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| Crowell v 465 Beacon Assoc., LLC |
| 2019 NY Slip Op 34471(U) |
| June 3, 2019 |
| Supreme Court, Dutchess County |
| Docket Number: Index No. 52373/16 |
| Judge: Maria G. Rosa |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

ROBERT CROWELL,

Plaintiff,

DECISION AND ORDER

Index No. 52373/16

-against-

465 BEACON ASSOCIATES, LLC and
BROTHERS TRATTORIA, INC.,

Defendants.

The following papers were read on Defendants' motion for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - K

AFFIRMATION IN OPPOSITION
EXHIBITS A - G

REPLY AFFIRMATION
EXHIBIT A

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained in a slip-and-fall accident at Brothers Trattoria located at 465 Main Street, Beacon, New York. The plaintiff was a sales representative for a wine and liquor distribution company. He went to Brothers Trattoria on June 20, 2016 at approximately 11:00 a.m. to make a sales call. Plaintiff had been there many times prior. Upon arriving he parked in a back parking lot, went up the rear steps and entered through a rear door that was open. The rear entrance had three concrete steps leading from the parking lot into hallway off the kitchen. Plaintiff walked up the steps with no difficulty and met with the restaurant owner in the dining room for ten minutes. He slipped and fell while exiting the restaurant down the same rear steps. Defendants move for summary judgment asserting Plaintiff can not sufficiently identify the cause of his fall and that it neither created nor had notice of the alleged dangerous condition.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of

law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented “in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion.” Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

Defendants have submitted copies of the pleadings, the deposition testimony of Plaintiff and an owner of Brothers Trattoria and photographs of the rear steps and entrance way. Plaintiff testified at his deposition that he had used the rear entrance numerous times prior. After the sales meeting he proceeded towards the rear steps to exit the restaurant. He was looking straight ahead, and slid as he placed the heel of his right foot on the top step. He then twisted around and fell to the ground striking his buttocks and right elbow. When asked if he knew what his foot slid on, he replied, “I don’t know.” He was then asked what, if anything, was on the step that caused him to fall. He replied, “[t]he step was black. I couldn’t tell you what was on it.” He stated that the weather conditions were clear and sunny that day and he did not notice anything amiss with the step when he entered the building approximately ten minutes prior.

Skender Berisha was the restaurant owner who met with Plaintiff just prior to his fall. He testified that he responded after Plaintiff’s fall and tried to help him stand up. He stated that after the emergency medical personnel transported Plaintiff from the scene he examined the steps. He stated that they were “all nice and dry.” Berisha stated that the restaurant had not received any prior complaints about the condition of the rear steps. He claimed that its practice was to clean the kitchen and rear steps every evening at approximately 9:30 p.m. prior to the next day’s business. Such practice included sweeping and mopping the rear stairs. He asserted that on no prior occasion had he ever observed garbage or grease on the steps.

The foregoing is sufficient to establish Defendants’ *prima facie* entitlement to summary judgment. In a slip-and-fall action, to impose liability there must be evidence that the defendant created the alleged dangerous condition or had actual or constructive notice of it. A defendant satisfies its threshold burden of establishing summary judgment as a matter of law by demonstrating that it neither created a hazardous condition nor had actual or constructive notice of any such condition. The photographs and deposition testimony establishes that there was nothing inherently dangerous with the rear steps, nor were there any substances on the stairs that would constitute a dangerous condition.

Plaintiff’s inability to identify the cause of a fall is also fatal to a negligence cause of action. Hoovis v. Grand City 99 Cents Store, Inc., 146 AD3d 866 (2nd Dept 2017). Without the ability to identify the cause of a fall, any finding that the defendants’ negligence caused the fall would be speculative. *Id.* At his deposition, Plaintiff was unable to identify the cause of his fall without engaging in speculation. While he testified his right heel slid on something, he expressly stated that he did not know what his foot slipped on and couldn’t say what, if anything, was on the steps. He

could not identify or describe in any manner the presence of a foreign substance on the steps nor any other defect. The law does not permit a finding of negligence on such testimony as a jury would have to speculate to conclude that Plaintiff's fall was due to the Defendants allowing an unidentified slippery substance to exist on the stairs.

In opposition, Plaintiff fails to raise a material issue of fact. The mere fact that the restaurant employees used the rear exit to take out garbage is insufficient to establish the existence of a dangerous condition on the steps. Notably, Berisha testified at his deposition that he entered the restaurant on that day at approximately 10:00 a.m. using the rear entrance and that there were no foreign substances on the steps at that time. Plaintiff himself testified that when he used the steps to enter the restaurant he did not observe any dangerous condition. Nor is Plaintiff's affidavit asserting that there was a greasy type substance on the steps that caused his fall sufficient to avoid summary judgment. This statement directly contradicts Plaintiff's deposition testimony that he was unable to identify the cause of his fall. Such an attempt to raise a feigned factual issue is insufficient to avoid the consequences of his deposition testimony. See Semple v. Starling Estates, LLC, 300 AD2d 297 (2nd Dept 2002). Finally, Plaintiff's attempt to rely on the doctrine of *res ipsa loquitur* is misplaced. For the doctrine to apply, a plaintiff must establish: (1) the event is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agent or instrumentality within the exclusive control of the defendant; and (3) it must not be due to any voluntary action or contribution on the part of the plaintiff. Barril v. McClure, 163 AD3d 752 (2nd Dept 2018). People routinely slip and fall in the absence of someone's negligence, and Plaintiff's fall could have occurred due to his own misstep. Thus, the doctrine does not apply. Plaintiff's claim that summary judgment is premature because Defendants have not yet produced an employee for a deposition also fails to provide sufficient ground to defeat the motion. He fails to demonstrate that discovery might lead to relevant evidence or that facts essential to oppose the motion lie exclusively within Defendants' knowledge. The claimed need for a deposition consists more of hope or speculation that such deposition will uncover evidence sufficient to defeat the motion. This is an insufficient basis for denying summary judgment. See Skura v. Wojtowski, 165 AD3d 1196 (2nd Dept 2018). Based on the foregoing, it is

ORDERED that Defendants' motion for summary judgment is granted and this action is dismissed. The pre-trial conference scheduled for June 4, 2019 is canceled.

The foregoing constitutes the decision and order of the Court.

Dated: June 3, 2019
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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