

Duino v CEM W. Vil., Inc.
2022 NY Slip Op 32347(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 158731/2018
Judge: Shlomo Hagler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SHLOMO HAGLER PART 17

Justice

-----X

<p>TONY DUINO,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>CEM WEST VILLAGE, INC.,STEPHAN MARSAN,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>INDEX NO. <u>158731/2018</u></p> <p>MOTION DATE <u>02/16/2021</u></p> <p>MOTION SEQ. NO. <u>002</u></p>
---	---

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 111, 112, 113, 114, 115, 116, 125

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this premises liability action, defendant Stephen Marsan (Marsan) moves, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint as against him.¹ Plaintiff Tony Duino (Duino) opposes and Marsan replies. Defendant CEM West Village, Inc. (CEM) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint as against it. Plaintiff opposes and CEM replies.² The court heard oral argument on these motions.³

¹ While plaintiff labeled the pleading as an amended complaint, Marsan argues that the pleading is more properly labeled second amended complaint. CEM also so labels the pleading. For uniformity and where appropriate, the court will describe the motion and cross motion as seeking summary judgment dismissing the second amended complaint, but will also abridge the reference to complaint.

² Generally, a cross-movant is not entitled to file reply papers absent leave of court, and CEM did not seek such leave. Moreover, the cross motion was made after repeated adjournments of the motion and stipulations providing for an extension of time for CEM to oppose the motion; the stipulation(s) did not address an extension of time in which to file a cross-motion. Additionally, CEM waited with its cross motion until Marsan filed his reply and it is not clear that CEM gave sufficient notice pursuant to the CPLR. Nonetheless, in the exercise of discretion and for judicial efficiency, and noting the lack of objection, the court considers cross-movant's reply.

³ At oral argument the court also heard from the parties on their discovery motions (seq. nos. 001 and 003). This decision and order addresses the summary judgment motion and cross motion; the court's decisions on the discovery motions were made on the record and subsequently set forth in filed decisions and orders.

Background

Plaintiff alleges in his second amended complaint (complaint) that he sustained serious personal injuries when, on July 23, 2018 and as a result of defendants' negligence (first cause of action) and violations of laws, statutes, ordinances and regulations (second cause of action), he was caused to slip/trip and fall (the accident) on a staircase leading from one interior level to another within 149 West 10th Street, New York, New York (premises or townhouse). Plaintiff alleges that the accident occurred when he was descending the staircase leading from the first or main floor to the next lower level or garden floor, as he stepped with his left foot from the landing to the first step of the staircase, the back of his heel connected with the step and he fell. This staircase is not an interior staircase exiting to the outside.

That the accident occurred is not disputed, although its nature and cause or lack thereof are very much in dispute. It also does not appear disputed that plaintiff's injuries resulting from the accident include left leg oblique displaced tibial shaft fracture with anterior displacement and left ankle posterior malleolus fracture and syndesmotic injury, for which surgery was performed on July 24, 2018, consisting of open reduction and internal fixation and implants. Among other items of damages, plaintiff seeks: medical expenses (he asserts he did not have insurance) incurred as a result of his hospital stay and surgery; subsequent, ongoing and future medical expenses in connection with all of his past, present and future physical injuries; pain and suffering, and lost earnings.

The following also does not appear to be in dispute. The premises was constructed in 1885, substantially renovated between 2004 and 2008, acquired by CEM on or about August 23, 2017, and rented to Marsan pursuant to lease dated as of January 1, 2018 (lease). Marsan requested certain repairs or changes; these were approved by CEM and performed, including the

removal of the carpeting on and painting of the stairs. The lease consists of four pages and its provisions include the following. Under the heading of use of premises, the lease provides that Marsan “shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi - governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises” (*id.* at 1, ¶ 4). It further provides that Marsan “will, at [his] sole expense, keep and maintain the Premises and appurtenances in good and sanitary condition and repair during the terms of this Agreement and any renewal thereof” (NYSCEF Doc. No. (Doc) 58, ¶ 9 at 2). The lease then proceeds to list ten specific obligations, which were stated to be without limiting the foregoing obligation; repair or rebuilding of the staircase or installation of a handrail are not listed as part of these specific obligations. Additionally, the lease provides that CEM had the right to enter the premises for inspection and to make “any repairs, additions or alterations as may be deemed appropriate by [CEM] for the preservation of the Premises or the building” (*id.* at 2 ¶ 10).

