SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MARC STEWART

Plaintiff,

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 150391/2018

MOTION DATE 12/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68

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

Defendant's motion for summary judgment is denied.

Background

Plaintiff contends that he was working as a technician for Verizon when he fell while on a service call in the basement of a property owned by defendant. Plaintiff was sent to the property to fix an elevator phone line. He testified that he fell forward while in the elevator machine room (NYSCEF Doc. No. 52 at 80). Plaintiff added that "I don't remember nothing about what I could get, what I couldn't get. Don't know what cut my hand. I was just down like that" (*id*. at 82). He claimed that "Then I got up angry, dust myself off and walked out" (*id*. at 83).

When asked what caused him to fall, plaintiff insisted that "It was like a, I guess if the basement get flooded, it's a path for water to go somewhere. It's a ditch I guess you would call it, a groove or a ditch in the ground" (*id*. at 87). He claimed he only noticed the ditch "When I

got up or when I was laying there, I don't know. I just saw it. I was like, damn, I didn't see it before I fell in it" (*id*.).

Defendant moves for summary judgment on the ground that there is no groove or ditch in the elevator machine room where plaintiff was working on the day of the accident. It argues that the machine room has two levels with a step down located about eight feet from the door. Defendant argues that there was no condition in the elevator machine room that was hazardous or unsafe. It also insists that even if there was some defect, it had no actual or constructive notice of that defect.

Defendant also attaches the affidavit of its expert, who claims that upon his inspection of the elevator machine room, he found no groove or ditch whatsoever (NYSCEF Doc. No. 54, ¶ 7). He added that although there is a 10-inch step in the middle of the room, it is "clearly discernable from the excellent lighting in the room and the obvious elevation difference between floor levels" (*id*. ¶ 25).

In opposition, plaintiff contends that the room was poorly lit and he fell because of a trench or "ditch-like" step down in the middle of the room. He explains that he needed surgery on his right shoulder, fractured a toe as well as an ankle injury. Plaintiff insists that the lighting was bad in the elevator machine room and that defendant admits there was step down in the middle of the room.

In reply, defendant contends that plaintiff never mentioned anything about the lighting in his deposition testimony and contends that plaintiff's affidavit submitted in opposition is simply an attempt to muddy the waters regarding the actual defect. It argues that plaintiff never asserted there was a step and instead testified he fell due to a groove or ditch.

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 a 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]).

The Court denies the motion on the ground that there is a material issue of fact with respect to the lighting in the elevator machine room.[1] Although defendant insists that plaintiff never mentioned lighting at his deposition, plaintiff correctly observed in opposition that he was

[1] That plaintiff did not include a response to defendant's statement of material facts does not require the Court to grant the motion. 22 NYCRR 202.1 permits the Court to overlook the failure to comply with the trial court rules. And, here, there is no question that the parties know what the case is about.

never questioned about the lighting at the deposition. And poor lighting was clearly included in plaintiff's bill of particulars (NYSCEF Doc. No. 61 at 2). It was not plaintiff's obligation to raise this issue at his deposition. Therefore, he was entitled to cite this issue in his affidavit in opposition wherein he asserts that the lighting was poor and that the lighting depicted in the photos submitted by defendant shows significantly more lighting (NYSCEF Doc. No. 58, ¶ 4) than was present on the date plaintiff fell.

Although defendant submitted photos of the elevator machine room that make it seem as if it were an operating room, that does not compel the Court to grant the motion. Attaching photos from the room dated long after the date of the accident does not eliminate an issue of fact about the lighting. And the fact is that there is an issue of fact about whether a dangerous condition existed if the lighting was poor. Plaintiff testified he was in an unfamiliar location (he had never been in that building before) and the photos demonstrate there is a 10-inch step in the middle of the room, a potentially unexpected place for a step down. A fact finder could conclude that having a step down in the middle of poorly lit room proximately caused the dangerous condition that led to plaintiff's fall.

The Court recognizes that plaintiff described the dangerous condition as a groove or ditch at his deposition when, in reality, there is only a step down. For some reason, plaintiff did not seemingly hire its own expert or send an investigator to take photos or take measurements. In any event, the Court cannot make a credibility determination on a motion for summary judgment. That plaintiff now claims that he meant a "step down" when he said a groove or ditch is likely going to be the focus of counsel for defendant's cross-examination at trial but it does not compel the Court to grant the motion given the lighting issue. It is axiomatic that a plaintiff cannot raise a feigned issue of fact via an affidavit in opposition to a summary judgment motion, but

plaintiff's new characterization of the defect is not plaintiff's only defense to the instant motion. To be clear, plaintiff does not change the way in which the accident occurred; rather, he attempts to modify what he fell over (a step versus a groove or ditch). A fact finder might believe that the allegedly low lighting caused plaintiff to mischaracterize the dangerous condition that purportedly caused his fall. On a motion for summary judgment, where the plaintiff's Bill of Particulars lists low lighting but the defendant never asked him about it (or showed him pictures with bright lights) at his deposition, the Court is unable to discredit plaintiff's account if a plausible scenario exists in which he might recover.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing this case is denied.

1/3/2023
DATE

ARLENE P. BLUTH, 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