SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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PHYLLIS FEINBERG and BERNARD FEINBERG,

Plaintiffs,

- v -

72ND TENANTS CORPORATION, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, MICHAEL A. NATH, NANCY H. COLES, MD, INDIVIDUALLY, and NANCY H. COLES, MD, D/B/A NANCY H. COLES, MD PLLC,

Defendants.

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INDEX NO. 162435/2019

MOTION DATE 07/11/2023, 07/11/2023

MOTION SEQ. NO. (MS) 002 003

DECISION + ORDER ON MOTION

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72ND TENANTS CORPORATION, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, and MICHAEL NATH

Third-Party Plaintiffs,

-against-

NANCY H. COLES, MD PLLC

Third-Party Defendant.

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Third-Party
Index No. 595287/2020

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 101, 103, 104, 105, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 136, 137

were read on this motion to/for JUDGMENT - SUMMARY

Phyllis Feinberg (plaintiff) sustained personal injuries on June 11, 2019, when she fell at the offices of Nancy H. Coles, M.D., located in the lobby of the building at 125 East 72nd Street in the city, state, and county of New York. Plaintiff seeks to recover damages from defendants, 72nd Tenants Corporation, the owner/lessor of the building; Brown Harris Stevens Residential Management, LLC

(BHS), the building's managing company; and Michael Nath, the managing agent (together, the building defendants). Plaintiff's husband, Bernard Feinberg, joins plaintiff for a loss of consortium claim. The building defendants impleaded third-party defendant Nancy H. Coles, MD PLLC (Coles PLLC). The building defendants and Coles PLLC cross claim against each other for indemnification to the extent of their liability to plaintiffs. Plaintiff subsequently amended her complaint to add as defendants Nancy H. Coles, M.D., individually (Dr. Coles) and Nancy H. Coles, MD PLLC (Coles PLLC, together with Dr. Coles, the Coles defendants).

The Coles defendants (MS 002) and the building defendants (MS 003) each move for summary judgment pursuant to CPLR 3212 to dismiss plaintiffs' direct case against them as well as their respective crossclaims. The Coles defendants also move for summary judgment dismissing the third-party plaintiff's third-party complaint. Plaintiffs oppose both motions seeking to dismiss their claims. The building defendants partially oppose the Coles defendants' motion on the duty to warn claim.

Facts

On June 11, 2019, plaintiff went to an ophthalmologist, Dr. Nancy Coles, for her eye examination appointment for a routine checkup (NYSCEF # 82 – Pltf's Dec 20, 2021 EBT Tr at 26:15-17). After her examination, plaintiff went to leave Dr. Coles' office. Plaintiff opened the door, stepped down, and closed the door. As she closed the door with right hand, she lost her balance and fell (*id.* at 30:13-20).

At her deposition held on November 9, 2021, plaintiff recounted her eye examination with Dr. Coles, her eye doctor for more than fifteen years (*id.* at 20). When asked about the incident, plaintiff testified that when she left Dr. Coles' office, she opened the door, stepped down, closed the door with her right hand, and lost her balance and "fell on [her] butt" (*id.* at 30:11-20). When "[she] stepped down, closing the door behind [her] . . . [and] lost her balance[,]" she was facing the lobby (*id.* at 30:21-14). A moment later, she fell (*id.* at 33:20-25). Plaintiff described the step area and consisting of "a couple of other steps" with no handrail or lighting (*id.* at 33:2-19). Plaintiff did not call out for help after she fell seeing no one around. She managed to get up and out of the building (*id.* at 36:16-37:17). She did not go back into Dr. Coles' office to seek help because "[she] just couldn't go up those steps." (*id.* at 37:18-38:05).

Dr. Nancy Coles testified that she had been in the subject office since June 1989 (NYSCEF # 85 at 20:5-7). Looking at the photograph of the step outside her office, Dr. Coles testified that the light in the step was to highlight the step and had been there since 1989 (*id.* at 20). Dr. Coles testified that the step was safe and well maintained by the building (*id.* at 35). Dr. Coles testified that there is nothing in her chart that indicates that she dilated plaintiff's eyes that day. But, she added, that the dilation of a patient's eyes would not affect that patient's ability to exit her office (*id* at 36). Dr. Coles vaguely recalled a number of years ago, a patient had

stumbled leaving the office (*id.* at 37). Her office did not have a warning sign of the step..