The Federal Action

Plaintiff instituted this action against CEM in this court based on the location of the premises and shortly thereafter amended his complaint. CEM removed the action to federal court, based on diversity of citizenship. By answer to amended complaint, dated November 14, 2018, CEM denied the material allegations of the complaint, and asserted 14 affirmative defenses.⁴ Plaintiff again amended his complaint so as, *inter alia*, to add Marsan as a defendant.

By answer dated August 20, 2019, Marsan denied the material allegations of the complaint and asserted six affirmative defenses. In light of the joining of non-diverse party

⁴ As CEM’s answer is not attached to either Marsan’s papers or CEM’s papers, CEM failure to comply with CPLR 3212 (b) is sufficient to deny CEM’s cross motion. CEM’s answer is, however, available for the court’s review on NYSCEF. In the exercise of its discretion, to promote judicial economy, and in the absence of objection, the court will nonetheless consider CEM’s cross motion on the merits.

Marsan, plaintiff petitioned for his action to be remanded. CEM opposed. Federal court issued its June 16, 2020 decision and order remanding the action to state court.

Discovery in Federal Court

The parties recount and rely upon certain discovery that was held in federal court, namely, depositions and plaintiff's expert's 2019 engineering report and supplemental engineering report.⁵ It appears that neither CEM nor Marsan served and filed in this court a demand for a bill of particulars and neither the demand nor a bill of particulars is referenced in or annexed as exhibits to the papers.

Defendant CEM took plaintiff's deposition on April 26, 2019 (plaintiff's 2019 deposition) and a copy of the approximately 127 paged transcript (not including the index) is annexed as an exhibit to Marsan's moving papers (NYSCEF Doc No. [Doc] 53).

Defendant Marsan took plaintiff's videotaped deposition on February 11, 2020 (plaintiff's 2020 deposition), and a copy of the 177 paged transcript (not including the index) is attached as an exhibit to Marsan's moving papers (Doc 54). Copies of each deposition transcript with index are attached as exhibits to plaintiff's opposing papers (Docs 66 and 69).

On June 7, 2019, plaintiff took CEM's deposition, with Marsan appearing on CEM's behalf. Marsan attaches a four page excerpt of that transcript (Doc 55), and plaintiff attaches the entire deposition transcript, consisting of 89 pages (compressed into 37 pages) (Doc 75).

On June 24, 2019 plaintiff took the deposition of Robert Logan Greenslade (Greenslade), an individual who performed certain repairs to the premises (the Greenslade deposition). Of the 75 paged deposition transcript, Marsan attaches excerpts consisting of 9 pages of testimony (Doc

⁵ Plaintiff objects to defendants' submission of the deposition transcripts and the 2019 expert reports, arguing that these documents lack the proper evidentiary foundation and may not be considered. To the extent, if at all, these documents were initially in proper evidentiary form, either defendants cured the deficiencies or plaintiff did. Additionally, plaintiff waived any such objection by relying on these documents in his opposing papers.

56). The exhibit includes testimony regarding Greenslade's removal of a continuous piece of carpet that created a stairwell runner on the stairs and painting of the stairs. In describing the work done on the staircase leading from the subbasement to the garden level, Greenslade testified that he "removed carpet that was creating a false profile that was bunching and considered to be, in [his] opinion and Stephen's [Marsan] opinion, a little bit of a dangerous condition" (*id.* at 17, line 24 through 18, line 3). Greenslade also performed this work on the staircase leading from the first or main floor to the garden floor level. Greenslade testified that Marsan told him that he wanted the work done "Due to the conditions of the carpet which were a trip hazard, as well as creating a false profile to the basement stairwell" (*id.* at 24, lines 22-24).

On November 21, 2019, plaintiff took the videotaped deposition of Michelle Fontanez (Fontanez), CEM's assistant treasurer/assistant (the Fontanez deposition). She testified, among other matters, to certain telephone conversations she had with Greenslade regarding the repairs. Of the 84 page transcript, Marsan attaches excerpts to his moving papers, including 9 pages of her testimony, and, to his reply, two pages of testimony (Docs 57 and 93).

Plaintiff's 2019 Expert Reports

By expert exchange dated August 1, 2019, plaintiff noticed that he intends to call Vincent Ettari, P.E. (Ettari) as an expert witness (expert notice). Marsan attaches excerpts of the notice and expert report and plaintiff attaches the entire document (Docs 59 & 70-72, respectively). Ettari's expected testimony was noticed to include Ettari's interview with plaintiff, Ettari's experience and education in the field of engineering, and Ettari's December 1, 2018 inspection of the premises with plaintiff. Ettari's engineering report, dated July 30, 2019 (Ettari's report), was annexed to the expert notice. Ettari issued a supplemental engineering report dated September 10, 2019 (Ettari's supplemental report) (collectively, the 2019 Ettari reports). Marsan attaches

excerpts of Ettari's supplemental report and plaintiff attaches the entire report (Docs 60 and 73, respectively).

