SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK : Part IA-12

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CARLOS FLORES,

Plaintiff,

-against-

58TH STREET CAPITAL LLC, PALIN ENTERPRISES, CARARD MANAGEMENT CORP. and HALSTEAD MANAGEMENT COMPANY, LLC,

Defendants.

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DECISION AND ORDER
Index No. 30388/2017E
Motion Seq. #002

HON. KIM ADAIR WILSON
J.S.C.

Kim Adair Wilson, J.:

"**NOTICE OF MOTION**," filed August 20, 2021, by Nick Migliaccio, Esq. (Law Office of Thomas K. Moore), on behalf of defendants 58th Street Capital, LLC, Palin Enterprises and Carard Management Corp. seeks "(1) An Order pursuant to CPLR § 3212 for summary judgment dismissing the Plaintiff's Complaint in its entirety with prejudice against Defendants 58TH STREET CAPITAL LLC, PALIN ENTERPRISES and CARARD MANAGEMENT CORP." By way of "**NOTICE OF CROSS-MOTION**," dated and filed October 22, 2021, by Ryan S. Goldstein, Esq. (Law Office of Ryan S. Goldstein, PLLC), on behalf of plaintiff Carlos Flores, opposes and cross-moves for an "Order...(1) disqualifying the Law Office of Thomas K. Moore, attorneys for the Defendants 58th Street Capital LLC, Palin Enterprises and Carard Management Corp. ("Defendants" or "Third-Party Plaintiffs") pursuant to 22 NYCRR 1200.27 (New York Disciplinary Rule 5-108) for the conflict of interest that exist with their law firm now representing the defendants after previously presenting the third-party defendant WELCOME GROUP OF NEW YORK, LLC.[1]; (2) in opposition to the Defendants motion seeking summary judgment relief; [and] (3) disqualify Kowalski & Devito (prior counsel for the Defendants and Third-Party Plaintiffs) from any intentions or ability to reinstate their previous representation of same" (**NYSCEF Lines 43-70**). Plaintiff's cross-motion, however, is untimely, specifically, 45 days late[2] (CPLR 3212[a]); and the plaintiff submits no good cause for the delay (CPLR § 2004). Accordingly, this Court declines to consider plaintiff's cross-motion, but his opposition papers, which are timely pursuant to the parties' Stipulation[3], shall be considered. The defendants' motion is determined as set forth below.

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[1] By "STIPULATION OF DISCONTINUANCE OF THIRD-PARTY ACTION," dated June 15, 2021, the third-party action against Welcome Group of New York, LLC, the tenant of the subject premises, doing business as Dawat Haute, Cuisine of India, has been discontinued without prejudice.

[2] The Note of Issue was filed on May 10, 2021. Pursuant to statute, motions must be filed no later than 120 days later. Accordingly, all motions had to be filed on or before September 7, 2021. Plaintiff's cross-motion was filed on October 22, 2021.

[3] By "Stipulation To Adjourn," dated September 22, 2021, the parties agreed to adjourn the motion to permit plaintiff's counsel to file his "Affirmation in Opposition," on or before October 25, 2021.

Plaintiff Flores commenced this personal injury action alleging that, on November 24, 2014, he was working as a full-time dishwasher and general cleaner for the owners of Dawat Haute, Cuisine of India, a restaurant, located at 210 East 58th Street and Lexington Avenue ("subject property"), when he was caused to slip and fall on stairs leading to the basement of the restaurant due to the defendants' negligence. At the time of plaintiff's accident, defendant 58th Street Capital, LLC ("58th Street") owned the building; and defendant Carard Management managed the building. In July 2015, after plaintiff's accident, defendant Halstead Management assumed the management responsibilities. Defendant Palin Enterprises allegedly has no ownership interest in the subject property.

Defendants 58th Street Capital, LLC, Palin Enterprises and Carard Management Corp. ("58th Street, Palin and Carard") move for CPLR 3212 summary judgment, dismissing plaintiff Flores' complaint in its entirety with prejudice against the defendants.

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit (CPLR 3212[b]). In order to prevail on its motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that *prima facie* showing (*Bethlehem Steel Corp v Solow*, 51 NY2d 870 [1980]). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material question of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In the instant motion, defendants 58th Street, Palin and Carard assert, in substance, that, at the time of plaintiff's alleged accident, they were an absentee, out-of-possession, landlord who relinquished possession and control to the tenant restaurant; the plaintiff is unclear as to the cause of his fall and thus, unable to establish a *prima facie* case of negligence; and they neither possessed actual or constructive notice of nor created the alleged defective condition. In support of their motion, they proffer the pleadings, a Lease and Renewal for the subject property; photographs and a drawn diagram of the subject stairs; and the deposition testimony transcripts of plaintiff Flores, Michael Fremder and Virender Kumar.

