SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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RONALD SHARPE,

Plaintiff,

- v -

SHABBAT LLC, SHIMON AVRAHAMI, BANK OF NEW YORK MELLON, BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL P.C., JOSEPH JUSEWITZ, M.M SH LLC, MERCURY CREDIT CORP., NYC DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEDIVA SCHWARZ

Defendant.

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INDEX NO. 109311/2011

MOTION DATE 10/01/2021

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 35, 36, 41, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendants Shabbat LLC (Shabbat), Mercury Credit Corp. (Mercury) and Nevida Schwarz (Schwarz) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment on the third-party complaint against third-party defendant Pars 2 Auto Repair Inc. (Pars). Plaintiff Ronald Sharpe opposes the motion and cross-moves, pursuant to CPLR 3025, for leave to amend the bill of particulars.

Factual and Procedural Background

This action arises from an accident that allegedly occurred on August 18, 2008 when plaintiff was struck by a bicycle operated by third-party defendant Karamoko Namroy (Namroy), a mechanic at Pars. The accident occurred on the sidewalk in front of the building where plaintiff

lived at 525 West 45th Street, New York, New York (the Building). Shabbat owned the Building when the accident occurred, and Schwarz was Shabbat's managing member (NY St Cts Elec Filing [NYSCEF] Doc No. 21, Suzanne M. Saia [Saia] affirmation, Ex I at 22-23).

After plaintiff commenced this action sounding in negligence, defendants brought a third-party action seeking indemnification against Namroy and Pars. The verified bill of particulars dated August 23, 2012 identifies the following dangerous conditions, of which defendants allegedly had actual and constructive notice and which violated unspecified statutes and building codes: tread size; riser height; handrails; "stairs in street beyond property line;" the outward swing of the door; and lack of a fire-rated, self-closing door (NYSCEF Doc No. 56, Nussin S. Fogel [Fogel] affirmation, Ex E, ¶¶ 2-3). A supplemental bill of particulars dated July 20, 2016 alleges violations of Labor Law §§ 27, 27-a, 29, 241-b and "Part 47 Transparent Glass Doors," 19 NYCRR 1220; New York City Building Code (Administrative Code of City of NY, tit 28, ch 7) § BC 3202.1.1; Administrative Code § 27-370; and the Uniform Fire Prevention and Building Code, 19 NYCRR 1220 (NYSCEF Doc No. 14, Saia affirmation, Ex B). Plaintiff's claims against co-defendants Borah, Goldstein, Altschuler, Nahins & Goidel PC, Bank of New York Mellon and NYC Department of Housing Preservation and Development have been dismissed. Co-defendants Shimon Avrahami, Joseph Jusewitz and M. M SH LLC and third-party defendant Namroy have never appeared.

On January 3, 2020, plaintiff filed a note of issue (NYSCEF Doc No. 53, Fogel affirmation, Ex B). This motion and cross motion followed.

Legal Conclusions

A. Defendants' Motion for Summary Judgment

Defendants argue that summary judgment is warranted on the grounds that: (1) the accident was not caused by the front door of the Building; (2) Shabbat had no notice of a dangerous condition; (3) Schwarz is not personally liable in the absence of evidence that Shabbat was her alter ego; and (4) there is no evidence that Mercury exercised control over the Building. Submitted in the support of the motion is an affidavit from defendants' expert, Jeffrey J. Schwalje, P.E. (Schwalje), who opines that the statutory or building code violations cited in the supplemental bill of particulars are inapplicable.

Plaintiff opposes and argues that the motion is untimely under CPLR 3212 and that issues of fact preclude granting summary judgment. He relies on his own affidavit and an affidavit from his expert, architect Robert Tan (Tan).

