

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23442
W/kmg

_____AD3d_____

Submitted - May 1, 2009

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
L. PRISCILLA HALL, JJ.

2009-00086

DECISION & ORDER

Emperatriz Arzola, respondent, v Boston Properties
Limited Partnership, et al., appellants.

(Index No. 25368/06)

Lester Schwab Katz & Dwyer, LLP, New York, N.Y. (Howard R. Cohen and Harry Steinberg of counsel), for appellants.

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Queens County (Weiss, J.), dated November 17, 2008, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff allegedly tripped and fell over a mat which had been placed in the lobby of the defendants' building due to inclement weather. Although the edges of the mat had been taped to the floor, the plaintiff claims that the front of the mat was bunched up and raised prior to her fall. After depositions had been conducted, the defendants moved for summary judgment dismissing the complaint on the ground that they neither created nor had actual or constructive notice of the alleged hazardous condition of the mat. The Supreme Court denied the defendants' motion, concluding that they had failed to sustain their initial burden of establishing their entitlement to judgment as a matter of law. We agree.

A defendant who moves for summary judgment in a trip-and-fall case has the initial

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burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it (see *Bruk v Razag, Inc.*, 60 AD3d 715; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598; *Totten v Cumberland Farms, Inc.*, 57 AD3d 653, 654; *Soto-Lopez v Board of Mgrs. of Crescent Tower Condominium*, 44 AD3d 846). To sustain this burden, “the defendant must offer some evidence as to when the area in question was last . . . inspected relative to the accident” (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d at 599; see *Bruk v Razag, Inc.*, 60 AD3d 715; *Soto-Lopez v Board of Mgrs. of Crescent Tower Condominium*, 44 AD3d 846; *Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410). Since the defendants offered no evidence as to when the lobby area where the plaintiff fell was last inspected prior to the accident (cf. *Hayden v Waldbaum, Inc.*, _____AD3d_____ [decided herewith]), they failed to make a prima facie showing that they did not have constructive notice of the alleged hazardous condition of the mat. In view of the defendants' failure to satisfy their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiffs were sufficient to raise a triable issue of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Bruk v Razag, Inc.*, 60 AD3d 715).

RIVERA, J.P., ENG, CHAMBERS and HALL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court