

**Weinfauch v 160 E. 84th St. Assoc.**

2008 NY Slip Op 31296(U)

May 1, 2008

Supreme Court, New York County

Docket Number: 0103993/2006

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. BARBARA R. KAPNICK

PRESENT:

PART 12

Justice

Index Number : 103993/2006

WEINRAUCH, ROSLYN

vs.

160 EAST 84TH STREET

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 103993/06

MOTION DATE: \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAY 06 2008

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 5/1/08

BARBARA R. KAPNICK <sup>JSC</sup>

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
ROSALYN WEINRAUCH and HARRY  
WEINRAUCH, M.D.,

DECISION/ORDER

Index No. 103933/06  
Motion Seq. No. 002

Plaintiffs,

-against-

160 EAST 84TH STREET ASSOCIATES,  
THE FEIL ORGANIZATION, INC. and  
BROADWALL MANAGEMENT CORP.,

Defendants.

**FILED**

MAY 06 2008

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
BARBARA R. KAPNICK, J.:

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Roslyn Weinrauch on May 6, 2005 at the building where she resides located at 160 East 84<sup>th</sup> Street, New York, New York, when she was caused to trip and fall when her left foot got caught under a floor mat that had been placed down in the lobby.

Defendants now move for summary judgment dismissing plaintiffs' Complaint.

It is well settled that

[t]o impose liability upon a defendant in a slip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it (citations omitted). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. (citations omitted).

*Rubin v Cryder House*, 39 AD3d 840 (2nd Dep't 2007). See, also, *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986); *Budd v Gotham House Owners Corp.*, 17 AD3d 122 (1st Dep't 2005).

Defendants do not dispute that one of their employees placed the mat on the floor earlier in the day in anticipation of rain, but argue that there is no evidence that they created or had actual or constructive notice of any alleged ripple in the floor mat. In addition, defendants argue that the defect, if any, was trivial in nature.

In opposition to the motion, plaintiff Rosalyn Weinrauch claims that "[d]efendants placed a floor mat on the lobby floor that was left uneven, not flat with the floor, and raised from the lobby floor about two inches in height." She further claims that "[o]n prior occasions, I observed rippled rubber edges on the floor mats in the lobby. On the day my knee was fractured, the floor mat was buckled and its fabric was raised too, causing the rubber edges to be raised and thus not flat with the lobby floor."

Plaintiff Roslyn Weinrauch's husband, co-plaintiff Harry Weinrauch, M.D., has also submitted an affidavit in which he represents that "[t]he floor mat was buckled and its fabric was raised too causing the rubber edges to be raised from the surface of the lobby floor approximately two inches in height and six inches in length. The floor mat was a trap that caught her left

shoe and foot, and caused her to pitch forward and fall to the lobby floor."

Plaintiff Rosalyn Weinrauch further claims to have spoken to a former resident, Lita Cohen, after her accident, who told her that she too had fallen over a floor mat in the lobby a few months earlier.

Plaintiffs, however, have not been able to locate Ms. Cohen, who has reportedly moved to an unknown location in Paris, and thus have not been able to submit an affidavit from her. Defendants do not dispute that Ms. Cohen previously fell in the lobby, but Gjergj Paloka, the Superintendent of the building, did not recall ever hearing that Ms. Cohen tripped over a mat. Likewise, Patrick Brosman, a doorman at the building, did not recall that Ms. Cohen fell on a mat in the lobby.

Defendants argue that the very fact that the floor mat may have been slightly buckled at the time of plaintiff's accident cannot in and of itself serve as the basis for imposing liability against them, and contend that there is nothing in the record to suggest when the alleged ripple occurred in the floor mat.

It is just as likely under these facts that the mat was caused to flip up as the result of the plaintiff's fall and was not a pre-existing condition. In the absence, inter alia, of proof that the mat was turned up before the plaintiff's accident, a jury would be required to speculate as to the cause of her trip and fall (citations omitted).

*Penn v Fleet Bank*, 12 AD3d 584 (2nd Dep't 2004). See also, *Rubin v Cryder House*, *supra* at 841.

Accordingly, based on the papers submitted and the oral argument held on the record on March 5, 2008, this Court finds that plaintiffs have not met their burden of showing that defendants either created the condition or had actual or constructive notice of it.

This Court is, therefore, constrained to grant defendants' motion for summary judgment. The Clerk may enter judgment dismissing plaintiffs' Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: May / , 2008

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**FILED**  
MAY 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK