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

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HANNAH BUCKSTINE,

Plaintiff,

-against-

JORDAN SCHOR, JORDAN'S OF NEW PALTZ LLC, L'CORE ENTERPRISE CORP., KEITH CARPENTIER, WAYNE BRADFORD and ROBERT GERMINARA (deceased),

Defendants.

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L'CORE ENTERPRISE CORP.,

Third-party Plaintiff

against

WAYNE BRADFORD,

Third-party Defendant

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INDEX NO. 57710/2016

DECISION/ORDER

Motion Dates: 09/04/2019
10/02/2019
Motion Seqs. 10[1], 11,12,13

ECKER, J.

The following papers were read on: the motion of plaintiff HANNAH BUCKSTINE (plaintiff) [Mot. Seq. 11], made pursuant to CPLR 3212, for an order granting partial summary judgment against defendants JORDAN SCHOR and JORDAN'S OF NEW PALTZ, LLC. (jointly Jordan), striking Jordan's twelfth affirmative defense, and directing entry of judgment in plaintiff's favor; the motion of defendant/third party plaintiff L'CORE ENTERPRISE CORP.(L'Core) [Mot. Seq.12], pursuant to CPLR 3212, for an order granting L'Core summary judgment dismissing the complaint and all cross-claims alleged against it and granting L'Core summary judgment on its claims for indemnification and contribution in the third-party complaint, plus costs and disbursements and; the motion of Jordan [Mot.

[1]It appears that the parties erred in uploading the motions such that motion sequence 10 was incorrectly labeled motion sequence 11. The subsequent motions followed that sequencing. As such, motion sequence 10 is denied as moot.

Seq. 13], pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims alleged against Jordan:

PAPERS

Mot. Seq. 11(plaintiff)

Notice of Motion, Affirmation and Exhibits A-N
Affidavit in Opposition (Jordan) and Exhibit A
Reply Affirmation (plaintiff)

Mot. Seq. 12 (L'Core)
Notice of Motion, Affirmation, and Exhibits A-U
Affirmation in Opposition(plaintiff) and Memorandum of Law
Affirmation in Support (Jordan)
Reply Affirmation (L'Core)

Mot. Seq. 13 (Jordan)
Notice of Motion, Affidavit, and Exhibits A-PP, 1-4, QQ, 1-3, RR-SS and Memorandum of Law
Affirmation in Opposition (plaintiff), Exhibits A-M and Memorandum of Law and Exhibit I
Affidavit in Support (L'Core)
Reply Affirmation (Jordan)

Upon the foregoing papers, the court determines as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a fall down at set of interior basement stairs at a pizzeria located at 53 Main Street, New Paltz, N.Y. The accident occurred on October 25, 2014, at the pizzeria operated by Jordan Schor and Jordan's of New Paltz LLC (Jordan). The premises was leased from defendant/third-party plaintiff L'Core. Plaintiff has no recollection of the day or night of her accident, nor can plaintiff identify the cause of her accident. Plaintiff does not deny that she was intoxicated at the time of her accident. Plaintiff suffered serious head injuries as the result of the fall.

On the date of the accident, plaintiff was eighteen years old and beginning freshman year at SUNY New Paltz. She and her roommates attended a house party. Witnesses testified that plaintiff and the roommates were drinking before and after the party. At some point, plaintiff's group traveled to Jordan's to purchase pizza. Jordan's did not serve alcohol.

According to witnesses, plaintiff exhibited signs of intoxication and expressed a need for a restroom. The women's restroom was closed and there was a line at the men's restroom. There was a closed curtain in the hall next to/behind the women's bathroom. According to a nonparty witness, the curtain had a "Keep Out" sign on it. Other witnesses testified to the presence of the curtain. According to the nonparty witness, plaintiff exited the bathroom line, walked behind the curtain, came a back, and told the witness that there was a door back behind the curtain. Plaintiff then again left the line and walked behind the curtain.

According to defendant's expert (Building Inspector Gary Beck), and uncontradicted by plaintiff, the layout of the accident site is as follows: The curtain opened in the center and went from floor to ceiling. As a person walks through the curtain, straight ahead is an exit door to an outside alleyway. The distance from the curtain to the exit door was 7 ½ feet. Just before the exit door there was a hallway on the right leading to the basement door. The basement door opened out, not over the stairs, but into the hallway. The hallway from the left edge of the exit door that leads to the alley to the basement door was 77-1/2 inches. The door to the basement door had a sign that stated "Employees Only," and this sign was there at the time of the accident. There is landing at the basement steps and a handrail as a person descends. The stairway to the basement has 11 steps with 12 risers. There is a light switch above the handrail.

After plaintiff disappeared behind the curtain for a second time, the nonparty witness heard a series of loud sounds. He walked behind the curtain to investigate. He found the basement door open. He turned the light switch on and saw plaintiff at the bottom of the basement stairs. No one witnessed plaintiff's fall and plaintiff has no memory of the event.

Plaintiff commenced this action against Jordan and L'Core on May 31, 2016. An amended complaint was filed on August 1, 2016, followed by a second amended complaint on December 29, 2016, each against the same three defendants. On October 20, 2017, L'Core filed a third-party summons and complaint against Wayne Bradford[2] (Bradford). By decision dated December 14, 2017, plaintiff was granted leave to amend the second amended complaint to add Keith Carpentier[3], Bradford and Robert Germinara[4] (deceased) as defendants. On December 20, 2017, plaintiff filed a third amended complaint. The defendants filed answers and numerous compliance conferences took place.

On May 31, 2019, a Trial Readiness Order was entered and plaintiff filed a Note of Issue on June 6, 2019.

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[2] On September 20, 2019, the court (Lefkowitz, J.) denied Bradford's motion, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint, plus costs and disbursements, on the ground that the motion was untimely. [NYSCEF No. 365].

[3] On February 9, 2018, Carpentier moved to dismiss plaintiff's third amended complaint as to the allegations against him. In a decision and order dated May 3, 2018, this court granted Carpentier's motion to dismiss pursuant to CPLR 3211(a)(7), failure to state a cause of action.

[4] Plaintiff concedes that Germinara's estate has not been served. In addition plaintiff submits an unsigned stipulation discontinuing the action as against Germinara, which Jordan refused to sign. [NYSCEF No.22].

Mot. Seq. 11- *plaintiff's motion, pursuant to CPLR 3212, for an order granting partial summary judgment against Jordan, striking Jordan's twelfth affirmative defense, and directing entry of judgment in plaintiff's favor;*

Jordan filed an answer to the third amended verified complaint on or about March 8, 2018. In the answer, Jordan alleges affirmative defenses of: Article 16, culpable conduct; an obvious hazard; collateral sources; failure to mitigate; an ordinary product; no statutory violation; no negligent conduct; lack of notice of a defect; third-party liability; General Obligations Law; and action barred against Jordan Schor, personally. The answer also includes cross-claims against L'Core, Bradford and Germinara.

The first motion at issue herein [Mot. Seq. 11] focuses on the twelfth affirmative defense set forth in Jordan's answer. Jordan specifically alleges that if plaintiff "has been injured and damaged as alleged in the complaint, such injury and damage were caused and contributed to by acts of third-parties, over which defendants have no control." [NYSCEF No. 227]. Plaintiff moves to strike the twelfth affirmative defense, arguing Jordan has "provided no factual basis to support any such affirmative defense." [NYSCEF No. 361 p.3].

On a motion for summary judgment dismissing an affirmative defense, the movant has the initial burden of demonstrating its *prima facie* entitlement to judgment as a matter of law (*Bank of New York v Penalver*, 162 AD3d 834 [2d Dept 2018]: *U.S. Bank N.A. v Weinman,* 123 AD3d 1108 [2d Dept 2014]). Here, plaintiff's general averments that the affirmative defense "fails to provide any facts demonstrating that any non-named party is essential to this action," without more, is simply inadequate to set forth *prima facie* entitlement to judgment dismissing the defense as a matter of law. Accordingly, the motion is denied without the need to consider the sufficiency of Jordan's opposition to the motion.[5] (*see Refuse v Wehbeh*, 167 AD3d 956 [2d Dept 2018]).

Mot. Seq. 12 and 13- L'Core's motion [Mot. Seq. 12] (supported by Jordan), pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross-claims alleged against it and granting L'Core summary judgment on its claims for indemnification and contribution in the third-party complaint, plus costs and disbursements; and the motion of Jordan[6] [Mot. Seq. 13] (supported by L'Core), pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims alleged against Jordan:

In support of the motion, L'Core submits: the pleadings; the bill of particulars; the Note of Issue; an affidavit by a physician (Milzoff); an affidavit by a Building Inspector (Beck); an affidavit by Lai; deposition transcripts; photos; and drawings. On its motion,

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[5] To the extent that, for reasons that are unclear, plaintiff periodically uses the phrase affirmative "defenses" when discussing the twelfth affirmative defense, any attempt to secure summary judgment on an affirmative defense other than the twelfth fails for the same reason, plaintiff fails to set forth a *prima facie* showing of entitlement to summary judgment.

[6] Jordan joins in L'Core's arguments and L'Core joins in Jordan's arguments. [NYSCEF No. 359].

Jordan submits, in addition to L'Core's submissions, copies of orders, a copy of the Lease and the Purchase agreements, an affidavit from Jordan, and papers from *Grande v Won Hee Lee*, (Index No. 10906/2011). Of import, the Building Inspector opines, in his professional opinion, that the relevant area, area lighting, basement door, basement stairs, and basement handrail were not in violation of any New York State Code, and the area was in conformance with good and acceptable commercial property practices as well as applicable codes, rules and regulations. [NYSCEF No. 255].

Of note, Bradford has not opposed L'Core's motion. As such, the part of the motion in which L'Core seeks an order granting summary judgment on L'Core's claims for indemnification and contribution in the third-party complaint, plus costs and disbursements, as against Bradford is granted without opposition.

In opposition, plaintiff submits, in addition to the previously submitted exhibits, various medical records, photographs, newspaper articles, an attorney's affirmation, a memorandum of law, and an affidavit from an investigator Rudy Uhliezch. Uhlitzsch is an investigator "employed by Pagones-O'Neill, Inc., in Beacon New York," as a Senior Investigator responsible for planning and conducting investigations. [NYSCEF No. 346]. He states that he conducted a site inspection of the pizzeria, but does not set forth the date or the time of day of his inspection. He describes the area and asserts that plaintiff would have had to step back in order to open the basement door all of the way before stepping down the stairs. He describes the stairs, claiming that some tiles were missing and the area has "no natural light." He acknowledges the existence of the electric light and the handrail. He then states that:

> "It is my opinion with a reasonable degree of investigative certainty that the conditions inside of the Premises, such as the absence of visible markings, absence of a locked basement door, absence of adequate light and the curtain created a trap and a dangerous situation which caused [plaintiff] to fall." [NYSCEF No. 346].

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, however, 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; Alvarex v Madeline D'Anthony Enterprises, Inc.v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *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; Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]*; Hammond v Smith,* 151 AD3d 1896 [4th Dept 2017]).

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 (*Grande v Won Hee Lee,* 171 AD3d 877 [2d Dept 2019]; *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 (*Grande v Won Hee Lee, supra; Thompson v Commack Multiplex Cinemas*, 83 AD3d 929 [2d Dept 2011]; *Rivera v J. Nazzaro Partnership, L.P.*, *supra*). 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 (*Grande v Won Hee Lee, supra*).

Here, defendants made a *prima facie* showing of their entitlement to judgment as a matter of law by submitting, *intra alia*, plaintiffs' testimony, wherein she admitted that she did not know the cause of her accident, or what caused her to lose her balance and fall (*Grande v Won Hee Lee, supra; Amster v Kromer, supra*). In fact, a review of the deposition testimony, the investigator's affidavit, and the exhibits submitted reveals that no one, including plaintiff, was able to definitively identify what caused plaintiff to fall on the stairway, other than her own misstep. Moreover defendant's qualified expert, Gary Beck, who opines with a reasonable degree of certainty that there were no code violations at the property sets forth a *prima facie* showing that there was no code violation structural defect that caused the fall. Hence, the evidence demonstrated that it was just as likely that some other factor, such as a misstep or a loss of balance due to her intoxication, could have caused her accident (*Grande v Won Hee Lee, supra*).

In opposition, plaintiff fails to generate a question of fact as to the issue (*Amster v Kromer, supra*; *Aistizabal v Kostakopoulos*, *supra*). Plaintiff admits that she can not identify what caused her to fall and has no memory of the accident. A plaintiff's inability to testify as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence (*see Patrikis v Arniotis*, 129 AD3d 928, 930 [2015]; *Costantino v Webel*, 57 AD3d 472, 472 [2008]). A plaintiff must present evidence, however, showing that proximate cause may be inferred from the facts and circumstances underlying the injury. Such an inference may only be made when the evidence is sufficient to permit a finding based on logical inferences from the record and not upon speculation alone (*Grande v Won Hee Lee, supra; Thompson v Commack Multiplex Cinemas*, *supra*; *Rivera v J. Nazzaro Partnership, L.P.*, *supra*).

