Buell, told him that the stairs were dangerous and needed to be fixed, to which Buell responded (*id.* at 29-30),

"everything is slippery here when they're wet ...," but that it was not feasible to replace a granite staircase.

Buell had no maintenance duties at the building nor any responsibility to inspect the stairs, but if something came to his attention, he, as an employee, would report it to management. He could not recall whether anyone else had ever slipped and fallen on the steps at issue and whether anyone had ever complained to him of the steps being slippery or of the waterfall causing any slipperiness.

In her bill of particulars, Yarmush alleges that the accident occurred as a result of the defendants' negligence in causing the stairway to "be, become and remain in a defective, dangerous and hazardous condition ...," in failing to properly maintain the stairway, make sure that it was not too slippery, make adequate inspections, and take adequate precautions, and in allowing the stairs to have cracks, the treads to have improper depths, and the risers to have improper heights. The 2009 supplemental bill of particulars adds that the defective condition which caused the fall was a crack in the third step up from the staircase's bottom, and the staircase's slipperiness.

At her June 2010 deposition, Yarmush, who could not recall which foot she stepped out on before her fall, testified that the cause of her fall was the presence of an indented seam, also referred to by her as a crack, between the step's granite blocks, caused by the way they were placed. She was unsure whether the step at issue was the third, fourth, or fifth from the bottom, but after being shown photographs of the steps, which only showed, as is relevant, the fourth and sixth steps having a seam in the vicinity where one would be

walking when next to the right handrail, Yarmush seemed to abandon the claim that the third or fifth step could have been the location of the accident.

At her deposition Yarmush did not distinguish between the seams of the fourth and sixth steps, vis a vis the nature of the alleged crack defect. She could not recall whether one of her shoes had become caught in the crack, only noticed the crack after she slipped and turned around, and did not determine, at the time of her fall, that it was due to the crack. She later testified that "[p]robably" her foot got caught in the crack. (Yarmush Examination Before Trial at 33.) Thereafter, in response to the question of whether one of her feet made contact with the crack, Yarmush claimed that she did not remember. In response to the question of whether she had tripped or slipped, Yarmush stated, "No, I slipped." *Id.* at 172.

Yarmush further testified that she did not remember if it had rained that day and that it was not raining at the time of the accident. Thereafter, Yarmush was asked whether she remembered the staircase being wet at the time in issue, and she responded that the wetness was due to it having rained earlier in the day and to the waterfall. When asked if she knew whether the wetness was due to the rain, the waterfall or a combination, she couldn't say with any degree of certainty. *Id.* at 17-18. Yarmush then testified that she did not see the wetness before she slipped and did not notice it on the day of the accident after she had slipped. *Id.* at 27-28.[2]

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[2] According to Yarmush, the side of the staircase near the waterfall was rusty, but the other side was not.

[* 6]

When asked directly "[d]o you know what caused you to fall or lose your balance?" Yarmush responded "[y]es. There's a cracked step." *Id.* at. 28. Later, when asked again about whether the water from the waterfall caused her to fall, she responded, "I'm not sure. It was an added factor." *Id.* at 34.[3] Yarmush was then asked whether, in addition to catching her foot in the seam, she also slipped, and answered "I kind of remember the way that I fell and landed. I don't remember — I don't remember." *Id.*

Following Yarmush's deposition, defendants served her counsel, by cover letter dated July 16, 2010, with a copy of her deposition transcript. Her counsel then served an errata sheet sworn to on September 21, 2010. As is relevant, she changed her answer, that she could not remember if she saw water droplets in the area of the seam, to "I do recall seeing water droplets." Curcio aff., ex. G.

Defendants now move to strike the errata sheet, especially that part relating to water droplets in the area of the seam, and rely on that part of CPLR 3116 (a), which requires changes in deposition transcripts to be made within 60 days of "submission" of the transcript to the witness, and permits a deposition to be used as though signed if not returned within that 60-day period. Defendants also move for an order granting them summary judgment dismissing the complaint on the ground that Yarmush cannot identify the alleged conditions which caused her fall, and merely speculated that she fell because she stepped on one of the seams between the granite blocks and because the steps were wet

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[3] Yarmush described the amount of water as "random droplets," but Yarmush could not remember whether she had seen such droplets "around the area" of the seam in the stair. *Id.* at 35.

and slippery. Additionally, defendants assert that the alleged conditions were not dangerous or defective, and, accordingly, did not require defendants to remedy them or issue warnings.

Defendants' motion is supported by the affidavit of their civil engineer, Scott Derector ("Derector"), who opines that the handrails and heights and depths, respectively, of the risers and treads were code compliant. Derector also observes that, although Yarmush's supplemental bill of particulars recited that she fell from the third step from the bottom of the staircase, there was no seam on that step in the area where she allegedly was walking. He further observes that the fourth step had such a seam, that it had a height differential from one side of the seam to the other of less that a quarter inch, and that such minor height differential could not be considered dangerous. Derector also notes (aff., ¶ 12) that "near" the seam, at the nose of the fourth step, the granite block had a three-quarter inch chip, but that if Yarmush stepped on that chip it meant that she had not properly placed her foot on the step, so that the chip was irrelevant.

Regarding the step's alleged slippery condition, Derector argues that water droplets for the adjacent fountain were not dangerous. Noting that the building codes require that the means of egress be slip resistant, Derector conducted dry slip resistance testing on the third, fourth, and fifth treads from the bottom, and concluded that, under dry conditions, the steps' slip resistance was adequate for walking. He added that it is common knowledge that, when wet, most walking surfaces are less slip resistant, thereby requiring the pedestrian to be more careful, and attentive. As to the steps here, Derector opined that "[i]t

appears" that they are no different from hundreds of other granite steps, which may be found in New York, and that granite is no "more slippery when wet than any other surface may be." Derector aff., ¶ 3.

In opposition, Yarmush's counsel claims that Derector stated that there was a chip "at" the seam, and observed a one quarter inch height differential at the seam. Accordingly, plaintiff's counsel maintains that there are triable issues as to whether these two conditions caused Yarmush's fall. Yarmush herself adds that, after reviewing photographs of the accident site, she has determined that the step in issue was the fourth step from the bottom, and that she "believe[s]" that she stepped on the "crack (seam) and was caused to fall." Yarmush aff., ¶ 4.

As to slipping on water, both Yarmush's counsel and Yarmush have abandoned the claim that the slippery condition of the steps was from rain. Yarmush now solely claims, in her affidavit, that the waterfall's droplets contributed to her fall, noting that she had previously testified that she had seen water droplets on the steps, and "believes" that she misunderstood the subsequent question of whether she saw water in the area of the seam, so she therefore corrected that answer to reflect that she did recall seeing droplets there.

**Discussion**

The movant on a summary judgment application bears the initial burden of prima facie establishing that party's entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44

AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Where a moving party makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009). Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987). However, "[a] shadowy semblance of an issue ... " is insufficient. *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974) (internal quotations and citations omitted).

A property owner or operator is required to maintain the premises in a condition which is reasonably safe. *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 (2d Dept 2010); *Razla v Surgical Sock Shop II, Inc.*, 70 AD3d 916, 917 (2d Dept 2010). In a slip/trip and fall case, a defendant moving for summary judgment is usually required to demonstrate, "prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises ... ." *Gradwohl*, 70 AD3d at 636; *see also Lee v Ana Dev. Corp.*, 83 AD3d 545 (1st Dept 2011); *Razla,* 70 AD3d at 917.

Not every height differential between adjoining walking surfaces, which results in a person's fall, is actionable. *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997). Whether a condition is dangerous or amounts to a triviality, which is not actionable, turns on the particular facts of a case. *Id.* A dangerous condition, which is open and obvious, "is not fatal to a plaintiff's negligence claim, but rather is relevant to plaintiff's comparative fault." *Saretsky v 85 Kenmare Realty Corp.*, __AD3d_, 2011 NY Slip Op. 03979, * 3, 2011 WL 1796367 (1st Dept 2011); *see also Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 (1st Dept 2010).

A defendant may also be entitled to summary judgment where it shows that the plaintiff could not identify the accident's cause. *Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460 (1st Dept 2010); *Burnstein v Mandalay Caterers*, 306 AD2d 428 (2d Dept 2003). A plaintiff must attribute the cause of an accident to a specific defect or defects. *See Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 (1st Dept 2010); *Telfeyan v City of New York*, 40 AD3d 372, 373 (1st Dept 2007); *Kane v Estia Greek Rest.*, 4 AD3d 189, 190-191 (1st Dept 2004). However, positive or direct proof of causation is not required. The defect can be established by inference. *Gramm v State of New York*, 28 AD2d 787, 788 (3d Dept 1967), *affd on the majority opinion of the App Div*, 21 NY2d 1025, 1026 (1968) (plaintiff not required to establish "precise condition of the particular step[4] upon which she fell, as respected one or more of the negligent conditions found applicable to the stairway

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[4] The Court of Appeals in *Gordon v American Museum of Natural History* (67 NY2d 836, 838 [1986]) indicated that the plaintiff in *Gramm* established causation, despite her failure to indicate on which step she had fallen.

generally"). While an accident can have more than one proximate cause, and a plaintiff does not have to exclude all possible causes not attributable to a defendant's negligence, "the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence ... ." *Lynn v Lynn*, 216 AD2d 194, 195-196 (1st Dept 1995) (internal quotation marks and citation omitted). That is because liability cannot rest on conjecture. *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 (2d Dept 2006); *Kane*, 4 AD3d at 190-191; *Lynn*, 216 AD2d at 196.

With respect to Yarmush's claim that she fell on the chip, neither at her deposition nor in opposition to this motion did Yarmush herself specifically claim that a three-quarter inch chip at the edge of the fourth step was a cause of her fall. Rather, she claimed at her deposition that the only defect in the seam of the fourth step was the same as the defect in the sixth step's seam, namely the indentation of the seam caused by the way the granite blocks were placed. Her statement, that exhibit "C," attached to her opposing affidavit (¶ 4), is a photograph of the "crack," does not suffice to raise an issue that the chip caused her fall, because, aside from the fact that the photograph is somewhat fuzzy, that statement is bald, does not mention a chip, is patently tailored to overcome the absence in her deposition testimony of any such specific claimed defect causing her fall, does not explain why the chip was never mentioned by Yarmush at her deposition, and is at variance with her explanation of the crack at her deposition. *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 (1st Dept

2001) (conclusory, self-serving affidavit at variance with plaintiff's deposition testimony created a feigned issue which was insufficient to defeat summary judgment).

Further, Yarmush's attorney mischaracterized Derector's statement that the chip was "near" the seam, as it having been "at" the seam. In any event, plaintiff's claims regarding the crack, whether it was the chip or the indentation from how the blocks were placed, must be dismissed as speculative, since she testified that she did not remember whether either of her feet made contact with the crack, and simply stated (Yarmush Examination Before Trial, at 33) that her foot "[p]robably" got caught in the crack. Even in her opposing affidavit (¶ 4) she merely asserted that she "believe[s]" that she stepped on the crack. Finally on this issue, as a matter of law the less than one quarter inch seams between the granite blocks amounted to trivialities, which are not actionable.

This leaves Yarmush's sole remaining claim, that she slipped on water from the waterfall, which claim is relevant to the branches of the motion which seek summary judgment dismissing the balance of the action and to strike plaintiff's errata sheet. Defendants seek summary judgment dismissing Yarmush's claim that she slipped on droplets from the fountain on the grounds that such claim was based solely on speculation and that no dangerous condition existed. This branch of the motion is granted, and the action is dismissed.

A review of plaintiff's deposition transcript reveals that it is rife with inconsistencies and contradictory and speculative statements. *See Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496, 497 (inconsistent statement in plaintiff's deposition testimony was appropriately

rejected in connection with summary judgment motion, since it was designed to create an issue which was feigned). Indeed, a review of Yarmush's deposition shows that she testified that the crack caused her to fall, and that she did not see any water where she fell either before, or after her fall. *See* Yarmush Examination Before Trial, at. 27-28. When asked specifically about the water condition, she responded that she could not remember. Later, she testified that she was not sure whether water on the step caused her to fall, but, apparently afraid to rule out that possibility, Yarmush surmised that it contributed to her fall. *Id.* at 34.

Moreover, Yarmush's changed deposition testimony with respect to the presence of water on the stair, by use of the errata sheet, which change she claims was necessary because she allegedly did not understand the question which was posed, is insufficient to defeat summary judgment, since her explanation for the change is "not supported by the record" (*Marzan v Persuad*, 29 AD3d 652, 653 [2d Dept 2006]) , and constitutes a feigned issue, designed to avoid the ramifications of her prior, speculative deposition testimony (*Thompson v Commack Multiplex Cinemas*, 83 AD3d 929 [2d Dept 2011]). In light of the dismissal of the action, the branch of the motion which seeks an order striking the errata sheet is denied as moot.

In conclusion, it is

ORDERED that the branch of the defendants' motion, which seeks an order striking the errata sheet, is denied as moot; and it is further

ORDERED that the branch of defendants' motion, which seeks an order granting them summary judgment dismissing the complaint, is granted, and the complaint is dismissed with costs and disbursements to defendants Boston Properties Limited Partnership, Citigroup Center Condominium, BP/CG Center I LLC, Citigroup Center Condominium, BP/CG Center II LLC, and St. Peter's Lutheran Church of Manhattan as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
June 9, 2011

FILED

JUN 14 2011

NEW YORK
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ENTER:

J.S.C.