Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES PART 17

Justice

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JOYCE MORRIS,

Plaintiff, **Index No.: 12100/05**
Motion Date: 4/18/07

-against- **Calendar Number: 38**

J. FOSTER PHILLIPS FUNERAL HOME, INC.

Defendant.

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The following papers numbered 1 to 10 read on this motion by defendants for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition-Affirmation-Exhibits.....	6-8
Reply Affirmation.....	9-10

Upon the foregoing papers it is ordered that defendant's motion for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint is granted, for the following reasons.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

According to the complaint, the action herein stems from plaintiff's slipping and falling while walking on the marble floor, inside the defendant's funeral home located at 179-24 Linden Boulevard, Queens County, New York, on December 20, 2004. Plaintiff alleges that defendant's failure to place mats or runners on the marble floors that were wet due to snow caused water to accumulate and she slipped on this water. At her deposition, Plaintiff stated that she entered the

funeral home and walked along a path of carpet mats, or runners until she entered the chapel to view her deceased husband. After leaving the chapel, she slipped and fell on an area of the exposed marble floor between the carpeted floor outside the chapel and the runner placed over the marble floor. She claims to have slipped on water, that she saw after she fell. However, she did not see any water or any wetness as she walked throughout the funeral home to the chapel. As a result of her fall, she suffered injuries and brought this action to recover damages.

Defendant now moves for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint on the grounds that it did not create the condition which caused plaintiff's accident and it did not have actual or constructive notice of the alleged condition which plaintiff claims caused her accident. Plaintiff opposes this motion.

It is well settled that in order to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition and a reasonable time to undertake remedial actions. Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.) Pollio v Nelson Cleaning Company, 269 AD2d 512, (2d. Dept. 2000.) On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. *See*, Colt v. Great Atlantic & Pacific Tea Company, Inc. 209 AD2d 294 (1st. Dept. 1994.)

Initially, this court is satisfied that defendant has made a prima facie showing of entitlement to judgment as a matter of law. It has submitted evidence, inter alia, deposition testimony of plaintiff and Ms. Veronica Cosma, the witness who accompanied plaintiff on the date of the accident, John Pantoja, the director of the funeral home, and Mac Fortune, the funeral director. This evidence establishes that defendants neither created the dangerous condition nor had actual or constructive notice of the condition. Pollio v Nelson Cleaning Company, 269 AD2d 512 (2d Dept 2000.) Plaintiff's deposition testimony indicates that she did not know when the wet condition, allegedly caused by tracked in snow, was created. There is no indication that prior to her fall she noticed any water on the floor. Ms. Cosma's testimony indicates that on the day and time in question, the sidewalk in front of the funeral home was clear of snow and she did not see any snow or water inside the funeral home. John Pantoja, stated that on the subject day, he had not received any complaints of wetness on the marble floor and his staff monitored the floor. He also stated that runners were placed throughout the home that day and when he checked the floor areas, he did not observe any wetness. He also stated that after plaintiff fell, he went up to her and saw she was sitting on the carpet and exposed marble floor. After inspecting the area on his hands and knees, he did not find any wetness on the floor or the carpet. Mr. Fortune stated that he was near plaintiff when she fell and he did not observe any wetness in the area; nor did he receive any

complaints of a wet floor that day. The burden thus shifted to the opponent of this motion, to show that defendants created the condition or had actual or constructive knowledge of the hazardous condition which caused plaintiff to fall and that defendant had a reasonable time to correct the condition. *See*, Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.)

Plaintiff claims that defendant created the condition since there was snow outside that day and defendant did not place runners on the marble floor that covered the whole floor. According to plaintiff the defendant, in essence, created the condition by failing to take appropriate remedial steps because they did not extend the runners over the entire marble floor area and the exposed area became wet and that is where she fell. She claims that this failure led to a dangerous condition due to the marble being more slippery when wet than the runners and this caused her accident.

Contrary to plaintiff's argument, even if the runners were not properly placed, there is nothing but speculation to suggest this caused the wet condition. This speculation includes the peculiar happenstance that people tracked in snow from the outside and walked along the runners, or the floor and the snow melted and formed a puddle of water only in the portion of the marble floor not covered by a runner. As such, there was no evidence that the defendant created the wet condition. In any event, plaintiff's claim regarding the placing of the mats does not negate the need to show notice of the wet condition. Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.) It is clear that the defendant has demonstrated lack of actual notice of the particular accumulation of water that allegedly caused the plaintiff to fall.

Regarding constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy. Masotti v Waldbaums Supermarket 227 AD2d 532 (2d Dept. 1996). Plaintiff's deposition testimony regarding the amount of water on the floor does not provide evidence that the water existed for a sufficient period of time to establish constructive notice. The fact that snow was outside does nothing to suggest a wet condition was present inside the building for such an extensive period of time as to permit an inference that the defendants had constructive notice of the condition. *See*, Kershner v Pathmark Stores, Inc. 280 AD2d 583 (2d. Dept 2001.) Nor does it create a duty to place runners so as to cover a complete path over the floor. Since there is no evidence that the condition complained of was present for a sufficient period of time for the defendants to have discovered and remedied it, there is no basis for an inference that the defendants had constructive notice of the condition. *See* Ford v Citibank, N.A., *supra* at 509. This renders plaintiff's expert's testimony nothing more than speculation and incapable of defeating this summary judgment motion since there is no suggestion that the marble floor was inherently dangerous and needed to be completely covered. Finally, the mere awareness of a general

Consequently, plaintiff has failed to raise a triable issue of fact regarding whether the defendant created or had actual or constructive notice of the dangerous condition. *Id*. Accordingly, plaintiff has not met her burden and defendant's motion for summary judgment is granted and the complaint is dismissed.

DATED: April 24, 2007

ORIN R. KITZES, J.S.C.