

**Kessler v 215 E. 68th St., LP**

2008 NY Slip Op 32363(U)

August 25, 2008

Supreme Court, New York County

Docket Number: 0101509/2006

Judge: Walter B. Tolub

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: TOLUB  
Justice

PART 15

KESSLER, ROSY

INDEX NO. 101509/06  
MOTION DATE 8/15/08  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

215 EAST 68<sup>th</sup> Street, LP.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

**IS DECIDED  
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
AUG 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/21/08

WALTER B. TOLUB

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
ROSY KESSLER

Plaintiff,

-against-

215 EAST 68<sup>th</sup> STREET, LP and RUDIN  
MANAGEMENT CO., INC.,  
Defendants.

Index No. 101509/06  
Mtn Seq.001

**FILED**  
AUG 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
**WALTER B. TOLUB, J.:**

This is Defendants' motion for summary judgment dismissing the Compliant pursuant to CPLR § 3212.

Facts

This action arises out of an accident which took place on March 1, 2005 at about 7:00 p.m. Plaintiff was a tenant in the building located at 215 East 68<sup>th</sup> Street, New York, New York. On the day of the accident, it had snowed for many hours. Plaintiff claims that she left her apartment for the first time that day at about 7:00 in the evening. She took the elevator down to the lobby and when she exited the elevator vestibule, she passed an area that was covered by an "L" shaped configuration of mats. The mats were placed on the floor by Defendants' employees because of the inclement weather.

When Plaintiff passed the mat area, she claims she slipped and fell and attempted to support her fall by bracing herself with her right arm. Following the incident, Plaintiff discovered

\* 3 ]  
that her arm was severely fractured and required surgery.

Plaintiff claims that the floor was wet and slippery on the day of the incident posing a dangerous condition. Plaintiff also claims that Defendants failed to properly cover and clean the floor during the time when people were tracking in snow through the lobby and elevator areas. Plaintiff further claims that Defendants knew that the weather conditions posed a dangerous condition and that Defendants were negligent in: (1) Failing to keep the floors in a dry and non-slippery condition; (2) in permitting a slippery condition to exist; (3) failing to mop the area when it became apparent that the floor was wet and slippery; (4) in failing to prevent water and snow from being tracked into the area; (5) in failing to take account and recognize the effect of the water and snow on the polished marble surface; and (6) in failing to extend mats into areas where water and snow had been tracked in.

By this motion Defendants seek summary judgment pursuant to CPLR §3212.

#### Discussion

To be granted a motion for summary judgment, the moving party must make a prima facie showing that there are no triable issues of fact (Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851 [1985]). The absence of material facts entitles that party to judgment as a matter of law (Id.). Once the prima facie case

is made, the party opposing the motion for summary judgment must produce evidentiary proof that material issues of fact do indeed exist, thereby warranting a trial (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Alvord and Swift v. Steward M. Muller Const. Co., 46 N.Y.2d 276). Summary judgment is a drastic remedy concerned with issue-finding not issue-determination. (Esteve v. Abad, 271 A.D. 725 [1st Dep't 1947]). If the court has any doubt as to the existence of genuine issues of material fact, summary judgment should be denied (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]).

On Defendants' motion for summary judgment, Defendants may demonstrate the lack of several prima facie elements of Plaintiff's case, however, to prevail, Defendants only need to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once Defendants present evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the Plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

To sustain a cause of action for negligence, a plaintiff must prove defendant had a duty to plaintiff, breached that duty, and that the breach was the proximate cause of plaintiff's injury. Damages and foreseeability must also be shown. (Hyatt

[\* 5.]  
v. Metro-North Commuter Railroad, 16 A.D.3d 218 [1st Dep't 2005]). Generally, a landowner owes a duty to maintain the premises in reasonably safe condition. (Smith v. Costco Wholesale Corp., 50 A.D.3d 499 [1st Dep't 2008]).

Defendants argue that they satisfied their duty to maintain the premises in a reasonably safe condition in view of the all the circumstances (Basso v. Miller, 40 NY2d 233 [1975]).

Defendants further argue that they did not create the dangerous condition and that they had neither actual nor constructive notice of any dangerous condition that precipitated the injury.

Constructive notice requires a showing that the defect was "visible and apparent and [existed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon v. American Museum of Natural History, 67 NY2d 836,837-838 [1986]; citing Negri v. Stop and Shop, 65 NY2d 625, 626 [1985] and Lewis v. Metropolitan Transp. Auth., 64 NY2d 670 [1984], *aff'd* 99 AD2d 246, 249 [1 Dept. 1984]). "[A] mere general awareness of some dangerous condition is legally insufficient to establish constructive notice." (Segretti v. Shorestein C., East, L.P., 256 AD2d 234, 235 [1 Dept. 1998], *citations omitted*.) However, Plaintiff can also show constructive notice by establishing that an "ongoing and recurring dangerous condition existed in the area of the accident [and] was routinely left unaddressed." (O'Connor-Miele v. Barbite

[\* 6]  
A Holzinger, Inc., 234 AD2d 106, 106-107 [1 Dept. 1996]).

Therefore, Defendants must show either that: (1) the condition did not exist long enough for the Defendants' employees to clean the wet floor, to the extent that it was wet; or (2) the condition did not exist long enough to replace any saturated mats; or (3) that the condition existed but had been addressed.

Defendants fail to meet this burden. Defendants submitted deposition testimony from employees who were in the lobby at the time of the incident who claim that the floor was not visibly wet or wet at all for that matter. However, the deposition testimony of Plaintiff contradicts the Defendants' offered testimony. Plaintiff claims that she fell in a wet area in the lobby, which was not covered by a mat and that her clothes were wet as a result of her fall. The contradicting testimonies raise questions of fact regarding Defendants' notice of the claimed defect.

Inasmuch as questions of fact exist about whether Defendants breached their duty to the Plaintiff, Defendants' motion for summary judgment must be and is denied.


Accordingly, it is

ORDERED that Defendants' motion for summary judgment to dismiss the complaint is denied.

\*7]  
Counsel are directed to appear for a pre-trial conference on September 26, 2008, at 11:00 a.m. in Part 15, Room 335, 60 Centre Street, New York, New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/25/08

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
AUG 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK