Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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MOUNITA AHMED and KAZI ISLAM,

Plaintiffs,

Index No.: 3051/07
Motion Date: 1 /28/09
Motion Cal. No.: 2
Motion Seq. No.: 1

-against-

QADER HOSSAIN,

Defendant.

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The following papers numbered 1 to 13 read on this motion for an order, pursuant to CPLR § 3212, granting Hossain summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 6
Affirmation in Opposition.....	7 - 9
Reply Affirmation.....	10 - 11
Reply Memorandum of Law.....	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff Mounita Ahmed ("plaintiff") on December 25, 2006, as the result of the presence of water that caused her to slip and fall in the front foyer of the single family home owned by defendant Qader Hossian ("defendant"), located at 165-33 85th Avenue, Jamaica, New York, as she was leaving a Christmas party, which she attended with her husband, plaintiff Kazi Islam ("Islam"). It had rained continuously that day and throughout the party. Defendant moves for summary judgment dismissing the complaint, alleging that he "had no duty to place mats on the floor nor did he have any actual or constructive notice of the water."

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993).

As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

A property owner has a duty to maintain its premises in a reasonably safe condition. Peralta v. Henriquez, 100 N.Y.2d 139, 144 (2003); Basso v. Miller, 40 N.Y.2d 233 (1976); Miguel v. SJS Associates, LLC, 40 A.D.3d 942 (2nd Dept. 2007); Rodriguez v. White Plains Pub. Schools, 35 A.D.3d 704, 705 (2nd Dept. 2006). As a general proposition, a "defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted)." Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999). "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice." Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it." Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996).

In cases involving wet surfaces, "to impose liability for an injury proximately caused by a dangerous condition created by weather tracked into a building, a defendant must either have created the dangerous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial actions." Ford v. Citibank, N.A., 11 A.D.3d 508 (2nd Dept. 2004); Friedman v. Gannett Satellite Info. Network, 302 A.D.2d 491 (2nd Dept. 2003). Thus, to prevail on a motion for summary judgment, a defendant establishes a prima facie entitlement to judgment as a matter of law by a showing that the defendant did not create the wet condition or have notice of it such that they could have prevented the plaintiff's accident by exercising reasonable care. Miller v. Gimbel Bros., Inc., 262 N.Y. 107 (1933); Murphy v. Lawrence Towers Apartments, LLC, 15 A.D.3d 371 (2nd Dept. 2005); Garcia v. Delgado Travel Agency, 4 A.D.3d 204 (1st Dept. 2004).

In support of his motion for summary judgment, defendant proffered, inter alia, the deposition testimony of both plaintiffs, as well as his deposition testimony, to show that he had

neither actual nor constructive notice of a dangerous condition caused by wetness in the foyer caused by rain. The testimony established that plaintiffs were among the ten or eleven guests attending, with their children, a Christmas party hosted by defendant on a rainy evening, following a full day of rainfall. The testimony further showed that upon arrival, the guests removed their shoes in the foyer and deposited their umbrellas nearby; and that during the party, guests left the house to smoke cigarettes outside and then returned. Plaintiff testified that at the close of the party, she put her shoes on and slipped when she went to retrieve her umbrella. She also testified that she did not see water at any time before her fall, and that she was not aware of any prior accidents. Her husband, plaintiff Islam, testified that he did not complain about a wet floor prior to plaintiff's fall, and that he felt the water on the floor next to his wife, and described the water: "Like not too much water; it was wet." Defendant, by using the deposition testimony, made a prima facie showing of his entitlement to summary judgment by presenting sufficient evidence to show that he neither created nor had actual notice of any allegedly dangerous condition created by moisture in the foyer area.

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (2nd Dept. 1993). In opposition, plaintiffs submit, inter alia, the affidavit of plaintiff Islam, who stated:

> I was at the home of defendant with my wife and several other couples for a dinner party. I arrived with my wife around 8:00 pm, possibly earlier. Wet shoes and umbrellas were put to an area just inside of the door as indicated in the photograph attached as exhibit "H" to the motion. There was no mat in the area to place the shoes or any other type of receptacle to catch dripping rain water from wet umbrellas.

He further stated that approximately one hour after his arrival, he put his shoes on to go outside to smoke and observed that "the floor was still wet due to the shoes and the dripping umbrellas," and added:

> Approximately 1 hour after this, around 10:30pm, my wife and I were getting ready to leave. I went back to the area where the shoes were in order to put my shoes on. At that time the floor was still wet, and was even wetter than when I arrived due to the drippings from the umbrella and the traffic of people going in and out to smoke. The floor still had not been cleaned, and no mats had been placed. I put on my shoes, and I walked outside when I heard my wife scream. I

> went back inside and observed my wife on the floor in the area where the shoes and umbrellas were located, just to the side of the front door.

Plaintiffs argue that defendant "did not place any mats and did not mop or clean the area at any time during the evening prior to plaintiff's fall," despite his awareness that "wet shoes and umbrellas were placed in the foyer." They further argue that a "reasonable visual inspection herein would have revealed that there was water on the floor by virtue of the combination of wet shoes, wet umbrellas and constant traffic by the front door." Plaintiff concludes that the alleged facts are sufficient to raise an issue of fact as to whether defendant had actual and constructive notice of the dangerous condition that he failed to remedy.

The Appellate Division, Second Department, in Curtis v. Dayton Beach Park No. 1 Corp., 23 A.D.3d 511 (2nd Dept. 2005), stated:

> A property owner is not obligated to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation (see Miller v. Gimbel Bros., 262 N.Y. 107, 186 N.E. 410; Negron v. St. Patrick's Nursing Home, 248 A.D.2d 687, 671 N.Y.S.2d 275). In the absence of proof as to how long a chunk of ice was on the floor of the hallway, there is no evidence to permit an inference that the defendants had constructive notice of the alleged defect which caused the plaintiff to fall (see Kershner v. Pathmark Stores, 280 A.D.2d 583, 720 N.Y.S.2d 552; McDuffie v. Fleet Fin. Group, 269 A.D.2d 575, 703 N.Y.S.2d 510). Moreover, general awareness that ice may be tracked into a building during inclement weather is insufficient to establish constructive notice of the particular condition which caused the plaintiff to fall (see Yearwood v. Cushman & Wakefield, 294 A.D.2d 568, 742 N.Y.S.2d 661; cf. Fielding v. Rachlin Mgt. Corp., 309 A.D.2d 894, 766 N.Y.S.2d 381). Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment.

See, also, Rogers v. Rockefeller Group Intern., Inc., 38 A.D.3d 747 (2nd Dept. 2007)["A general awareness that water was likely to be tracked on the [foyer] floor in rainy weather is insufficient, without more, to establish constructive notice of the particular wet condition that allegedly caused the plaintiff to slip (citation omitted)."]

Plaintiffs have raised an issue of fact at least as to whether defendant had constructive notice of the wet condition on the floor, which was allegedly observed for at least one hour prior to the accident. See, Ruic v. Roman Catholic Diocese of Rockville Centre, 51 A.D.3d 1000 (2nd Dept. 2008); Hackbarth v. McDonalds Corp.. 31 A.D.3d 498 (2nd Dept. 2006); see, also, Kormusis v. Jeffrey Gardens Apartment Corp., 31 A.D.3d 392, 392 (2nd Dept. 2006)["Viewed in the light most

favorable to the plaintiff, we find that there was sufficient evidence to submit to the jury the issue of whether or not the defendants had constructive notice of the allegedly defective condition"]. Although a defendant may not be "required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain"(Curtis v. Dayton Beach Park No. 1 Corp., 23 A.D.3d 511 (2nd Dept. 2005); Yearwood v. Cushman & Wakefield, Inc., 294 A.D.2d 568 (2nd Dept. 2002); Negron v. St. Patrick's Nursing Home, 248 A.D.2d 687 (2nd Dept. 1998)), defendant failed to establish his entitlement to summary judgment as a matter of law by submitting evidence sufficient to establish that he did not have constructive notice of the alleged dangerous condition [(Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2nd Dept. 2008)], or that he took reasonable precautions to remedy wet conditions on his premises caused by a lengthy rainstorm. See, Ford v. Citibank, N.A., 11 A.D.3d 508 (2nd Dept. 2004). Here, a trip and fall allegedly was caused by a wet floor at the entryway to a single family home to which guests have been invited and are greeted at the door by the host, defendant, who takes the guests' wet coats, and directs the guest to deposit their shoes and umbrellas directly on the floor. Whether defendant had notice of the condition of the ceramic tile floor under such circumstances or took appropriate remedial action presents "competing contentions [that] must be viewed 'in a light most favorable to the party opposing the motion' (Lakeside Constr. v. Depew & Schetter Agency, 154 A.D.2d 513, 514-515, 546 N.Y.S.2d 136)." Marine Midland Bank, N.A. v. Dino & Artie's Automatic, 168 A.D.2d 610 (2nd Dept. 1990).

Based upon the foregoing, this Court finds that there are triable issues which cannot be resolved summarily. Accordingly, defendant's motion for an order granting him summary judgment, pursuant to CPLR §3212, and dismissal of the complaint is denied.

Dated: March 23, 2009

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J.S.C.