

Chikviladze v 4812 Mgt. LLC
2020 NY Slip Op 32047(U)
June 24, 2020
Supreme Court, Kings County
Docket Number: 500776/15
Judge: Edgar G. Walker
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At an IAS Term, Part 90, of the Supreme Court of the State of New York, held in and for the County of Kings, on the 24th day of June, 2020.

P R E S E N T:

HON. EDGAR G. WALKER, J.S.C.

-----X

ZURAB CHIKVILADZE,

Plaintiff,

-against-

Index No.: 500776/15

4812 MANAGEMENT LLC, ARKADIY IZRAILOV, MD,
MEDICAL CARE PLLC, AND ROBERT S MOSKOWITZ, MD

Defendants,

-----X

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations)

Annexed _____
248-253, 254-256

187-199, 219-221,

Opposing Affidavits (Affirmations) _____

257-258, 273-275,

Affidavits/ Affirmations in Reply _____
276

266-267, 268-272,

Upon the foregoing papers, defendant Robert S Moskowitz, MD (Moskowitz) moves in motion sequence (mot. seq.) eight for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the plaintiff’s complaint and all cross-claims against him. Defendants 4812 Management LLC (Management), Arkadiy Izrailov, MD (Izrailov), and Medical Care, PLLC (Medical) move in mot.seq. ten for summary judgment in their favor dismissing the plaintiff’s claims and all cross-claims against them. Finally, plaintiff Zurab Chikviladze (Plaintiff) cross-moves to each of the aforementioned motions in mot.seq. twelve

and thirteen for summary judgment in his favor upon the issues of liability and disability discrimination¹. The motions were consolidated for decision.

.Background Facts and Procedural History

The instant action arises out of an August 12, 2014 fall in which Plaintiff claims that he sustained various injuries. Plaintiff was the home healthcare worker for an elderly patient named Iosif Furmanov. As part of his duties, he took Furmanov to an appointment with Izrailov at his medical practice, Medical. As the patient was wheelchair bound and the street entrance to the office was up a flight of stairs, Plaintiff was instructed to proceed through the lobby of the building which was owned by defendant Management. Though there were also steps to access the rear entrance to Izrailov's office, a ramp had been fitted over a portion of the staircase to allow wheelchairs to reach the entrance. Plaintiff and Furmanov arrived at the office without incident. Upon completion of the appointment, they left through the rear entrance, intending to proceed down the ramp. Plaintiff fell, allegedly sustaining injuries. Furmanov, knocked unconscious, was hospitalized but did not survive.

By summons and complaint dated January 21, 2015, Plaintiff commenced the instant action against Management, Izrailov, and Medical. The complaint alleged that the negligence of the defendants caused Plaintiff to be injured. Management answered and asserted cross-claims for indemnification. Izrailov and Medical similarly answered and cross-claimed. A preliminary conference was held on July 8, 2015 and a compliance conference on March 9, 2016. Upon Plaintiff's motion, leave to file an amended complaint to add the owner of the ramp, Moskowitz, as a defendant was granted two months later. All of the defendants answered and asserted cross-claims against each other. Following numerous discovery-related motions and the resultant orders, Plaintiff filed a note of issue on July 30, 2018. Motions by the defendants to strike the note of issue were denied by short form order dated September 6, 2018 and a further discovery schedule set. Therein, JHO Schneier also extended the parties' time to file summary judgment motions through December 28, 2018. Moskowitz did so on December 27th and Izrailov, Medical, and Management jointly did so the next day. Plaintiff filed another discovery related

¹ No claim for discrimination is raised in Plaintiff's complaint. It appears that this is an alternate basis for liability for his injuries. As it is – like his negligence claims – premised upon the ramp being a dangerous condition, the Court need not address it separately.

motion instead (and later filed yet another motion to strike). It was only in May 2019, that Plaintiff filed his cross-motions for summary judgment.

Analysis

Plaintiff argues that the ramp was a dangerous condition owned by Moskowitz and set up and utilized by Izrailov on premises owned by Management. He further notes (and the defendants do not dispute) that all of the defendants were aware that the ramp was in use to allow handicap access to the doctors' office. According to Plaintiff, the ramp was placed at an overly steep angle starting from a too-small landing, not affixed to the wall, and did not have handrails. Thus, he argues, it was a dangerous condition that proximately caused his injuries.

Defendants focus on Plaintiff's testimony that the ramp he fell from differed significantly from the one owned by Moskowitz, utilized regularly by Izrailov, and with which Management was familiar. Plaintiff was adamant that the ramp from which he fell was covered in rubber (Plaintiff tr. 37:10-17) and felt flexible like a wooden board (Id. 42:16-43:10, 47:20-48:7, 51:14-19, 154:9-10). He was confident it was not the one in use when he returned to the accident scene with an attorney several days later (Id. 59:11-22, 153:23-154:4) – and which was identified by Moskowitz as the one he owned. Plaintiff explained that he fell from a ramp which was narrower and without the “metal things on the sides” (55:15-56:13). Additionally, he states that it did not appear foldable (Id. 61:80-62:2, 154:20-155:3), was “just flat” (Id. 155:11), and lacked the line down the middle visible in the photographs of Moskowitz's ramp (Id. 62:3-63:21, 154:23-155:8). He also notes that it lacked “those metal things that are going over the landing” (Id. 95:10-17) and that the corners were different (Id. 155:8-9). However, it is undisputed that Moskowitz's was the only ramp in use at that location and that it was present when Plaintiff fell. As such, Plaintiff's assertion that he fell from a different ramp is not fatal to his claim and is relevant only to the accuracy of his recollection of what occurred and, arguably, to his credibility.

Moskowitz further argues that he was not involved in setting up the ramp on the day that Plaintiff fell. He notes –and Izrailov confirms –that their practice was that whoever's patient needed the ramp would set it up with the assistance, if any, of his staff (Izrailov tr. 50:15-51:9, 73:23-74:12; Moskowitz tr. 27:4-12). The two of them did not do so together and Moskowitz

claims that he was not even present at the time that Izrailov did so that day. He further argues that the ramp had been in regular use for ten years without incident or complaint (Moskowitz tr. 31:4-9, 64:4-65:2). It was a commercially available model (Id. 26:8-17) and had metal rails extending upward from the sides, a non-slip surface, and ends designed to nest on the top stair and sit flat on the floor (Id. 28:20-29:9, 61:20-64:3). His policy was that he, another doctor, or an ambulette driver were the only one's allowed to use the ramp when he set it up (Id. 65:3-11, 67:7-69:11). He had no reason to believe that the ramp was dangerous. Though he had permission from Management to build a permanent ramp outside the building leading to the front entrance to his office, he elected not to do so due to the expense and the availability of a much cheaper, practical option, the portable ramp (Id.34:3-36:5, 37:4-19).

Management adopts Moskowitz's arguments and adds that it did not own, select, set-up, or use Moskowitz's ramp. It also received no complaints about the ramp such to put it on notice of any potential issue (see, Sternbuch tr. 46:13-21, 50:4-8). Likewise, Izrailov argues that the ramp was selected and owned by Moskowitz and that he was not aware of any dangerous or defective condition caused by its use.

“To impose liability on a defendant as a result of an allegedly dangerous condition on the premises, there must be evidence that the dangerous condition existed and that the defendant either created the condition, or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Melo v. LaGuardia Fitness Center Corp.*, 72 A.D.3d 761, 762 [2d Dept 2010]). “[T]hat a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury” (*Buglione v. Spagnoletti*, 123 A.D.3d 867 [2d Dept 2014]). However, “[c]ases grounded on circumstantial evidence require a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred” (*Bettineschi v. Healy Elec. Contracting, Inc.*, 73 A.D.3d 1109,1110 [2d Dept 2010]). “Where it is just as likely that some factor other than a dangerous or defective condition, such as a misstep or a loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation” (*Gaither–Angus v. Adelphi University*, 180 A.D.3d 875, 876 [2d Dept 2020]).

There are significant relevant factual disputes as to what occurred. Plaintiff states that the ramp was slightly shaky when he pushed Furmanov's wheelchair up to Izrailov's office (Plaintiff tr. 39:15-40:3). He claims to have slowly and carefully centered himself and his patient on the ramp before slowly beginning to back down (Id. 43:15-44:3, 113:3-114:2, 120:2-11, 139:4-22). The ramp began to shake and bounce up and down (Id. 45:4-46:17, 47:20-48:7, 51:6-141:15-142:5). The wheelchair began to tip to the right and, despite his best efforts, he and it tumbled off the ramp and hit the lobby floor (Id. 49:4-50:14, 143:13-144:5). Izrailov, on the other hand, states that the ramp was extremely heavy and had a solid, non-flexible metal surface (Izrailov tr. 54:5-24, 56:5-24). He (rather than Plaintiff) wheeled Furmanov up the ramp without issue (Id. 77:15-22) – and, in fact, his policy was that when he always took wheelchair-bound patients up and down the ramp himself (Id. 121:21-122:7). He never had any issues with the ramp and received no complaints about it (Id. 122:22-123:14, 133:25-134:9). Plaintiff was disgruntled and rushed off with Furmanov at the end of the appointment, preventing Izrailov from assisting the patient down the ramp (Id. 78:4-22, 79:5-12). Izrailov claims that he called out a caution to Plaintiff but then almost immediately heard the thud of the falling wheelchair and rushed out and assisted the unconscious Furmanov (Id. 79:11-22, 92:15-93:23, 125:18-130:7). Izrailov also stressed that the ramp only covered a portion of the staircase and implied that Plaintiff might have missed the ramp (Id. 78:22-79:4, 112:2-11).

In Plaintiff's version of events, the ramp was dangerous. It shook and it bounced. It was too steep and lacked handrails. Despite taking every reasonable precaution and properly and cautiously backing the wheelchair down the ramp, he was injured as a result of an unsafe ramp belonging to Moskowitz and set up by Izrailov for use by Plaintiff. Management had constructive notice that the hazard was present in its lobby but did not prevent Moskowitz and Izrailov from continuing to place it there. On the other hand, were Dr. Izrailov to be correct, the ramp was not dangerous. It had a non-skid surface and rails along the edges of the top to prevent a properly-handled wheelchair from accidentally rolling off the side. It was Plaintiff's hurried lack of care that was the proximate cause of the accident.

It is, thus, clear that issues of credibility as to the parties' respective testimony are critical and preclude a grant of summary judgment (see *Forrest*, 3 NY3d at 315).

Conclusion

Accordingly, it is

ORDERED that Moskowitz's motion for summary judgment is denied; and it is further

ORDERED that Management's, Izrailov's, and Medical's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motions for summary judgment are both denied.

This constitutes the decision and order of the Court.

ENTER:

A handwritten signature in black ink, appearing to be 'EW', written over a horizontal line.

Hon. Edgar G. Walker, J.S.C.