

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

ZHUZHUNA PALAGASHVILI,

Plaintiff,

-against-

CHARLOTTE FRIEDMAN, et al.,
Defendants.

Index No. 17139/06

Motion
Date August 5, 2008

Motion
Cal. No. 19

Motion
Sequence No. 2

PAPERS
NUMBERED

| | |
|---|-------|
| Notice of Motion-Affidavits-Exhibits..... | 1-5 |
| Defendant Charlotte Friedman's Memo of Law... | 6 |
| Cross Motion..... | 7-10 |
| Opposition..... | 11-16 |
| Reply..... | 17-24 |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendant Charlotte Friedman's motion for an order pursuant to CPLR 3211(a)(5) dismissing the complaint and cross claims of the co-defendants and defendant Tobias Jungreis' cross motion for an order pursuant to CPLR 3212 dismissing the complaint and cross claims of the co-defendants are hereby consolidated solely for the purposes of disposition.

Plaintiff commences this action seeking to recover damages for injuries sustained during an alleged slip and fall on a sidewalk/walkway/curb in front of the premises known as 97-15 64th Road, Rego Park, County of Queens, New York. Plaintiff brought suit against three named defendants: Charlotte Friedman, Tobias Jungreis, and Romar Realty, a New York limited liability company. In a previous suit involving the same alleged slip and fall, plaintiff brought suit against the City of New York, Young Cho, Theresa A. Cho, Alex Cerny and Helena Cerny to recover damages ("Action No. 1"). In Action No. 1, summary judgment was granted against plaintiff with respect to the Cho defendants.

The Court found in that action that the plaintiff failed to make a showing that the Cho defendants either caused or created the defective condition causing the accident, or were under a statutory obligation to keep the accident site in a reasonably safe condition. On the basis of this opinion and the alleged contradictions contained in plaintiff's deposition testimony and affidavit, defendant Charlotte Friedman moves and co-defendant Tobias Jungreis cross-moves for summary judgment and a dismissal of plaintiff's complaint.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e. with the proponent of the issue. Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. at 272; *300 East 34th Street Co. v. Habeeb*, 248 AD2d 50 [1st Dept 1997].) A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century Fox Film Corp.*, *supra*).

The role of the court is to determine if bona fide issues of fact exist, and not to resolve issues of credibility. As the Court stated in *Knepka v. Tallman* (278 AD2d 811 [4th Dept 2000]):

Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint (*see, Mickelson v. Babcock*,

190 AD2d 1037; see, generally, *Black v. Chittenden*, 69 NY2d 665; *Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY 2d 338). Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial (see, *Schoen v. Rochester Gas & Elec.*, 242 AD2d 928; *Mickelson v. Babcock*, supra. See also, *Yaziciyan v. Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact."]).

Nevertheless, summary judgment is properly granted when the opponent of the motion raises only feigned issues of fact (see, *Perez v. Bronx Park South Associates*, 285 AD2d 403 [1st Dept 1999], in which the Court held that the submission of a one-page affidavit from a neighbor, which was in conflict with plaintiff's deposition testimony, was insufficient to raise an issue of fact; *Glick & Dullock v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 ["feigned" issues do not raise question of fact]; *Singh v. Kolcaj Realty Corp.*, 283 AD2d 350 [1st Dept 2001][plaintiff's expert's opinion that illegally parked car was proximate cause of accident was a legal conclusion which was of no consequence, and could not defeat defendant's motion for summary judgment]; *Phillips v. Bronx Lebanon Hospital*, 268 AD2d 318 [1st Dept 2000] ["self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony....").

I. 3211(a)(5)

That branch of defendant's motion dismissing the cause of action pursuant to CPLR 3211(a)(5) is denied.

It is well-settled that the doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a [full and] fair opportunity to *** litigate the point (*Gilbrerg v. Barbieri*, 53 NY2d 285 [1981]). Two requirements must be satisfied before the doctrine may be invoked. First, the identical issue must necessarily have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a

full and fair opportunity to contest the prior determination (see, *Kaufman v. Lilly & Co.*, 65 NY2d 449 [1985]).

Defendants contend that the determination made in Action No. 1 effectively precludes plaintiff from relitigating the issue of the location of plaintiff's fall. More specifically, defendant Friedman asserts that there has been a judicial determination that plaintiff did not fall on the public sidewalk abutting 97-15 64th Road and 97-17 64th Road, the alleged site of the accident. The Court disagrees. Application of the collateral estoppel doctrine would be misplaced as the Court in Action No. 1 did not address the issue of the specific site or location of the accident. The opinion in Action No. 1 one merely recites the law on what duties owners of land have to keep public sidewalks in a reasonably safe condition. The decision does not address the location of the accident, and as such, an identical issue in this present action has not been decided on.

II. Plaintiff's Alleged Contradictory Statements

That branch of defendant's motion seeking summary judgment due to plaintiff's alleged contradictory testimony in a prior action is denied.

In support of their motions defendants rely on a line of cases that establish the proposition that a party's affidavit that contradicts her prior sworn testimony is insufficient to defeat a properly supported motion for summary judgment (see, *Rogers v. City of New York Housing Authority*, 298 AD2d 312 [1st Dept 2002]; *Zylinski v. Garito Contracting*, 268 AD2d 427 [4th Dept 2000]; *Breland v. Flushing YMCA*, 245 AD2d 410 [2d Dept 1997]). Defendants' reliance on these cases is misplaced as this case does not involve contradiction of prior sworn testimony. Defendants assert that in plaintiff's prior deposition for Action No. 1, the plaintiff testified that she fell in front of the "Bukh prayer house", which is located at 97-13 64th Road, which contradicts her complaint in this action which states plaintiff fell between the buildings 97-15 and 97-17. This assertion by defendants, however, is not supported by the deposition transcript. A close review of plaintiff's testimony reveals that plaintiff never unequivocally testifies that the accident occurred in front of a "Bukh prayer house".

Plaintiff was asked the following questions and gave the following responses:

Q. Did you fall in front of a building or something else?

A. It's a Bukh prayer house, there is a barbershop in that area, too, but I fell close to the Bukh prayer house. P. 11, L. 21-22.

* * *

Q. Did you fall in front of the Bukh prayer house?

A. It's very difficult for me to judge. Was I directly in front of the Bukh prayer house, maybe there was two steps forward, two steps backwards; I am not sure about that, because I could not remember exactly. (Emphasis added).

P. 13, Lns. 23-25 - P. 14, L. 2-5.

Plaintiff's equivocating sworn deposition testimony in a prior action concerning where she tripped and fell in relationship to the Bukh prayer house, does not constitute a contradiction of the assertions alleged in plaintiff's verified complaint in the instant action. Plaintiff merely states in her deposition "I fell close to the Bukh prayer house." (Plaintiff's deposition of Zhuzhuna Palagashvili, P. 11, L. 21-22)

Defendants having not sustained their burden of proving the absence of triable issues of fact, the motion and cross motion for summary judgment are denied.

The foregoing constitutes the decision and order of this Court.

Dated: October 30, 2008

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Howard G. Lane, J.S.C.