

<b>Richardson v County of Nassau</b>
2016 NY Slip Op 32833(U)
July 27, 2016
Supreme Court, Nassau County
Docket Number: 1173/15
Judge: Denise L. Sher
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**SHORT FORM ORDER**

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

**PRESENT: HON. DENISE L. SHER**  
Acting Supreme Court Justice

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ALFRED RICHARDSON,

Plaintiff,

- against -

TRIAL/IAS PART 37  
NASSAU COUNTY

Index No.: 1173/15  
Motion Seq. No.: 03  
Motion Date: 05/18/16  
**XXX**

COUNTY OF NASSAU, TOWN OF HEMPSTEAD,  
VILLAGE OF HEMPSTEAD and HEMPSTEAD  
HOUSING AUTHORITY,

Defendants.

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**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant The Village of Hempstead Housing Authority s/h/a Hempstead Housing Authority ("Housing Authority") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it. Plaintiff opposes the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, on February 1, 2014, at approximately 12:00 p.m., in the lower level of the premises known as

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260 Clinton Street, Hempstead, New York, when defendant Housing Authority's employee, Kevin Cichonczyk, pushed a garbage cart into plaintiff, who is handicapped and, at the time of the incident, was exiting an elevator on his motorized scooter. The impact from the garbage cart forced plaintiff to the ground off of his scooter and caused him to fracture his hip.

Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about February 9, 2015. *See* Defendant Housing Authority's Affirmation in Support Exhibit A. Issue was joined by defendant Housing Authority on or about March 10, 2015. *See* Defendant Housing Authority's Affirmation in Support Exhibit B.

In support of the instant motion, defendant Housing Authority submits the transcript from the Examination Before Trial ("EBT") of Kevin Cichonczyk ("Cichonczyk"), a maintainer for said defendant. *See* Defendant Housing Authority's Affirmation in Support Exhibit G.

Counsel for defendant Housing Authority submits that, according to Cichonczyk's deposition testimony, "[a]fter his hire, the Housing Authority trained Mr. Cichonczyk in the safe operation of equipment.... Specific to trash collection and disposal, the Housing Authority trained Mr. Cichonczyk in using the compactor, where to place the trash, and how to safely move the trash from the compactor to the outside.... The Housing Authority trained Mr. Cichonczyk to maintain the safety of residents.... The Housing Authority trained Mr. Cichonczyk to watch for people in the hallways of the building.... The Housing Authority trained Mr. Cichonczyk to watch especially for elderly persons in the building, as they may not be as aware of their surroundings.... The Housing Authority trained Mr. Cichonczyk to safely operate the push carts used to transport garbage from the building.... The Housing Authority trained Mr. Cichonczyk not to overload the push carts with garbage so as to obstruct vision of obstacles in front of the cart.... Mr. Cichonczyk never loaded the carts higher than chest height...." *See id.*

Along with Cichonczyk's EBT testimony, defendant Housing Authority also submits the transcripts from the EBTs of plaintiff and non-party witness Elijah Colbert ("Colbert") in support of its motion. *See* Defendant Housing Authority's Affirmation in Support Exhibits E and F.

Counsel for defendant Housing Authority asserts that, according to plaintiff's, Colbert's and Cichonczyk's deposition testimonies, "[o]n February 1, 2014, plaintiff used the elevator in the building to travel to the ground floor of 260 Clinton Street.... When the elevator reached the ground floor, plaintiff backed out of the elevator in his wheelchair.... Plaintiff exited the elevator immediately after the doors opened.... Plaintiff could only see the walls on either side of the elevator doors when he first left the elevator.... Plaintiff could not see the hallway to the right and left until he was already in the hallway.... As plaintiff backed his wheelchair out of the elevator and entered the hallway, a push cart struck the left side of his wheelchair.... Authority maintenance worker Kevin Cichonczyk was pushing the cart.... The cart was not filled to the top with garbage.... Plaintiff did not see the cart before it hit his wheelchair.... Mr. Cichonczyk did not see plaintiff prior to the impact.... Nothing obstructed Mr. Cichonczyk's view forward while he was pushing the cart.... Mr. Cichonczyk only used the force necessary to make the cart move while pushing the cart.... Mr. Cichonczyk was not pushing the cart fast.... Mr. Cichonczyk knew of the need to move cautiously through the vestibule because there is limited space.... The cart makes noise as it moves.... Mr. Cichonczyk did not hear any noise from plaintiff's scooter.... The elevator doors make no sound when they open.... The elevator makes no sound when someone arrives on the floor.... The impact occurred just as Mr. Cichonczyk pushed the cart past the doorway leading into the elevator vestibule.... Plaintiff was not looking toward the cart as he was backing out of the elevator.... After the cart impacted his wheelchair, the wheelchair fell over to the right.... Plaintiff fell out of the wheelchair and landed on the ground.... Plaintiff came to rest

on the ground on the right side of his body.... Mr. Cichonczyk assisted plaintiff back into his chair and helped him move to the nearby lobby....” See Defendant Housing Authority’s Affirmation in Support Exhibits E- G.

Counsel for defendant Housing Authority argues that, “[j]ust because an unfortunate accident occurs it does not mean the accident occurred due to negligence. Plaintiff had to prove not only that he suffered an injury, but that he suffered that injury because the Housing Authority or its employee was negligent. He failed to meet his burden. To establish a negligence cause of action, a plaintiff must demonstrate (1) a duty of care owed to the plaintiff; (2) a breach of that duty; (3) that the breach is a proximate cause of plaintiff’s injury or damages; and (4) that the plaintiff suffered a legally cognizable injury or damages. [citation omitted].... To prevail, plaintiff had to establish that the Housing Authority, or its employee, was negligent. The question here is whether the Housing Authority’s employee (Mr. Cichonczyk) operated the garbage cart in a ‘prudent and reasonable manner.’ [citations omitted].... There is no evidence that Mr. Cichonczyk was pushing the cart in a negligent fashion. He was pushing the cart with only the force required to move it.... The cart was not full of garbage and his view forward was not compromised.... He was moving the cart cautiously through the vestibule area in front of the elevator.... He did not see plaintiff before plaintiff suddenly appeared in front of him... For plaintiff’s part, he admitted that he was not looking in the direction that the cart was traveling when he backed out of the elevator.... Nor could he have been seen until he was already in the hallway.... Plaintiff admitted that, had Mr. Cichonczyk been able to see him, he would not have hit plaintiff with the cart.... Plaintiff does not claim that Mr. Cichonczyk intentionally struck him with the cart.... If there is any negligence, it is on plaintiff for entering a hallway without looking both ways, like a pedestrian who darts into traffic. Plaintiff testified had he looked, he probably could have seen the cart:.... To find liability here, the Court must decide that tort liability applies

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anytime an accident happens, even where the defendant was not negligent. The law does not sanction that result. [citations omitted]. There is no evidence that any negligence by the Housing Authority or Mr. Cichonczyk was the proximate cause of plaintiff's fall. There is no issue of fact requiring a trial here." See Defendant Housing Authority's Affirmation in Support Exhibit G.

Counsel for defendant Housing Authority adds that, "[t]o the extent plaintiff claims the Housing Authority was negligent in its training, supervision, or hiring of Mr. Cichonczyk, the claim fails for several reasons. As plaintiff's claims against the Housing Authority sound in *respondeat superior* for the actions of an employee within the scope of his employment, plaintiff cannot also assert a claim for negligent supervision, training, or hiring. [citation omitted]. Nor is there any evidence that Mr. Cichonczyk was negligent, as outlined at length above. There can be no failure by the Housing Authority to train or supervise an employee in something that was not negligent. Even if there was such a duty, the Housing Authority has no duty to train an employee in 'common and ordinary' activities, like pushing a cart. [citation omitted]. Finally, to recover on a theory of negligent hiring or retention, plaintiff must establish that the Housing Authority was on notice of the 'relevant tortious propensities of the wrongdoing employee.' [citation omitted]. There is no such evidence here. The Housing Authority trained Mr. Cichonczyk to safely operate the cart.... Nor is there any evidence that a failure in training was the proximate cause of plaintiff's injury; plaintiff was injured despite safe operation of the cart."