The building's superintendent, Dennis Campbell, also testified. Campbell was not present at the time of the incident but he wrote up an incident report a week or so later when plaintiff's husband and the property manage, Michael Nath, came into the building to talk about the incident. Nath told Campbell to do an incident report based on what plaintiff's husband said (NYSCEF # 86 at 13-15:18).

The Coles Defendants' Motion for Summary Judgment (MS002)

Plaintiffs allege that defendants owe plaintiff a duty to keep the premises in a safe condition or to warn her of any defects – the one step abutting the door to Dr. Coles' office in the lobby of the building.

The Coles defendants argue that they do not have any common law, statutory, or contractual duty to plaintiff because they do not own or control the property, nor did they create or cause the alleged defective condition, which was the step outside the office door (NYSCEF # 71 – MOL at 2-8). Plaintiff responds that defendants owe her a duty to keep the property in a reasonably safe condition (NYSCEF # 118 – pltf's MOL at 14). Plaintiff adds that since the Coles defendants were in possession of the office in the subject building, the Coles defendants had a duty to their invitees such as their patients (*id.*, ¶ 69). And even if the Coles defendants did not have a duty to maintain the area of the step outside the office, plaintiff proffers that the Coles defendants had a duty to inform her patients of the step since they had notice of that defect. The notice was Dr. Cole's vague recollection that another patient "stumbled leaving the office and then got up and walked away" which occurred "a number of years before [plaintiff's accident]" (NYSCEF # 118 at 6 citing NYSCEF # 85 at 36:15–37:2). Plaintiff proffers that whether the step is defective is a triable issue of fact. In reply, Dr. Coles points to the inconsistency of plaintiff's deposition testimony and affidavit testimony on plaintiff's inability to identify the cause and location of her fall, and argues that they had no duty to maintain the step (NYSCEF # 135 at 3-6).

The Building Defendants' Motion for Summary Judgment (MS003)

As for the building defendants' argument that the complaint should be dismissed as against them, the building defendants point to plaintiff's uncertainty as to why she lost her balance and did not recall tripping or slipping on anything (*id.* at 3-4 citing NYSCEF # 82 – pltf's tr at 38:6-12). The building defendants also points out that when plaintiff was shown a photograph at her deposition, which photograph depicted the doorway and entrance of Dr. Coles' office, plaintiff denied that it was the step where she fell (*id.* at 1). Plaintiff had testified that there were several steps. The building defendants claim that because plaintiff failed to identify the cause of her fall, her complaint should be dismissed (NYSCEF # 74 at 9-11).

The building defendants present an expert witness, George Pfreundschuh, a professional engineer, who, besides reviewing the pleadings and transcripts in this

case, also inspected the site of the incident (NYSCEF # 95, ¶ 7). Pfreundschuh described the step and door, and found the light color step to have two identifying dark-colored grip strips on the outer edge of the step. The step was 50 ½ inches wide and 13 ¾ inches deep (*id*, ¶'s 16, 17). Also, there was a handrail on the right (exiting) and a light encased in a plastic cover that was secure. The single step was safe for its purpose, and the door swinging inward to the office causes people to look outward to see the step before exiting. Pfreundschuh cited to several Building Codes to state that this single step does not constitute a stairway. Pfreundschuh opined that any step or stairway presents a hazard for users who do not exercise reasonable care for their safety. But, this single step was well maintained and was reasonably safe for its intended use (*id.*, ¶'s 43, 44)

Plaintiffs oppose the building defendants' motion, arguing, among other things, that plaintiff has sufficiently identified the cause and location of her fall in a post-deposition affidavit (NYSCEF # 107 at 14-16). The affidavit indicates that when plaintiff left the office, she closed the door with her right hand behind her while she was facing the lobby and standing on the step (NYSCEF # 115 – pltf's Apr 18, 2023 Aff, ¶ 7). Plaintiff noticed there was a light window inside the step with a bright light shining; she then moved to her left because she did not want to step on it (*id.*). As she moved aside, she attempted to reach out for a support but there was none, and as a result, she lost her balance and fell (*id.*). According to plaintiff, the light recessed in the step and the lack of a handrail on the left caused her fall (*id.*). Plaintiff's affidavit also states that she recognized the step where her accident occurred from the photograph depicting the entrance of Dr. Coles' office (*id.*, ¶ 10).

