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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 120901/2003

CERTNER, ROBERTA

VS

WPG RESIDENTIAL

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/6/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A 1	1-2
Answering Affidavits — Exhibits A 1	3
Replying Affidavits	4
Sur-Reply	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

FILED
JUL 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/1/08

J.S.C.

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: IAS PART 7

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ROBERTA CERTNER,

Plaintiff,

- against -

WPG RESIDENTIAL CO., INC., RESIDENTIAL MANAGEMENT CO., INC. and 677 TENANTS CORP.,

Defendants.

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Index No. 120901/03

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this case, plaintiff, a self-employed herbalist and acupuncturist, seeks compensation for injuries that she alleges she suffered when she slipped and fell in the lobby of the apartment building (the Building) in which she lives, in Manhattan, on October 17, 2003. Defendants move, pursuant to CPLR 3212, for summary judgment in their favor, dismissing the complaint.

On the evening of the incident, plaintiff and "Mango," plaintiff's 36-pound Wheaton terrier, were out for a short walk outside the Building. At her examination-before-trial (EBT), plaintiff testified that on the way out of the Building, at approximately 11:15 P.M., she walked through the lobby and vestibule leading to the street and noticed no water or debris on the lobby floor. Mango was then on the leash.

Plaintiff further testified that when she and Mango left the Building, it was raining very hard, that she had not brought an umbrella, and that the two got wet on the less-than-five-minute walk she and Mango took before returning inside. Plaintiff stated that upon returning, she walked through the vestibule, letting go of Mango's leash, and back through the doors that lead

into the Building's lobby, with Mango scampering through the lobby straight toward the elevator, as was his usual routine (Falco Aff., Exh. F, at 21).

Plaintiff swore that she was halfway between the lobby door and the elevator when she fell, and that she observed a "little thing of water" on the floor, but could not recall whether she noticed the water as she was falling, or thereafter. Plaintiff further swore that she did not know how long this water had been on the floor prior to her fall.

It is undisputed that the Building has rubber mats that are stored in a vestibule that is located near the ground floor apartment of the Building's superintendent, Albert Osario. Osario testified that in the event of rain, the mats would be placed on the floor of the Building's lobby and vestibule. It is undisputed that this was not done prior to plaintiff's fall.

On the evening of the incident, Osario testified that he had been visiting his daughter, in Queens, and that it was not raining when he left the Building at 6:00 P.M., or when he later left his daughter's apartment at approximately 10:00 P.M., but that it was drizzling lightly when he excited from his car upon arriving back at the Building, at approximately 10:45 P.M., at which time the Building's lobby floor was dry. Osario further testified that after returning to the Building, he went straight to his apartment and took a shower, during which time his son, Julian Osario, age 13, informed him about plaintiff's fall. Osario stated that he went into the lobby after his shower, and that while the floor was not wet, he put down mats to avoid future problems, in the event that it began to rain hard. Osario also stated that it was management policy to place mats in the lobby and vestibule when it was raining.

Julian Osario testified that his father returned to the Building at about 11:00 P.M. on the evening of the incident. Julian also testified that while he observed plaintiff lying on the lobby floor, he had no recollection as to whether the floor was wet that evening.

The cooperative's president, Judy Wennig, testified that she went for a walk at around 10:00 P.M. and that it was not raining, but started lightly raining at around 11:45 P.M. or 12:00 A.M. Defendants submit an official weather report for that evening that they contend demonstrates that there were only insignificant amounts of rain falling during the evening of the incident, and that during the hour of the incident, the rainfall was 1/10th of an inch.

Defendants argue that they are entitled to summary judgment in their favor because, based on the witness testimony described above, there is no proof that they had actual or constructive notice of the water condition that plaintiff alleges caused her fall. Defendants argue that the precipitation occurred virtually simultaneously with plaintiff's accident, thus leaving insufficient time, as a matter of law, for notice of the need for floor mats.

Defendants also contend that they are entitled to summary judgment because plaintiff cannot eliminate other reasonable causes of "the puddle of water" that was on the floor at the moment of her fall (Falco Mov. Aff., at 3), and that any jury verdict finding them liable would be speculative because it was just as probable that Mango caused plaintiff's fall by tracking water into the lobby seconds before she entered. In that event, defendants argue, they also would not be liable because of insufficient notice of the just-caused condition. Defendants also maintain that it is unreasonable to charge them with the duty to observe and clean an accumulation of water that plaintiff was unable to see.

In opposition, plaintiff provides the affidavit of Behrooze Nournia, who swears that on the night of the incident, he was present at plaintiff's home at 7:15 P.M. Nournia further swears that at that time it was raining, and the sidewalks were becoming wet, and that when he left the Building at approximately 8:30 P.M., it was still raining and the floors in the lobby and vestibule were wet, and without mats.

Plaintiff also submits the affidavit of Andrew Rector, who swears that he was employed as a dog walker on the night of the incident, and then walked Olive and Fred, dogs owned by tenants of the Building. Rector states that it was raining that evening, that he walked Olive at about 9:00 P.M., and that at times he had to carry her because she resists walking in water. Rector further states that he finished the walk, and returned to the Building, where there was water on the floor, and that after he dropped Olive off, the water was still there, it was still raining, and there were no mats on the floor.

In addition, plaintiff provides the report of meteorologist Joseph P. Sobel, PhD, who opines that steady rain fell from 8:00 P.M. through the end of October 17th, and with greater intensity between 10:15 P.M. and 11:40 P.M. Sobel states that light rain is defined as falling at the rate of less than 0.10 of an inch per hour, and moderate as between that rate and 0.30 of an inch hourly, and that from 6:30 P.M. to 11:15 P.M., approximately 0.15 of an inch of rain fell. Sobel further states that puddles outside the premises would have formed between 8:00 and 8:30 P.M. on the night of the incident. Sobel swears that the opinions in his affidavit are based on the interpretation of the best sources of weather information available to a reasonable degree of scientific certainty. He also lists the locations of the climatological reports and observations upon which the opinion in his affidavit is based.

Plaintiff also submits the affidavit of Warren W. Cronacher, a licensed professional engineer. Cronacher swears that he inspected the Building's lobby floor, in August 2007, and found that it was extremely slippery when wet. Cronacher further swears that defendants' failure to put down mats on the lobby floor violated sections 27-127 and 27-128 of the Administrative Code of the City of New York, because the means of egress from the Building was not kept in a safe condition where the extremely slippery floor surface, dangerous for pedestrians, was

allowed to exist (Silverstein Aff., Exh. D, ¶ 6). Cronacher also opines that the absence of the floor mat was a proximate cause of plaintiff's injuries.

Plaintiff argues that Osario testified that he was required to place mats on the floor any time it rained, and that she is not required to establish that the dangerous condition was precipitated by torrential rainfall. She further argues that the weather reports submitted demonstrate that rain fell for a sufficient time, and with sufficient intensity, to saturate the streets and sidewalks prior to her fall.

In order for a movant on a motion for summary judgment to prevail, it must provide sufficient admissible evidence eliminating material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in a light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]), according that party the benefit of all reasonable favorable inferences (*Gurfein Bros. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]). Where a movant has met its burden, the burden then shifts to the non-moving party to demonstrate that there exists a material issue of fact for trial (*Zuckerman*, 49 NY2d at 562).

It is undisputed that defendants had not put down floor mats on the night of the incident.[1] Somewhat conflicting evidence has been presented about the weather, including how much, and when, it was raining that evening. The weather reports and expert testimony, demonstrating that there was rainfall that evening, coupled with the affidavits of Rector and Nournia, stating that the lobby floor was wet hours prior to plaintiff's fall, raise an issue of fact sufficient, on a summary

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[1] There is also no evidence that defendants mopped the floor (*compare Boccaccino v Our Lady of Pity R.C. Church*, 18 AD2d 1055, 1055 [1st Dept 1963] [granting summary judgment in favor of defendant and stating that "[t]here was also proof that the floor of the church was mopped between Masses that morning"]).

judgment motion, to defeat defendants' argument that there was no constructive notice because significant rainfall only began immediately prior to plaintiff's fall (*see Kormusis v Jeffrey Gardens Apt. Corp.*, 31 AD3d 392, 393 [2d Dept 2006] ["the plaintiff [at trial] must show that the defect existed for a sufficient time to have allowed the property owner the opportunity to discover and cure it").

While defendants argue that it was just as likely, if not more likely, that the water on the lobby floor was logically attributable to plaintiff's wet dog (Def. Reply Memo. of Law, at 3), whether water accumulated on the lobby floor earlier in the evening, or after Mango's entrance routine, is a disputed factual issue for the trier of fact. Defendants rely on *Verde-Stefani v Melohn Properties* (13 AD3d 255 [1st Dept 2004]), in which the evidence demonstrated only that the water on the steps where plaintiff had fallen appeared to have come from plaintiff's shaken umbrella. Here plaintiff submits witness affidavits demonstrating that there exists an issue as to whether the floor may have been wet for hours. Accordingly, on this record, the court cannot determine as a matter of law that defendants were not afforded ample notice of a wet condition on the lobby floor necessitating the use of rain mats. That plaintiff herself did not notice a wet condition, or only noticed a bit of wetness on the floor, is merely additional evidence for consideration by the fact finder, but is not the sole evidence in this case, where both the evening's weather and the condition of the floor are disputed.

In addition, "'[g]enerally, issues of proximate cause are for the fact finder to resolve" (*Gray v Amerada Hess Corp.*, 48 AD3d 747, 748 [2d Dept 2008], quoting *Adams v Lemberg Enters., Inc.*, 44 AD3d 694, 695 [2d Dept 2007]), and it is well known that a court's charge on summary judgment is issue finding, not issue determination. Giving plaintiff's version of the facts the benefit of reasonable favorable inferences, as the court must on this motion, it cannot be

said as a matter of law that a jury could *not* determine that defendants' not having put down rain mats was a substantial factor in causing the occurrence of which plaintiff complains. Issues of negligence, proximate cause, and foreseeability are generally best left to a jury for resolution when undisputed (*Rotz v City of New York*, 143 AD2d 301, 304 [1st Dept 1998]; *see Pignatelli v Gimbel Bros., Inc.*, 285 AD 625, 627 [1st Dept], *affd* 309 NY 901 [1955]), how much more so the case where facts are disputed as here.

In reply, defendants argue that plaintiff, in opposing their motion, fails to provide evidence to demonstrate that the accident occurred on an area of the Building's floor that would normally be covered with a mat during rain and, consequently, has not shown that defendants' failure to put down mats was a substantial factor in causing her to slip and fall. This argument is unpersuasive as it is defendants who carry the burden to eliminate material issues of fact in their moving papers. Clearly defendants were on notice of plaintiff's allegation in her bill of particulars concerning their failure to put down floor mats and that she testified that the accident occurred roughly half the distance between the vestibule and elevator. Despite that knowledge, defendants did not, with their moving papers, or after, provide evidence demonstrating that plaintiff fell in an area of the lobby that would not have been covered with a mat during rain.

Defendants, relying on the rule that a party may not through an affidavit submitted on summary judgment contradict his or her own deposition testimony in order to feign an issue of fact (*Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007]), argue that the affidavits of Nournia and Rector raise only a feigned issue of fact as to the existence of constructive notice. This argument is unpersuasive. In *Katz v Sheepshead Bay Us Theatre* (11 Misc 3d 1060 [A] [Sup Ct, Kings County 2006]), upon which defendants rely, the plaintiff testified that her boyfriend was not with her when she fell, and the court thus disregarded the boyfriend's affidavit

indicating otherwise. In *Fontana v Fortunoff* (246 AD2d 626 [2d Dept 1998]), also cited by defendants, a plaintiff contradicted her own deposition testimony with a later submitted affidavit (*see also Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 236 [1st Dept 2001]).

While the First Department has recently stated that self-serving affidavits that clearly contradict a party's own deposition testimony and "can only be considered to have been tailored to avoid the consequences of h[is] earlier testimony" are insufficient to raise an issue of fact (*Fernandez*, 45 AD3d at 391, quoting *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]), defendants concede that the affidavits of Nournia and Rector do not directly contradict plaintiff's deposition testimony. Moreover, nothing has been submitted demonstrating that the affidavits contradict the witnesses' own deposition testimony. Furthermore, whether Nournia, as defendants contend, may be biased because he was a visitor to plaintiff's home is a credibility issue unsuited to determination on summary judgment (*see id.* at 391).

On another note, defendants argue that while Sobel holds himself out as an expert meteorologist, his report does not contain credentials that would qualify him to opine, based on engineering principles, about the conditions of streets and sidewalks. Sobel swears that he earned a Ph.D. in meteorology from Pennsylvania State University in 1976, and a masters in 1970, and that he is a member of the American Meteorological Society and has been qualified as an expert forensic meteorologist witness at numerous trials throughout the country. While Sobel discusses the condition of the streets and sidewalks and puddle formation during rain, the bulk of his affidavit concerns rainfall rates and weather during specific time periods. The court cannot determine, as a matter of law, that he is not qualified to testify as to such matters.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

Dated: July 6, 2008
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.