

## Advocate's VIEW

# Expert affidavits do not always defeat summary judgment

In certain personal injury cases, plaintiffs rely upon expert witnesses to prove that a defendant created a dangerous condition. For example, in a trip-and-fall case, a plaintiff may retain an engineering expert to opine that a roadway was improperly constructed, leading to a dangerous condition that caused the plaintiff to fall and injure himself.

Plaintiffs frequently submit expert affidavits in opposition to summary judgment motions filed by defendants seeking dismissal of their complaints. These expert affidavits may defeat summary judgment by creating questions of fact as to the nature of the condition, the defendant's duty, and whether the defendant met the standard of care. However, such submissions will not automatically allow a case to proceed and complaints are often dismissed when the expert's affidavit is conclusory or lacks sufficient factual specificity. This article explores when a plaintiff's expert affidavit is insufficient to withstand summary judgment.

### The relevant standard

When moving for summary judgment, the defendant must establish that it did not create the dangerous condition that caused the plaintiff to fall and did not have actual or constructive notice of the alleged dangerous condition. See *Pelow v. Tri-Main Dev.*, 303 AD2d 940, 941 (4th Dept. 2003). If the defendant meets this burden, the plaintiff then must "come forward with sufficient evidence in admissible form to raise a triable issue of fact



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whether defendant created the dangerous condition or had actual or constructive notice thereof." *Quinn v. Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 858 (4th Dept. 2005).

Conclusory and speculative expert affidavits do not defeat summary judgment.

After the defendant has met its burden, the burden then shifts to the plaintiff to establish a question of fact on the condition at issue. A plaintiff cannot defeat summary judgment by relying upon a speculative expert affidavit opining in conclusory fashion that the defendant created the dangerous condition. Thus, the mere submission of an expert affidavit does not automatically create a question of fact or "a battle of the experts" that would prevent summary judgment. Instead, a thorough review of the expert's affidavit and what the expert relied upon are crucial.

New York courts have not hesitated to grant a defendant summary judgment, despite plaintiff's submission of an expert affidavit. For example, in *Amaya v. Denihan Ownership Co., LLC*, 30 AD3d 327 (1st Dept. 2006), the Appellate Division reversed the trial court's decision, and awarded summary judgment to the defendant. In that case, the plaintiff alleged that he slipped and fell outside of the de-

fendant's hotel where there were puddles of water. *Id.* He alleged the puddles were a dangerous condition and were due to "structural defects in the platform." *Id.* The Appellate Division was not persuaded, finding that the expert affidavit "contained speculative, conclusory assertions as to the alleged defects, and cited to various broad or inapt engineering rules, regulations, and standards." *Id.*

A similar result was reached in *Rochford v. City of Yonkers*, 12 AD3d 433, (2d Dept. 2004). There, the plaintiff claimed she was injured when she stepped into a depression on a city street. The court awarded summary judgment to the defendant even though "the plaintiff's engineer opined that the defect resulted from the improper construction or repaving of the street." *Id.* at 433. The court found that the expert "failed to support that conclusion with any empirical data or foundational facts, nor did he recite any relevant construction practices or standards and explain how the City deviated therefrom." *Id.* at 433-34. See also *Ioffe v. Hampshire House Apt. Corp.*, 21 AD3d 930, 931 (2d Dept. 2005) (affidavit was "completely speculative and conclusory, failed to set forth foundational facts, assumed facts not supported by the evidence, and failed to recite the manner in which the engineer came to his conclusions.")

### Comparable rulings by the Fourth Department

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In a different context, the Fourth Department similarly held that a plaintiff “failed to raise a triable issue of fact by submitting the conclusory and speculative affidavit of its hazardous materials expert” regarding the cause of a fire. See *Cataract Metal Finishing, Inc. v. City of Niagara Falls*, 31 AD3d 1129, 1130 (4th Dept. 2006). In that case, a defendant established that it did not cause the relevant fire, and the court rejected the plaintiff’s expert affidavit that concluded otherwise. *Id.* See also *New York Mut. Underwriters*

*v. King*, 85 AD3d 1645, 1646 (4th Dept. 2011) (“The affidavit of plaintiff’s expert in opposition to the motions is insufficient to raise a triable issue of fact because it is based on mere speculation.”).

#### **Conclusion**

In New York, even though all inferences favor the non-moving party on a motion for summary judgment, a plaintiff cannot simply produce an expert affidavit for the case to survive. If the burden shifts to the plaintiff to create a question of fact to defeat summary judgment and an expert

affidavit is relied upon, the affidavit must be substantive, and must be based upon data and foundational facts. Speculative and conclusory affidavits are inadequate.

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