Contentions: Marsan's Motion (Motion Seq. No. 002)

Marsan's Moving Papers

The gravamen of Marsan's motion is that as plaintiff testified during his 2020 deposition that he was unable to identify the defect that caused his accident, he cannot demonstrate proximate cause, and, pursuant to a long, consistent line of New York appellate authority, Marsan accordingly is entitled to summary judgment dismissing plaintiff's claim.

In support, Marsan points to the following:

"Q. Why do you think you fell?

Plaintiff's counsel: Objection.

You can answer.

A. I don't know why I fell."

(Plaintiff's 2020 deposition, at 80, lines 2-5) (the cause question and answer).

Marsan asserts that "Duino either recognized that his own misstep was the true cause of the fall and (to his credit) could not bring himself to lie under oath, or he truly does not know why he fell" (Memorandum of Law in Support of Defendant Stephen Marsan's Motion for Summary Judgment [supporting memo], Doc 62, at 2). "Either way, where, as here, the plaintiff himself cannot pinpoint the negligence of the defendant as the cause of his fall, no reasonable jury could find in favor of the plaintiff" (*id.* at 2-3). Marsan asserts that plaintiff's inability to identify the cause of his fall dooms his claim.

Additionally, Marsan argues that as plaintiff could not reasonably identify the cause of the accident, the alleged staircase or premises defects asserted by plaintiff's expert or otherwise asserted by plaintiff cannot salvage his case. Further, the alleged defects fail as a matter of law as they are based on inapplicable regulations or facts that are wholly contradicted by plaintiff's

deposition testimony, primarily referencing certain testimony from plaintiff's 2020 deposition. Marsan additionally argues that Ettari's citations to various administrative regulations concerning tread height and depth, the necessity of handrails, and lighting requirements, are inapplicable and do not apply as a matter of law.

Marsan's related or additional assertions or arguments include the following. Plaintiff fell because of a misstep and his fall was not connected to any supposed defect. Plaintiff twice had walked up and down the staircase and acknowledged at his deposition that the staircase was narrow, old and steep and that he wanted to be careful and watch where he was going. The lease did not obligate Marsan to "incur or perform any extraordinary or structural repairs to the Townhouse" (supporting memo at 4). CEM had the right of reentry to make repairs or alterations of the premises. It is not disputed that neither Marsan nor CEM is responsible for the previous renovation of the premises or the construction of the staircase.

Marsan further argues that "Ettari opines that only *after* Duino began to fall did the absence of a handrail (or any of the other alleged deficiencies) have any impact, noting: 'As [Duino] fell, he was unable to regain his stability as a result of several factors, including the lack of a Handrail along the Top Five Treads of the Stairway, the excessive Running Slope of the Top Tread ... and the failure of the Treads to have a suitable Coefficient of Friction'" [citing the 2019 supplemental report at 4). Marsan then contends that "Duino himself does not purport to claim that the coefficient of friction, tread depth, or stairwell lighting caused the fall" (supporting memo at 9).

Additionally, Marsan claims lack of notice. He asserts that while he testified that the steps were old and slippery, he also asserts that he testified there were no complaints and that no prior accident occurred. He contends that Duino's accident "was the first case of anyone falling

on the staircase as Marsan testified that he was ‘not aware of anyone else slipping and tripping on that staircase’ [citing the transcript at 45:20-24], nor had anyone complained about the condition of the staircase [*id.* at 45:25-46:6 (supporting memo at 7)]. The court notes that the transcript reads as follows:

“Q. From the date you moved in until the date of Tony’s [Duino’s] accident, are you aware of anyone else slipping or tripping on that staircase?”

[CEM’s counsel] Objection.

A. Not that I know of.

Q. Do you recall during that same time period having any conversations with anyone who complained about the condition of that staircase, specifically the top two steps?”

A. Before this accident I don’t believe so, I don’t remember.”

(Doc 55, at 45, line 20 to 46, line 6).

Marsan also points to Duino’s deposition testimony, primarily from his 2020 deposition. While the lighting was dim, he had enough light to see the staircase. Plaintiff did not mention to his friends visiting him at the hospital after the accident that Marsan or CEM was to blame for his fall. In September 2018 a friend recommended he speak with a lawyer and his friend referred him. Plaintiff testified at his deposition that he had not observed that the staircase did not have a handrail until a friend informed him which “actually made [Duino] think, wow, that’s why I fell down that stairs” (citing plaintiff’s 2020 deposition at 84:4-6). Marsan additionally appears to attribute Duino’s accident to the drinking of alcoholic beverages by the group, which included Duino, that met for and had dinner at the premises and thereafter attended a jazz bar. Upon Duino’s return to the premises, he entered the premises at the main level and began to descend the townhouse’s interior staircase which led to the garden level (and thereafter to the subbasement level) to retrieve a guitar Marsan had gifted him.

Plaintiff's Opposing Papers

Plaintiff contends that contrary to Marsan's arguments, "plaintiff has presented ample evidence concerning exactly where, why and how [plaintiff] fell" (Doc 63, Affirmation in Opposition [opposing aff], at 5 ¶ 9). In support, plaintiff points to his deposition testimonies, particularly his 2019 deposition, and Ettari's 2019 reports. Additionally, plaintiff submits Ettari's affidavits attesting to these 2019 reports. Plaintiff also submits an additional report from Ettari, in affidavit form, consisting of 17 pages and sworn to on August 20, 2020 (2020 Ettari report) (Doc 74).

In addition to asserting that as counsel objected to the cause question Marsan cannot use the answer, plaintiff submits a two page affidavit addressing his response (plaintiff affidavit). There, he asserts that he gave his response to the cause question because he "was caused to fall by many different factors/defects which were present on the day of the accident which rendered the step and staircase unsafe and a trap" (Doc 78 at 1 ¶ 4). Plaintiff states that the defects, present on the day of the accident and addressed in the Ettari reports, "include that the subject step was sloped, the depth of the step was too short, the risers were too high and of different heights, the step was slippery, there were no handrails and the lighting was inadequate" (*id.*).

As to Marsan's argument that neither he nor CEM were responsible for the construction or reconstruction of the staircase, plaintiff points out that Marsan removed the carpeting and had the staircase painted. Relying on the expert reports, plaintiff argues that Marsan and CEM's actions "greatly exacerbated the dangerous conditions that were present on the staircase on the date of the accident" (opposing aff at 5, ¶ 10). Plaintiff identifies these conditions as "the sloped step, the missing handrail, the short depth of the subject step and the inadequate lighting" (*id.*). Plaintiff argues that defendants had actual and constructive notice of the defects, as they "are

visible to anyone observing the staircase and step” (*id.*). Plaintiff also points out that the complaint asserted two causes of action: one based on common law and one based on violation of statutes/codes/ordinances. Accordingly, even were certain building code sections not applicable as argued by Marsan, the negligence action remains viable for determination by the jury.

Additionally, plaintiff argues that the cases relied upon by Marson are distinguishable from this case, as here plaintiff does set forth his prima facie case and factual issues remain for jury determination. In distinguishing Marson’s cases, plaintiff contends that their facts and reasoning are not applicable to the case at bar. Here, plaintiff remembered and testified to the surrounding events and how and where he fell, and plaintiff and Ettari identified the numerous defects in the steps and stairway and the dim lighting. The defects of the stairs and their dangerous condition are apparent from a review of the photographs marked as deposition exhibits. Plaintiff contends that in contrast to Marsan’s cited cases, the case at bar is not based on rank speculation. Rather, “the facts clearly support the plaintiff’s claim that he was caused to slip and fall due to the many defects present on the step in question” (opposing aff at 23, ¶ 30).

Plaintiff relies on both of his deposition transcripts, and points to, among other testimony, the following from his 2019 deposition. A handrail was not present on the staircase. It was dark when plaintiff fell down the staircase and the lighting was dim. As plaintiff began to descend the staircase, he “took one step with [his] left foot to go to the first step and started falling from there” (plaintiff’s 2019 deposition, at 77, lines 20-22). He stepped off the landing and his left heel clipped the first step. His sneaker did not catch on anything. When asked “Was anything slippery when you took that step, to your knowledge?” (*id.* at 80, lines 24-25), plaintiff answered that he “never had got traction. [His] heel hit the step and it just kept going” (*id.* at 81, lines 2-3).

He also testified at his 2019 deposition that he “was not able to put [his] entire foot on the step. It was just like the back of [his] heel (*id.* at 81, lines 18-20). When the back of plaintiff’s heel connected with the step, his heel slipped off and he fell; “[i]t wasn’t enough to hold [him] and [he] skidded off” (*id.* at 82, lines 6-7). Plaintiff also testified that when the accident occurred, “he reached out to try to grab anything and like to hold [himself] but then [he] just kind of went” (*id.* at 82, lines 16-18.) Plaintiff marked on the photograph introduced as a deposition exhibit where he put his left foot as he was descending.

Plaintiff also points to his 2020 deposition testimony, including the following. He thought to himself that the stairs were really steep. He was looking down at his foot where he was stepping. He agreed with the 2019 deposition testimony he gave regarding his accident as read to him by Marsan’s counsel. When Marsan’s counsel asked: “Why not put your entire foot on the stair as opposed to just your heel” (*id.* at 69, lines 23-25) plaintiff answered “I’m looking down. I take the step, where I’m expecting that step to be because you can see the steps, and my left heel clipped the step” (*id.* at 70, lines 3-6). Plaintiff testified that while he “was falling” he “reached out to grab something” but he “couldn’t grab anything” (*id.* at 83, line 13 and lines 6-7).

Additionally, plaintiff extensively cites the 2019 Ettari reports, which noted or included Ettari’s various measurements, the stairs’ defects, and Ettari’s opinions and conclusions. Included in these references are Ettari’s opinions regarding: 1) the stair risers, treads, and combination of tread depth and rise which he found to be deficient pursuant to the applicable code; 2) the absence of a handrail; 3) the coefficient of friction, which he found to be contrary to applicable standards in effect; 4) the cross slope of the top five steps, noting that the subject step had a cross slope of 6.3 % making the tread very dangerous; and 5) the lighting, which Ettari found did not meet the applicable code’s requirements.

Plaintiff also points other sections of Ettari's 2019 reports, including Ettari's opinion that the owner failed to comply with Section 28.301.1 of the New York City Building Code, regarding, *inter alia*, the owner's general obligations to maintain the building and all parts of it in a safe condition and for the building to be maintained in good working order. Plaintiff also points to Ettari's opinion that although plaintiff reached for a handrail to stabilize himself, the subject staircase did not have handrails and thus failed to comply with Section C26-292.0(1) (1) of the 1938 Building Code that requires exit stairs to have handrails on both sides.

Additionally, plaintiff points to Ettari's 2020 report. His opinions, which he states are based on his cited data and to a reasonable degree of engineering and construction certainty, include the following: (1) "even if" the stairway "is not a Required Interior Stairway, it still must afford a reasonable amount of safety to those who use it" (Doc 74, at 16 ¶ 42); and (2) the staircase "failed to conform to the standards provided" on the 2008 design plans for the premises renovations and as promulgated in the "Published Generally Accepted Standards for the construction of Stairways" (*id.*). Ettari also opines that plaintiff's injury occurred because of: (1) defendants' failure "to construct and/or refurbish the subject Stairway such that it complied with all of the requirements of the Published Generally Accepted Standards and Texts for the construction of Stairways" (*id.* at 17); (2) the owner's failure to maintain the stairway in compliance with the "Published Generally Accepted Standards which were in existence at the time the Stairways was constructed, installed, and/or refurbished" (*id.*), and (3) the defendants' failure to construct and/or refurbish the stairway to comply with the requirements of the Design Plans.

Plaintiff also points to Marsan's deposition testimony that: Marsan removed the carpeting because he did not like it; he had the steps repainted; there was no handrail on the staircase when

he moved in; he told anybody taking the staircase “to be careful” because “it was [a] very steep, old staircase” (Doc 75, at 46, lines 10-11 and 14-15); in the photograph marked as a deposition exhibit the left hand side of the step seemed higher than the right hand side of the step; Marsan’s wife complained about the staircases because they were old stairs and the staircase was very steep; the steps could be slippery if one descended without wearing shoes.

Additionally, plaintiff argues that Marsan did not meet his prima facie burden of demonstrating that he did not have actual or constructive notice of the defective stairway. The deposition photographs show the various alleged defects, and Marsan testified that the staircase was very steep. Additionally, plaintiff asserts that even assuming Marsan is correct that plaintiff fell because of his misstep, Marsan is nonetheless liable, as when plaintiff fell he reached out for something to grab but there was no handrail on either side and “as a result he continued to fall suffering severe injuries” (opposing aff at 27 ¶ 40).

Marsan’s Reply Papers

Marsan contends that plaintiff failed to set forth any genuine issue of disputed material fact that defeats Marsan showing, and plaintiff’s attempts to do so are belied by the evidence and case law. He argues that plaintiff’s affidavit and the expert reports are shams and a transparent attempt to avoid summary judgment, as they contradict plaintiff’s deposition testimony that he does not know what caused him to fall and are contrary to plaintiff’s other testimony. For example, plaintiff testified that the light was sufficient for him to see the step, and, thus, plaintiff’s assertion that inadequate lighting caused the accident is insufficient to create a triable issue of fact.

Further, Marsan asserts that plaintiff’s conclusory affidavit ignores his deposition testimony to the contrary, including that plaintiff “mis-stepped (no reasonable person walks

down stairs entirely on his heels), and instead throws everything and the ‘kitchen sink’ as the purported cause of the fall” (Doc 97, Reply Memorandum of Law [Reply Memo], at 6). Marsan also argues that “plaintiff’s scattershot approach amounts to the kind of ‘rank speculation’” which has been rejected by the First Department (*id.* at 6). Additionally, Marsan asserts that plaintiff’s affidavit and Ettari’s 2020 report “unintentionally prove Marsan’s point; Duino does not know if any of the alleged defects and/or conditions actually caused his fall, he has only identified where he fell and left it to his expert to guess why” (*id.* at 7). Further, the Ettari reports are riddled with hearsay, espouse new theories, lack adequate foundation and cannot be used to fill in the gaps and absence of proximate cause.

Additionally, Marsan reiterates or supplements his moving arguments, including that: (1) the conditions or defects which Ettari asserts caused plaintiff’s fall are not supported by plaintiff’s deposition testimony and are inapplicable as a matter of law; (2) Marsan, as tenant, was not obligated by the Lease to make repairs to the staircase or add handrails; and (3) Marsan was not on notice of any alleged defect.

CEM’s Cross Motion

CEM references and incorporates Marsan’s moving and reply papers, and, without the support of any additional exhibit(s) or affidavit(s), argues in its cross motion that it too is entitled to summary judgment “because Duino is unable to identify the defect that caused his injury” (Doc 112, Memorandum of Law in Support of Cross Motion, at 1). CEM addresses plaintiff’s assertions regarding the staircase or step’s alleged defects and argues that plaintiff’s admission that he does not know why he fell demonstrates that his fall was not a result of any alleged defect. Additionally, CEM argues that it is not disputed that it did not construct the townhouse in 1885 and did not renovate it in or about 2008, and, therefore, did not design the steps in a

dangerous or defective manner. CEM also argues that Duino's attempts to create an issue of fact are unsuccessful, including his argument that the removal of the carpet from and repainting of the staircase greatly exacerbated the dangerous conditions. Not only are plaintiff's arguments contradicted by his deposition testimony but they also are speculative and conclusory.

In opposition, plaintiff adopts and relies upon his opposing papers to Marsan's motion. Plaintiff further points out that CEM failed to present any expert testimony and Ettari's opinion remains unchallenged. Plaintiff also argues that the cases cited by CEM are distinguishable. Further, plaintiff raises other arguments or restates certain arguments he previously made. These include: that plaintiff did testify how he fell and identified certain defects of the stairs and staircase; Ettari identifies numerous defects which are also evident from the photographs introduced as exhibits at the deposition(s) and plaintiff's deposition testimonies; certain defects which resulted in the slippery and dangerous condition of the stairs became evident once Ettari measured and performed tests on the steps and staircase; plaintiff's deposition testimony that there was enough light to see the actual staircase "does not then mean that the plaintiff could adequately see the defects on the staircase" (Doc 113, affirmation in opposition to cross motion, ¶ 20).

In its reply, CEM first asserts that contrary to plaintiff's assertion, it did challenge Ettari's opinion in its moving papers as it "joined in and adopted" Marsan's arguments, including those as to the Ettari reports (Doc 115, Reply Memorandum of Law in Support of Cross Motion, at 1). Addressing various assertions by plaintiff, CEM contends the following. Ettari's 2020 report should be disregarded in its entirety, as it relies entirely on speculation and purports to give an opinion on purely legal issues such as whether a code section was violated and proximate cause. Additionally, because plaintiff attributed his accident to multiple causes, he cannot pinpoint the

actual proximate cause, and any such determination. Further, the expert opinion should be disregarded as it is not the expert's role to decide legal issues such as whether a building code section was violated and the proximate cause of plaintiff's accident.