In opposition to the motion, counsel for plaintiff argues that "[i]t is plaintiff's claims that defendant was negligent in failing to use reasonable care under the circumstances, and failing to see what was there to be seen." See Plaintiff's Affirmation in Opposition Exhibit A.

Counsel for plaintiff further argues that, "[d]efendant has not shown its entitlement to summary judgment because it has not shown its absence of negligent (*sic*). The evidence shows that defendant was negligent in blindly **pushing** a full cart of garbage into the elevator vestibule

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area with so much force that it knocked over the handicapped plaintiff and his motor scooter. The plaintiff was clearly there, and defendant had an obligation to see what was there to be seen. In fact, the defendant admitted he had full visibility of the vestibule area when leaving the compactor room and heading down the hallway. Also, the defendant should have been listening carefully to make sure that no one in a wheelchair or scooter was exiting the elevator, and he should have been listening for the sound of the elevator doors opening. Defendant's testimony was equivocal about listening, but he admitted that everything makes some noise. With respect to the foreseeability of the risk, defendant admitted that he was aware of the risk of pushing the cart forward blindly, and was aware of the infirmities of the elderly and handicapped people living in the HUD building at 260 Clinton Street. In considering the 'burden of avoiding the risk', there was no reason why the cart couldn't be pulled into the elevator vestibule, rather than pushed, if defendant's vision was obscured. Additionally, in assessing any potential negligence on the part of the plaintiff, New York State adheres to comparative negligence standards, not contributory negligence. Therefore, it is a question of fact for a jury to determine whether any negligence on the part of the plaintiff was a factor in causing this accident, and whether such negligence was a proximate cause of his injuries."

In reply to plaintiff's opposition, counsel for defendant Housing Authority contends that "[p]laintiff claims that the Housing Authority was negligent, but fails to point to anything in the record establishing such negligence. Plaintiff failed to come forward with admissible evidence establishing an issue of material fact for trial.... Plaintiff does not explain how this accident was foreseeable when neither party could see the other. The vestibule blocks view of the elevator doors as one is approaching it through the hallway.... Plaintiff acknowledged the elevator doors are not visible from the hallway. There is no evidence Mr. Cichonczyk was pushing the cart in an unreasonable matter (*sic*); he testified he pushed it with just the force needed to move it and was

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not pushing it fast.... It is unclear how Mr. Cichonczyk could have operated the cart any more safely to avoid plaintiff's sudden appearance in his path."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve

issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Based upon the evidence and legal arguments presented, the Court finds that defendant Housing Authority has established, *prima facie*, its entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. Defendant Housing Authority has demonstrated that there is no evidence that plaintiff suffered his alleged injuries because defendant, or its employee, Cichonczyk, was negligent. There is no evidence that Cichonczyk was operating the subject garbage cart in any manner other than prudently and reasonably. The Court concurs with counsel for defendant Housing Authority that not all accidents are due to negligence.


As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the

existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

The Court finds that plaintiff has failed to met his burden to come forward with competent evidence to demonstrate the existence of a material issue of fact. The conclusory and speculative claims of plaintiff's counsel, set forth in the Affirmation in Opposition to the instant motion, are of no probative value and are insufficient to raise triable issues of fact. *See Zuckerman v. City of New York, supra.* Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact. *See Billordo v. E.P. Realty Associates, 300 A.D.2d 523, 752 N.Y.S.2d 556 (2d Dept. 2002).*

Therefore, based upon the above, defendant Housing Authority's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER  
  
DENISE L. SHER, A.J.S.C.  
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Dated: Mineola, New York  
July 27, 2016

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COUNTY CLERK'S OFFICE