

**Bah v Green Lack Mgt. LLC**

2024 NY Slip Op 31382(U)

April 15, 2024

Supreme Court, Kings County

Docket Number: Index No. 524297/2018

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15<sup>th</sup> day of April, 2024.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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MARIAMA BAH,

Plaintiff,

Index No.: 524297/2018

-against-

**DECISION AND ORDER**

GREEN LACK MANAGEMENT LLC,

Motion Seq. 03

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) \_\_\_\_\_

45-53

Opposing Affidavits (Affirmations) \_\_\_\_\_

78-80

Reply Affidavits (Affirmations) \_\_\_\_\_

83-87

Upon the forgoing papers, plaintiff Mariama Bah (“Bah”) moves for an order pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability against defendant Green Lack Management LLC; dismissing the First (Contributive Negligence), Second (Relative Culpability), Third (Lack of Actual or Constructive Knowledge), Fourth (Proportionate Share of Fault), Fifth (Lack of Knowledge), Seventh (Own Contributory Negligence), Eighth (Failure to State a Claim), Tenth (Proximate Cause), Eleventh (Assumption of Risk), Thirteenth (All Risks and Hazards were open,

obvious and apparent); and Fourteenth (Culpability) affirmative defense; and setting the matter down for trial on the issue of damages only.

### **BACKGROUND**

This is a personal injury action stemming from an October 10, 2018 trip and fall accident at a bodega owned by defendant Green Lack Management LLC located at 1334 Broadway, Brooklyn, New York. Plaintiff alleges that at the time of the accident, she had exited and was walking down the steps outside the bodega when she stepped on a chipped, broken step, lost her balance and fell, sustaining injuries.

### **PROCEDURAL HISTORY**

On or about December 4, 2018, plaintiff commenced this action for personal injuries by filing a summons and complaint against defendant Green Lack Management LLC. On or about July 19, 2019, defendant joined issue. On March 16, 2023, plaintiff moved to strike defendant's answer, to preclude defendant from calling witnesses at trial or using their affidavits in support of, or opposition to, a dispositive motion and to extend the summary judgment deadline. By Court Order dated April 14, 2023 ("Preclusion Order"), the defendant was "precluded from testifying at trial, offering evidence or submitting an affidavit in response to any dispositive motion on the issue of liability only."<sup>1</sup> On August 10, 2023, a note of issue was filed. On October 31, 2023, the defendant moved to vacate the Preclusion Order. By Court Order dated January 10, 2024, defendant's motion to vacate the Preclusion Order was denied. Plaintiff now moves for summary judgment.

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<sup>1</sup> NYSCEF Doc. No. 42.

### *The Parties' Positions*

#### *Plaintiff's Motion for Partial Summary Judgment*

Plaintiff argues that there can be no dispute as to the facts and circumstances that led to the claimed injuries, as the Preclusion Order bars defendant from introducing evidence to contradict the facts plaintiff set forth. Plaintiff also argues that defendant has a duty, as a property owner, to keep the property reasonably safe from defective conditions. In support of her argument, plaintiff submits, *inter alia*, defendant's verified answer, which demonstrates that defendant admitted to owning the subject premises. According to plaintiff's deposition testimony, on the date of the accident, she went to the subject bodega to get a snack.<sup>2</sup> The accident occurred as she was coming out of the bodega.<sup>3</sup> A gentlemen held the door open for her as she was exiting the bodega.<sup>4</sup> Plaintiff placed her left foot on the first step and her right foot on the second step, which was chipped, with a piece missing from the stairs.<sup>5</sup> As she stepped on the second step, she fell forward and landed on her hands and left knee.<sup>6</sup>

#### *Defendant's Opposition*

In opposition, the defendant argues that the plaintiff failed to make a prima facie showing of entitlement to summary judgment. In support of the opposition, defendant submits the attorney affirmation of Karen C. Higgins "(Higgins)", which contends that the plaintiff failed to demonstrate that defendant breached any duty of care. Moreover, the

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<sup>2</sup> Plaintiff's EBT tr at page 14, lines 16-18; page 15 lines 20-22.