The defendants contend, in substance, that they are an absentee, out-of-possession, landlord who relinquished possession and control to the restaurant tenant. "It is well established that an out-of-possession landlord... 'is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is

contrary to a specific statutory safety provision" (*Matias v West 16th Realty LLC*, 189 AD3d 681 [1st Dept 2020] citing, *DeJesus v Tavares*, 140 AD3d 433 [1st Dept 2016]). The defendants refer to the proffered lease, dated October 2001, between "CARARD MANAGEMENT CORP., as Agent for Capital Properties Co....hereinafter referred to as OWNER, and Welcome Group of N.Y., LLC..., hereinafter referred to as TENANT." Therein, the pertinent provisions state the following:

> **Repairs**: 4. Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein...and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.
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> **Occupancy:** 15. ...Tenant has inspected the premises and accepts them as is, subject to the riders annexed hereto with respect to Owner's work, if any. In any event, Owner makes no representation as to the condition of the premises and Tenant agrees to accept the same subject to violations whether or not of record.
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> **No Representations by Owner**: 20. Neither Owner nor Owner's agent have made any representations or promises with respect to the physical condition of the building...Tenant shall be conclusive evidence that the said premises and building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects.

During his deposition (August 26, 2020), Michael Fremder, employed by defendants Palin and Carard, self-described as their Assistant Comptroller from 2002 to 2015 and then as Comptroller in 2016. Because he only visited the residential portion of the subject premises, and not the restaurant, he lacks knowledge of the subject stairs, its make-up, and its condition. The landlord's last inspection of the premises would have occurred in October 2001, when the lease was executed. He understands that the tenant restaurant would only contact the landlord for major renovations. For example, permission is required for any changes to the electrical system or ceiling fixtures. The landlord's permission, however, is not required if the stairs required refacing. Mr. Fremder was unaware of the tenant making requests for such repairs or alterations. He is also unaware of any restrictions in the lease requiring tenant to use a specific type of material for the stairs, or lighting in the restaurant; and he received no complaints about the condition of the stairs or insufficient lighting.

During his deposition (December 8, 2020), Virender Kumar self-described as the president of Welcome Group of New York LLC, which was doing business as Dawat Haute Cuisine of India, the tenant of the subject property. Mr. Kumar stated that Sushil Malhotra executed the lease in 2001 and he, himself, executed its renewal in 2012. The leased space included the main floor, and the basement which consisted of a storage area, walk-in refrigerator, and his office. As part of the renewal of the tenants' 2011-2012 lease, the tenant

was responsible for making repairs inside the restaurant; no work was performed in the beginning. Upon review of the photographs depicting the subject stairs and lighting condition, Mr. Kumar confirmed that they were a fair and accurate depiction of the subject stairs, with a handrail on its left, in 2014, at the time of plaintiff's accident; the staircase had non-slippery rubberized material on the steps in 2001 and in 2014; and he stated that the stairs were in very good condition during the duration of the lease and no work was performed on the stairs. Mr. Kumar further testified that the lighting from the main restaurant ceiling illuminated the stairs and there is lighting in the basement's ceiling; the light switches are located on the wall next to the staircase and can be turned on before descending the stairs. The basement light remains on during the restaurant's hours of operation. If a light went out, the staff or manager changed the bulb. Some time after 2012, Mr. Kumar recalled the hiring of a licensed electrician to install new lighting in the restaurant area to make it brighter; and he described the staircase lighting as "bright." The staircase was cleaned daily with a broom and mop by staff. Although he used the subject stairs several times daily, he never walked on the steps after they were mopped or wet. He stated that there were no prior accidents on the stairs, and he received no complaints about its condition or about lighting. Mr. Kumar was at the restaurant five to six days a week but was not present on the day of plaintiff's fall. He learned about it a day or two later, but was not informed as to the cause of the fall.

With that, the defendants contend that the plaintiff is unclear as to the cause of his fall and thus, unable to establish a *prima facie* case of negligence. A defendant in a slip and fall case is *prima facie* entitled to summary judgment as a matter of law where plaintiff is unable to identify the exact cause of his or her fall (*Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011] *Rudner v New York Presbyterian Hospital*, 42 AD3d 357 [1st Dept 2007]; *Reed v Piran Realty*, 30 AD3d 319 [1st Dept 2006]). In other words, "a plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Dennis v Lakhani*, 102 AD3d 651 [2nd Dept 2013] citing (*Capasso v Capasso*, 84 AD3d at 998; *see Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903, 903 [2012]; *McFadden v 726 Liberty Corp.*, 89 AD3d at 1068; *Alabre v Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287 [2011]; *Rajwan v 109-23 Owners Corp.*, 82 AD3d 1199, 1200 [2011]; *Aguilar v Anthony*, 80 AD3d 544, 545 [2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d at 810-811). Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheerconjecture (*see Alabre v Kings Flatland Car Care Ctr., Inc.*, 84 AD3d at 1287; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435 [2006]). Plaintiff Flores testified that, on November 24, 2014, he was working as a full-time dishwasher and general cleaner for the owners of Dawat Haute, Cuisine of India, at the subject property, when he was descending the subject stairs and his ankle twisted, causing him to fall and sustain a serious injury. He worked at the premises for approximately six or seven months, and during that time, had walked up and down those stairs many times a day; and was one of the three persons

responsible for sweeping and mopping the stairs. On the day of his accident, he had traveled up and down the stairs about five times without incident. Mr. Flores did not recall what caused him to fall; how he fell; how many stairs made up the staircase; the material the stairs were made of; if he held onto the handrail; whether he had anything in his hands when he fell; whether there was a light switch on the side of the stairs; or whether the lights were on or working that day. He subsequently testified that the cause of his fall was due to "poor lighting" and "irregular stairs," and that, in the past, he experienced difficulty going up and down the stairs, but never reported it to anyone; and in the past, his foot would slip, but he never looked to determine what caused it.

The defendants further contend that they neither possessed actual or constructive notice nor created the alleged defective condition. "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a *prima facie* demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470 [1st Dept 2012] citing *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [2010] [internal quotation marks omitted]). It is well settled that the defendant, as the movant for summary judgment, bears the initial burden to establish lack of notice as a matter of law (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]; *Moreira v City of New York*, 4 AD3d 311 [2004]). Constructive notice is established by evidence of a recurring dangerous condition in the area of the accident that was routinely left unaddressed by the defendant *(Harrison v New York City Housing Authority*, 94 AD3d 512 [1st Dept 2012] *citing Modzelewska v City of New York*, 31 AD3d 314 [2006]). Here, Mr. Kumar testified that no prior accidents occurred on the stairs, and he received no complaints about the stairs or lighting. Plaintiff Flores testified that he made no complaints about neither, nor was he aware of his co-workers making such complaints.

In accordance with the lease agreement and the deposition testimony of Mr. Fremder and Mr. Kumar, this Court determines that the defendants have established that it is an out-of-possession landlord. The lease terms provide that the tenant restaurant bore the responsibility of maintaining the subject stairs. Mr. Fremder stated that refacing of stairs did not require the landlord's permission. Mr. Kumar stated that the stairs were in good condition and its surrounding lighting was sufficient, and there was a light switch on the side of stairs prior to descending the stairs; no work was performed on the stairs during the duration of the lease; no prior accidents occurred on the stairs; and he received no complaints concerning the stairs or lighting.

Based on the foregoing, this Court finds that the defendants have met their burden. In meeting his shifting burden of proof, and in opposition to the defendants' motion, plaintiff Flores contends that the defendants caused and created the defective condition. In support of his position, plaintiff relies on the evidence submitted by the defendants. He contends that Articles 3 and 46 of the Lease place the onus on the landlord to the extent that the landlord's

consent is required before the tenant is permitted to make alterations or additions to the electrical systems. Plaintiff is correct to the extent that Article 3, entitled "Alterations," dictates that the "Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent." Article 46, entitled "ELECTRICITY," addresses, inter alia, the required consent for alterations regarding electricity, tenant's responsibility for payment, and that it shall not exceed proper capacity (Articles 46.1 through 46.4). These provisions, do not however, support plaintiff's contention that they create triable issues of fact.

The plaintiff testified that the cause of his fall was due to insufficient lighting on the stairs and "irregular floor stairs" and "anti-skid things." Therefore, plaintiff avers that there are triable issues as to whether the lighting was sufficient and who bears responsibility for the poor lighting. Mr. Fremder acknowledges that the alteration of ceiling fixtures required the owner's consent and Mr. Kumar testified that the lighting was changed in 2012. There is no evidence, however, expert or otherwise, that the lighting was insufficient. Moreover, while it is undisputed that the owner's consent was required to change or add to the electrical wiring, there is no evidence that the defendants were responsible for the amount of illumination in the restaurant or on the stairs.

Plaintiff asserts that a triable issue of fact exists as to whether the defendants possessed actual and constructive notice because Mr. Fremder testified that Scott Ross performed periodic inspections to identify conditions that require repair and replacement. Plaintiff, however, proffers no evidence that the stairs required repairing or replacing. When a defendant has not created a dangerous condition and has no actual or constructive notice of the dangerous condition, liability may not be imposed (See *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [2008]).

Finally, in addressing plaintiff Flores' allegations in his Bill of Particulars that the defendants violated New York City Administrative Codes Sections 28-301.1 and 305.1, this Court determines that, upon its review of the statutes and the proffered evidence, defendants made no such violations. Section 28-301.1 generally governs the maintenance of the building, facilities and structures. Plaintiff proffers no evidence that this description encompasses stairs or a staircase. Section 305.1 governs retaining walls and partition fences, which are not at issue.

Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that the defendants have met their burden and plaintiff has failed to meet his shifting burden of proof.

Accordingly, defendants 58th Street Capital, LLC, Palin Enterprises and Carard Management Corp.'s motion for summary judgment is **GRANTED** as stated herein, and plaintiff's complaint is dismissed solely as against them.

The movants are directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: January 14, 2022
Bronx, New York

Hon. Kim Adair Wilson, J.S.C.