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| Youngster v Park E. Synagogue Congregation |
| 2023 NY Slip Op 32523(U) |
| July 24, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 160278/2021 |
| Judge: Lori S. Sattler |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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AYELET YOUNGSTER

Plaintiff,

- v -

PARK EAST SYNAGOGUE CONGREGATION,

Defendant.

INDEX NO. 160278/2021

MOTION DATE 05/16/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 27

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

In this premises liability action, Defendant Park East Synagogue Congregation (“Defendant”) moves for a pre-examination before trial (“EBT”) Order dismissing Plaintiff Ayelet Youngster’s (“Plaintiff”) Complaint and all claims against it pursuant to CPLR 3212 or CPLR 3211(a)(7). Plaintiff opposes the motion.

This is a personal injury action in which Plaintiff alleges that on August 6, 2021, she tripped and fell due to a hazardous condition on a stairwell at the Park East Synagogue (“premises”) (NYSCEF Doc. 1). In the Verified Bill of Particulars (NYSCEF Doc. 10), she asserts that she tripped and fell on steps located in Defendant’s building because the stairwell was not properly lit. She states that the alleged incident occurred at 7:00 pm on a staircase accessed through the East 68th Street entrance of the premises, leading to the women’s section for services.

Defendant contends that Plaintiff has failed to raise an issue of fact that would require a trial of this matter. It points to affidavits submitted with its papers from Jason Smith, Security

Manager at the synagogue, and its engineering expert, Kelly D. Scott, P.E., who each claim there was adequate lighting at the synagogue and that there were no dangerous or defective condition that existed in the stairwell at the time of the incident. Accordingly, Defendant asserts that summary judgment must be granted. In the alternative, it seeks dismissal under CPLR 3211(a)(7) because it contends Plaintiff fails to state a cause of action.

In an affidavit which Defendant claims is improper due to the failure to designate where it was signed, Plaintiff contends that the incident occurred at 7:00 pm. She further asserts that she fell because there “was no illumination in the extremely dark staircase . . . causing me to be unable to see observe [sic] the stairs, lose my balance, and fall down the stairs” (NYSCEF Doc. 20, ¶ 3, 4). In an affirmation of counsel, Plaintiff contends that Defendant’s affiants did not observe the fall and did not inspect the area until at least 40 minutes later, suggesting that they did not see the conditions at the actual time of the incident.

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 39 NY2d 557, 562 [1980]). Failure of the movant to make this showing requires denial of the motion, regardless of the sufficiency of opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If the movant makes this initial showing, the burden shifts to the opposing party which must then produce evidentiary proof in admissible form to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendant fails to demonstrate entitlement to pre-EBT summary judgment. In his affidavit, Jason Smith states that the synagogue did not receive complaints about the overhead

light fixtures or lighting conditions where Plaintiff fell prior to the incident (NYSCEF Doc. 14). In addition, he attests to the fact that Plaintiff and her family left the synagogue at 7:37 pm and that he inspected the stairs between that time and 8:00 pm. The light fixtures had to be manually turned on and off and were on at the time.

Kelly Scott, an engineering consultant hired by Defendant, also inspected the stairs in question (NYSCEF Doc. 15). At the time of his inspection on March 3, 2022, all elements of the lower flight of stairs where the purported incident took place were maintained in good condition and were safe for the intended use. He further measured the illumination level and asserts that the illumination and the lower flight of stairs conform to the 2014 New York City Building Code.

Defendant's motion for summary judgment filed before the deposition of witnesses is denied. Summary judgment prior to the deposition of the movant is premature (*Barreto v City of New York*, 194 AD3d 563, 564 [1st Dept 2021], quoting *Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]). The motion asserting that no material issues of fact exist is based in part on an affidavit of its own witness, who has not yet been deposed. An examination of, *inter alia*, Jason Smith might lead to additional information and discovery which Plaintiff has not had the ability to obtain (*Cannon v New York City Police Dept.*, 104 AD3d 454 [1st Dept 2013]). Additionally, the affidavits Defendant presents fail to eliminate all issues of fact as to the condition of the stairway at the time of the incident and as to notice.

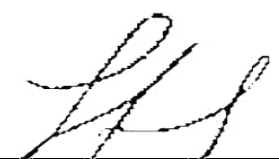
When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable

legal theory” (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). “A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law” (*id.*). Upon a review of the Complaint and accepting the allegations therein as true, the pleading does set forth a cause of action for negligence. Plaintiff contends that she fell due to poor illumination in a stairwell thus clearly setting forth a premises liability claim. Accordingly, that branch of Defendant’s motion seeking dismissal pursuant to CPLR 3211(a)(7) is denied.

Accordingly, Defendant’s motion is denied in its entirety. A Status Conference shall be held on September 19, 2023 at 9:30 a.m. at 60 Centre Street, Room 212.

All matters not decided herein are hereby denied.

This constitutes the Decision and Order of the Court.

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| <u>7/24/2023</u> DATE | | |  _____ LORI S. SATTLER, J.S.C. |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> GRANTED | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> SUBMIT ORDER | <input type="checkbox"/> OTHER |
| | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |