SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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LISA-ERIKA JAMES,

Plaintiff,

- v -

KENSINGTON ASSOCIATES, LLC, TRYAX REALTY MANAGEMENT, INC., MICHAEL SCHMELZER, AND MIGUEL LEON

Defendant.

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INDEX NO. 151262/2014

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 134, 137, 140, 146, 147, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 217, 218, 219, 220, 228

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 221, 222, 223, 224, 225, 226, 229

were read on this motion to/for STRIKE- SPOLIATION.

Motion Sequence Numbers 006 and 008 are consolidated for disposition. The motion (MS006) for summary judgment by defendants is granted. The motion (MS008) to strike defendants' answer arising out of defendants' purported spoliation of certain evidence is denied.

Background

Plaintiff claims that she was hurt while walking up the stairs between the fourth and fifth floors in her apartment building. Defendants move for summary judgment dismissing this case on the ground that plaintiff never actually fell. Defendants contend that after they told plaintiff that there was video footage of the incident showing that plaintiff did not fall, she changed her

version of the incident and now claims she slipped and was injured by shifting her weight onto her left side.

Defendants also point out that the judge previously assigned to the case denied plaintiff's motion to preclude the use of the video based on defendant's purported failure to turn it over (NYSCEF Doc. No. 109). In her decision, Justice Kern noted that plaintiff had requested a video depicting her falling and "All that defendant has is a video of her walking on those steps that day and not falling" (*id.* at 18). Justice Kern also noted that "It is undisputed that on the day of the deposition, the defendant clearly informed plaintiff about the video that did exist, which is just a video of her walking up and down the stairs and not falling" (*id.* at 18-19).

Defendants also attach an expert's affidavit which concludes that the alleged defect—a chip in the stairs—was not an actionable defect (NYSCEF Doc. No. 103). Defendants emphasize that after the alleged accident, plaintiff told an urgent care center that she hurt her knee after falling in the street.

Plaintiff opposes the summary motion on the ground that its expert concludes that the chip in the stairs was a defect that caused plaintiff's accident. The expert insists the chip was not a trivial defect and that it violated various statutes. Plaintiff also points to another expert's report which insists that the video cannot be relied upon because it was spliced. Plaintiff also argues that the motion for summary judgment is untimely because it was filed more than 60 days after the note of issue was filed.

Discussion

To be entitled to the remedy of 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978).

As an initial matter, the Court finds that defendants' motion was timely filed. This part's rules require the filing of dispositive motions to be within 120 days after the filing of the note of issue and defendants complied with that directive.

Setting aside the fact that plaintiff lived in the building and passed the alleged defect hundreds of times (which could be an independent basis to dismiss the case), the fact is that the video does not show a slip or fall of any kind on the day of the accident. It shows that plaintiff has a pronounced limp as she starts walking up the stairs but nothing out of the ordinary occurs between the fourth and fifth floors. While plaintiff's expert claims the video was spliced (NYSCEF Doc. No. 191), that does not necessarily create an issue of fact. Defendants admit that they provided video footage of when plaintiff appeared in the video from November 10-15, 2013 rather than hand over five days worth of footage.

The assertion by plaintiff's expert that the time stamp on the video freezes at 20:17:40 and then skips to 20:17:42 (*id.* ¶ 8) is inapposite because plaintiff claimed in her deposition that she fell (NYSCEF Doc. No. 108 at 10). In fact, plaintiff confirms numerous times that she fell (*id.*). Even if the video froze for two seconds, it is not possible for plaintiff to fall (and suffer serious injuries) and get up within a second.

Plaintiff's subsequent effort to try and explain that she fell without actually falling does not create an issue of fact (*see id.* at 61-63 [plaintiff explaining how she fell but did not actually fall]). Instead, plaintiff admitted that no other part of her body came into contact with the steps besides her feet (*id.* at 64). That version of events is backed up by the video—that plaintiff just walked up the stairs without incident.

The Court observes that plaintiff's expert (Dr. Marletta) apparently did not get the message that plaintiff did not actually fall; he concludes that "there were several contributing

factors to this *fall* including broken, damaged, and eroded treat nosing" (NYSCEF Doc. No. 190, ¶ 74). A Court cannot find an issue of fact from an expert's report that is predicated on a version of events different from the account provided by plaintiff.

In sum, plaintiff cannot create an issue of fact by changing her story within a deposition from claiming that she fell to one in which she somehow hurt her left knee by walking up the stairs. It is also critical to point out that plaintiff claims she tore her left ACL. There is simply no way to conclude that a jury could reasonably find that plaintiff suffered such a severe injury when considering the video or plaintiff's deposition testimony. To be clear, the Court is not making a credibility determination. Rather, it is considering plaintiff's own words and the video and concluding that defendants are not negligent. The Court cannot ignore a video and plaintiff's testimony that, taken together, lead to one conclusion: that no accident actually occurred.

Spoliation Motion

The Court also denies plaintiff's motion for spoliation arising from the production of the aforementioned video. As an initial matter, Justice Kern already denied plaintiff's motion to preclude the use of the video and to strike defendants' answer based on defendants' purported failure to turn over the video (*see* NYSCEF Doc. No. 109). This Court cannot find that spoliation occurred where the Court has already declined to impose penalties against defendants based on production of the same video.

Moreover, the note of issue was filed in this case on August 13, 2018 and plaintiff waited until June 3, 2019 to make a discovery motion about spoliation. It is simply too late to complain about discovery; plaintiff had years to raise issues with the video but waited until *after* defendants made a motion for summary judgment to ask the Court to strike defendants' answer.

And finally, defendants do not dispute that the video is spliced to reflect only plaintiff's appearances in the video. If plaintiff wanted to watch the 96 hours of footage, then she should have made the instant motion before filing the note of issue.

Accordingly, it is hereby

ORDERED that the motion (MS006) by defendants for summary judgment is granted, and the clerk is directed to enter judgment accordingly with costs upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS008) by plaintiff to *inter alia* strike defendants' answer based on purported spoliation is denied;

12/9/19
DATE

ARLENE P. BLUTH, J.S.C.

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