To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANGEL FERNANDEZ,

Plaintiff,

DECISION & ORDER
Index No. 56208/2019
Sequence No. 1

-against-

WILSON R. LEE,

Defendant.

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WOOD, J.

The court has read NYSCEF Document Numbers 12-32, in connection with defendant's motion for summary judgment to dismiss the complaint. This action arises for alleged personal injuries sustained by plaintiff, on or about November 15, 2018. Plaintiff was a tenant for at least five years at 226 Smith Street, Peekskill ("the Premises"), when at about 8:30 PM, he was going down the outside stairs at the Premises, to start shoveling snow, when he fell. Plaintiff alleges that he was injured due to a dangerous condition caused by defendant, (as owner of the premises at the time of the fall), failing to properly install and/or maintain exterior lighting at the front of the premises, by carelessly constructing and/or maintaining dangerous and defective steps at the front of the porch at the premises, and by failing to install proper railings at the steps.

Based upon the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687

[2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

The elements of negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]; Pulka v Edelman, 40 NY2d 781, 782 [1976]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it within a reasonable time (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]); Baillet v Auerbach, 277 AD2d 335 [2d Dept 2000]).

Defendant contends that plaintiff's allegations that there was inadequate lighting at the stairway is baseless since the light switch located at the bottom of the interior stairway of the plaintiff's apartment/unit provided the use of the porch light at the time of the incident; therefore, lighting was available and was controlled by the occupants of the plaintiff's apartment/unit.

In further support of defendant's motion, he offers the testimony of plaintiff. Plaintiff testified that defendant paid him to remove the snow outside of the property (NYSCEF#21). Plaintiff described the accident as follows:

> Like I said, I went out to clean the snow. It was dark. There is no light at the porch; so, I didn't see the step clearly, and I fell. The first step.
>
> Q. So, on the day of the subject incident, was there a light in or around the porch? …
>
> So, there was a light fixture, but at the time of the incident was the light turned on?
>
> A. No, because I don't think anything was working.
>
> Q. Prior to the incident, had you ever used the light on the porch?
>
> A. No.
>
> Q. So, for the duration of the two years that Mr. Lee has been your landlord, the light has never been turned on?
>
> A. No, because it wasn't working.
>
> Q. Did you ever complain to Mr. Lee or tell him verbally that the light was not working?
>
> A. I recall that even the first owner, I had told.
>
> Q. Okay. I'm specifically referring to Mr. Lee right now. Do you recall telling Mr. Lee that the light was broken or not turned on, or not working prior to the incident?

> A. Yes; I recall very little that I had told him. That when he removed the contract with me when he bought the house, and I found out that he was the owner, I recall that I told him that he had to do something, but I don't know (NYSCEF#21, pgs.13-16).

Defendant asserts that he was present at the Premises the day of the accident, to give plaintiff a check to shovel the snow. Further, defendant offers the affidavit of Charles J. Schaffer, R.A., NCARB of Rimkus New York, P.L.L.C. who opined that the front stairway complied with the Housing Maintenance Section 1242.3d of the 1984 New York State Uniform Fire Prevention and Building Code that was applicable at the time of the conversion of the subject premises to a two-family dwelling in 1986 as the stairway had a handrail on at least one side. Mr. Schaffer's report also reveals that the height of the handrailing on the stairway also complied with 713.1f-4 of the 1984 New York State Uniform Fire Prevention and Building Code (NYSCEF#19).

As defendant points out, plaintiff has also failed to identify what the dangerous or defective condition was that allegedly caused him to fall other than photographs of the stairs after a snow fall (NYSCEF#13, pg.2). It is well-settled that in a slip-and-fall case, "a plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (Dennis v Lakhani, 102 AD3d 651, 652 [2d Dept 2013]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture" (Id. At 652).

Based upon the record, including the deposition testimony of the parties, and defendant's expert report, defendant sustained his burden prima facie to judgment as a matter of law by demonstrating that he neither created nor had actual or constructive notice of any hazardous condition on the stairs or the lighting that allegedly caused plaintiff to slip and fall, and

defendant maintained that he inspected the premises often, having been there the day of the accident, and further demonstrated that plaintiff could not identify the cause of his fall without resorting to speculation. Plaintiff throws out a garden variety of possible causes for the fall, but the court cannot decipher- what was the actual cause of defendant's fall- was it the alleged poor lighting, which plaintiff having lived as a tenant at the premises for years was certainly aware of, and had control of the lighting, or was it some other cause like the lack of a railing or faulty design of the staircase, or did he loose his footing or did he slip on the snow?

In opposition, plaintiff offers his affidavit :

"At and prior to the accident date, it was agreed between Mr. Lee and myself that when it snowed and there was accumulation on the porch and/or steps, I was to shovel the snow in exchange for payment from the landlord.

"4. It had snowed during the afternoon of the date of accident. Mr. Lee came to the premises at approximately 6:30 p.m. that day to ask me to clear snow from the porch and steps and gave me a check for $60.00 to do so.
5. At approximately 8:30 p.m., I left my apartment to begin the job of shove1ing the snow. It was dark on the porch, including the area of the steps leading down to the walkway, It is now my understanding that the bulb was out in the exterior light fixture on the porch.
6. As I stepped down onto the first step from the porch (at the place I circled on the photograph annexed to my attorney's affirmation), my foot twisted .and I fell down the remaining steps.1did not feel that I had slipped down the step but rather, lost balance because the step was not level. There was no handrail on that side of the steps" (NYSCEF#27).

Plaintiff's expert, Stanley H. Fein, PE, conducted an inspection of the porch steps exterior to the Premises on October 15, 2020 (two years after the accident). This expert concluded that the steps at the subject premises are treacherous, poorly designed, poorly maintained, and not in conformity with requirements of the New York State Building Construction Code, in contravention to defendants' expert's opinion. Frequently, this would invoke a typical battle of the experts resulting in raising a triable issue of fact. However, absent from plaintiff's expert affirmation and report is a showing that such alleged defective condition

is the proximate cause of plaintiff's fall. The expert also fails to consider that the incident took place while there was snow covering the step as plaintiff testified.

Additionally, plaintiff presented no proof that defendant had received any complaints about the lack of lighting or a defective staircase, or that it was visible and apparent and had existed for a sufficient length of time before the accident for defendant to discover and remedy it (Christal v Ramapo Cirque Homeowners Assn., 51 AD3d 846, 847 [2d Dept 2008]).

Further, plaintiff's own deposition testimony reveals that he was unable to identify a defect of the staircase that was the proximate cause of his injuries. The depositions of the parties reveal that defendant did not have actual or constructive notice of any defect or defects located on the subject stairs, and/or lighting where plaintiff alleges he fell. Thus, plaintiff's expert's submission, as well as the other submissions, fail to raise a triable issue of fact sufficient to defeat summary judgment.

All matters not specifically addressed are denied. This constitutes the decision and order of the court. Therefore, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing plaintiff's complaint is granted. The Clerk shall mark his records accordingly.

Dated: May 12, 2021
White Plains, New York

Charles D. Wood
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HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF