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

D32408
Y/ct

_____AD3d_____ Submitted - September 16, 2011

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2010-05358 DECISION & ORDER

Dorothy Ortiz-Tulla, appellant, v Federated Department Stores, Inc., formerly known as Macy's, et al., respondents.

(Index No. 102031/07)

Ameduri Galante & Friscia, Staten Island, N.Y. (Marvin Ben-Aron of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York, N.Y. (Howard R. Cohen of counsel), for respondent Federated Department Stores, Inc., formerly known as Macy's.

Mandelbaum, Salsburg, Lazris & Discenza, P.C., New York, N.Y. (Owen J. Lipnick of counsel), for respondents Ultimate Services, Inc., and USI Services Group, Inc.

In an action to recover damages for personal injuries, etc., the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), entered April 9, 2010, as, in effect, granted that branch of the motion of the defendant Federated Department Stores, Inc., formerly known as Macy's, and that branch of the separate motion of the defendants Ultimate Services, Inc., and USI Group Services, Inc., which were for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff commenced the instant action against Federated Department Stores, Inc., formerly known as Macy's (hereinafter Federated), to recover damages for personal injuries allegedly sustained when she fell on a floor in a Macy's department store (hereinafter the store) as a result of

Federated's negligence. Later, the plaintiff amended her complaint to add, as defendants, among others, Ultimate Services, Inc., and USI Services Group, Inc., (hereinafter together the USI defendants), alleging that each of them negligently provided cleaning services at the store.

After joining issue, Federated moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it on various grounds, and the USI defendants separately moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them on various grounds.

The Supreme Court, inter alia, in effect, granted that branch of Federated's motion which was for summary judgment dismissing the complaint insofar as asserted against it and that branch of the USI defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff appeals.

Although we agree with the plaintiff that the Supreme Court erred in determining that Federated and the USI defendants, in their respective motions, established their prima facie entitlement to judgment as a matter of law by demonstrating via the plaintiff's deposition testimony that she cannot identify the cause of her fall (*see generally Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921; *Garcia v New York City Tr. Auth.*, 269 AD2d 142, 142-143; *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7; *cf. Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015, 1016; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 435; *Golba v City of New York*, 27 AD3d 524, 524; *Curran v Esposito*, 308 AD2d 428, 429; *Lee v Rite Aid of N.Y.*, 261 AD2d 368, 368-369; *Pianforini v Kelties Bum Steer*, 258 AD2d 634, 635), we conclude nonetheless that the Supreme Court properly determined that they are entitled to summary judgment dismissing the complaint insofar as asserted against them on an alternate ground. In particular, Federated and the USI defendants, in their respective motions, established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not cause or create the alleged hazardous condition that caused the plaintiff's fall or have actual notice or constructive notice of such condition for a sufficient length of time to discover and remedy it (*see Frazier v City of New York*, 47 AD3d 757, 758). In opposition, the plaintiff failed to raise a triable issue of fact, either through her own affidavit (*see Harris v Five Point Mission-Camp Olmstedt*, 73 AD3d 1127, 1128-1129; *McFadden v Village of Ossining*, 48 AD3d 761, 762; *Fontana v Fortunoff*, 246 AD2d 626, 626-627) or that of her expert (*see Harris v Five Point Mission-Camp Olmstedt*, 73 AD3d at 1129; *Tomol v Sbarro, Inc.*, 306 AD2d 461, 461; *Mankowski v Two Park Co.*, 225 AD2d 673, 674). Accordingly, the Supreme Court properly granted those branches of the respective motions of Federated and the USI defendants which were for summary judgment dismissing the complaint insofar as asserted against them.

SKELOS, J.P., DICKERSON, LEVENTHAL and LOTT, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court