

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

D33361
Y/prt

_____AD3d_____

Argued - December 5, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-11122

DECISION & ORDER

Roza Tsekhanovskaya, appellant, v
Starrett City, Inc., et al., respondents.

(Index No. 27112/08)

Rosato & Lucciola, P.C., New York, N.Y. (Donald D. Casale and Joseph S. Rosato of counsel), for appellant.

Brody, Bernard & Branch, LLP, New York, N.Y. (Mary Ellen O'Brien and Tanya M. Branch of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Solomon, J.), dated August 16, 2010, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

The plaintiff allegedly sustained personal injuries when she tripped and fell over sticks located near a garbage chute in an apartment building. As a result, the plaintiff commenced this action against the defendants, who are the owners and managing agent of that building. The defendants moved for summary judgment dismissing the complaint, contending that they did not create the alleged hazardous condition or have actual or constructive notice of it. The Supreme Court granted the motion. The plaintiff appeals. We reverse.

In a trip-and-fall case, a defendant moving for summary judgment has the initial

December 20, 2011

Page 1.

TSEKHANOVSKAYA v STARRETT CITY, INC.

burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Leary v Leisure Glen Home Owners Assn., Inc.*, 82 AD3d 1169; *Przywalny v New York City Tr. Auth.*, 69 AD3d 598). “To meet its initial burden on the issue of . . . constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599; see *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610; *Braudy v Best Buy Co., Inc.*, 63 AD3d 1092). A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff’s case (see *Cummins v New York Methodist Hosp.*, 85 AD3d 1082).

Here, the defendants failed to establish, prima facie, that they did not have constructive notice of the alleged dangerous condition, as they failed to proffer evidence demonstrating that the condition existed for an insufficient amount of time for them to discover and remedy it (*id.*; see *Catanzaro v King Kullen Grocery Co.*, 194 AD2d 584). Since the defendants failed to meet their initial burden as the movants, we need not review the sufficiency of the plaintiff’s opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851), and thus the defendants’ motion for summary judgment dismissing the complaint should have been denied.

SKELOS, J.P., BELEN, LOTT and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court