At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 4th day of April, 2017.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

LYUBOV KRAVETS,

Plaintiff,

-vs-

313-23 OWNERS CORP.,

Defendant.

Motion Sequence #1
INDEX No. 508226/14

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Cross Motion and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers, defendant 313-23 Owners Corp. ("defendant") moves for an order, pursuant to CPLR § 3212, granting summary judgment dismissing the instant action as asserted against it.

Plaintiff Lyubov Kravets ("plaintiff") commenced the instant action to recover compensatory damages for personal injuries she allegedly sustained as a result of a slip[1] and fall accident (the "subject accident") that occurred on November 30, 2013. The subject accident took place in the walkway of a building owned by defendants and located at 313-23 Brightwater Court, in Brooklyn, New York (the "subject premises").

When considering a motion for summary judgment, the court should only grant the motion where there are no material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The movant has the burden of demonstrating "a prima facie

[1] The complaint alleges that plaintiff tripped rather than slipped (*see* Defendant's Affirmation, exhibit 1).

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the opponent to produce admissible evidence that establishes the existence of material issues which require a trial (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

It is well-settled that "a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 810-11 [2d Dept 2010]; *Hahn v Go Go Bus Tours, Inc.*, 144 AD3d 748, 749 [2d Dept 2016]).

In support of the instant motion, defendant proffers, among other things, the transcripts of the deposition testimonies of plaintiff, its property manager Ms. Irene Shreyberg ("Ms. Shreyberg"), and plaintiff's son, Yan Kravets (Mr. Kravets"). Defendant further proffers color photographs of the area where the subject accident allegedly occurred. According to plaintiff's testimony, at the time of the subject accident, she was standing in front of Brightwater Court and Brighton 4th waiting for her son to pick her up (Plaintiff's Deposition, 18: 14-15; 21: 16-17).

Plaintiff wanted to smoke a cigarette while she waited for her son to arrive at the agreed-upon location (*id.* at 41: 11-13). Due to heavy wind in the area, she decided to move from the sidewalk onto the walkway of the subject premises, which is located right in front of the cross-streets where she arranged to meet her son (*id.* at 41: 11-12). According to plaintiff, the ground of the walkway was made of a heavy tile material and had two lower steps abutting the sidewalk, which she walked up to enter the open area (*id.* at 43: 5-7; 51: 3-6). She further testified to observing a handrail attached to the left side of the steps (*id.* at 43: 8-16). There was an additional step at the top of the

walkway, immediately in front of the building's entrance, which plaintiff walked up and stood on top of while she smoked (*id.* at 51: 7-9). Upon seeing her son's vehicle approaching and after she had finished smoking, plaintiff began walking back out to the street, at which point she slipped and fell as she descended from the upper step (*id.* at 44: 8-12; 45: 23; 61: 2-4; 65: 14-15).

Plaintiff was sure that she fell as a result of having slipped but testified that she does not know or remember what caused her to slip (*id.* at 46: 9-12; 68: 9-13). Plaintiff also stated that she did not remember if what she slipped on smelled because she lost consciousness; and she did not see what she slipped on prior to the occurrence (*id.* at 46: 15-20). Specifically, when asked about the weather conditions at the time of the accident, plaintiff testified that it was cold and windy but had not been raining (*id.* at 47: 4-7). She further testified that she did not see any mops or buckets in the walkway, nor did she see anyone cleaning the area or remember any renovations or repair work being done (*id.* at 71: 6-15). Additionally, plaintiff stated that the subject area had good lighting and she was able to see where she was going (*id.* at 71: 20-24). Moreover, plaintiff was asked what side of the walkway she was walking on at the time of her fall, to which she answered that "when [she] was walking out, [she] was closer to the building" (*id.* at 60: 12-13). She then added that the area she slipped on was closer to the wall of the building, and that there were no handrails or anything else for her to hold onto where she was located (*id.* at 58: 20-22; 61: 5-8). However, plaintiff was shown a photograph of the walkway and was directed to circle the location of her fall, but refused to do so because she did not know exactly where she fell (*id.* at 67: 20-21; *see* exhibit 5).

