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| <b>Permutt v Jefferson Val. Professional</b>   |
| 2020 NY Slip Op 34783(U)   |
| April 23, 2020   |
| Supreme Court, Westchester County  |
| Docket Number: Index No. 60873/2018  |
| Judge: Terry Jane Ruderman   |
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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

-----X  
WILLIAM M. PERMUTT and SUSAN PERMUTT<sup>1</sup>,

Plaintiffs,

Index No. 60873/2018

- against -

DECISION and ORDER

JEFFERSON VALLEY PROFESSIONAL,  
NATURAL GREENSCAPES, INC., ASSET  
PROPERTY SERVICES, INC., and  
JEFFERSON VALLEY ASSOCIATES, LLC.,

Motion Sequence Nos. 1 - 3

Defendants.

-----X  
RUDERMAN, J.:

The following papers were considered on (1) the unopposed motion by defendant Natural Greenscapes, Inc. for an order pursuant to CPLR 3212 dismissing the complaint as against it (sequence 1); (2) the motion by defendants Jefferson Valley Professional, Asset Property Services, Inc., and Jefferson Valley Associates, LLC (the “Jefferson Valley defendants”) for an order pursuant to CPLR 3116 (a) striking plaintiff’s errata sheet/affidavit of corrections relating to his deposition testimony, and upon so doing, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the complaint and any cross-claims asserted against them (sequence 2); and (3) the cross-motion by defendant Natural Greenscapes, adopting the arguments and relief sought in co-defendants’ motion sequence 2 (sequence 3):

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<sup>1</sup> Plaintiff Susan Permutt has a derivative claim only; references to “plaintiff” in the singular refer to William Permutt.

| <u>Papers - Sequence 1</u>  | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion, Affirmation, Affidavit, Exhibits A - N, and<br>Memorandum of Law <sup>2</sup> | 1               |
| <u>- Sequence 2</u>   |                 |
| Notice of Motion, Affirmation,  | 2               |
| Plaintiff's Affidavit <sup>3</sup> in Opposition, Exhibits A - J                                | 3               |
| Reply Affirmation   | 4               |
| <u>- Sequence 3</u>   |                 |
| Notice of Cross-Motion, Affirmation   | 5               |

Plaintiffs assert that on January 16, 2018, at 9:30 a.m., plaintiff William Permutt fell while walking through the rear parking lot of a medical office complex at 3630 Hill Blvd. in Jefferson Valley, New York. Jefferson Valley Professional Center Condominium s/h/a Jefferson Valley Professional is the owner of the office complex; defendant Asset Property Services, Inc. is the managing agent; defendant Natural Greenscapes Inc. is the snow/ice removal contractor.

The Jefferson Valley defendants contend that not only has plaintiff changed his initial theory of liability, but the answers he gave at his deposition fail to establish the existence of a viable cause of action under his current claim. Specifically, they contend, plaintiff was unable at that time to pinpoint the defective condition on which he allegedly fell. They argue that plaintiff therefore improperly attempted to buttress his claim thereafter, with an "affidavit of

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<sup>2</sup> Plaintiffs state that they do not oppose Natural Greenscapes' motion for summary judgment (*see* NYSCEF Doc. No. 84, p. 1, ¶ 3).

<sup>3</sup> The "affidavit" by counsel for plaintiff was not notarized, despite its recitation that it is "duly sworn," so it may not be relied upon to the extent it purports to serve as evidence; nor does it qualify as an affirmation under CPLR 2106, since it does not recite that it is affirmed to be true under penalty of perjury. However, to the extent it serves as a vehicle for submission of the attached exhibits, and to convey plaintiffs' legal theory, its defects in form are disregarded by the court pursuant to CPLR 2101 (f).

corrections” in which he purports to clarify his answers to the deposition questions, but actually provides new assertions. The moving defendants contend that plaintiff’s purported corrections or clarifications must be rejected by the Court.

More specifically: at the outset of the litigation, in plaintiff’s original bill of particulars, he contended that “he was caused to slip and fall over an unsafe snowy and icy condition,” which had existed for several hours after a storm ended. In contrast, at his deposition, plaintiff testified that there was a hole at the spot where his accident occurred, in which his foot got caught, causing him to fall. He explained that it was only after his attorney went out and took photographs, that he was able to determine there was a hole at the spot where he fell, which he had not seen at the time of his accident. Plaintiff elaborated that all he had known before being shown the photographs by his attorney was that his left foot got caught on something.

Even then, defendants emphasize, when asked at his deposition to identify the spot in the photographs where his left foot had gotten caught, he was unable to specifically identify the location. Rather, he merely replied, “I fell somewhere over here. (Indicating.)” When asked if he was referring to the darker area “where there’s a -- it looks to be some sort of a hole?” he responded, “That’s the area where I fell.” Additionally, when he was asked about previous statements that he had slipped on ice, plaintiff denied that he had changed his mind, and explained, “No. I know I tripped, slipped, and fell. I didn’t know on what. I assumed at the time it was just ice.” In response to the question, “when you say your left foot was caught on something, are you referring to the hole that’s in Exhibit D?” plaintiff answered “I don’t know that.” When asked if he could mark the area with a pen, he said “I could mark it, but it’s... I could mark it approximately.”

After plaintiff's deposition, plaintiffs served a supplemental bill of particulars specifying that he slipped and then got his foot caught in an unsafe condition where snow and ice were covering a hole which caused plaintiff to trip and fall, and which existed as a result of defendants' negligence. It further alleged that defendants negligently failed to properly remove the snow and ice, and negligently failed to repair the "broken and holey" condition that existed for months prior to the accident.

Upon receipt of the transcript of his deposition, plaintiff provided an affidavit of corrections with what he termed "clarifications." These changes alter twelve of his deposition answers; for the most part, these additions to his answers essentially repeat the assertions that (1) plaintiff had not known the hole was there at the time of his accident, or before his attorney showed him photographs of the area, because at the time of his accident it was covered by snow and ice, and (2) that something in the hole had caused his foot to get caught, but he cannot identify the exact condition within the hole. For example, on page 88, in place of his answer "I can show you where I fell," plaintiff substitutes "I can show you where I fell and landed. I can show you my foot got caught somewhere in the hole but I cannot show you where specifically, inside the hole, where my foot got caught" (sic). Another illustrative alteration relates to a question contained on page 89: "Regarding the hole that's already been identified in Exhibit D, is it possible your left foot got caught in that hole?" At his deposition, plaintiff replied, "I can't answer that question," whereas the "clarification" plaintiff subsequently provided reads: "Yes, but I can't answer that question as to the exact location inside the hole where my foot got caught."

The existence of the broken and crumbling curb prior to the date of plaintiff's accident

was acknowledged by Sabrina Bluestone, of defendant Asset Property Services, property manager for the subject property, at her deposition. Bluestone testified that she had brought it to the attention of Marc Kaufman, the owner in charge, that the condition posed a tripping hazard.

#### Discussion

Defendants contend that plaintiff was unable to identify at his deposition the defective condition that allegedly caused him to fall, which failure establishes the invalidity of his claim; they argue that the Court must reject as a matter of law the additions contained in his affidavit of corrections.

Initially, the factual allegations made by plaintiff here are distinguishable from those cases where claims were dismissed because the plaintiff admitted she did not know what caused her to fall (*see e.g. Capasso v Capasso*, 84 AD 3d 997, 998 [2d Dept 2011]). Particularly when the specifics contained in plaintiff's affidavit of corrections are considered, he has sufficiently identified the defective condition that allegedly caused him to fall.

Defendants acknowledge that CPLR 3116 (a) permits a witness to make changes in form or substance to his or her deposition testimony, as long as such changes are accompanied by a statement of the witness's reasons for making them. However, they rely on case law establishing that a correction will be rejected where the proffered reason for the change is inadequate, and further, that an errata sheet may not be used to make material or critical changes to a witness's testimony (*see Torres v Board of Educ. of City of N.Y.*, 137 AD3d 1256 [2d Dept 2016]; *Horn v 197 5th Avenue Corp.*, 123 AD3d 768 [2d Dept 2014]; *Ashford v Tannenhauser*, 108 AD3d 735 [2d Dept 2013]).

The Court in *Torres v Board of Educ.* granted the defendants' motion to strike the plaintiff's errata sheets relating to his deposition, explaining that the corrections substantively changed portions of the plaintiff's deposition testimony which would have been in conflict with his earlier testimony at his General Municipal Law § 50-h hearing concerning the basis for the defendants' negligence; moreover, the plaintiff's stated reason, namely that he "mis-spoke" and needed to clarify his testimony, did not warrant the corrections (137 AD3d at 1257). In *Ashford v Tannenhauser*, the Court held that summary judgment should have been granted to the defendant because the plaintiff had used his post-deposition errata sheet to radically change much of his earlier testimony, with only a vague explanation that he had been "nervous" during his deposition, and in the absence of the proposed alterations, the plaintiff's deposition testimony was insufficient to raise a triable issue of fact (108 AD3d at 736-737). Similarly, in *Horn v 197 5th Avenue Corp.*, after "detailed, consistent, and emphatic" deposition testimony regarding the location of the accident, the plaintiff subsequently executed an errata sheet containing "corrections" which sought to establish that she actually fell at an entirely different location, 197 Fifth Avenue, instead of 140 Fifth Avenue (123 AD3d at 769). The Appellate Division there held that the motion court should have granted those branches of the defendants' motions which were to strike the errata sheet, based on the plaintiff's failure to provide an adequate reason for the "numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony" (*id.* at 770).

In contrast to those cases, the affidavit of corrections here did not amount to a significant alteration of plaintiff's deposition testimony. Plaintiff's testimony during the deposition may have been less clear, or more tentative, but he did assert that his foot became caught in the

broken pavement at the location where his accident occurred. His proposed corrections merely render his answers more definitive. Therefore, the case law on which defendants rely, prohibiting reliance on errata sheets that materially alter the factual claims made during the deposition, are not controlling here, and the striking of plaintiff's affidavit of corrections is not warranted.

Notably, while plaintiff made a more significant modification to his theory of liability between the original bill of particulars and his deposition, that earlier alteration does not provide a basis for the relief defendants seek here, the striking of plaintiff's affidavit of corrections to his deposition testimony.

Plaintiff's lack of certainty in identifying the spot in the broken pavement on which his foot got caught does not necessitate dismissal. Triable issues of fact have been found where plaintiffs have demonstrated uncertainty about the exact aspect of an identified defect that allegedly caused the accident (*see e.g. Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 1227 [3d Dept 2016]; *Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487 [4th Dept 2014]; *DiGiantomasso v City of New York*, 55 AD3d 502, 503 [1st Dept 2008]).

Defendants' argument in favor of summary judgment was premised on the striking of plaintiff's affidavit of corrections. Consequently, this Court's ruling declining to strike the affidavit of corrections requires the denial of defendants' motion for summary judgment. Of course, any modification between plaintiff's original and later factual claims may be raised to impeach plaintiff's credibility.

Nor have defendants established a right to summary judgment based on their claim of lack of notice. Even if there was a storm in progress, there are issues of fact as to whether the

broken pavement allegedly present underneath a thin coating of ice or snow was a cause of plaintiff's accident, since that defective condition was admittedly known to Sabrina Bluestone, the representative of the property's managing agent.

Accordingly, it is hereby

ORDERED that the motion by defendant Natural Greenscapes, Inc. for an order pursuant to CPLR 3212 dismissing the complaint as against it (sequence 1) is granted without opposition; and it is further

ORDERED that the motion by defendants Jefferson Valley Professional, Asset Property Services, Inc., and Jefferson Valley Associates, LLC for an order pursuant to CPLR 3116 (a) striking plaintiff's errata sheet/affidavit of corrections relating to his deposition testimony, and upon so doing, pursuant to CPLR 3212, granting summary judgment in their favor (sequence 2), is denied; and it is further

ORDERED that the cross-motion by defendant Natural Greenscapes (sequence 3) is denied in accordance with the decision in co-defendants' motion sequence 2; and it is further

ORDERED that all parties are directed to appear in the Settlement Conference Part, in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601 to schedule a trial, on a date to be subsequently announced by the Settlement Conference Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
April 23, 2020



HON. TERRY JANE RUDERMAN, J.S.C.