Summary Judgment

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"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, 471 [1st Dept 2012] [internal quotation marks and citations omitted]). *See also Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 (1st Dept 2013); *Martorel v Tower Gardens, Inc.*, 74 AD3d 651, 652 (1st Dept 2010); *Haracz v Cee Jay, Inc.*, 74 AD3d 1145, 1146 (2d Dept 2010).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). "On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d

499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the “drastic remedy” of summary judgment is “issue - finding,” not “issue - determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

Discussion

Prior to addressing Marsan’s and CEM’s main argument that summary judgment should be granted because plaintiff at his deposition testified that he does not know why he fell, the court first addresses the other explicit or implicit arguments defendants assert in support of their motions. The following is a restatement of some of those arguments. The accident occurred because plaintiff drank one or more alcoholic beverages and not because of defendants’ negligence. As plaintiff did not tell visitors at the hospital that he blames the defendants for his accident, his claim of negligence lacks merit. As plaintiff twice went up and down the staircase the day of his accident and did not fall, there were no defects, he was aware of the condition of the staircase and steps, and his accident was the result of his own action or inaction. Defendants’ reading of plaintiff’s expert reports and the deposition testimonies demonstrate that plaintiff’s accident was because of a misstep or plaintiff using only his heels to descend the staircase, and not because of any defect in the stairway or step. Plaintiff’s expert’s identification of more than one defect of the staircase or step proves that plaintiff cannot identify the cause of his accident. The defects asserted by plaintiff’s expert are contradicted by plaintiff’s deposition testimony and are not applicable as a matter of law.

As asserted in these papers, however, these and similar arguments go to credibility, evidence of a competing cause of plaintiff’s fall, weight of the evidence, comparative fault, or

whether plaintiff can ultimately prove his case at trial. These issues generally, and specifically here, do not lend themselves to summary judgment.

Identifying the Cause of the Accident

Turning now to the gravamen of defendants' papers, defendants contend that as plaintiff testified during his deposition that he does not know why he fell, plaintiff cannot establish the proximate cause of his fall without speculation and, accordingly, defendants should be granted summary judgment. Plaintiff disagrees with defendants' premise, analysis, and conclusion.

Summary judgment is warranted where a plaintiff "did not remember or know why he fell, if indeed he fell on the staircase itself" as "[a]bsent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing" (*Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 [1st Dept 2004]). "It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011] [internal citations omitted]).

Generally, affidavits which contradict plaintiff's prior deposition testimony are insufficient to defeat defendants' prima facie showing that plaintiff did not know the cause of their accident. Where a plaintiff sustained injuries in a slip and fall, "her affidavit that she slipped on ice on the sidewalk contradicted her earlier deposition testimony that she did not know what she slipped on, and this created only a feigned issue of fact, which was insufficient to defeat defendant's motion" (*Polanco v Durgaj*, 202 AD3d 638, 638 [1st Dept 2022] [internal citations omitted]). So too plaintiff, who was unable at his deposition to identify what caused him to slip on the step, failed to defeat the summary judgment motion by submitting in opposition affidavits from two tenants who alleged a general wetness on the stairs following a rainfall (*Caraballo v*

Kingsbridge Apt. Corp., 59 AD3d 270 [1st Dept 2009]). In *Telfeyan v City of New York*, 40 AD3d 372, 373 (1st Dept 2007), the First Department held that “[a]ffidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment” (*id.* at 373 [internal quotation marks and citations omitted]).

Similarly, expert affidavits that contradict plaintiff’s deposition testimony or fail to demonstrate that the defects caused the accident are generally insufficient to defeat defendants’ prima facie showing. In *Alston v Zabar’s & Co., Inc.* (92 AD3d 553 [1st Dept 2012]), defendants met their initial summary judgment burden by submitting plaintiff’s deposition testimony that she did not observe anything on the floor prior or subsequent to her fall and did not know what caused her to fall. While plaintiff introduced an expert engineer’s affidavit stating that plaintiff’s fall was caused by the combination of the floor’s slope and the coefficient of friction on parts of the floor that lacked anti-slip strips, plaintiff failed to demonstrate the existence of a triable fact issue, as her expert did not establish that prior to her fall plaintiff walked on the area lacking the strips.

“Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate” (*Kane*, 4 AD3d at 190 [internal citations omitted]). See *Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 (1st Dept 2007) (while the bill of particulars alleged plaintiff’s fall was due to a rise in the door’s saddle, defendant was entitled to summary judgment, as plaintiff testified at her deposition that she did not know why she fell and opposing affidavits “would require a jury to speculate as to the existence of the alleged defective door

saddle at the time of the accident” [*id.* at 358 [internal citation omitted]]. See also *Batista v New York City Tr. Auth.*, 66 AD3d 433, 434 (1st Dept 2009) (“The assertion of plaintiff’s expert that there were defects in the staircase on which plaintiff fell is insufficient to raise an issue of fact as to proximate cause, because there is no evidence connecting plaintiff’s fall to those defects” (*id.* at 434 [internal citations omitted])).

