Hernandez v Iglesia Del Dios Vivio Columna Y Apoyo De La Verdad
2020 NY Slip Op 30764(U)
February 24, 2020
Supreme Court, Kings County
Docket Number: 523541/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 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 24th day of FEBRUARY 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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MARIA HERNANDEZ,

Plaintiffs,

Index No.: 523541/2017

-against-

Decision and Order

IGLESIA DEL DIOS VIVIO COLUMNA Y APOYO DE LA VERDAD "LA LUZ DEL MUNDO",

Defendants.

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The following *papers* numbered 11 to 28 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	11-21
Opposing Affidavits (Affirmations)	23-25
Reply Affidavits (Affirmations)	26-28

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

Defendant "LA LUZ DEL MUNDO", move pursuant to CPLR 3212, for an order granting summary judgment dismissing the plaintiff's complaint on the ground that the undisputed facts on the record establish that no liability for the accident exists as to the defendant. Plaintiff opposes the same.

MS #1

ARGUMENTS

Defendant, "LA LUZ DEL MUNDO", contends the plaintiff is unable to identify the cause of her fall, nor can she identify the location of the fall without resorting to speculation and the inability to do so are fatal to her cause of action. Defendants further contend the plaintiff may not rely on her testimony in the 50-h hearing as it is inadmissible because the defendants were not a party to that action, did not participate in the hearing, were not present at the hearing and would have no reason to be aware of said hearing.

In opposition, plaintiff contends, it is clear from the plaintiff's deposition testimony that she identified that she fell on a hole in the sidewalk, and at no time does the plaintiff state that she does not know what caused her to fall. Plaintiff also contends that the inability to identify the actual hole on the sidewalk that caused her to fall goes to credibility or veracity not an issue for summary judgment. Additionally, plaintiff contends that during a 50-h hearing she did identify where she fell by circling a photograph.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh,* 45 Misc2d 93 [Sup Ct, Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield,* 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze,* 84 NY2d 1019 [1995]).

In a trip-and-fall case, 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 (*see Kudrina v. 82–04 Lefferts Tenants Corp.*, 110 AD3d 963, 964, 973 NYS2d 364; *Dennis v. Lakhani*, 102 AD3d 651, 652, 958 NYS2d 170; *Califano v. Maple Lanes*, 91 AD3d 896, 897, 938 NYS2d

140; *Alabre v. Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287, 924 NYS2d 174). In *Singh*, "the ... defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a transcript of the plaintiff's deposition testimony, which demonstrated that the plaintiff could not identify either the cause of her fall or its location without resorting to speculation" (*see Williams v Vines*, 128 AD3d 1056, 1057 [2015]; *Ash v City of New York*, 109 AD3d 854, 855 [2013]; *Bolde v Borgata Hotel Casino & Spa*, 70 AD3d 617, 618 [2010]); quoting, *Singh v. City of New York*, 136 AD3d 641, 642–43, 24 NYS3d 407 (2 Dep't 2016). However, "a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*see McFadden v 726 Liberty Corp.*, 89 AD3d 1067, 1067 [2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810 [2010]; *Blochl v RT Long Is. Franchise, LLC*, 70 AD3d 993, 993 [2010]; *Miller v 7-Eleven, Inc.*, 70 AD3d 791, 791 [2010]); quoting, *Ash v. City of New York, Trump Vill. Section 3, Inc.*, 109 AD3d 854, 855, 972 NYS2d 594 (2013).

In the present case, it is clear from the deposition testimony of the plaintiff herself that she is unable to identify what caused her to fall without resorting to speculation. At deposition plaintiff testified as follows:

> "Q: Were there broken pieces of cement there; was there a hole; how would you describe it?
> A: Holes, there were holes.
> Q: Did you fall in one of the holes?
> A: There were small holes, small holes.
> Q: Did you fall in one of the holes?
> A: I tripped on the hole on the sidewalk.
> Q: Did you see the hole before you tripped on it?
> A: No.
> Q: Did you see the hole after you tripped on it?

A: I didn't notice.
Q: How do you know –
A: They stood me up.
Q: Ma'am, if you didn't see the hole before you fell and you didn't notice it after you fell, how do you know that you fell in a hole?
A: Because the entire sidewalk was broken.
Q: Can you describe the hole that you fell in?
A: I don't remember. I don't remember.
Q: Did you ever see the hole that you fell in before or after the accident?
A: If I would have seen it beforehand, I wouldn't' have fallen.
Q: You didn't see it beforehand; is that correct?
A: No, I was walking and I tripped.
Q: Did you see the hole after you fell?
A: No, they stood me up, so I don't know. Some people came and they stood me up.
Q: Is it fair to say you never saw the hole you fell in?
A: No, I tripped, I tripped in a hole.
Q: Did you ever see the hole?
A: If I would have seen it, I wouldn't have fallen." *See Plaintiff's Deposition Testimony* pp. 18- 20.

Here, the defendant established its entitlement to judgment as a matter of law by submitting the deposition testimony of the plaintiff, in which she unable to identify the cause or location of her fall without speculation. See *Ash v. City of New York, Trump Vill. Section 3, Inc.*, 109 AD3d 854, 855, 972 NYS2d 594 (2013). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The testimony given by the plaintiff at the hearing conducted pursuant to General Municipal Law § 50-h cannot be used as against the defendants in this case, "since they were not notified about the hearing and were not present for the testimony given by the plaintiff" (*see* CPLR 3117 [a] [3]; *Claypool v City of New York,* 267 AD2d 33 [1999]); quoting *Weinberg v. City of New York*, 3 A.D.3d 489, 490, 770 N.Y.S.2d 431 (2004). Moreover, plaintiff failed to submit an admissible affidavit, and instead only submits an attorney affirmation. (*see Sehgal v. www.nyairportsbus.com, Inc.,*100 AD3d 860, 955 NYS2d 604, 2012 NY Slip Op.*; Hanakis*

v. DeCarlo, 98 AD3d at 1084, 951 NYS2d 206; *Perez v. Brux Cab Corp.*, 251 AD2d 157, 159, 674 NYS2d 343). "An attorneys' affirmation, is not based on personal knowledge of the facts, and has no probative value" (*see, Skinner v. City of Glen Cove,* 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai,* 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690). *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996).

Accordingly, defendants request for summary judgment dismissing the complaint is hereby granted, for the reasons stated above.

This constitutes the Decision/Order of the Court.
Date: FEBRUARY 24, 2020

RICHARD VELASQUEZ, J.S.C.

SO ORDERED

Hon. Richard Velasquez

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