Here, the affidavit of plaintiff's investigator is insufficient to generate an issue of fact as to negligence or as to proximate cause. To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite

skill, training, education, knowledge, or experience to render the opinion, which the investigator's affidavit fails to do (*Hofmann v Toys "R" US-NY Ltd. Partnership*, 272 AD2d 296 [2d Dept 2000]). In any event, the investigator's findings are speculation as his conclusions, made without any reference to the time or date of the inspection, that there were certain defects in the stairway or lighting, is not probative to the conditions that existed at the time of the accident.

Furthermore, the investigator fails to identify a structural defect that caused the fall and his theory that the lighting was inadequate or that locking the basement door was permissible and would have prevented the accident, without more, is speculation. Simply put, without a factual basis to connect any alleged defects in the stairway to plaintiff's accident, any finding that the moving defendants' failure to prohibit access to the stairway proximately caused the accident would be based on pure speculation (*Grande v Won Hee Lee, supra*; *see Knudsen v Mamaroneck Post No. 90, Dept. of N.Y.—Am. Legion, Inc.,* 94 AD3d 1058, 1059 [2d Dept 2012]). Here, 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, a conclusion by the investigator as to causation is based upon sheer speculation (*see Ash v City of New York*, 109 AD3d 854 [2d Dept 2013]).

Contrary to the plaintiff's contention, the *Noseworthy* doctrine (*see Noseworthy v City of New York,* 298 NY 76, 80 [1948]) does not apply in this case, since the moving defendants' knowledge as to the cause of the accident is no greater than that of the plaintiff (*see Grande v Won Hee Lee, supra; Hod v Orchard Fields, LLC,* 111 AD3d 794, 794 [2d Dept 2013]). In any case, the doctrine does not relieve the plaintiff of the obligation to provide some evidence to raise a triable issue of fact as to the moving defendants' fault, which she fails to do (*see Grande v Won Hee Lee, supra*; *see Sawyer v Dreis & Krump Mfg. Co.,* 67 NY2d 328, 334 [1986]).

Consequently, plaintiff fails to generate an issue of fact warranting the denial of defendants' motions for summary judgment. Accordingly, L'Core and Jordan's motions for summary judgment dismissing the complaint and all cross-claims against them are granted[7].

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 that the motion of plaintiff HANNAH BUCKSTINE [Mot. Seq. 11], made pursuant to CPLR 3212, for an order granting partial summary judgment against

[7]To the extent that plaintiff argues that Jordan owed a special duty of care to plaintiff based on Jordan's knowledge that some students who patronized the pizzeria, which did not serve alcohol, arrived intoxicated, plaintiff fails to submit any legal precedent in support of this argument and fails to generate a question of fact as to the issue. In any event, the finding of a special duty would not cure plaintiff's fatal inability to establish causation (*Grande v Won Hee Lee, supra*).

defendants JORDAN SCHOR and JORDAN'S OF NEW PALTZ, LLC., striking defendants JORDAN SCHOR'S and JORDAN'S OF NEW PALTZ, LLC.'S twelfth affirmative defense, and directing entry of judgment in favor of plaintiff HANNAH BUCKSTINE is denied; and it is further

ORDERED that the part of the motion of defendant/third party plaintiff L'CORE ENTERPRISE CORP. [Mot. Seq.12], made pursuant to CPLR 3212, for an order granting defendant/third party plaintiff L'CORE ENTERPRISE CORP. summary judgment dismissing the complaint and all cross-claims alleged against it is granted and the complaint and all cross-claims asserted against defendant/third party plaintiff L'CORE ENTERPRISE CORP. are dismissed; and it is further

ORDERED that the part of the motion of defendant/third party plaintiff L'CORE ENTERPRISE CORP.[Mot. Seq. 12], made pursuant to CPLR 3212, for an order granting defendant/third party plaintiff L'CORE ENTERPRISE CORP. summary judgment on its claims for indemnification and contribution in the third-party complaint, plus costs and disbursements, as against defendant/third-party defendant WAYNE BRADFORD is granted without opposition; and it is further

ORDERED that the motion of defendants JORDAN SCHOR and JORDAN'S OF NEW PALTZ, LLC. [Mot. Seq. 13], made pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff HANNAH BUCKSTINE'S complaint and all cross-claims alleged against defendants JORDAN SCHOR and JORDAN'S OF NEW PALTZ, LLC. is granted; and it is further

ORDERED that motion sequence 10 is denied as moot; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, Room 1600, on December 10, 2019, at 9:15 a.m.

This constitutes the Decision/Order of the court.

Dated: White Plains, New York
October 21 2019

ENTER,

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

Appearances
All appearing parties via NYSCEF