

<b>Fernandez v 608136 LLC</b>
2012 NY Slip Op 31196(U)
April 30, 2012
Supreme Court, New York County
Docket Number: 103474/2010
Judge: Joan A. Madden
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**HON. JOAN A. MADDEN**  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 61

Index Number : 103474/2010  
**FERNANDEZ, JOSE**  
vs.  
**618136**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_

No(s). \_\_\_\_\_

No(s). \_\_\_\_\_

No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

## FILED

MAY 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 11, 2011

\_\_\_\_\_  
**HON. JOAN A. MADDEN**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X

JOSE FERNANDEZ

INDEX NO. 103374/10

Plaintiff,

-against-

608136 LLC,

Defendant.

-----X

JOAN A. MADDEN, J.:

**FILED**  
**MAY 07 2012**  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendant moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and plaintiff opposes. For the reasons stated below the motion is denied.

Plaintiff seeks damages for personal injuries he allegedly sustained on October 16, 2009, when he fell while walking down an exterior metal staircase leading to the courtyard in the rear of his apartment building, located at 618 West 136<sup>th</sup> Street, New York, New York. The building is owned by defendant 618136, LLC.

At his deposition, plaintiff testified that the incident occurred "from 7:00 to 7:30 p.m.," when he was taking his garbage to the area where it is stored in the back of the building in the outside courtyard. Plaintiff testified that when he left his apartment which is on the third floor, another person was with him, Rafael Almonte. After opening the door from the interior of the building, plaintiff was standing outside on the platform on top of the metal staircase which leads

down to the courtyard; Mr. Almonte was behind him. Plaintiff testified that he had one bag of garbage in his left hand, was holding the handrail with his right hand, and he “started to climb down the stairs,” and “when I was almost at the bottom, I went like (indicating), and then I fell down.” Plaintiff claims he fell because the staircase was dark. Plaintiff testified that the light bulb at the top of the staircase was out, and two days earlier he had observed that the same light bulb was out.

In moving for summary judgment, defendant relies on plaintiff’s deposition testimony that he “did not know what happened” and he did not know if he tripped or slipped on something, or “missed a step.” Defendant contends that since plaintiff cannot explain the reason for his fall and is unable to identify what caused him to fall, he cannot show that defendant’s alleged negligence contributed to the accident. Defendant also contends that the evidence establishes that the lights were “functioning” at the time of the accident, and even if one light was out, there is “no evidence that one light being out was a proximate cause of plaintiff’s injuries.”

The proponent of a motion for summary judgment “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. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra at 324.

“The owner or possessor of property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it.” Freidah v. Hamlet Golf & Country Club, 272 AD2d 572, 573 (2<sup>nd</sup> Dept 2000). Here, the record sufficiently establishes the existence of triable issues of material fact as to whether the absence of adequate lighting was a substantial factor in causing plaintiff’s injuries. See e.g. Quinlan v. Cecchini, 41 NY2d 686 (1977) (triable issue of fact existed as to whether failure to light vestibule at top of landing to stairway was proximate cause of plaintiff’s injuries); Freidah v. Hamlet Golf & Country Club, supra at 573 (complaint should not have been dismissed where triable issues of fact were raised as to whether the alleged lack of adequate lighting created or helped to create dangerous condition); Wank v. Herman, 2 AD2d 867 (2<sup>nd</sup> Dept 1956) (whether lack of adequate light on stairway was proximate cause of accident was sufficient to present question for trier of fact).

Contrary to defendant’s contention, plaintiff’s failure to identify the precise cause of his fall is not fatal to his claim. “To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant’s negligence was a substantial cause of the events which produced the injury . . . Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable.” Klapa v. O & Y Liberty Plaza Co, 218 AD2d 635, 636 (1<sup>st</sup> Dept 1995) (quoting Derdiarian v. Felix Contracting Corp, 51 NY2d 308, 315 [1980]).

In opposition to the motion, plaintiff submits his own affidavit, as well as affidavits from three witnesses: Rafael Almonte, the friend who was with plaintiff when he fell; Jose Marte a

neighbor who was in the lobby when he heard plaintiff scream and went to the courtyard to investigate; and Ken Fernandez, plaintiff's grandson who went down to the courtyard right after the accident. The court agrees with defendant that plaintiff cannot use his own or other affidavits to change his testimony. See Zamir v. Hilton Hotels, Corp., 304 AD2d 493 (1<sup>st</sup> Dept 2003); Schachat v. Bell Atlantic, Corp., 282 AD2d 329 (1<sup>st</sup> Dept 2001); Phillips v. Bronx Lebanon Hospital, 268 AD2d 318, 320 (1<sup>st</sup> Dept 2000); Rodriguez v. Jones, 227 AD2d 220 (1<sup>st</sup> Dept 1996). In this case, however, plaintiff's affidavit and the affidavits of the other witnesses are properly considered by the court as they amplify rather than contradict plaintiff's deposition testimony. See Severino v. 157 Broadway Associates, LLC, 84 AD3d 505 (1<sup>st</sup> Dept 2011) (where record revealed that defense counsel never inquired of plaintiff as to the precise cause of her accident, plaintiff was entitled to submit a more detailed affidavit clarifying her deposition testimony); Bosshart v. Pryce, 276 AD2d 314 (1<sup>st</sup> Dept 2000) (summary judgment denied when allegations by plaintiff in opposition to the motion, though more detailed, did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2<sup>nd</sup> Dept 1995) (court did not err in considering affidavit that did not contradict plaintiff's deposition testimony).

Here, the issue of inadequate lighting was clearly raised by plaintiff in the complaint and the bill of particulars,<sup>1</sup> and at his deposition when he testified, through a Spanish interpreter, that the light at the top of the metal stairs was "not on" at the time of his accident that "there was no

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<sup>1</sup>Paragraph 17 of the complaint and paragraph 3 of the bill of particulars allege that defendant was negligent, *inter alia*, "in failing to provide adequate lighting." With respect to lighting, the bill of particulars further alleges that defendant was negligent "in causing, permitting and/or allowing said premises, and more specifically, the staircase area thereat to exist in a dark and dangerous condition; defendant failed to place adequate artificial lights at said premises."

light either,” two days before, on October 14, 2009. At the deposition, defendant’s counsel asked plaintiff if on October 16, 2009, he could “see the steps” as he was walking down them, and plaintiff answered, “I was able to see them because they are in front of you, to the side right there by you. You’re able to see them.” Plaintiff’s response is not inconsistent with his affidavit, which clarifies that while plaintiff could “see” the steps, the staircase was nonetheless dark, which is consistent with his testimony that he was unable to tell what caused him to fall, i.e. whether the steps were wet or if something was on the steps, or whether he tripped or missed the step.

Specifically, in his affidavit, plaintiff explains that he testified that he could see the steps because “I knew what the steps looked like as I had lived in that building for over 28 years and had walked down those steps thousands of time. While I was able to see the steps to some degree, I told the attorney I could not tell whether anything was on them or whether or not they were wet or dry. I couldn’t even tell whether or not I tripped on something or lost my footing because it was dark and difficult to see. When my deposition was read to me by my grandson, Ken Fernandez, I realized that the lawyer never asked me specifically if it was dark where I fell, or if the lack of light affected my vision.” Plaintiff’s affidavit further explains that he testified that he could also “see” the garbage cans in the courtyard, “because the garbage cans that I was going to were located on a wall several feet away from where I fell on the stairs and I do believe that there is a light above those garbage cans which provides light for them.”