Furthermore, according to the deposition testimony of Mr. Kravets, he did not witness plaintiff slip because upon arriving at the subject location, he was looking down at his cell-phone while waiting on plaintiff to walk to his vehicle (Yan Deposition, 7: 24; 16: 20-21; 17: 12-13). By the time Mr. Kravets looked up from his cell-phone a few seconds later, plaintiff was already on the floor (*id.*

at 17: 16-23; 18: 16-19, 23-25). Notwithstanding, Mr. Kravets testified that upon coming to his mother's aide, he did not notice anything on the floor where she was lying (*id.* at 19: 3-4, 25; 20: 2).

Finally, according to the deposition testimony of Ms. Shreyberg, prior to the subject accident the subject premises had a live-in Superintendent whom, among other things, swept the building's steps twice a day, once in the morning and once in the evening (*id.* at 16: 11-13; 27: 14-25; 31: 2-8). Ms. Shreyberg testified that she also visited the subject premises once or twice a week to inspect it (*id.* at 19: 2-8). Moreover, Ms. Shreyberg testified that she did not recollect having to hire someone to perform repair work on the walkway and/or stairs prior to the date of the subject accident, and had no recollection of the handrails ever being replaced (*id.* a 22: 4-8).

Based upon a review of the record submitted by the parties, and the relevant law, the Court finds that defendant has satisfied its initial prima facie burden of demonstrating its entitlement to judgment as a matter of law by submitting evidence that plaintiff is unable to identify the cause of her fall (*see Hahn*, 144 AD3d at 749; *Barone v Concert Service Specialists, Inc.*, 127 Ad3d 1119, 1119-20 [2d Dept 2015]; *Trapani v Yonkers Racing Corp.*, 124 AD3d 628, 629 [2d Dept 2015]; *Patrick*, 77 AD3d at 810-11). The Court notes that in addition to not knowing what caused her to fall, plaintiff's own testimony, as well as that of her son, indicates that there were no conditions present on the walkway that would have caused her to slip. Furthermore, plaintiff's testimony as to where she fell is inconsistent and conflicts with her son's testimony. Specifically, during the deposition of Mr. Kravets, he was shown the same photograph previously shown to plaintiff of the walkway and was asked to identify and circle the portion where he picked plaintiff up (*id.* at 21: 4-9). Mr. Kravets circled an area on the upper left portion of the walkway and indicated that plaintiff was right next to the railing, which conflicts with plaintiff's testimony that she fell away from the railing

and closer to the wall of the building (*id.* at 22: 5; *see* exhibit 5). In light of the foregoing, defendant is entitled to summary judgment as a matter of law.

In opposition, plaintiff contends that the step Mr. Kravets marked as the location where plaintiff fell "has a missing area of non-slip treading in its nosing" (Plaintiff's Affirmation, ¶ 7), which violates of New York City Administrative Building Code §27-375 and §27-376, and, alternatively, violates defendant's common law duty to maintain its premises in a reasonably safe condition. Based upon a review of the record submitted by the parties, and the relevant law, the Court finds that the evidence proffered by plaintiff, in opposition, is insufficient to raise a triable issue of fact as to whether defendant violated its duty of care. As an initial matter, the Court notes that neither plaintiff nor Mr. Kravets's deposition testimonies clearly establish where plaintiff fell and what caused her to fall. Notably, the area of the photograph where Mr. Kravets circled is darkened and not readily visible. Thus, plaintiff counsel's argument that plaintiff fell due to the lack of non-slip treading across the upper step where she was standing is speculative (*see Hahn*, 144 AD3d at 749), and, since plaintiff's counsel lacks personal knowledge of the facts asserted herein, is insufficient to raise a triable issue of fact (*see Barbieri v D'Angelo,* 128 AD2d 661, 661 [2d Dept 1987]). As such, defendant's motion for summary judgment is granted.

Accordingly, defendant's motion for summary judgment is granted and the complaint herein is dismissed. The foregoing constitutes the decision, order and judgment of the Court.

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HON. LARRY D. MARTIN

J.S.C.