A party moving 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 any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "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]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

This Court first addresses the timeliness of the motion. CPLR 3212 (a) provides, in relevant part, that a "motion [for summary judgment] shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." The preliminary conference order from 2014 and this Court's Part Rules directed the parties to file

summary judgment motions within 120 days of the filing of the note of issue. Plaintiff filed the note of issue on January 3, 2020. The end of the 120-day period following the filing of the note of issue fell on Saturday, May 2, 2020. Thus, defendants had until Monday, May 4, 2020, to timely file the motion (*see* General Construction Law § 25-a [1]). On March 20, 2020, 77 days after plaintiff filed the note of issue, former Governor Andrew M. Cuomo signed an executive order staying "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to … the Civil Practice Law and Rules" through April 19, 2020 (Executive Order [Cuomo] No. 202.8 [9 NYCRR 8.202.8]). This toll was extended through November 3, 2020 (*see* Executive Order [Cuomo] No. 202.72 [9 NYCRR 8.202.72]). "A toll suspends the running of the applicable period of limitation for a finite time period, and '[t]he period of the toll is excluded from the calculation of the [relevant time period]'" (*Brash v Richards*, 195 AD3d 582, 582 [2d Dept 2021] [citation omitted]). Once the toll expired, defendant had 43 days, or until Thursday, December 17, 2020, to timely file a motion for summary judgment. However, defendants did not file the instant motion for summary judgment until March 5, 2021 (NYSCEF Doc No. 8).

In reply, defendants concede that the motion is untimely, but contend they have good cause for the delay, citing counsel's technical difficulties in calendaring the motion and in performing remote work during the COVID-19 pandemic, reassignment of the matter to a different attorney, and counsel's failure to realize that the toll had lapsed on November 3, 2020 (NYSCEF Doc No. 67, Saia affirmation). "'[A]n electronic calendaring error," however, does not constitute good cause (*see Wilmington Sav. Fund Socy. v McKenna*, 172 AD3d 1566, 1568 [3d Dept 2019]; *Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell*

Univ., 114 AD3d 472, 473 [1st Dept 2014] [overlooking the deadline for filing a summary judgment motion by mistake is not good cause]). Likewise, an increase in counsel's caseload does not qualify as good cause (*see Bejarano v City of New York*, 18 AD3d 681, 682 [2d Dept 2005] [no good cause shown where the defendant attributed the delay to "its large caseload"]; *Breiding v Giladi*, 15 AD3d 435, 435 [2d Dept 2005] [concluding that "perfunctory claims of unspecified clerical inadvertence and reassignment of counsel were insufficient to constitute good cause"]). That defendants' counsel was unaware the toll set forth in Governor Cuomo's executive orders had ended does not constitute good cause (*see e.g. Fine v One Bryant Park, LLC*, 84 AD3d 436, 437 [1st Dept 2011] [no good cause where the defendants failed to apprise themselves of an IAS judge's rule setting forth the time within which a summary judgment motion must be filed]; *Giudice v Green, 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008] [same]).

Defendants further assert that they filed the motion once they learned the court would begin accepting motions after the onset of the COVID-19 pandemic. While the court temporarily suspended accepting the filing of papers in non-essential matters on March 22, 2020 (*see* Admin Order of Chief Admin Judge of Cts AO/78/20), this suspension lapsed on May 4, 2020 (*see* Admin Order of Chief Admin Judge of Cts AO/87/20). Additionally, "a court should not consider a good cause argument proffered by a movant if it is presented for the first time in reply papers" (*O'Neil v Environmental Prods. Corp.*, 187 AD3d 771, 772 [2d Dept 2020]; *Cullity v Posner*, 143 AD3d 513, 514 [1st Dept 2016] [stating that the failure to address the timeliness of a summary judgment motion "is fatal"]), and here, defendants' motion must be denied for the additional reason that they failed to address good cause in their initial moving papers (*see Rivera v Zouzias*, 190 AD3d 994, 995 [2d Dept 2021] [collecting cases]; *Cabibel v XYZ Assoc., L.P.*, 36 AD3d 498, 498 [1st Dept 2007] [denying summary judgment where the defendants "failed to seek an extension of time to

file their motion or to proffer an excuse for their delay, doing so only in reply to plaintiff's opposition"]). Accordingly, defendants' motion for summary judgment is denied.

B. Plaintiff's Cross Motion to Amend the Bill of Particulars

Plaintiff cross moves for leave to amend the bill of particulars to plead a violation of Multiple Dwelling Law § 35.

It is well settled that "[l]eave to amend a complaint should be freely given absent prejudice or surprise so long as the proposed claims are not palpably insufficient or devoid of merit" (*Brummer v Wey*, 187 AD3d 566, 566 [1st Dept 2020]). The party opposing the motion bears the burden of establishing that the delay hindered its preparation (*see Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [requiring lateness plus significant prejudice]), or "that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]). It is within the court's discretion whether to grant the motion (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]).

Multiple Dwelling Law § 35 reads, in relevant part, that "[i]n every multiple dwelling erected after April eighteenth, nineteen hundred twenty-nine, every door giving access to an entrance hall from outside the dwelling shall contain at least five square feet of glazed surface." Based on his inspection of the Building's entrance on March 14, 2016, Tan opines within a reasonable degree of architectural certainty that the Building's entrance door was in a violation of Multiple Dwelling Law § 35, which required clear glass panels (NYSCEF Doc No. 55, Fogel affirmation, Ex D, ¶¶ 2 and 4-7). Tan further opines that, "[b]ecause the door instead had obscured glass panels, anyone exiting the building would have been unable to see the pedestrian or vehicular

traffic coming on the sidewalk from the left, and would have been unable to avoid coming into contract with such pedestrian or vehicular traffic" (*id.*, ¶ 7).

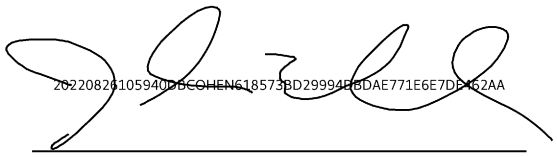
In opposition, defendants contend that plaintiff waited more than five years to amend the bill of particulars. However, "mere delay is not a sufficient basis to deny the relief" (*Schiff v ABI One, LLC*, 155 AD3d 543, 543 [1st Dept 2017]). Nor is there any merit to their claim that additional deposition testimony is necessary. Plaintiff has shown there would be no prejudice or surprise as a result of the proposed amendment since defendants were aware that the glass panels in the front door were opaque, not transparent (*id.*). Plaintiff testified at his deposition that glass panels in the Building's front door were "frosted, fuzzy, blurry" (NYSCEF Doc No. 15, Saia affirmation, Ex C at 43). Plaintiff described previous instances in which he came into physical contact with pedestrians on the sidewalk as he exited the front door (*id.* at 45). Critically, plaintiff alleged in his complaint that defendants were negligent in "failing to maintain a proper lookout or have or maintain reflecting mirrors or clear glass at or by the front door of the property" (NYSCEF Doc No. 13, Saia affirmation, Ex A at 10). Thus, plaintiff is not seeking to add a new theory of liability (*see Sagarese v City of New York*, 173 AD3d 435, 436 [1st Dept 2019]).

Nevertheless, the motion is denied (*see Valerio v 265 McClellan Realty, Inc.*, 203 AD3d 414, 415 [1st Dept 2022]). Defendants proffer an affidavit from Schwalje, who opines that the statute does not mandate clear glass panels. Multiple Dwelling Law § 35 (Entrance doors and lights) mandates that a door giving access to an entrance hall from outside contain "at least five square feet of glazed surface," but the statute does not require that the door contain transparent or clear glass, but only a "glazed surface." Significantly, Multiple Dwelling Law §§ 4 (Definitions) and 35 do not define the term "glazed surface." Thus, defendants have shown that the amendment is patently devoid of merit.

Accordingly, it is hereby:

ORDERED that the motion brought by defendants Shabbat LLC, Mercury Credit Corp. and Nevida Schwarz for summary judgment dismissing the complaint and for summary judgment on the third-party complaint against third-party defendant Pars 2 Auto Repair Inc. (motion sequence no. 009) is denied; and it is further

ORDERED that the cross motion of plaintiff Ronald Sharpe for leave to amend the bill of particulars is denied.



8/26/2022
DATE

DAVID B. COHEN, J.S.C.

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