

De Pepin v Berik Mgt., Inc.

2020 NY Slip Op 30509(U)

February 21, 2020

Supreme Court, New York County

Docket Number: 153417/2018

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. ALEXANDER M. TISCH</u>	PART	IAS MOTION 18EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>153417/2018</u>
	ROSANNA MERCADO DE PEPIN, JOSE PEPIN	MOTION DATE	<u>N/A</u>
	Plaintiffs,	MOTION SEQ. NO.	<u>003</u>
- v -			
	BERIK MANAGEMENT, INC., 215 ENTERPRISES, LLC,	DECISION + ORDER ON MOTION	
	Defendants.		
-----X			

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 92, 99, 100, 101, 102, 103, 104, 105, 106 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing papers, defendants Berik Management, Inc. (Berik) and 215 Enterprises LLC (215 Enterprises) move for summary judgment pursuant to CPLR 3212.

BACKGROUND

Plaintiffs Rosanna Mercado De Pepin (Mercado), and her husband Jose Pepin (Pepin) commenced the instant action to recover damages for injuries sustained by Mercado when she fell down the stairs at her apartment building on January 5, 2018. The building, located at 569 West 150th Street, New York, New York, is owned by both Berik and 215 Enterprises. Mercado alleges that as a result of the fall, she now suffers from short term memory loss, seizure disorder, ambulation difficulties, right sided weakness, and speech difficulties. Mercado also alleges that she has no recollection of the fall or how it occurred. Pepin is suing for loss of services.

DISCUSSION

Pursuant to CPLR 3212 (b), summary judgment shall be granted if the cause of action or defense shall be established sufficiently to warrant judgment as a matter of law. "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute,

and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). On a movant’s motion for summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v. Restrani Contruc. Corp.*, 18NY3d 499, 503 [2012]). “Once the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Waisman*, 39 AD3d 303 at 306, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “If there are several possible causes of injury, for one or more of which defendant is not responsible, plaintiff cannot recover without proving the injury was sustained wholly or in part by a cause for which the defendant was responsible” (*Lynn v. Lynn*, 216 AD2d 194 [1st Dept 1995]).

Defendants argue that their motion for summary judgment should be granted because there are several equally plausible causes for the fall, and plaintiffs have not proven that defendants were responsible. In opposition, plaintiffs argue that they are entitled to a lesser standard of proof under the *Noseworthy* doctrine and Pattern Jury Instruction (PJI) 1:62 (*Noseworthy v. City of New York*, 298 NY 76 [1948]). Additionally, plaintiffs argue that the medical records and expert opinion submitted by defendants are inadmissible as they are uncertified and unsworn to. Plaintiffs also maintain that they have proven proximate causation through defendants’ alleged statutory violations including the lack of two banisters in the stairwell, and the existence of a tread depth inconsistency. Further, plaintiffs contend that Mercado fell on a defective step. Finally, plaintiffs contend that a reasonable jury could infer proximate causation from the video depicting the fall (*see* Motion Sequence #2, Plaintiff’s Exhibit E).

As a preliminary matter, at this time plaintiffs are not entitled to a lesser standard under the *Noseworthy* doctrine because plaintiffs failed to demonstrate “by clear and convincing evidence that [plaintiff] suffered amnesia and that there was a causal relationship between defendants’ alleged fault and [plaintiff’s] alleged amnesia” (*Varona v. Brooks Shopping Ctrs. LLC*, 151 AD3d 459 [1st Dept 2017]).¹

Plaintiffs argue that the medical records submitted by defendants are not relevant and should not be considered as they have not been certified or authenticated pursuant to CPLR 4518 (c). Plaintiffs further argue that defendants’ expert’s opinion is inadmissible as it is unsworn as required by CPLR 2106 (a). With respect to the records’ certification/authentication, a “plaintiff’s uncertified medical records may be considered [... when a] plaintiff does not dispute [the medical records] accuracy or veracity” (*Ward v. Lincoln Elec. Co.*, 116 AD3d 558 [1st Dept 2014]; citing *Carlton v. St. Barnabas Hosp.*, 91 AD3d 561 [1st Dept 2012]; CPLR 4518 [c]). Dr. Robert S. April’s medical opinion is in compliance with CPLR 2106 (a), in that “the statement of [...] a physician authorized by law to practice in the state [...] subscribed and affirmed by [him or her] to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.” Both the medical records and opinion show that there are several possible causes for the injury, only one of which defendants may have been responsible for. Therefore, plaintiffs must show that defendants’ negligence was “a substantial cause of the events which produced the injury” (*Lynn*, 216 AD2d at 195).

¹ Plaintiffs may request PJI 1:62 prior to trial.

Plaintiffs argue that the use of the word “banisters” in plural form in both Chapter 334 of the 1901 New York Tenement Housing Law § 36, and the 1899 Building Code for the City of New York, § 1306, should be interpreted to mean that every stairwell requires more than one banister. The Court disagrees. The use of the words “banisters” does not necessarily mean that a building is required to have banisters on each side, but rather is “referring to the requirements of ‘stairs’ or ‘stairways’ in the plural and not to a requirement for a single stairway like that at issue in the case at bar” (NYSCEF Doc. No. 106, page 14, footnote 10). Additionally, under plaintiffs’ interpretation, stairways could be required to have five, ten, or even 100 banisters. As for the video, it is not relevant in determining whether there needs to be two banisters, because the pertinent statutes do not require two banisters.

With respect to plaintiffs expert Nicholas Bellizzi’s affidavit, the Court finds that his dimensional stair tread inconsistency theory is speculative and conclusory (*see Bacic v. New York City Transit Authority*, 64 AD3d 526, 527 [2nd Dept 2009]). However, viewing the facts in a light most favorable to plaintiffs, the Court finds merit in Bellizzi’s opinion, which is supported by photographs, that step #10 was defective because it was worn in the middle portion with a slopped edge. The question of whether step #10 was defective, and therefore a proximate cause of Mrs. Mercado’s fall, is one best left for the jury (*see Newman v. RCPI Landmark Properties, LLC*, 28 NY3d 1032, 1033-34 [2016] [“Questions regarding proximate cause generally are for a trier of fact”]). The Court has considered plaintiffs’ remaining arguments and considers them unavailing.

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

This constitutes the decision and order of the Court.



2/21/2020

DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: