At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 1st day of October 2020.

PRESENT:
Honorable Reginald A. Boddie, JSC

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HENRY MCLAURIN,

Plaintiffs,

Index No. 501725/2017
Cal. No. 27 MS 4

Against

DECISION AND ORDER

DUANE 131, LLC,

Defendant.

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Papers	Numbered
MS 4	Docs. # 58-91

Upon the foregoing cited papers, the decision and order on Duane 131's Motion for Summary Judgment, pursuant to CPLR 3212, and Motion to Dismiss, pursuant to CPLR 3126, is as follows:

Plaintiff commenced this action to recover for personal injuries he allegedly sustained on September 27, 2016, when he tripped and fell on the interior steps at 135 Duane Street, New York, New York, a five-story, mixed-use building owned by defendant Duane 131 LLC (Duane 131). Plaintiff and two other individuals were hired to clean out apartment 3W. Plaintiff and his coworkers had been at the premises for several hours continuously ascending and descending the stairs removing furniture and debris from the apartment when his accident happened.

Duane 131 sought summary judgment on the grounds that plaintiff was unable to identify the location or cause of his fall and, in the alternative, defendant did not have actual or constructive notice of the allegedly defective condition. Defendant also sought to dismiss the complaint,

pursuant to CPLR 3126, for plaintiff's allegedly willful and contumacious failure to appear for an IME pursuant to the Court's August 5, 2019 order of preclusion and plaintiff's repeated violations of other discovery orders. Plaintiff opposed.

Duane 131 acknowledged its motion was filed more than 120 days after the Note of Issue was filed. It argued plaintiff prematurely filed the Note of Issue before the completion of necessary discovery and therefore it had good cause for the delay in filing the instant motion.

As an initial matter, the Court notes plaintiff filed the Note of Issue on January 17, 2019, pursuant to the January 9, 2019 order of the Honorable Lizzette Colon, which directed plaintiff to file the Note of Issue on or before January 18, 2019. The Court also notes that discovery in this case was prolonged another 10 months pursuant to various Court orders concluding with Justice Colon's August 5, 2019 order. There, the Court referenced its prior order dated May 13, 2019, and directed plaintiff to appear for an EBT on or before September 16, 2019, or be precluded without further motion. Plaintiff appeared and testified under oath on September 16, 2019.

The August 5, 2019 order also directed plaintiff to appear for an IME on or before October 15, 2019, or be precluded without further motion, and referenced its prior order dated May 13, 2019. On October 1, 2019, defense counsel sent a letter to plaintiff's counsel proposing two options for conducting the subject IME: one in October in Richmond County and one in December in Kings County, the latter of which plaintiff chose. Plaintiff failed to appear for the IME on December 11, 2019, and defendant filed the instant motion on January 3, 2020, 23 days after plaintiff's December 11 non-appearance and 80 days after the October 15 deadline set by the August 5 order.

In *Brill v City of New York*, the Court concluded ". . . 'Good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation

for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill*, 2 NY3d 648, 652 [2004]). Here, defendant has demonstrated good cause for the delay in filing the instant motion.

Defendant also sought dismissal of the complaint pursuant to CPLR 3126. A court may strike the "pleadings or parts thereof" (CPLR 3126 [3]) as a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *Maiorino v City of New York*, 39 AD3d 601, 601 [2d Dept 2007]). Here, Justice Colon's August 5, 2019 order precluded plaintiff without further motion upon non-appearance at either the EBT or the IME. Accordingly, this branch of defendant's motion is denied based on the August 5, 2019 order of Justice Colon.

Defendant also sought summary judgment on the grounds that plaintiff was unable to identify the exact location or cause of his fall. At his deposition, plaintiff was presented with photographs of the stairwell and asked to mark the step on which he fell. Plaintiff was unable to mark the photographs. He was also unable to recall how many steps he had descended before he fell. He testified, "[i]t could have been at the top [nearest to the landing]. I'm not sure."

Plaintiff was also asked what caused his fall. He testified, "I don't know if it had—I can't—I'm not — I don't know if it had a spring in the step or it moved or something but my foot twisted and I just fell down the stairs; [y]es, I don't know if it was a divot inside a grave (sic). You know, some steps have grave (sic) in it so I don't know if my foot got caught in the grave (sic) while I was walking down or not." Plaintiff could not recall whether he felt the spring in the step at any point while he was going up and down the steps prior to the accident. He also testified that his [right] foot "just gave way; [l]ike the spring – it seemed like my foot bounced off the step. The

stair's got like grime in them." When asked whether he would say there was a substance on the step, plaintiff answered, "[c]ould be, I'm not sure."

In opposition, plaintiff's counsel argued that plaintiff's identification of the stairwell was sufficient to establish the location of the accident. Counsel also argued plaintiff established the cause of his accident when testified that he fell when the step bounced and moved and his foot got caught in the grooves of the step. Plaintiff's counsel also proffered an estimate or invoice by Nazim Suli, Contracting to "[s]ecure 5th [s]tep in hallway between lobby and 2nd Floor," date January 16, 2017, arguing post-accident evidence of remedial measures evidence is admissible to establish issues of ownership and actual notice.

"Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013], citing *see Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610, 610-611 [2d Dept 2011]; *Melnikov v 249 Brighton Corp.*, 72 AD3d 760 [2d Dept 2010]). "However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Ash*, 109 AD3d at 855, citing *see McFadden v 726 Liberty Corp.*, 89 AD3d 1067, 1067 [2d Dept 2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810 [2d Dept 2010]; *Blochl v RT Long Is. Franchise, LLC*, 70 AD3d 993, 993 [2d Dept 2010]; *Miller v 7-Eleven, Inc.*, 70 AD3d 791, 791 [2d Dept 2010]).

"[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*O'Connor v Metro Mgt. Dev., Inc.*, 130 AD3d 698, 699-700 [2d

Dept 2015], quoting *Rivera v J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827 [2d Dept 2014]; *see Ash v City of New York*, 109 AD3d at 855). "Although '[p]roximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident, . . . mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action'" (*Ash*, 109 AD3d at 855, citing *Costantino v Webel*, 57 AD3d 472, 472 [2d Dept 2008]; *see Louman v Town of Greenburgh*, 60 AD3d 915, 916 [2d Dept 2009]).

"Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (*Costantino*, 57 AD3d at 472, citing *see Oettinger v Amerada Hess Corp.*, 15 AD3d 638 [2d Dept 2005]). In *Costantino*, the defendants made a prima showing of entitlement to judgment as a matter of law by establishing that plaintiff could not identify the cause of her fall without engaging in speculation (*Costantino*, 57 AD3d at 472 , citing *see Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434 [2d Dept 2006]; *Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2d Dept 2002]; *Barnes v Di Benedetto*, 294 AD2d 655 [3d Dept 2002]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation" (*Ash*, 109 AD3d at 855, citing *see Alabre v Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287 [2d Dept 2011]; *Manning*, 28 AD3d at 435 [2d Dept 2006]).

Here, plaintiff was unable to mark the location of his fall on photographs of the subject stairwell or testify without speculation as to where on the staircase he fell. Further, plaintiff testified he may have fallen when the step bounced or moved or when his foot got caught in a groove or his foot gave way. He also testified that there may have been grime on the stairs.

Defendant has therefore demonstrated its entitlement to summary judgment (*see e.g. Ash*, 109 AD3d at 855).

Plaintiff's counsel's arguments in opposition were insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Counsel's characterization of plaintiff's testimony failed to account for speculative language plaintiff used which qualified all of his statements. Further, counsel's proffer of the January 2017 estimate or invoice to "[s]ecure 5th [s]tep in hallway between lobby and 2nd Floor" was insufficient to raise a triable issue or rehabilitate plaintiff's speculative testimony as to where and why he fell. Accordingly, defendant's motion is granted and the complaint is dismissed.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
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