SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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JULIET CHIN,

Plaintiff,

- v -

LONG ISLAND RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA NEW YORK CITY TRANSIT, and CITY OF NEW YORK,

Defendants.

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INDEX NO. 154992/2021

MOTION DATE 06/26/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 56-85 were read on this motion to/for JUDGMENT – SUMMARY.

In this trip and fall action, plaintiff moves for summary judgment in her favor as to liability against all defendants except the City of New York, to strike the first affirmative defense of plaintiff's culpable conduct in defendants' answer, and to extend the deadline to file the note of issue.

Defendants Long Island Railroad, Metropolitan Transportation Authority, New York City Transit Authority, and MTA New York City Transit (collectively, the Transit Defendants) oppose plaintiff's motion and cross-move for dismissal and summary judgment dismissing the complaint, on the ground that plaintiff did not know what caused her accident. Plaintiff opposes the cross-motion.

BACKGROUND

At plaintiff's deposition, she testified that, on January 7, 2021, between 4 p.m. and 4:30 p.m., she was in Penn Station and fell while walking down a set of steps (Plaintiff's Exhibit H, Chin EBT at 15, lines 18-20; at 16, lines 13-20; at 18, lines 14-16; at 20, lines 19-20; at 25, lines 2-5 [NYSCEF Doc. No. 66]). According to plaintiff she had taken the E train to Penn Station, 34th Street, to go to the Long Island Railroad to catch the 4:32 p.m. train to Hempstead on her way home (*id.* at 19, lines 13 through 20, line 2; at 20, lines 16-18).

Plaintiff testified that, after going through turnstiles, she descended a set of steps that was to her left, and then she turned left to go down a second set of stairs (*id.* at 23, lines 21-23; at 25, lines 2-4; at 7, lines 19-22). According to plaintiff, "there were people

in front of me and the next thing I know, I was at the bottom of the steps in pain" (*id.* at 24, lines 9-11). Plaintiff was looking straight ahead before she fell (*id.* at 33, lines 9-11).

According to a New York City Police Department Aided Report, the stairwell was identified as M6A at Penn Station (*see* Plaintiff's Exhibit B in support of motion [NYSCEF Doc. No. 60]).

Plaintiff stated that she returned to the location the next day and took pictures, one of which was marked as Defendants' Exhibit A at her deposition (*id.* at 26, lines 7-23). According to plaintiff, Defendants' Exhibit A depicted "the lip where it dug out, the concrete was dug out and that lip is right there (indicating) (*id.* at 26, lines 16-18; *see also* Plaintiff's Exhibit H [NYSCEF Doc. No. 66]).[1] Plaintiff was then asked:

> "Q And in this photo, Defendants' Exhibit A, do you see the cursor moving and right here, this is the defect or the condition of the step that you say caused you to fall (indicating)?
>
> A. Yes, sir" (*id.* at 26, line 25 through 27, line 6).

When asked if she looked where she was placing her feet before she fell, plaintiff answered, "No, I don't usually look down like that when I'm walking" (*id.* at 33, lines 12-15). When asked if she recalled if her foot actually made contact with what caused her to fall, plaintiff answered, "No" (*id.* at 34, lines 5-8).

Meanwhile, at plaintiff's statutory hearing, when she was asked what caused her accident, plaintiff replied, "At the time, no. I just heard people yelling, screaming, and cursing that I fell on, from the lip, there's people behind that was behind me saying I fell from the lip itself that was there. There's a raised lipped [sic]" (*see* Transit Defendants' Exhibit B, hearing tr at 13, lines 13-17 [NYSCEF Doc. No. 79]).

Dorothy Rivera, an employee of defendant New York City Transit Authority (NYCTA) in the Stations Department, testified on behalf of the Transit Defendants (*see* Plaintiff's Exhibit I in support of motion, Rivera EBT, at 9, line 23 through 10, line 3).

According to Rivera, she inspected stairway M6A around November 2020, in response to a customer complaint about a hazardous condition on the stairway (Rivera EBT, at 18, line 24 through 19, line 9). Rivera saw that the top tread of stairway M6A was "lifted" (*id.* at 19, lines 11-15). Rivera stated, "It looked like a raised tread. The top, the very top step, had a raised tread, and the grout underneath looked like it was lifted" (*id.* at 24, lines 22-24). Rivera estimated that the metal tread was lifted "[a]pproximately maybe one and a half inch" (*id.* at 25, lines 3-5).

Rivera stated that, in response to the complaint, she contacted the real estate department to determine whose property the stairway was on (*id.* at 21, lines 9-13).

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[1] Photographs marked as Defendants' Exhibits A, B, C, D, and E are appended to the end of the transcript of plaintiff's deposition.

According to Rivera, the stairway was located on New York City Transit property and owned by the NYCTA (*id.* at 21, lines 23-24; at 35, lines 22-24). When shown a photograph marked as photograph A, Rivera identified the photograph as depicting the lifted tread of stairway M6A, and that it was the same condition that as what the stairway looked like in November 2020 (*id.* at 38, lines10-22).

Rivera testified that the top tread was repaired in April 2021 (*id.* at 25, line 19 through 26, line 5). According to Rivera, between November 2020 and April 2021, she walked around the area "[m]aybe around 10 times" (*id.* at 26, lines 18-20). During that period, there were no warning signs, cones, or barricades around stairway M6A (*id.* at 27, lines 2-6).

DISCUSSION

> "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. If the moving party produces the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action"(*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019] [internal citations and quotation marks omitted]).

On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

I. Plaintiff's motion for summary judgment in her favor as to liability against defendants

"To subject a property owner to liability for a hazardous condition on the premises, a plaintiff must demonstrate that the owner either created the alleged hazardous condition or had actual or constructive notice of the condition" (*Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [1st Dept 2006]).

Here, Rivera's deposition testimony established that the NYCTA had actual notice of a defect in the top tread of stairway M6A in November 2020, based on Rivera's inspection of the area following a customer complaint of a hazardous condition. Rivera's testimony also established that the defect existed on property that was maintained by the NYCTA. Lastly, Rivera confirmed that a photograph depicting the stairway M6A was in the same condition as when Rivera had inspected the stairway in November 2020.

However, the Transit Defendants argue that plaintiff's motion should be denied because plaintiff testified at her statutory hearing and at her deposition that plaintiff was unable to identify what caused her to fall (affirmation of Transit Defendants' counsel in opposition and in support of cross motion ¶ 9 [NYSCEF Doc. No. 74]).

"A plaintiff cannot establish a prima facie case of negligence if he cannot explain what caused him to fall" (*Holzman v Manhattan and Bronx Surface Tr. Operating Auth*., 271 AD2d 346, 347 [1st Dept 2000]). Moreover, "[i]t 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]).

However, as plaintiff's counsel points out, plaintiff did explicitly identify at her deposition that the condition of the top tread had caused her to fall (*see* Chin EBT at 29, lines 2-6 ["Yes, sir that is correct"]). Plaintiff's statutory hearing testimony that she did not know what caused her to fall and plaintiff's deposition testimony that she was not looking where she was placing her feet before she fell and that she did not recall if her foot had made contact with the raised tread (Chin EBT at 33, lines 12-15; at 34, lines 5-8) raise issues of fact as to plaintiff's credibility as to whether the defective top tread had, in fact, caused her to trip and fall.

Thus, plaintiff's motion for summary judgment in her favor as to liability against the Transit Defendants is denied.

Although not raised by the Transit Defendants, the court notes that plaintiff did not meet her prima facie burden of summary judgment with respect to the Long Island Railroad or the Metropolitan Transportation Authority. Rivera's deposition testimony established that stairway M6A was on property that was owned by the NYCTA. Plaintiff did not submit any evidence that would establish the liability of the Long Island Railroad. Additionally, "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Delacruz v Metropolitan Transp. Auth*., 45 AD3d 482, 483 [1st Dept 2007]).

The branch of plaintiff's motion for summary judgment seeking to strike the first affirmative defense of plaintiff's culpable conduct is denied. Plaintiff's counsel argues that "[i]t is incumbent upon defendants to provide evidence in support of their affirmative defense" (affirmation of plaintiff's counsel in support of motion ¶ 40). However, "[m]erely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" (*Hairston v Liberty Behavioral Mgt. Corp*., 157 AD3d 404, 405 [1st Dept 2018]). Although plaintiff's counsel argues that "'not looking down before she fell' is of no significance" (affirmation of plaintiff's counsel in opposition to cross-motion and in further support of motion ¶ 25 [NYSCEF Doc. No. 84]), not looking downward at one's footing at the time of the fall can support a finding for comparative negligence (*see Ramputi v Ryder Const. Co.*, 12 AD3d 260, 261 [1st Dept 2004]).

The branch of plaintiff's motion to extend the note of issue deadline is granted, and the note of issue deadline is extended to April 18, 2025. As plaintiff did not explain what discovery remains outstanding for the court to be able to set a realistic extension

of the note of issue deadline, the court directs the parties to appear at a status conference on April 17, 2025 to discuss the outstanding discovery that remains.

II. The Transit Defendants' cross-motion for summary judgment

The Transit Defendants' cross-motion for summary judgment is denied.

First, plaintiff is not required to identify at the time of the accident "the precise condition that caused [her] to fall," which can be identified at his deposition (*see Johnson v 675 Coster St. Hous. Dev. Fund*, 161 AD3d 635, 636 [1st Dept 2018]). Second, as discussed above, plaintiff did explicitly identify at her deposition that the condition of the top tread had caused her to fall. In any event, "plaintiff's inability to specify at her deposition[ ] exactly how she was caused to fall . . does not give defendant an automatic right to summary judgment dismissal here" (*Garcia v New York Tr. Auth.*, 269 AD2d 142, 142-43 [1st Dept 2000]; *see also Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 556-57 [1st Dept 2012] ["it 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 at that spot"]). Even if plaintiff had not seen the condition that caused her to fall, "liability may be established through circumstantial evidence" (*Castellanos v 57-115 Assoc., L.P.*, 211 AD3d 459, 460 [1st Dept 2022]).

CONCLUSION

It is hereby **ORDERED** that plaintiff's motion is **GRANTED IN PART TO THE EXTENT THAT** the branch of plaintiff's motion to extend the deadline to file the note of issue is granted, and the note of issue deadline is extended to April 18, 2025; and it is further

ORDERED that the parties are directed to appear in person for a status conference on April 17, 2025 at 11:30 a.m. in IAS Part 21, 80 Centre Street Room 280, New York, New York; and it is further

ORDERED that the remaining branches of plaintiff's motion for summary judgment in her favor as to liability against defendants Long Island Railroad, Metropolitan Transportation Authority, New York City Transit Authority, and MTA New York City Transit, and to strike the affirmative defense of plaintiff's culpable conduct, are **DENIED**; and it is further

ORDERED that the cross-motion to dismiss and for summary judgment by defendants Long Island Railroad, Metropolitan Transportation Authority, New York City

Transit Authority, and MTA New York City Transit is **DENIED**.

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2/6/2025
DATE

RICHARD TSAI, J.S.C.

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