

**Lonardo v Common Ground Community IV Hous.  
Dev. Fund Corp.**

2019 NY Slip Op 30086(U)

January 10, 2019

Supreme Court, New York County

Docket Number: 158061/2017

Judge: Robert D. Kalish

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

**PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

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JOHNIE LONARDO,  <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> COMMON GROUND COMMUNITY IV HOUSING DEVELOPMENT FUND CORPORATION and BREAKING GROUND IV HOUSING DEVELOPMENT FUND CORPORATION,  <p style="text-align: center;">Defendants.</p>	INDEX NO. <u>158061/2017</u>  MOTION DATE <u>12/20/2018</u>  MOTION SEQ. NO. <u>001</u>
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**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38, 39 were read on this motion to/for JUDGMENT – SUMMARY.

Motion for summary judgment, pursuant to CPLR 3212, by Defendants is granted for the reasons stated herein.

**BACKGROUND**

Plaintiff is suing Defendants for a fall in a hallway on Defendants' premises on July 26, 2017 which Plaintiff alleges was caused by wetness on the floor.

Defendants run a homeless shelter located at 197 Bower St. in Manhattan. Plaintiff was a resident at this shelter at the time of his fall.

Defendants present a surveillance video (without sound) that shows Plaintiff first walking down the hallway without incident and then turning around and walking back. (Affirm. in Supp., Ex. I [Video]; Ex. J [Hines Aff.] ¶ 7 [stating that video is true and accurate depiction of Plaintiff's fall]; Ex. K [Kellum Aff.] ¶ 7 [same].) The video shows that the hallway floor is clean, well-lit, and free of debris, substances or liquid. At the 1:25 minute mark, Plaintiff stops walking and stands just a few feet from the camera that appears to be mounted on the ceiling. Plaintiff stands in this position moderately swaying forward and backward until the 2:05 minute mark when he loses his balance taking several steps backwards and then falls on his back. At the 2:45 minute mark, two individuals approach Plaintiff, one in a red shirt and another shirtless. Both individuals traverse the area where Plaintiff fell without incident or any indication that there was a condition where Plaintiff fell. Through the entirety of the video no liquid substance appears anywhere on the hallway floor.

Defendants also submit affidavits from two employees who attended to Plaintiff after his fall: one from Kevin Hines, the individual in the red shirt, who first came to Plaintiff's assistance

and the other from Clarence Kellum who arrived later. Both employees state in their affidavits that they did not see “anything wrong with the floor and did not see any evidence of water or liquid on the floor.” (Affirm. in Supp., Ex. J [Hines Aff.] ¶ 6; Ex. K [Kellum Aff.] ¶ 6.) These employees also state that Plaintiff “appeared to be under the influence and had slurred speech and could not keep his eyes open.” (Hines Aff. ¶ 5; Kellum Aff. ¶ 6.)

In addition, Defendants submit an affidavit and case note from Plaintiff’s case manager. (Affirm. in Supp., Ex. L [Case Note]; Ex. M [Torres Aff.].) The case note states that Plaintiff met with his case manager and after the accident that Plaintiff “reported using cannabis on the day [of the incident] mentioned which caused dizziness and fall.” (Case Note; see also Torres Aff. ¶ 5 [same].)

In addition, Defendants submit an affidavit from a licensed professional engineer who inspected the area of the accident. (Affirm. in Supp., Ex. N [Silberman Aff.] ¶¶ 1-3.) Said engineer states that he did not find any defects in the flooring and that the flooring was “level and had an acceptable coefficient of friction based on industry standards.” (Id. ¶ 4.)

At the time that Defendants filed their moving papers, Plaintiff had not yet appeared for a deposition, having failed to appear for his previous three (3) scheduled depositions.

In the moving papers, Defendants state that they “were forced to make this motion prior to the completion of discovery” because “it is apparent that the Plaintiff has no intention of appearing for a deposition.” (Affirm in Supp. ¶ 16.) Defendants argue that this Court should grant the instant motion for summary judgment because the video submitted clearly shows that there was no liquid where Plaintiff fell and that Plaintiff simply lost his balance while he was standing.

However, Plaintiff appeared for a deposition on December 3, 2018, just days before Plaintiff’s counsel filed opposition papers—and as such a copy of the transcript was not available for submission on this motion. Nonetheless, Plaintiff submitted an affidavit stating that “I started to become unsteady on my feet and then my foot slipped on water or a clear liquid coming from the bathroom door” next to where the accident occurred. (Affirm in Opp., Ex. A [Plaintiff Aff.] ¶ 5.) Plaintiff further states that leaks emanating from the bathroom is a recurring problem that he has reported to building management and his case manager several times over the two or three years that he has resided at the shelter. (Id. ¶ 7.) Plaintiff also asserts that Mr. Kellum, who assisted him and submitted an affidavit, did not inspect the area where he fell for liquid, but makes no mention of whether the other employee – Mr. Hines – undertook an inspection. (Id. ¶ 9.) Plaintiff also denies telling his case manager that he fell because he was dizzy from cannabis use, and states that he was “not under the influence of any alcohol, drug and substance at the time of the accident.” (Id. ¶ 10.)

In Plaintiff’s opposition papers, Plaintiff’s counsel argues that the instant motion is premature as Plaintiff’s deposition transcript is not available, Defendants’ depositions have not taken place, and Defendants have not supplied maintenance and repair records for the subject bathroom in response to Plaintiff’s demands. In addition, Plaintiff’s counsel argues that the

Plaintiff's account that there was water on the floor—in contradiction of all of the other evidence—raises a triable issue of fact.

In reply, Defendants argue that any outstanding discovery is immaterial given that the video clearly shows that Plaintiff's fall was not caused by slipping on a liquid substance. In addition, Defendants argue that given the video, Plaintiff's statement in his affidavit that he fell on liquid only raises a feigned issue of fact.

### DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].) “Once this showing has been made, 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].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

It is clear from the video that at no point is any water or liquid substance present on the hallway floor immediately prior to Plaintiff's fall. In addition, the video shows Plaintiff standing still directly in front of the camera and swaying forward and backwards for roughly thirty (30) seconds before he loses his balance and falls backwards. The video evidence demonstrates incontrovertibly that Plaintiff's fall was caused by his own loss of balance and not by a dangerous condition on the premises.

Although Plaintiff claims in a sworn affidavit that his fall was caused by a liquid substance, this statement is “flatly contradicted” by the video and therefore has no probative value. (*Holmes v New York City Tr. Auth.*, 166 AD3d 530 [1st Dept 2018].) In addition, Plaintiff's argument that the motion is premature is unavailing. Here, the video clearly shows that Plaintiff's fall was caused by his own loss of balance and that the liquid substance that he alleges caused his fall did not exist. No amount of further discovery will change these facts. (*Burrus v New York City Tr. Auth.*, 52 Misc 3d 1208(A), at \*3 [Sup Ct, New York County 2016] [Stallman, J.]

Accordingly, the instant motion for summary judgment is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment, pursuant to CPLR 3212, is granted and the complaint is dismissed in its entirety with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the status conference scheduled for January 15, 2019 is canceled; and it is further

ORDERED that said Defendants are directed to serve a copy of this order upon the Clerk of the Court with notice of entry within twenty (20) days of the date of this Order; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/10/2019  
DATE

*Robert D. Kalish*  
**HONORABLE ROBERT D. KALISH**  
J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE