SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

FAY TRAST,

INDEX NO.:018490/05

Plaintiff,

MOTION DATE:2-20-08
SUBMIT DATE:3-25-08
SEQ. NUMBER - 002

-against-

FARMINGDALE MULTIPLEX CINEMAS,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 1-31-08..... 1
Memorandum of Law in Support, dated 2-1-08.....2
Affirmation in Opposition, dated 3-12-08.....3
Reply Affirmation, dated 3-24-08.....4

The motion by defendant for summary judgment dismissing the complaint pursuant to CPLR §3212 is granted and the action is dismissed.

This action arises from injuries sustained by the plaintiff who slipped and fell in the lobby of defendant's movie theater, while preparing to get on line to get further inside, on January 1, 2005.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion.

Mgrditchian v. Donato, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient defense to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*,

196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Plaintiff claims that as she was approaching the entrance line, she tripped on an unknown object. After the fall, she saw a shiny box like for candy, as well as, some popcorn and paper napkins in the area. A witness on line states that she saw popcorn and candy wrappers in the lobby in the line area, as well as popcorn, a candy box, some napkins and a white paper bag in the area of the fall. This witness had made these observations 10 minutes before the event but made no complaint. The same witness testified at deposition that she had previously complained to management on at least four occasions that the theater lobby and bathrooms were getting sloppy.

The manager of the theater testified by deposition and submits an affidavit that immediately after the fall, the area was free of debris and as to the system and policies in effect for lobby cleanup, policing and patrol by theater employees, including her own observations made that day.

Crediting the testimony of the witness that the condition existed for 10 minutes does not provide the equivalent of constructive notice. *Hitzler v. St. Teresa's Church*, 35 AD3d 369 (2d Dept. 2006); *Branham v. Loews Orpheum Cinemas, Inc.*, 31 AD3d 319 (1st Dept. 2006); *Ruck v. Levittown Norse Associates, LLC*, 27 AD3d 444 (2d Dept. 2006).

Although circumstantial evidence may be employed in a case such as this and a plaintiff need not positively exclude every possible cause of the accident, *Gayle v. City of*

New York, 92 NY2d 936 (1998) a plaintiff must show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred and other possible causes must be rendered sufficiently remote so as to avoid the need for speculation. (*Cain v. Amaro*, 287 AD2d 676 (2d Dept. 2001); see also *Goldman v. Waldbaum*, Inc., 297 AD2d 277 (2d Dept. 2002)). Here, the circumstantial evidence is not sufficient because it is predicated on speculation and leads to further speculation.

Viewing the evidence in the light most favorable to plaintiff as according her every reasonable inference, the Court finds that a jury could not find negligence on the part of the defendant. Defendant has made a *prima facie* showing that it did not create or have actual or constructive notice of a dangerous condition on the floor, on which the plaintiff allegedly slipped and the plaintiffs have failed to raise a triable issue of fact. Plaintiffs have failed to demonstrate that the defendant created a dangerous condition which caused the accident, without proof of how long any foreign substance was there or that the defendant had actual or constructive notice of the condition and failed to remedy it within a reasonable time. *Gordon v. American Museum of Natural History,* 67 NY2d 836 (1986).

Finally, plaintiff's evidence of previous complaints made by the non-party witness are not sufficient to establish that there was a recurring dangerous condition. A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of a particular condition. *Love v. Home Depot USA, Inc.*, 5 AD3d 636 (2d Dept. 2004); *Petty v. Harran Transportation Co., Inc.*, 300 AD2d 290; *Cf Garcia v. U-Haul Co., Inc.*, 303 AD2d 453 (2d Dept. 2003)

Having found no material issues of fact, defendant's motion for summary judgment is granted and the complaint is dismissed.

This shall constitute the Decision and Order of this Court

ENTER

DATED: April 4, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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