Dovbeniuk v 222 Mgt. Corp.
2019 NY Slip Op 30706(U)
March 12, 2019
Supreme Court, Kings County
Docket Number: 510975/2015
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of March, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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IVAN DOVBENIUK,

Plaintiff,

- against -

2222 MANAGEMENT CORP. And MILLENIUM ELEVATOR GROUP, INC.,

Defendants.

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2222 MANAGEMENT CORP.,

Third Party Plaintiff,

- against -

MILLENIUM ELEVATOR GROUP, INC.,

Third Party Defendants.

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DECISION AND ORDER

Motions Sequence #3, #4

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4
Opposing Affidavits (Affirmations).....	5, 6, 8, 9,
Reply Affidavits (Affirmations).....	7, 10

After a review of the papers and oral argument, the Court finds as follows:

This action was commenced by the filing of a summons and complaint on the 8th day of September, 2015, whereby the Plaintiff, Ivan Dovbeniuk (hereinafter "the Plaintiff") claims that on March 19, 2015, he suffered personal injuries when he tripped and fell while exiting an elevator located in a building known as 2222 East 18th Street, Brooklyn, N.Y. (hereinafter the "Premises"). Defendant/Third Party Plaintiff, 2222 Management Corp. (hereinafter "2222") moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment to 2222 and

dismissing the complaint and all cross claims and counter-claims against it. Defendant/Third Party Defendant, Millennium Elevator Group, Inc. (hereinafter "MEG") cross-moves (motion sequence #4) for an order pursuant to CPLR 3212 granting summary judgment to MEG and dismissing the complaint and all cross-claims against it.

In support of its motion, 2222 contends that dismissal should be granted because the Plaintiff cannot identify the cause of his fall. 2222 points to the testimony of the Plaintiff at his deposition. 2222 points to Plaintiff's testimony during which he indicated that when the subject elevator reached the sixth floor (the floor on which his apartment was located) the doors opened and he stepped out first with his left foot, placing it on the hallway floor. Plaintiff alleges that thereafter he attempted to bring his right foot out of the elevator. He acknowledges that he lifted his right foot up, moved it forward and tripped. (2222 Motion, Exhibit K, Pages 44 to 45). The Plaintiff, continuing his testimony, stated that he tripped, but denied that he caught his foot on something. The Plaintiff stated that he tripped on "...something between the elevator and the lobby floor." (2222 Motion, Exhibit K, Pages 45 to 46). Plaintiff also stated that he fell after tripping and when he "...fell, I turned my head and I did not see the floor of the elevator cabin." He explained that he looked down "just seconds" after he fell but that the elevator doors had closed. The Plaintiff thereafter indicated that when he looked down the elevator doors were "open". (2222 Motion, Exhibit , Pages 47 to 48).

Defendant 2222 also points to the testimony of the resident superintendent for the Premises, Ms. Hatipoglu, who indicated that during her frequent use of the elevator, she never witnessed and never received a complaint of mis-leveling in relation to the subject elevator. 2222 also relies on the testimony of the President of MEG, Boris Evelkin, and one of the MEG's mechanics, Andrey Belousov. They both indicated frequent maintenance and no indication for the alleged misleveling

of the subject elevator. Defendant 2222 concludes that dismissal is in order for two reasons. First, 2222 contends that the Plaintiff could not specifically identify the cause of his fall. Second, even assuming a mis-levelling as a cause of the fall, 2222 did not cause or create the mis-leveling and had no notice of it.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *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 a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the 2222's motion, the Court finds that 2222 has submitted sufficient evidence to establish, *prima facie*, that the instant cause of action is defective as the

Plaintiff did not clearly identify the cause of his fall.[1] Generally, "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. " *Mitgang v. PJ Venture HG, LLC*, 126 A.D.3d 863, 864, 5 N.Y.S.3d 302, 304 [2nd Dept, 2015], quoting *Rivera v. J. Nazzaro P'ship, L.P.*, 122 A.D.3d 826, 995 N.Y.S.2d 747 [2nd Dept, 2014]. "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation." *Hahn v. Go Go Bus Tours, Inc.*, 144 A.D.3d 748, 749, 40 N.Y.S.3d 549, 551 [2nd Dept, 2016], quoting *Ash v. City of New York, Trump Vill. Section 3*, Inc., 109 A.D.3d 854, 972 N.Y.S.2d 594 [2nd Dept, 2013]. In the instant proceeding, the Plaintiff's deposition testimony failed to identify the cause of his fall and as a result the movants have met their respective *prima facie* burdens.

In opposition, the Plaintiff has failed to raise an issue of fact that would prevent the Court from granting summary judgment. The Plaintiff's affidavit, submitted in the Affirmation in Opposition, made statements that were not only not included in the Plaintiff's deposition testimony, but which arguably conflicted with his deposition testimony.[2] Specifically, the Plaintiff states in his affidavit (Plaintiff's Affirmation in Opposition, Affidavit, Paragraph 6) that his right

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[1] The Court also finds that, in light of this finding, Defendant MEG has met its *prima facie* burden as well.

[2] The Court notes that any defect in relation to the requirements of CPLR 2102(b) concerning the Plaintiff's Affidavit as found in the Affirmation in Opposition to the motion by Defendant 2222, was corrected in the Plaintiff's Affirmation in Opposition to Defendant MEG's motion. In the Affirmation in Opposition to Defendant MEG's motion, the Plaintiff provided an affidavit in the Russian language "accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." *Rosenberg v. Piller*, 116 A.D.3d 1023, 1025, 985 N.Y.S.2d 250, 252 [2nd Dept, 2014].

foot tripped between the elevator floor and the 6th floor landing, causing him to fall. This testimony "...constituted an attempt to create a feigned issue of fact specifically designed to avoid the consequences of [his] earlier deposition testimony." *Freiser v. Stop & Shop Supermarket Co., LLC*, 84 A.D.3d 1307, 1309, 923 N.Y.S.2d 732, 734 [2nd Dept, 2011]. Accordingly, the Defendants' motions for summary judgment are granted.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendant 2222 Management Corp. (motion sequence #3) is hereby granted and the complaint and any cross claims are dismissed as to Defendant 2222 Management Corp.

The motion by Defendant MEG (motion sequence #4) is also hereby granted and the complaint and any cross claims are dismissed as to Defendant MEG.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.