SHORT FORM ORDER

INDEX No. 618349/2020
CAL. No. 202301402OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 2/13/24
ADJ. DATE 4/16/24
Mot. Seq. # 002 MD

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ISMAILNASR and AZZA HEGAZY,

Plaintiffs,

- against -

FORWILLIS REALTY, LLC and BRETTON FOX REALTY, INC.,

Defendants.

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GRUENBERG KELLY DELLA
Attorney for Plaintiffs
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Ronkonkoma, New York 11779

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Attorney for Defendants
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Uniondale, New York 11553

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendant Forwillis Realty, LLC, filed 1/10/24 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiffs, filed April 2, 2024 ; Replying Affidavits and supporting papers by defendant Forwillis Realty, LLC, filed April 15, 2024 Other ; it is

ORDERED that the motion by defendant Forwillis Realty, LLC for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the Court, on its own motion, amends the caption to remove Bretton Fox Realty, Inc. as a defendant; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that, if applicable, within thirty (30) days of the entry date of this Order, notice pursuant to CPLR §8019[c] with a copy of the Order shall be served upon the County Clerk, along with payment of any required fees.

This action arises out of a personal injury claim against defendants Forwillis Realty, LLC and Bretton Fox Realty, Inc. by plaintiff Ismail Nasr, who sustained injuries on May 1, 2018 at 8:15 a.m. The accident allegedly occurred when he tripped and fell while walking on a sidewalk leading to the premises known as 468 Mill Road in Coram, New York, which is the location of his employer. The complaint alleges that defendant Forwillis Realty, LLC is the owner of the subject premises. By his bill of particulars, plaintiff alleges defendant Forwillis Realty LLC was negligent in allowing a dangerous condition to remain on the subject walkway. Plaintiff's wife, Azzy Hegazy, asserts a derivative cause of action for loss of services. Pursuant to a partial stipulation of discontinuance executed on September 24, 2021, the claim against defendant Bretton Fox Realty, Inc. was discontinued with prejudice.

Forwillis Realty now moves for summary judgment dismissing the complaint against it on the ground that plaintiff is unable to identify what caused him to fall. Forwillis Realty also argues that there is no evidence that it caused, created or had notice of the alleged dangerous condition of the sidewalk. In support of its motion, Forwillis Realty submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, a photograph of the subject premises, and an affidavit of Carl Jewell. Plaintiffs oppose the motion, arguing that plaintiff identified the cause of his fall and there are credibility issues regarding the location and cause of the fall. In opposition, plaintiffs submit, among other things, transcripts of the parties' deposition testimony and the expert report of James Pugh.

At his examination before trial, plaintiff testified that he was employed by Nature's Value Inc. at the time of the accident and that he was going to work. He testified that he parked his car in the parking lot and was walking towards the main entrance of the building. He testified that he was walking at a normal speed on the concrete walkway, not on the grass. He testified that he tripped on an uneven surface with a crack, lost control, and fell forward, causing his head and body to hit the wall of the building.

At his examination before trial, Bharat Kakumanu, who is employed as the director of quality for Nature's Value, testified that he is plaintiff's supervisor and that he observed the subject accident. Kakumanu testified that he had just parked his vehicle and was walking on the walkway when he observed plaintiff about 30 to 40 feet from the main entrance. He testified that plaintiff appeared to be in a hurry, that he was walking briskly and then started running. He testified that plaintiff was running on a grassy area and tripped over the area where the grassy area and the walkway to the building meet.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Cruceta v Funnel Equities, Inc.***, 18 AD3d 693, 795 NYS2d 728 [2d Dept 2005]; ***Labella v Willis Seafood***, 296 AD2d 382, 744 NYS2d 504 [2d Dept 2002]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***McDonnell v Our Lady of Mercy Roman Catholic Church***, 209 AD3d 729, 176 NYS3d 644 [2d Dept 2022]; ***Goldin v Riker***, 273 AD2d 197, 709 NYS2d 119 [2d Dept 2000]). Liability can be predicated only on failure of defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Gloria v MGM Emerald Enters., Inc.***, 298 AD2d 355, 751 NYS2d 213 [2d Dept 2002]).

In this case, Forwillis Realty failed to establish prima facie its entitlement to summary judgment. Here, while plaintiff testified that he was walking on the concrete walkway at a normal speed, Kakumanu testified that plaintiff was running towards the entrance and tripped over the area where the grassy area and concrete walkway meet. The conflicting deposition testimony as to where and how the accident occurred raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Clarke v 1710, LLC***, 209 AD3d 828, 177 NYS3d 70 [2d Dept 2022]; ***Ahr v Karolewski***, 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Gordan v Honig***, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]). Moreover, viewing the evidence in the light most favorable to plaintiff, Forwillis Realty failed to established that plaintiff cannot identify what caused his fall (*see* ***Davidoff v First Development Corp.***, 148 AD3d 773, 48 NYS3d 755 [2d Dept 2017]; ***Korn v Parkside Harbors Apartments, LLC***, 134 AD3d 769, 22 NYS3d 99 [2d Dept 2015]). Plaintiff testified at his deposition that he lost control when he stepped on an uneven surface with a crack while walking on the concrete walkway. Having determined that Forwillis Realty failed to establish its prima facie burden on the motion, it is unnecessary to consider the sufficiency of plaintiff's papers in opposition (*see* ***Zambri v Madison Sq. Garden, L.P.***, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]). Accordingly, the motion by Forwillis Realty for summary judgment dismissing the complaint against it is denied.

Finally, as the parties' counsel have executed a partial stipulation of discontinuance as to defendant Bretton Fox Realty, Inc., the Court, sua sponte, amends the caption of this action removing Bretton Fox Realty as defendant to accurately identify the relevant parties (*see* CPLR 1003). Thus, the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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ISMAIL NASR and AZZA HEGAZY, :

:

Plaintiffs, :

:

-against- :

FORWILLIS REALTY, LLC,

Defendant.

Defendant shall promptly serve a copy of this order with notice of its entry upon plaintiffs and the Clerk of the Court, who shall mark the court's records to reflect the amended caption. Defendant also shall promptly serve upon the County Clerk the notice required under CPLR 8109 (c) to amend the caption of this action in the manner specified in this order.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 7.17.24

LINDA KEVINS, JSC

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION