SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

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FENG CHEN

Plaintiff,

- v -

FORTY SEVENTH FIFTH COMPANY LLC,

Defendant.

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INDEX NO. 152279/2020

MOTION DATE 04/18/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

In this premises liability action, Defendant Forty Seventh Fifth Company LLC ("Defendant") moves for an Order dismissing Plaintiff Feng Chen's ("Plaintiff") Verified Complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

According to the Verified Complaint, Plaintiff asserts that he was injured on April 21, 2017 as a result of an unsafe work condition in a building owned by Defendant (NYSCEF Doc. 1). He purportedly sustained injury when he a "safety door" fell or collapsed on him. Plaintiff asserts that Defendant had notice of the "defective condition" that it created.

Defendant contends that there are no material issues of fact because there is no evidence that it caused or created the open-door condition that purportedly injured Plaintiff. It further asserts that there is no evidence that it had actual notice of the alleged condition. Defendant supports this by submitting the affidavit of Carl Klein, the building manager. In his affidavit he states that he did not open the door in question, which leads to a pipe closet, did not access the pipe closet on that date, and was not aware of the door being in an opened position. He further states that employees in the building were not instructed to open the door, and that staff

conducted continuous inspections of the premises, including the stairway where the incident occurred (NYSCEF Doc. 23).

In an affirmation, Plaintiff's counsel states that this application must be denied because only limited discovery has been conducted. They have served one combined demand which they claim has been rejected. They contend that the facts related to who created the dangerous condition are within the exclusive control of Defendant and that they cannot "verify the veracity" of Defendant's alleged facts supporting their application.

In reply, Defendant points to its response to the combined demand which does list one additional nonparty witness and indicates that they are not aware of any other witnesses. They submit an affidavit from that nonparty, Angelo Petti (NYSCEF Doc. 32). In his affidavit, Petti states that he is employed by the building and that he is familiar with the pipe closet. He was not aware of an instance on or about the date of the purported accident where the closet door was left open and unattended. The closet in question contains water valves and he indicates that as the Chief Engineer only he had authority to shut off the water and, upon his direction, the staff might be directed to shut off the water. The affidavit states that he did not open the pipe closet or direct that it be open at that time nor was he made aware of any complaints that the door was open. He has never received an open closet report prior to the incident and was not aware of any problems in or about April 2017.

On a motion for summary judgment, the moving party "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] [internal citations omitted]). After the movant makes this prima facie showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact" such that trial of the action is required (*id.*). The Court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous or defective condition or did not have actual or constructive knowledge of the condition (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012]).

Defendant through the submission of affidavits from the building manager and chief engineer has set forth facts which demonstrate that it did not have actual or constructive knowledge of the condition. Both stated that they had not opened the door or instructed any staff to open the door. They also indicate that that they did not receive notice that the door was open. Plaintiff submits only an affirmation of counsel in opposition thus providing no evidentiary proof to establish the existence of a material issue of fact.

Plaintiff has not set forth sufficient facts to warrant denial of the motion as premature. "Should it appear from affidavits submitted in opposition to the motion that facts essential justify opposition may exist but cannot be stated, the court may deny the motion may order a continuance to permit affidavits to be obtained or disclosure to be had . . ." CPLR 3212(f). Claims in opposition must be supported by something other than "mere hope or conjecture" (*Voluto Venutres LLC v Jenkins Gilchrist Parker Chapin LLP*, 144 AD3d 557 [1st Dept 2007], citing *Neryaev v Solon*, 6 AD3d 510 [1st Dept 2004]).

Here, Plaintiff submits no affidavits in opposition to the motion. Although the attorney's affirmation states that additional discovery must be done, that claim is not supported based on the affidavits and discovery submitted by Defendant in opposition. Plaintiff has further failed to demonstrate the necessary diligence required to oppose the motion (*see Cruz v Otis Elevator Co.*, 238 AD2d 540 [1st Dept 1997]). Accordingly, Defendant's motion is granted and it hereby:

ORDERED that this action is dismissed.

All matters not decided herein are hereby denied.

6/5/2023
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE