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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:

Hon. Thomas Feinman
Justice

NAOMI ADELMAN as Administratrix of the Estate of RHODA RUBIN, Deceased,

Plaintiff,

- against -

THE BRISTAL AT LYNBROOK and ULTIMATE CARE NEW YORK, LLC.,

Defendants.

TRIAL/IAS PART 8
NASSAU COUNTY

INDEX NO. 600016/13

X X X

MOTION SUBMISSION
DATE: 1/12/15

MOTION SEQUENCE
NO. 3

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

The defendants, The Bristal at Lynbrook, (hereinafter referred to as "Bristal"), and the defendant, Ultimate Care New York, LLC, (hereinafter referred to as "Ultimate Care"), move for an order dismissing plaintiff's Amended Verified Complaint as and against defendant, Ultimate Care, pursuant to CPLR §3211, based upon their lack of any relationship to the premises on the date of plaintiff's accident, and granting defendants, Bristal and Ultimate Care, summary judgment dismissing plaintiff's Amended Verified Complaint in its entirety. The plaintiffs submit opposition. The defendants submit a reply affirmation.

At the outset, that branch of the defendants' motion for an order discontinuing plaintiffs' action as and against the defendant, Ultimate, is granted. The plaintiffs have not refuted that Ultimate had no relationship to the subject premises on the date of plaintiffs' loss.

The plaintiff, Rhoda Rubin, (hereinafter referred to as "Rubin"), initiated this action to recover for personal injuries sustained on April 14, 2012 when the plaintiff fell at the defendants' premises. Rubin, a resident, by way of Bill of Particulars, Supplemental Bill of Particulars, and Second Supplemental Bill of Particulars, alleges that she fell while attempting to enter the handicapped stall in the first floor restroom, while using her walker, "opened the stall door with one hand [and] was caused to lose her balance and fall." Rubin alleges that the dangerous and hazardous condition was that the handicapped stall door was not large enough to accommodate a standard sized walker. Rubin claims that the defendants violated statutory provisions, however, Rubin has not alleged any specific statutory violations.

"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; 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 v. City of New York*, 109 AD3d 854). A pedestrian who alleged that she was caused to trip and fall from a tuft of grass growing out of a sidewalk expansion joint, who testified that she did not see the tuft of grass prior to falling, and that she did not know why she fell, could not identify the cause of her fall. (*Id*). Therefore, her allegation that the tuft of grass caused her to fall was mere speculation. (*Id*).

"In a premises liability case, a plaintiff's inability to identify the cause of the accident 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." *(DeForte v. Greenwood Cemetery*, 114 AD3d 718; citing *Deputron v. A&J Tours, Inc.*, 106 AD3d 944; and *Laskowski v. 525 Park Avenue Condominium*, 93 AD3d 822). The defendant in *DeForte, supra*, was entitled to summary judgment as a matter of law by submitting the deposition testimony of the injured plaintiff which demonstrated that he could not identify the cause of his fall without resorting to speculation. (*Id.*, citing *Capasso v. Capasso*, 84 AD3d 997; *Hartman v. Mountain Val. Brew Pub*, 301 AD2d 570; and *Barretta v. Trump Plaza Hotel & Casino*, 278 AD2d 262). While proximate cause may be established without direct evidence of causation, by inference of the circumstances of the accident, mere speculation as to the cause of the accident, when there could have been many possible causes, is fatal to the cause of action. (*Constantino v. Webel*, 57 AD3d 472).

Here, the defendants have made a *prima facie* showing of entitlement to summary judgment as a matter of law by establishing that the plaintiff, Rubin, could not identify the cause of her fall without engaging in speculation. Rubin testified that she entered the first floor bathroom, as she had done so for the prior seven years, placed her right hand on her walker, used her left hand to open the stall door and then attempted to put her left hand back on her walker when she lost her balance and fell backwards. When deposed, Rubin was asked if she knew how she lost her balance and what caused her to fall, and Rubin responded, "I just lost my balance." Ms. Staine, employed by Bristal as a Med-Tech, testified that she responded to Rubin's fall, saw Rubin shortly after her fall lying on the floor with her walker across her chest, asked Rubin how she fell, and Rubin responded that she fell on her walker. Based upon the foregoing, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. (*Antonia v. Srour*, 69 AD3d 666; *Jackson v. Fenton*, 38 AD3d 495; *Hartman v. Mountain Valley Brew Pub, Inc.*, 301 AD2d 570).

Additionally, the defendants produced an affidavit on behalf of an architect who avers that he inspected the ladies' first floor bathroom on July 31, 2013, prior to plaintiff's fall, and opined that the size of the doorway for the subject stall was compliant with the American Disabilities Act, (ADA). Furthermore, the alleged theory of *res ipsa loquitur* is inapplicable *sub judice* as the foregoing has failed to support a fact pattern indicating that plaintiff's accident occurred in a manner that does not ordinarily occur in the absence of negligence. (*Bass v. Otis Elevator Company*, 255 AD2d 284).

As the defendants have met their initial burden of proof, the burden shifts to the plaintiffs to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). Once the movant for summary judgment has met his or her burden, it is incumbent upon the party opposing said motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which warrant a trial." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320). The plaintiffs, in opposition, assert, by way of counsel, that the plaintiffs have not met their *prima facie* burden. The plaintiffs have not refuted the arguments set forth by the defendants and have not raised an issue of fact to defeat the motion for summary judgment.

Upon the foregoing, it is hereby

ORDERED that the defendants' motion for summary judgment is hereby granted and therefore, plaintiffs' complaint is dismissed.

ENTER:

J.S.C.

Dated: March 4, 2015