<sup>3</sup> Plaintiff's EBT tr at page 15, line 23 to page 16, lines 2 and 9-16.

<sup>4</sup> Plaintiff's EBT tr at page 16, lines 22-25.

<sup>5</sup> Plaintiff's EBT tr at page 17, lines 24-25 to page 18, lines 2-10.

<sup>6</sup> Plaintiff's EBT tr at page 17, lines 24-25 to page 18, lines 2-3.

defendant contends that the plaintiff did not submit any photographs of the defective condition of the step, any expert report detailing the purported defect nor provide any measurements thereof. The defendant argues the plaintiff did not provide evidence of how long the purported condition had existed prior to her accident nor that it was large enough to have been noticed by the defendant.

Defendant also argues that the Court's Preclusion Order does not prevent defendant from opposing the plaintiff's motion. Specifically, the Preclusion Order does not state that defendant's counsel cannot submit an attorney affirmation arguing that the plaintiff did not meet her prima facie burden of proof as to liability, and same would not constitute as defendant testifying at trial, offering evidence, or submitting an affidavit. The defendant contends it is merely pointing out how plaintiff failed to meet her burden of showing that there is an actionable, nontrivial defect that caused her alleged injuries and that there is no need for the defendant to present any new testimony or evidence.

### *Plaintiff's Reply*

In reply, the plaintiff reiterates that she has met her initial burden of establishing prima facie entitlement to judgment as a matter of law through her deposition testimony. Plaintiff also reiterates that the defendant is precluded per the Preclusion Order, as defendant had constructive notice of a dangerous condition and should have known of the chipped stairs if it had inspected the stairs on a regular basis. Plaintiff argues that the Higgins affirmation, solely on its own, is insufficient to defeat summary judgment and should be disregarded, as it lacks probative value, is not evidence and is nothing more than unsubstantiated speculation.

## DISCUSSION

“The 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 triable issues of fact. The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. Moreover, the court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.” (*Moonilal v Roman Cath. Church of St. Mary Gate of Heaven*, 2024 WL 950077 [2d Dep’t 2024][internal citations omitted]).

“Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Song v CA Plaza, LLC*, 208 AD3d 760, 762 [2d Dep’t 2022][internal citations omitted]). Courts have held that deposition testimony submitted by a plaintiff is sufficient to establish the plaintiff’s prima facie entitlement to summary judgment on the issue of liability (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dep’t 2012]).

Here, the plaintiff has established prima facie entitlement to partial summary judgment as a matter of law on the issue of liability through her own deposition testimony, which demonstrated that the accident occurred when she stepped on the chipped, broken step, and fell over (*See Acevedo v CKF Produce Corp.*, 216 AD3d 885, 886 [2d Dep’t 2023]; *Mora v I-10 Bush Terminal Owner, L.P.*, 214 AD3d 785, 786 [2d Dep’t 2023]).

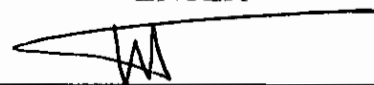
The Court now turns to the defendant's submission in opposition to determine its sufficiency to defeat the grant of summary judgment. The Court notes that the Higgins affirmation was the sole submission in opposition to the motion, and the [defendant] relied on the same evidence that was submitted in support of the motion (*Odi v Lifetouch, Inc.*, 35 AD3d 420, 421 [2d Dep't 2006]). The Court finds that the defendant failed to raise a triable issue of fact, as the Higgins affirmation, without further evidence or personal knowledge of how the accident occurred, is insufficient to raise a triable issue of fact (*Laffey Fine Homes of New York, LLC v 7 Cowpath, LLC*, 210 AD3d 974, 975 [2d Dep't 2022] citing *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980][internal citations omitted]).

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for partial summary judgment on the issue of liability against defendant Green Lack Management LLC (Seq. 03) is hereby granted in its entirety, and the matter is set down for trial on the issue of damages only.

This constitutes the decision and order of the court.

ENTER



J.S.C.

Hon. Wavny Toussaint  
J.S.C.