Plaintiffs further submit an affidavit of Joseph Farahnik, a registered and licensed professional engineer, as to the condition of the step (NYSCEF # 125). Farahnik asserts that the step was dangerous and defective for "(1) the lack of warning sign in the office . . . ; (2) the lack of a second handrail on the left side of the step; (3) the placement of the light causing an individual to step to the left side of the step; (4) high intensity of the thread light causing momentary visual disturbance; and (5) the design of the door swinging inward into the office occupying the right hand to close" (*id.*, ¶ 16). Farahnik further asserts that the above defects were the proximate cause of plaintiff's accident (*id.*, ¶ 18).

In reply, the building defendants argue that plaintiff's affidavit testimony should be disregarded because it directly contradicts her deposition testimony and provides no explanation for the contradiction (NYSCEF # 136 at 3-7). They also argue that plaintiff's mere identification of the location is not sufficient to defeat the motion for summary judgment (*id.* at 7-9).

Discussion

On a motion for summary judgment, the moving party must "make a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact" (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party makes this

initial showing, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]).

In a slip-and-fall action, a defendant is entitled to summary judgment when the defendant makes a prima facie demonstration that it neither created the dangerous condition nor had actual or constructive notice of its existence (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-32 [1st Dept 2015]). Alternatively, a defendant may show that the plaintiff provides testimony demonstrating the inability to identify the defect that caused the injury (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]).

Even viewing the evidence in a light most favorable to plaintiff, both sets of defendants met their burden of making a prima facie showing entitling them to summary judgment by submitting plaintiff's testimony that plaintiff was unable to identify the cause of her fall (*see id.*, 86 AD3d at 454-455 [finding that the injured plaintiff who "circled the defect in" a photograph of the accident site was "based on his recognition of the approximate location where he fell—not his recognition of the defect itself[ ]" as "the type of 'rank speculation' that generally warrants summary judgment dismissal"]; *see also Ellis v City of New York*, 188 AD3d 594, 594 [1st Dept 2020]). When asked at her deposition, plaintiff testified that she did not know why she lost her balance and fell (NYSCEF # 82 at 38:6-9). Moreover, plaintiff denied that she tripped or slipped on anything which might cause her fall (*id.* at 38:10-12).

While plaintiff claims that plaintiff in her affidavit specifically identified the cause of her fall (NYSCEF # 107, ¶ 68), this affidavit contradicted her earlier deposition testimony. Notably, plaintiff's affidavit, signed on April 18, 2023, was prepared as support for plaintiffs' opposition to the defendants' summary judgment motion – after defendants pointed in their motion filed on January 26, 2023, that plaintiff failed to identify the cause of her fall when she was deposed (on November 9, 2021) (NYSCEF # 74 at 9 – Defts' MOL; NYSCEF # 88 – pltf's tr). The contradiction between plaintiff's deposition and her testimony does not create an issue of fact to defeat defendants' motion (*see e.g. Mermelstein v E. Winds Co.*, 136 AD3d 505, 505 [1st Dept 2016] [holding that the plaintiff's affidavit testimony contradicting his deposition testimony where he stated that he did not know why he fell did not present a triable issue to defeat a motion for summary judgment]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007] [holding that affidavit testimony that is submitted after the defendant made the argument and that directly contradicts testimony previously given by the same witness, without any explanation accounting for the disparity, is insufficient to defeat a motion for summary judgment]).

Relying on *Ciorciari v New York City Dept. of Parks & Recreation* (2018 NY Slip Op 31877[U] [Sup Ct, New York County 2018]), plaintiffs alternatively argue that plaintiff's identification of the location of her fall, coupled with expert

testimony identifying a defective condition of the step is sufficient to survive a summary judgment motion, (NYSCEF # 107, ¶ 69). This argument is unavailing.

When shown the photo of the step, plaintiff testified that she "never saw that before" and denied that the step was the location of her fall (NYSCEF # 82 at 48-49). However, referencing the same photo in her subsequent affidavit, plaintiff stated that she recognized the step as the location of her fall (NYSCEF # 115, ¶ 10; NYSCEF # 108). Moreover, in her deposition, plaintiff gave several inaccurate descriptions about the step. She testified that "[i]t wasn't a single step. There were a couple of other steps," and also stated that there was no light on the step (*id.* at 33). Given the two versions, plaintiff's identification of where she fell is speculative (*see Smith v City of New York*, 91 AD3d 456, 456-57 [1st Dept 2012] [finding that because plaintiff testified that she had "no idea" how she tripped and fell and could not identify or mark on photographs the defective condition, the "jury would have to engage in impermissible speculation to determine the cause of the accident"]; *cf Dixon v Superior Discounts and Custom Muffler ex rel. Jones*, 118 AD3d 1487, 1488 [4th Dept 2014] [denying defendant's summary judgment motion as plaintiff identified where she fell as the immediate vicinity of an elevation differential in the pavement]).

Plaintiffs' expert stating that the step was defective is insufficient to raise a triable issue as the expert's assertion was conclusory and unsupported by reference to any specific, applicable standards or practice (NYSCEF # 125; *see Boatwright v New York City Tr. Auth.*, 304 AD2d 421, 421 [1st Dept 2003] [finding an expert affidavit to be no value since the expert's opinion was conclusory and was not supported by references to specific, currently applicable safety standards or practices"]).

Finally, plaintiff's reliance on *DiGiantomasso v City of New York* (55 AD3d 502 [1st Dept 2008]) and *Brumm v St. Paul's Evangelical Lutheran Church* (143 AD3d 1224 [3d Dept 2016]) (NYSCEF # 107, ¶'s 67-68) does not help plaintiff as those cases are distinguishable. The plaintiffs in both *DeGiantomasso* and *Brumm* stated the cause of their respective falls with some specificity in contrast to plaintiff's deposition testimony here (*DiGiantomasso*, 55 AD3d at 502-503 [upholding denial of summary judgment for the defendant when the plaintiff testified that she had tripped over a manhole cover, even though she was not entirely certain and her statements had some inconsistencies]; *Brumm,* 143 AD3d at 1227 [upholding the denial of summary judgment for the defendant when the plaintiff testified that her toe had caught on some object and identified the cracked area as the spot that her toe caught]). In contrast, here, plaintiff did not identify or clarify as to what caused her to lose her balance and fall. Notably, she testified that she did not slip or trip on anything. And plaintiff failed to sufficiently reconcile her conflicting testimony about the multiple steps with no lights or handrail as opposed to her affidavit (in support of her opposition to defendants' motion for summary judgment) identifying the single step with a light and handrail as the place where she fell.

In sum, the Coles defendants' and the building defendants' respective motions for summary judgment are granted, and the complaint is dismissed. Consequently, the issue of whether the Coles defendants' have a duty to warn plaintiff of the step is academic. Also, the crossclaims by each set of defendants against the other, and the third-party defendants' motion for summary judgment for contractual indemnification are dismissed as moot.

Conclusion

Based on the foregoing, it is

ORDERED that defendants/third-party defendants Nancy H. Coles, MD, Individually and Nancy H. Coles, MD, d/b/a Nancy H. Coles, MD PLLC's motion for summary judgment to dismiss the complaint and the crossclaims, and the third-party complaint against them (MS 002) is granted; and it is further

ORDERED that defendants/third-party plaintiffs' 72nd Tenants Corporation, Brown Harris Stevens Residential Management, LLC, and Michael A. Nath's motion for summary judgment dismissing the complaint and crossclaims as against them (MS 003) is granted; and it is further

ORDERED that counsel for defendants shall serve a copy of this Decision and Order, along with notice of entry on plaintiffs within ten days of entry.

ORDERED that the Clerk of the Court is directed to enter judgment as written.

07/28/2023
DATE

MARGARET CHAN, 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