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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

Carolyn Curnal

-v-

Loews Cineplex

INDEX NO. 102326/06

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Notice of Cross-Motion)	2
Replying Affidavits	3, 4, 5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross-motion are determined pursuant to the Court's decision/order dated 8/21/08

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/21/08

M Friedman

MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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CAROLYN CURIEL,

Plaintiff(s),

- against -

Index No.: 102326/06

LOEWS CINEPLEX THEATERS, INC.,

Defendant(s).

DECISION/ORDER

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In this personal injury action, plaintiff sues for damages sustained when she slipped and fell on a wet floor during a snowstorm at defendant's movie theater on January 22, 2005. Defendant Loews Lincoln Theatre Holding Corp. ("Loews") moves for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves to strike defendant's answer or to preclude defendant from presenting evidence at trial or, in the alternative, for summary judgment against Loews as to liability.

It is undisputed that plaintiff arrived at defendant's premises to see a film during a snowstorm. (See P.'s Dep. at 46.) After plaintiff purchased her ticket, she fell on the bare floor while stepping from one mat to another. (Id. at 53.)

As a threshold matter, the court holds that the branch of plaintiff's cross-motion to strike defendant's answer or to preclude should be denied. It is undisputed that by orders of this court dated February 22, April 19 and May 31, 2007 (P.'s Cross-Motion, Ex. 4), defendant was required to provide a list of employees working at the premises on the date of the accident, or an affidavit on personal knowledge explaining why such employees could not be identified. From the outset, defendant took the position that it was unable to comply with these orders because the

records had been destroyed or become unavailable when Loews merged with AMC Entertainment, Inc. ("AMC"). However, it was not until July 23, 2007 that defendant produced an affidavit from a person who had searched for the records, attesting that "there are no available records" identifying such employees, and stating that "[m]any of the past schedules and time sheets pertaining to LOEWS were purged shortly after the merger of AMC/LOEWS in February 2006." (Aff. of Jeanne Nardone [senior manager], ¶4 [Ex. 8 to Cross-Motion].) This representation proved, at best, to be incorrect. In October 2007, defendant's counsel made his own search for the records and was able to compile a list of Loews' staff working on the date of the accident, which he then provided to plaintiff. (See Capobianco Aff. In Opp. to Cross-Motion, ¶9.)

The court strongly disapproves defendant's failure to comply in a timely, diligent fashion with the above discovery orders. However, in view of defendant's counsel's ultimate compliance with the orders,[1] the court will exercise its discretion to deny the drastic remedy of striking defendant's answer, and will direct further discovery. Raymond Tapia, the witness previously produced by defendant, had general knowledge of defendant's safety procedures during storms as of the date of plaintiff's accident, but no personal knowledge of the condition of the floor where plaintiff fell. It is well settled that "a 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall." (Piacquadio v Recine Realty Co., 84 NY2d 967, 968 [1994] [internal citation omitted].)

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[1]Defendant's response, dated October 29, 2007 (P.'s Cross-Motion, Ex. 1) identified employees who were working at the premises from 11:00 a.m. to 6 p.m. on the date of plaintiff's accident and who were still employed by AMC/Loews. The response indicated that defendant was still in the process of obtaining last known addresses for several other employees who were also working but were not still employed.

Thus, contrary to plaintiff's contention, the fact that defendant's employees had notice of a storm in progress is not sufficient to establish constructive notice of a dangerous condition where plaintiff fell. In view of defendant's dilatory, if not obstructive, conduct in producing the names of possible notice witnesses, plaintiff should have a further opportunity to conduct discovery. In particular, plaintiff should be permitted to depose one additional witness with personal knowledge of the condition of the floor where plaintiff fell and of the safety procedures followed on or in the vicinity of the location of plaintiff's fall before her accident.

The court notes that a plaintiff in a personal injury case has the burden of proving not only that the defendant had actual or constructive notice of a dangerous condition (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]), but also that the owner breached a duty to maintain the premises in a reasonably safe condition. (See Peralta v Henriquez, 100 NY2d 139 [2003].) This burden is a heavy one where an accident occurs during a storm, as the courts have repeatedly held that an owner "is not required to provide a constant, ongoing remedy when an alleged dangerous condition is caused by moisture tracked indoors during a storm." (Talavera v New York City Tr. Auth., 41 AD3d 135, 136 [1st Dept 2007]; Gibbs v Port Auth. of New York, 17 AD3d 252 [1st Dept 2005]; Hussein v New York City Tr. Auth., 266 AD2d 146 [1st Dept 1999]. See Pena v New York City Tr. Auth., 48 AD3d 309 [1st Dept 2008]; Rogers v Rockefeller Gp. Intl., Inc., 38 AD3d 747 [2d Dept 2007].) Nor is the owner required to cover all of the floors with mats or to mop continuously during a snow storm. (See Curtis v Dayton Beach Park No. 1 Corp., 23 AD3d 511 [2d Dept 2005]; Rogers, 38 AD3d at 749.)

Here, it is undisputed that defendant took safety precautions by placing mats on the floor during the storm. However, absent evidence as to what notice, if any, defendant had before plaintiff's accident as to the particular condition of floor in the vicinity of her fall, the court

cannot determine whether the mats were reasonably adequate. Put another way, the reasonableness of defendant's safety precautions should be determined only in light of defendant's actual or constructive notice.

The branch of plaintiff's motion to add AMC as a party defendant will be denied as untimely.

It is accordingly hereby ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion, to the extent it seeks to strike plaintiff's answer or to preclude, is denied on condition that 1) within 20 days after service of a copy of this order with notice of entry, defendant shall provide plaintiff with the last known address for all employees who working at the subject theatre between 11:00 a.m. and 6 p.m. on the date of plaintiff's accident; and 2) defendant shall produce for deposition, on 20 days' written notice from plaintiff, an employee with personal knowledge of the condition of the floor where plaintiff fell and of the safety procedures followed on or in the vicinity of the location of plaintiff's fall before her accident; and it is further

ORDERED that plaintiff's cross-motion is otherwise denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant with 20 days of the date of entry of this order, and shall notice the deposition of defendant's employee for a date no later than October 30, 2008. Failure to comply with these time limits shall result in denial of any further discovery.

This constitutes the decision and order of the court.

Dated: New York, New York
August 21, 2008

MARCY FRIEDMAN, J.S.C.