SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

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Vincent William **Decision and Order**

Plaintiff

Index No. 306383/2012

-against-

Family Baptist Church, Inc.,
Defendant

Howard H. Sherman
J.S.C.

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The following papers numbered 1 read on this motion for summary judgment

Notice of Motion, Affirmation in Support and Exhibits A-I	1	

Upon the forgoing papers , defendant's motion for summary judgment , submitted without opposition , is denied.

Procedural History

This action was commenced on July 30, 2012 seeking damages for personal injuries alleged to have been sustained in a September 12, 2011 trip and fall upon a defective condition on the sidewalk in front of defendant's church located at 1704 Topping Avenue, Bronx, New York.

Issue was joined with the service of defendant's answer in September 2012. The answer asserted six affirmative defenses.

By order to show cause dated November 20, 2013, counsel for plaintiff sought leave to withdraw. Two days later, defendant served outgoing counsel with a

counterclaim[1] seeking "liquid" and "punitive " damages arising out of "plaintiff's false, fraudulent and deceitful action." By decision and order of this court dated December 9, 2013. By the terms of that order, all proceedings were stayed for thirty days after service upon plaintiff of a copy of the decision/order.

The self-represented plaintiff was served with a Notice to Admit dated January 20, 2014 seeking *inter alia,* concessions as to statements attributable to plaintiff in hospital records .

To date, no Note of Issue has been filed.

Motion

Defendant Family Baptist Church, Inc. now moves for an award of summary judgment dismissing the complaint and for a judgment in favor of defendant as against plaintiff in the amount of $20,000.00 for "costs , fees, and sanctions relating to the plaintiff's claimed fraudulent lawsuit and on the basis of the defendant's Counterclaim for same..." The motion is supported by the affirmation of counsel , and the pleadings, and a copy of plaintiff's 10/07/13 deposition testimony, and a Notice to Admit dated January 20, 2014 as accompanied by certified records of Bronx Lebanon Hospital Center, and defendant argues that the hospital records demonstrate as a matter of law that plaintiff was not injured on the date of the accident alleged here , and the specific injury asserted as an achilles tear of the left ankle, was the result of a subsequent incident for which he sought treatment on 01/17/12.

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[1]It is unclear as to whether leave was sought to interpose a late counterclaim.

Discussion and Conclusions

It is by now well settled that 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 a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

In addition , as pertinent here, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart*, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Upon a review of the submissions here, as afforded all favorable inferences in favor of the non-moving party, it is the finding of this court that defendant has not met its prima facie burden to prove as a matter of law its defense that the injuries alleged here , i.e., left torn Achilles tendon requiring surgical repair, and internal derangements

of the right foot and hip were not caused by the trip and fall in front of the church on September 12, 2011. While defendant makes a compelling case of an alternative etilogy for the left ankle injury, as predicated on the certified hospital records, to the extent excerpts of these records fall within the business records exception to the hearsay rule as reflecting occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of (see, People v. Ortega, 15 N.Y.3d 610, 942 N.E.2d 210 [2010]), the record also includes plaintiff's unequivocal denial that he made the recorded statement attributable to him concerning the source of the left ankle injury for which he was treated on January 17, 2012 (see, WILLIAMS EBT: 107-109) . This testimony raises an issue of fact requiring an assessment of credibility outside the purview of this dispositive motion.

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This shall constitute the decision and order of this court.

Dated: September 2, 2015

Howard H. Sherman