The First Department has also held, however, that in certain circumstances summary judgment is not warranted even if a plaintiff at their deposition did not identify the cause of their fall. In *Kovach v PJA, LLC* (128 AD3d 445, 445 [1st Dept 2015]), the First Department found that to avoid summary judgment, a plaintiff “was not required to prove precisely which particular defect” caused her to fall [internal quotation marks and citation omitted]. In *Rodriguez v Leggett Holdings, LLC* (96 AD3d 555 [1st Dept 2012]), the plaintiff was apparently unable at his deposition to identify the cause of his fall. The court found, however, that when the affidavit of his expert engineer was “read in combination with plaintiff’s [other deposition] testimony” (*id.* at 556), plaintiff sufficiently raised “triable issues as to whether defective conditions at the identified location caused plaintiff to fall” (*id.* [internal citation omitted]). That affidavit provided that when the expert inspected the subject stairs, he “found a variety of defects and building code violations” (*id.* at 556), and plaintiff testified at his deposition that “the staircase was bad” and identified on the photograph the spot where he slipped (*id.*). “[I]t is enough to avoid summary judgment that [plaintiff] was able to identify the site of his fall, and his expert was subsequently able to identify defective conditions” (*id.*). Moreover, the perceived deficiencies in the expert’s affidavit, including that he failed to identify specific building code provisions that were violated, did not warrant summary judgment. “The affidavit specified the measurements he took, the problems he observed, and the nature of the violations and defective

conditions he claimed, and that is all that is needed to oppose summary judgment” (*id.* at 556-557).

Similarly, in *Babich v R.G.T. Rest. Corp.* (75 AD3d 439 [1st Dept 2010]), the court denied summary judgment to the tenant restaurant, finding that “the injured plaintiff’s testimony that she slipped on the top step of the subject stairway, coupled with her expert’s testimony of the slippery condition of such steps due to worn-off treads, provided sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition” (*id.* at 440-441 [internal citations omitted]).

Applying these principles, the court finds that defendants made a prima facie showing by pointing to the cause question and answer in plaintiff’s 2020 deposition testimony. Plaintiff, however, defeated that showing. The combination of plaintiff’s other testimony in his 2019 and 2020 depositions and his 2019 and 2020 expert reports, are sufficient to defeat defendants’ motion, particularly when such a showing and reasonable inferences therefrom are viewed in the light most favorable to plaintiff. Defendants’ replies fail to sufficiently rebut plaintiff’s showing.

To be sure, portions of the 2019 and 2020 expert reports and plaintiff’s affidavit contradict plaintiff’s deposition testimonies. And, were these contradicted factual assertions the only issues of fact asserted by plaintiff in his opposing papers, then plaintiff would have failed to demonstrate the existence of remaining genuine issues of fact. For example, plaintiff testified at his depositions that he did see the stairs, and therefore the allegation that inadequate lighting caused plaintiff’s accident is insufficient. So too plaintiff’s reliance on the building code regulation that a handrail is required for an interior exit stairway is misplaced, as the situs of the staircase where plaintiff fell was not an interior exit stairwell and the section is therefore not applicable. Similarly, a triable issue of fact as to these defendants’ negligence is not presented

when plaintiff asserts that plaintiff's accident was caused by any alleged non-compliance with the building renovation plans that were performed by another entity or individual years prior to CEM's purchase and Marsan's leasing of the premises. But just as, under these circumstances, this motion's determination does not rest solely on the isolated cause question and answer, so too defendants have not demonstrated their entitlement to summary judgment because certain of the defects set forth in the expert reports are inapplicable as a matter of fact or law. Nor does plaintiff's assertion of more than one cause for the accident equate to an inability, as a matter of law, for plaintiff at trial to establish that defendants' negligence caused his accident. There can be more than one proximate cause.

Further, and contrary to defendants' assertions, defendants did not establish their moving papers that there are no remaining issues of fact as to constructive or actual notice. For purposes of this motion and cross motion, the actual deposition testimony that defendants rely upon does not sufficiently meet defendants' prima facie burden of demonstrating the lack of a factual issue as to notice, particularly in the absence of an affidavit by Marsan or CEM on this issue.

Conclusion

Accordingly, it is

ORDERED that the motion of defendant Stephen Marsan for summary judgment (motion sequence number 002) is denied; and it is further

ORDERED that the cross motion of CEM West Village, Inc. for summary judgment is denied.

7/15/2022
DATE


SHLOMO HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER