SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

ANDREW BELFER and KAREN BELFER,

Plaintiffs,

- v -

SUREFOOT, L.C.,

Defendant.

INDEX NO. 156406/2014

MOTION DATE 9/6/17

MOTION SEQ. NO. 003

The following papers, numbered 64–83 and 91–104, were read on this motion for summary judgment.

Notice of Motion—Affirmation in Support—Memorandum of Law in Support—Exhibits A–M (w/amended versions)	Nos. 64–83
Affirmation in Opposition—Plaintiff's Affidavit—Exhibits 1–3—Expert's Affidavit—Exhibits 1–3—Memorandum of Law in Opposition	Nos. 91–100
Reply Affirmation in Support—Exhibit A—Reply Memorandum of Law in Support—Exhibit A	Nos. 101–104

Motion by Defendant Surefoot, L.C. pursuant to CPLR 3212 for an order granting summary judgment against Plaintiff Andrew Belfer and his wife, Plaintiff Karen Belfer, suing derivatively, is denied.

Plaintiff alleges that he was injured when he slipped and fell while he was walking in unfinished, custom-fitted ski boots at Defendant's store. Defendant brings the instant motion for summary judgment arguing that Plaintiff is unable to identify the cause of his fall, and, as such, Plaintiff's claims for negligence must be summarily dismissed. Defendant further argues that the complaint must be dismissed because Defendant had neither constructive or actual notice of the dangerous condition that caused Plaintiff's fall. For reasons stated below, the instant motion is denied.

BACKGROUND

In the instant complaint, Plaintiff alleges that, on January 5, 2014, he entered Defendant's store and was "in the process of getting fitted for custom-made ski boots at the Subject Premises," when he was "was caused to fall by the defective,

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

hazardous and improper conditions that existed in or upon the floors and/or the defective, hazardous and improper substances and/or materials used to coat, clean and/or maintain floor." (Lewyn Affirm., Ex. A [Complaint] ¶ 15.) In Plaintiff's bill of particulars, Plaintiff further alleges, among other things, that his accident was caused by:

> "Defendant's failure to provide and ensure that the ramp/incline and floors inside the Subject Premises were made of the proper materials, were properly inclined so as to be safe to walk upon and had the proper surface for the use by persons using the Subject Premises and walking thereon, particularly those persons such as Plaintiff who was fitted for ski boots by Defendant's employees, agents, servants and/or representatives, who told Plaintiff to walk on the ramp/incline and floors within the Subject Premises during the fitting process with a fitted mold with loose hoses placed on his feet by Defendant's employees, agents, servants and/or representatives[.]"

(Lewyn Affirm., Ex. C [Bill of Particulars] ¶ 2 (c).) In Plaintiff's supplemental bill of particulars, Plaintiff further alleged:

> "More specifically, with respect to the location of the occurrence, after Defendant's employee had placed Plaintiff's feet in shells with tubes hanging out from each shell, at a location in the back of Defendant's retail store, Plaintiff was directed to walk from the back of the store towards the front of the store. Plaintiff took several steps towards the platform in the front of the store to which he had been directed by Defendant's employee. The occurrence occurred at or near a display table that was located at Defendant's retail store on that date."

(Lewyn Affirm., Ex. D [Supplemental Bill of Particulars] ¶ 1.)

At Plaintiff's deposition, Plaintiff testified that on the date of his injury, he and his son entered Defendants at about 2 p.m. to purchase ski boots for the both of them. (Lewyn Affirm., Ex. E [Belfer EBT] at 28:10-29:23.) Plaintiff stated that the weather that day was nasty and that the store was not crowded. (Id. at 29:14-23.)

Plaintiff stated that he and his son decided to purchase boots that were fitted to the contours of their feet. (Id. at 34:13-41:21.) Plaintiff stated that he was informed by the salesman—named Adam—that the custom-fitting process took

about two hours. (Id. at 34:13-35:03.) Plaintiff stated that, as part of the process of getting his boots custom-fitted, he and his son went to the fitting area in the back of the store where they were eventually both outfitted "with the shells of the boots." (Id. at 29:24-30:15.) Plaintiff stated that these shells of the boots had tubes attached to them which would be used to pump foam into the boots and thereby create a custom-fitted liner. (Id. at 41:09-15.) Plaintiff stated that the "foaming station"—where the foam was pumped through the tubes into the boots—was at the front of the store. (Id. at 36:15-19.)

Plaintiff stated that after he was fitted with the shells of the boots, he began walking to the foaming station at the front of the store. Plaintiff stated that he probably walked "slower than I normally would, the boots aren't tight, there is no foam in them, there is no liner in them, so they are loosely fit and I would have walked slower than normal, not faster than normal." (Id. at 74:15-75:03.) Plaintiff also stated that the area between the fitting area and foaming area had "a fairly noticeable slope" and that the floor was higher in the back and "sloped downward towards the front of the store." (Id. at 45:07-46:21.) Plaintiff further stated that the floor in said area "was not in very good shape" in that was "blistered" and there were areas that "were a little slick looking." (Id. at 46:22-48:13.) When asked what he meant by "blistered," Plaintiff said the area looked "[l]ike when you see peeling paint . . . ." (Id.)

Plaintiff stated that he fell as he was about half-way to the foaming station, after having taken about five steps. (Id. at 62:25-63:11, 64:05-15.) When Plaintiff was asked about how he fell, the following colloquy ensued:

Q. Did you trip or slip?

A. Slipped.

Q. Did you slip on something?

A. I believe I slipped on one of the tubes.

Q. As you proceeded to the foaming area, were any of the approximately six to eight tubes that you testified to earlier that were coming out of the ski boot touching the floor?

A. I don't know.

Q. *Do you know what caused your fall other than you just said you believe it was the tubing?*

A. *I do not know what caused my fall.*

Q. Was your fall caused by slipping on debris?

A. Not that I know of.

Q. Did you ever tell any health care providers you slipped on debris?

A. Not that I recall.

Q. Did you tell anyone that the cause of your fall was this tubing?

A. I speculated that it was, yes.

Q. That's not my question. Did you tell anybody that prior to –

A. I told people that my legs flew out from under me and that I think that I might have stepped on these tubes. I was wearing loosely fitted boots with tubes hanging out walking down a ramp and I fell. I can't tell you exactly why I fell, I can just tell you I fell.

...

Q. When you say a cause, was there other causes of your fall?

A. Could have been the floor, could have been the wetness on the floor. Could have been the fact that it's not a skid-proof floor. The material is not -- is slippery just by its nature.

Q. Where was the wetness located?

A. It was a rainy day. There were people in the store. I don't know exactly if that was where I fell or not. There was dampness and wetness on the floor.

Q. Where specifically was there dampness or wetness on the floor?

A. I can't be more specific than I just was.

(Id. at 68:03-70:22 [emphasis added].)

Non-party Adam Jolley stated that he assisted Plaintiff and his son with making a purchase of ski boots on the date of the accident, and that, upon entering the store, he explained "the sales process from start to finish." (Jolley EBT at 36:16-38:05.) Mr. Jolley stated that a customer who wants to purchase custom-fitted ski boots must first have his feet scanned, and that scan is then sent to "the back" where the orthotics are made. (Id. at 28:04-31:02.) Mr. Jolley stated that while the orthotics are made, the customer picks out a particular shell and is fitted with a liner in the back of the store. (Id.) Mr. Jolley stated that once the customer is fitted, the customer then walks, about thirty feet, from the back of the store to the foaming stand at the front of the store where "[f]oam's injected into the liner as the customer stands in the boot." (Id.) Mr. Jolley stated that boots are "sturdy" and there are "tubes coming out of the boot." (Id. at 31:08-23.) Mr. Jolley further stated that the ground between the back and front of the store is level. (Id. at 31:24-32:11.) Mr. Jolley stated that he has never physically assisted a customer in walking to the foaming station, and that, other than Plaintiff, no customer has ever fallen on his or her way to the foaming station. (Id. at 41:09-45:13.)

Mr. Jolley stated that he instructed Plaintiff to walk from the back of the store to the front of the store for the foaming procedure. (Id. at 40:22-41:02.) Mr. Jolley stated that he was walking in front of Plaintiff—leading him to the foaming station—when he heard a loud thump. (Id. at 41:09-45:13.) Mr. Jolley stated that he turned around, asked Plaintiff if he was okay and offered his hand to help Plaintiff up. (Id.) Mr. Jolley further stated that he did not notice any debris or water around where Plaintiff fell. (Id. at 47:02-08.) Mr. Jolley stated that the boots Plaintiff was wearing had approximately ten tubes between two boots and that the tubes were approximately five to ten inches long. (Id. at 58:18-59:19.) Mr. Jolley further that he told Plaintiff that he could finish the foaming process another time, and that Plaintiff responded, "I'm okay, let's do it." (Id. at 49:04-17.)

Mr. Jolley further stated that, to his knowledge, no "written report of any sort" was produced regarding Plaintiff's accident and that he had no knowledge of any store policy to prepare such a report in the event of an accident. (Id. at 21:19-22:07; *see also* Ex. G [Cataldo EBT] at 34:09-36:04 [Defendant's store manager

stating that he was not aware of any policy to document customer accidents in writing].)

ARGUMENTS

Defendant argues that Plaintiff's claim of negligence must be summarily dismissed because "Plaintiff's admitted inability to identify the cause of his fall makes the fall's cause a matter of pure speculation." (Memo of Law at 1; see also Oral Arg. Tr. at 3:11-13, 9:04-21.) Plaintiff responds that he has provided evidence "that it is 'more likely' or 'more reasonable' that his injuries were caused by Defendant's negligence, in that:

- Defendant placed loosely-fitting, hard plastic ski boot shells onto Plaintiff's feet;
- Defendant inserted 5 tubes, each 5-10 inches long, into each shell, which protruded and flopped out from both the front and back of the ski boot shells that Defendant had placed onto on Plaintiffs feet;
- Defendant directed Plaintiff to walk on a slick and coated concrete floor containing ridges and blistered portions;
- Defendant directed Plaintiff to walk on a sloped pathway;
- The sloped pathway was not in good condition;
- The sloped pathway had no hand railing or support of any kind; and
- Defendant's salesperson provided no assistance or guidance of any kind to
- Plaintiff as he walked on this pathway (Defendant's salesperson being well ahead of Plaintiff with his back turned).
- As a consequence, Plaintiffs stepped on one of the tubes and fell hard causing his injuries."

(Opp. Memo. at 9.) In addition, Plaintiff submitted an affidavit that sought to clarify his testimony and pointed to a belated errata sheet that amends his testimony. In reply, Defendant asserted that Plaintiff's errata sheet and affidavit amounted only to attempt to assert feigned issues of fact.

At oral argument, the parties reiterated the same arguments. In addition, Plaintiff's counsel stated that he was effectively prevented from timely submitting an errata sheet for plaintiff's deposition because of medical issues he experienced

immediately after Plaintiff's deposition and thereafter did not recover for about a year. (Oral Arg. Tr. at 20:15-21:05.)

In addition, Defendant argues that it is also entitled to summary judgment because it lacked notice of a dangerous condition. In particular, Plaintiff argues that it lacked notice of a dangerous condition because "[a]ll customers who purchased custom fitted ski boots at the store had to go through a similar process as plaintiff," and "[n]ot a single other person is known to have slipped and fallen while walking in the boots with tubes." (Memo. in Supp. at 7.)

In addition, Defendant claims that it retained a professional engineer who "evaluated the slope of the floor" and determined that no dangerous condition existed. (Id. at 7-8.) In particular, Defendant claims that its engineer determined that the subject floor had "'an average static coefficient of friction of greater than 0.8'" which is "considered a non-slip surface and satisfied the slip resistance guideline of 0.5." (Id. at 8; see also Ex. K [Guido Aff.] ["[I]t is my opinion that the involved area of the flooring is in good condition, and free of holes or other significant damage to the surface contour. The involved area of the floor surface is level. Coefficient of friction testing confirmed that the floor is slip-resistant."].)

In opposition, Plaintiff argues that Defendant "created the very conditions" and that "[t]hese conditions include placing [Plaintiff] in loose-fitting ski boot shells with 5 tubes hanging out, each 5-10 inches long and then instructing him to walk on a sloped, inappropriate and substandard pathway with no hand rails or support, assistance or guidance of any kind." (Opp. Affirm. ¶ 3.)

Furthermore, Plaintiff points to the findings of its own architect who opined: "The quality and maintenance of the floor coating product can be summarized as deficient. With the added factor that the floor is apparently not level, the potential for tripping and/or slipping on the flooring at this site exists." (Leggio Aff., Ex. 2 [June 10, 2014 Letter from Leggio] at 2.) Plaintiff's architect further criticized the findings of Defendant's engineer arguing that Defendant's engineer improperly used "Neolite rubber test sensors." (Leggio Aff. at 3.) Plaintiff's architect argues that "[t]hose test sensors were the same as the rubber heals on shoes. In contrast, however, at the time of his fall. Plaintiff was actually wearing the outer shells of a ski boot made of hard dense plastic material." (Id.) As such, Plaintiff contends, at the very least, there is a battle of the experts, precluding summary judgment. (Opp. Memo. at 10-12.)

In reply, Defendant argues that Plaintiff's architect is unqualified to offer an expert opinion "to testify about practices at ski lodges and shops, and the design of ski boots." (Reply Memo. at 15-16.) Defendant further argues that Plaintiff's architect has "failed to explain how ski boots designed for walking on slippery surfaces such as snow and ice found at ski areas were somehow unsafe when used inside on an epoxy covered concrete floor." (Id. at 16.)

These same arguments were reiterated when the parties appeared for oral argument.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. Defendant Fails to Establish Prima Facie That Plaintiff Cannot Identify the Cause of His Fall.

On a motion for summary judgment, "a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall." (*Davidoff v First Dev. Corp.*, 148 AD3d 773, 774 [2d Dept 2017].) This rule is based on the theory that "[i]f a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation." (*McRae v Venuto*, 136 AD3d 765, 766 [2d Dept 2016] [internal quotation marks omitted]; *see also Gayle v City of New York*, 92 NY2d 936, 937 [1998] [holding that at trial, the plaintiff's "proof must render those other

causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence"].) As such, "[w]hile plaintiff's evidence need not positively exclude every possible cause of his fall other than the alleged [] defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation." (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006].)

At the same time, "the issue of proximate cause may be decided as a matter of law 'where only one conclusion may be drawn from the established facts." (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017].) Moreover, "[t]here can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause." (*Davidoff v First Dev. Corp.*, 148 AD3d 773, 775 [2d Dept 2017] [internal quotation marks, citations and emendation omitted].) As such, to survive summary judgment, the law "simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred." (*Haibi*, 156 AD3d at 147.)

Here, Defendant argues that Plaintiff cannot identify the cause of his fall based, among other things, Plaintiff's statement: "I do not know what caused my fall." (Memo in Supp. at 2.) In a vacuum, this statement would appear to be fatal to Plaintiff's case. However, this statement was not made in a vacuum. Rather, it was made in response to a question that specifically asked Plaintiff to discount slipping on a tube, which was what he previously stated he believed was the cause of his accident. As such, this statement cannot form the basis for summarily dismissing Plaintiff's complaint.

In addition, Defendant points to additional statements in the above colloquy, such as Plaintiff stating that he "speculated" that the tubing caused him to fall and that "I can't tell you exactly why I fell, I can only tell you I fell." (Memo in Supp. at 1-4.) Defendant argues that these statements indicate that Plaintiff cannot identify the cause of his fall and that this makes "the fall's cause a matter of sheer speculation." (Memo in Supp. at 1-4.) However, Plaintiff has alleged several conditions that he believes were substantial factors in bringing about his slip, such as: that the boots were loose fitting; that he may have slipped on one of the tubes; that the floor was "blistered" and appeared to be "slick" in certain areas; and that the area was sloped downwards.

Reading Plaintiff's testimony as a whole, and in light the most favorable to him, it would appear that Plaintiff has identified numerous alleged defects with sufficient facts and circumstances from which a trier of fact could reasonably infer that Plaintiff's fall was caused Defendant's negligence. As such, this Court does not find that "any finding of negligence would be based upon speculation." (*McRae v Venuto*, 136 AD3d 765, 766 [2d Dept 2016] [internal quotation marks omitted]." Rather, there are triable issues of fact regarding whether any one of the alleged conditions or the interrelation of the alleged conditions caused his fall.[1] (*See Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017] ["It bears repeating that the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts; but where as here there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide."] [internal quotation marks and emendation omitted].)

II. Defendant Fails to Establish, as a Matter of Law, That Neither Created a Dangerous Condition Nor Had Notice of a Dangerous Condition.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp., 79 AD3d 518, 519 [1st Dept 2010] [internal quotation marks omitted].) "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." (*Id.*)

Here, Defendant argues, in sum and substance, that it cannot be found liable for Plaintiff's injuries because, as a matter of law, there was no dangerous

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[1] It should be noted that Plaintiff has submitted an errata sheet, signed and acknowledged in May 2016 for the first time in response to the instant motion for summary judgment. Because the Court finds that Defendant fails to establish prima facie that Plaintiff cannot identify the cause of his fall—based on Plaintiff's allegations in the complaint, bill of particulars, supplemental bill of particulars and Plaintiff's un-amended deposition testimony—this Court does not address any issues raised regarding the submission of Plaintiff's errata sheets with his opposition papers.

On its face, the submission of the errata sheet—more than a year after the deposition—would appear to violate CPLR 3116 (a). However, Plaintiff's counsel has submitted that he was inhibited from timely submitting the errata sheet due to his own medical complications. As to the validity of this reason, the Court need not rule at this time. (*See generally Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 494 [1st Dept 2003].)

condition. (Memo in Supp. at 7-8.) Plaintiff, of course, argues that Defendant placed him in an inherently dangerous position by "placing [him] in loose-fitting ski boot shells with 5 tubes hanging out, each 5-10 inches long and then instructing him to walk on a sloped, inappropriate and substandard pathway with no hand rails or support, assistance or guidance of any kind." (Opp. Affirm. ¶ 3.) In this sense, Plaintiff does not simply allege that Defendant caused his injury by failing to remedy a transient or permanent condition on its premises, but rather Plaintiff argues that Defendant wholly placed Plaintiff in a dangerous situation through its sales process.

In arguing that no dangerous condition existed as a matter of law, Defendant relies heavily on the opinion of its engineer. However, Defendant's engineer only analyzed the flooring. Even assuming arguendo that the subject flooring was not a dangerous condition as a matter of law, there would remain a triable issue of fact as to whether Defendant negligently caused Plaintiff's injuries by instructing Plaintiff to walk in unfinished boots with tubes protruding from the boots.

In addition, Defendant also relies heavily on its claim that there were no "other complaints and slips and falls" in its argument that there was "the condition of the premises was neither dangerous nor hazardous for customers . . . ." (Id. at 7.) However, according to Mr. Jolley to his knowledge, no "written report of any sort" was produced regarding Plaintiff's accident, and Mr. Jolley had no knowledge of any store policy to prepare such a report in the event of an accident. (Id. at 21:19-22:07; *see also* Ex. G [Cataldo EBT] at 34:09-36:04 [Defendant's store manager stating that he was not aware of any policy to document customer accidents in writing].) As such, without a custom and practice for creating business records concerning onsite accidents, it is unclear what evidence Defendant is relying on for its claim that there have been no other complaints or slips and falls on its premises, apart from the memory of a single store manager. (*See* Cataldo Aff. ¶ 5.)

Based upon the submitted papers and the oral arguments, the Court finds that there are triable issues of fact as to whether any of the above allegedly dangerous conditions proximately caused Plaintiff to fall. It is for the trier of fact to determine whether Defendant was negligent in instructing Plaintiff to walk in unfinished ski boots in light of the other alleged dangerous conditions.

CONCLUSION

Accordingly, it is

ORDERED that Defendant Surefoot, L.C.'s motion pursuant to CPLR 3212 for an order granting Defendant summary judgment against plaintiffs Andrew and Karen Belfer is denied.

The foregoing constitutes the decision and order of the Court.

Dated: January 31, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE