To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

VIRGINIA RUCKEL,

Plaintiff,

-against

Index No. 50130/2017
DECISION/ORDER
Motion Date: 08/21/2019
Motion Seq. 1

1523 CENTRAL PARK AVE. OWNERS INC., STILLMAN MANAGEMENT, INC., COINMACH SERVICE LLC, and COINMACH LAUNDRY LLC,

Defendants.

ECKER, J.

The following papers were read on the motion of defendants 1523 CENTRAL PARK AVE. OWNERS INC. and STILLMAN MANAGEMENT, INC. [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint as against plaintiff VIRGINIA RUCKEL (plaintiff):

PAPERS

Notice of Motion, Affidavit and, Exhibits A-N
Affirmation in Opposition and Exhibits 1-2, 1-2
Affirmation in Reply

Upon the foregoing papers, the court determines as follows:

This personal injury action arises from a trip and fall. Plaintiff alleges that on March 4, 2016, she tripped and fell in defendants' building at 1523 Central Park Avenue, Yonkers N.Y. Plaintiff alleges that she stepped off of the elevator in the lobby of the building and proceeded toward an exit, when she fell. There was a mat in the relevant vestibule which was in place for as long as plaintiff could remember.

In the verified bill of particulars, dated January 10, 2018, plaintiff alleges that she fell because the "floor is uneven and there is a sudden change in the elevation of the floor which appears to the eye to be level." In the supplemental bill of particulars, dated January 23, 2019, plaintiff states that she "believes that the incline of the hallway was in violation of one or more laws, rules and regulations and ordinances." [NYSCEF

Nos.40, 41]. At deposition, plaintiff testified that the accident was not caused because the floor was uneven or inclined, but speculated that she tripped on the mat in the vestibule. [NYSCEF No. 42].

When asked a question concerning this conflict, plaintiff testified, as to her state of mind at the time that she signed the Verified Bill of Particulars, that:

> "No, because I don't know when I signed it, and to really know what happened. I don't know, you know. This is when I saw my attorney, and I don't know when I signed this. Is this the date?"

In terms of during the fall, plaintiff testified that she did not feel any causing her trip during the incident. She stated that her shoe came off and "I was on the floor. I mean everything just happened so, you know, instant." When asked if she felt herself trip, she testified:

> "It happened- all happened so quickly. I went to step, boom. The next thing I know I was - my face was into the steel bar in the door . . . "

In addition, when asked whether, as the accident was happening, she knew what caused her to fall, plaintiff responded "No, I guess no."

Plaintiff did theorize, however, that the only thing that could have happened was that the "rug was there, and the rug is always there. Sometimes it is lifted up a little bit in the corner because of all of the traffic, but I don't know. Obviously I tripped on that, I mean that is what I feel, and I couldn't grab for anything. I just went down." Plaintiff also testified, however, that she could not state for a fact that either foot touched the carpet before she fell. She stated that, after the fall, the rug seemed to be up a little bit in the corner. She admitted that she was assuming that she tripped on the rug because she "went flying. That's all I know."

Later in the deposition, plaintiff was asked by her attorney "How is it you believe your accident occurred." Plaintiff responded "I tripped on that rug."

Plaintiff's husband testified, in sum and substance, that he has seen, since the accident, the relevant carpet lift up, but admitted that he did not specifically notice any such condition at the time of the accident. [NYSCEF No. 45].

Plaintiff commenced this action by amended summons and complaint on October 11, 2017. Defendants Coinmach Service LLC and Coinmach Laundry LLC filed an answer on or about November 7, 2017. 1523 Central Park Ave Owners, Inc. and Stillman Management, Inc. served an answer with cross-claims on or about November 8, 2017.

On May 2, 2019, plaintiff filed a stipulation discontinuing all claims against

defendants Coinmach Service LLC and Coinmach Laundry LLC. [NYSCEF No. 28]. At the conclusion of discovery, a Note of Issue: Without Jury was filed on May 23, 2019. [NYSCEF No. 29].

Defendants 1523 Central Park Ave Owners, Inc. and Stillman Management, Inc. (jointly defendant) now move for an order granting summary judgment dismissing the complaint. Plaintiff opposes the motion.

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility(*Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth*., 294 AD2d 348 [2d Dept 2002]). Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]; *Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]). Thus a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]).

Furthermore, it is well-settled that the proponent of the 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 (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.,* 155 AD3d 605 [2d Dept 2017]). Importantly, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp., supra*; *see De Souza v Empire Transit Mix, Inc., supra; Pinelawn Cemetery v Metropolitan Transp. Auth.,* 155 AD3d 1069 [2d Dept 2017]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York, supra*; *Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

In support of the motion, defendant submits copies of: the pleadings, the Note of Issue, the Verified Bill of Particulars, the Supplemental Bill of Particulars, Photographs, the accident report, and the deposition transcripts of plaintiff, plaintiff's husband and defendant's witness (Mr. John Kierman, employed as superintendent by defendant). Plaintiff opposes the motion, relying on the submitted deposition transcripts.

Defendant argues that the absence of any proof of a defect in the flooring or of any notice of any defect based on plaintiff's own testimony, plaintiff's husband's

testimony, and defendant's witness' testimony, combined with the two bills of particulars, constitutes a *prima facie* showing warranting the dismissal of the complaint. At the core, defendant argues that the complaint must be dismissed because plaintiff does not know the cause of her fall.

In opposition, plaintiff submits an affirmation alleging that "it is respectfully submitted that: plaintiff did identify the cause of her fall." Plaintiff next alleges that defendant has failed to demonstrate lack of notice of the alleged defective condition.

In a trip-and-fall case, a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall (*Aristizabal v Kostakopoulos,* 159 AD3d 860 [2d Dept 2018]; *Amster v Kromer*, 150 AD3d 804 [2d Dept 2017]). Indeed, 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 (*Kozik v Sherland & Farrington, Inc.,* 173 AD3d 994 [2d Dept 2019]; *Aristizabal v Kostakopoulos, supra; Amster v Kromer, supra; Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2d Dept 2014]). Proximate cause may be inferred from the facts and circumstances underlying the injury only when the evidence is sufficient to permit a finding based on logical inferences from the record and not upon speculation alone (*Thompson v Commack Multiplex Cinemas*, 83 AD3d 929 [2d Dept 2011]).

Here, defendant makes a *prima facie* showing of entitlement to judgment as a matter of law by submitting, *intra alia*, plaintiff's deposition testimony, wherein she admitted that she did not know the cause of her accident, or what caused her to lose her balance and fall (*Amster v Kromer, supra*; *Grand v Won Hee Lee,* 171 AD3d 877 [2d Dept 2019]). This conclusion is further supported by plaintiff's bills of particulars in which she first alleged that she fell due to an uneven floor, and thereafter claimed that she fell due to an improper floor incline. In fact, a review of the deposition testimony and the exhibits submitted reveals that no one, including plaintiff, was able to specifically and definitively identify what caused her to trip, other than her own mis-step.

In opposition, plaintiff fails to generate a question of fact as to the issue (*Amster v Kromer, supra*; *Aistizabal v Kostakopoulos*, *supra; Burke v Umbaca,* 163 AD3d 618 [2d Dept 2018]). To the extent that plaintiff, when asked "how do you believe the accident occurred," responded "I tripped on that rug," that belief, under these circumstances, is not a definitive statement and is insufficient to generate an issue of fact as to the issue. As such, the court finds that the failure to identify the instrumentality that caused plaintiff to fall is fatal to her cause of action, thereby justifying the dismissal of the cause of action in the complaint as against defendant (*see Winegrad v New York University Medical Center*, *supra; Zuckerman v City of New York, supra*)[1].

[1]In light of this finding, the court need not determine whether plaintiff generated an issue of a fact as to notice of any alleged defective condition on defendants' part.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED the motion of defendants 1523 CENTRAL PARK AVE. OWNERS INC., and STILLMAN MANAGEMENT, INC. [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint as against plaintiff VIRGINIA RUCKEL is granted; and it is further

ORDERED that the complaint is dismissed in its entirety and the action is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
September 27, 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

To all parties appearing via NYSCEF