The affidavits from the three witnesses are likewise consistent with plaintiff’s deposition testimony, and simply provide more details. The eyewitness, Rafael Almonte, states that when he and plaintiff exited the building, he “noticed that it was very dark outside,” and that the “light

bulb immediately outside the door at the top of the stairs . . . was not on.” He states that the “sun had already come down and the lack of any lights made it very difficult to see the staircase,” that plaintiff “commented to me about how dark it was,” and he told plaintiff “to be careful and hold on and walk slowly.” Mr. Almonte also states that “as we approached the bottom of the stairs, Jose lost his footing and fell,” and that he and plaintiff both told the superintendent that “the reason Jose fell was because it was really dark.”

In their affidavits, both plaintiff’s grandson, Ken Fernandez, and the neighbor, Jose Marte, state that the light on the top of the staircase was “out” or “not on” when they arrived at the scene shortly after plaintiff’s accident. Ken Fernandez states that it was “very dark” on the staircase, the sun was “down,” and that the other lights in the courtyard “do not provide any lighting to the staircase.” Mr. Marte states that he has lived in the building for more than 10 years, that he uses the same staircase “to get to the area where I dump my garbage,” and that he observed that the light above the stairs “had not been working for at least several days before Mr. Fernandez’s accident.” Mr. Marte states when the light is not on, “it is extremely difficult to see where one step ends and the next begins.” He also states that he is “not sure if the other two courtyard lights were on or off, but they do not provide lighting to the staircase,” as one light is in an apartment doorway, and the other is “affixed to a wall several feet away from the staircase near the garbage cans.”

Thus, since plaintiff’s affidavit and the affidavits of the other witnesses amplify and do not conflict with plaintiff’s deposition testimony, they can be considered in determining defendant’s summary judgment motion. See *Bosshart v. Pryce*, supra.



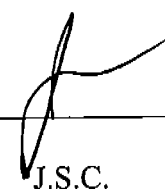
Finally, defendant fails to establish as a matter of law that the lighting was adequate and not a proximate cause of the accident. See e.g. Streit v. DTUT, 302 AD2d 450 (2<sup>nd</sup> Dept 2003) and Goldfarb v. Kzichevsky, 280 AD2d 583 (2<sup>nd</sup> Dept 2001) (defendants not entitled to summary judgment where they failed to show that they maintained the property in a reasonable safe manner and that inadequate lighting was not a proximate cause of the accident). Contrary to defendant's assertion that "the lights were functioning" at the time of the accident, defendant's superintendent, Mario Rodriguez, expressly acknowledged that at the time of plaintiff's accident, the light above the staircase was not on. Mr. Rodriguez testified that the two other lights down below in the courtyard were on, and explained that all three lights automatically go on at "nightfall." He seemed to suggest that the light above the staircase was not on because that area was not yet dark enough to activate the light, but testified that the three lights turn-on at the same time. He also testified that the light above the staircase was installed five or six years ago, at his suggestion, after he "called the office and told them that we need more light here." Such testimony is not only inconsistent, but supports plaintiff's position as to the lack of adequate lighting.

Based upon the foregoing, the court concludes that the record is sufficient to establish that triable issues of material fact exist as to whether the absence of adequate lighting was a substantial factor in causing plaintiff's injuries. See Sousie v. Laningburgh Boys & Girls Club, Inc., 291 AD2d 619 (3<sup>rd</sup> Dept 2002) (plaintiff's testimony that it was "black" at the bottom of the stairs, as supported by her daughter's affidavit that "it was very dark in the area of the stairs" and a witness statement that it was "very dark because the light was out," created an issue of fact as to whether the stairway was sufficiently illuminated).

Accordingly, it is  
ORDERED that defendant's motion for summary judgment is denied; and it is further  
ORDERED that the parties are directed to appear for a pre-trial conference on July 11,  
2012, at 10:00 a.m., in Part 11, Room 351, at 60 Centre Street.

**FILED**

DATED: April 30, 2012

ENTER: MAY 07 2012  
NEW YORK  
COUNTY CLERK'S OFFICE  
  
\_\_\_\_\_  
J.S.C.