[*1]

SCANNED ON 4/23/2009

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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Briton

INDEX NO. 102574/07

- v -

MOTION DATE

A1 Entertainment

MOTION SEQ. NO. 003

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 23 2009
COUNTY CLERK'S OFFICE

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

Dated: 4/15/09

Louis B. York
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 2

----------X

RANIT BITON,

Plaintiff,

-against- Index #102574/07

A 1 ENTERTAINMENT LLC d/b/a GUEST HOUSE, i/s/h/a GUEST HOUSE and GAIETY INVESTMENTS, LTD.,

Defendants.

YORK, J.

In this action, in which it is claimed that plaintiff nightclub patron, Ranit Biton, fractured her wrist after falling on a wet floor in the nightclub premises subleased by defendant, A 1 Entertainment (A1), A1, the codefendant landlord, Gaiety Investments, LTD. (Gaiety), moves for an order granting it summary judgment on the ground that it was an out-of-possession landlord, which had no duty to maintain the premises, and A1 and Gaiety seek summary judgment on the ground that neither had actual or constructive notice of the alleged defective condition. In its memorandum of law, A1 adds that Biton will be unable to establish that A1 created the dangerous condition allegedly responsible for her injuries.

The branch of the motion which seeks summary judgment on behalf of Gaiety on the ground that it was an out-of-possession landlord with no duty toward Biton and had no notice of the alleged condition is granted. It is clear from the lease of the premises to the primary tenant, which lease is appended to the moving affirmation (exh. G), that the tenant took the premises "as is" and had the duty to maintain it, with limited exceptions, not applicable here. Gaiety merely retained the right to enter to inspect and make the necessary limited repairs, again not applicable here. The deposition testimony of Gaiety's Building Manager, Melissa Katz, and of A1's General Manager, Mathias Van Leyden, as well as Katz's affidavit support the assertions that the duty to maintain the premises was on A1, and that Gaiety only inspected the premises with A1's permission and on limited occasions, and that Gaiety had no notice of the condition that was allegedly responsible for Biton's injuries. The law is well settled that an out-of-possession landlord under the circumstances presented here is entitled to summary judgment. Doyle v B3 Deli, Inc. 224 Ad2d 478 (2d Dept 1996). Accordingly, Gaiety's application is granted, and the action is dismissed as to it.

This leaves the application of A1. According to Biton's January 2, 2007 Verified Bill of Particulars (at ¶8),the

accident occurred on October 9, 2005 when she "slipped and fell on a recently mopped wet wooden floor, that did not contain a 'wet floor sign." Biton testified at her deposition that she was at the dark, crowded nightclub with friends and acquaintances named Hevi, Danny, Amir and Sivan, had, about 5-10 minutes before she fell, passed by the area where she eventually fell (Biton ebt at 51), and that she fell on the floor which was wet and slippery, thereby fracturing her wrist. She testified that because of the nightclub's dark lighting conditions, it was difficult to see the floor, and that she therefore did not see water on the floor before she fell. She further testified that she thought the substance that she fell on was water, that it had no smell, but that she did not touch the substance to see what it was (*Id.* at 55), although she did touch it (*Id.* at 56). Biton testified that her friend Danny effectively confirmed that the substance was water because he told her that he saw a guy mopping "this area," and that Hevi also told her that he saw someone mopping, although he did not specifically tell her that it was in the area where she fell. *Id.* at 54-57. Biton, who did not see anyone mopping the area where she fell, and who was at the nightclub for about a half hour before she fell, did observe someone mopping at area perhaps 50 meters away from the accident

site (*Id.* at 47-48). The area she slipped on was not wood, and was apparently concrete. Biton testified that after she fell she was assisted by a black male employee. No ambulance was called, and she evidently did not realize the severity of her injury until she left the nightclub.

According to Van Leyden, who did not believe he was working on the night in issue, the nightclub, on that night, had three employees in each room, for a total of six who were sweepers, responsible for sweeping, mopping and then dry mopping the floors in order to clean up spills, that they were given training on how to do their duties and that there was a manager on duty. Van Leyden ebt at 24-26. Van Leyden did not elaborate on the nature of the training or on how often the floors were inspected or mopped. In addition, there were 6-8 waiters, 6-7 bartenders and at least one bouncer. No warning signs were posted after a mopping done while the nightclub was open in the evening because of the danger that someone would trip over such a sign, but during the day, before nightclub patrons were there, such a sign would be used. *Id.* at 26.

During discovery in an earlier action, which was commenced by Biton with respect to this accident, which case was ultimately dismissed allegedly because of plaintiff's

failure to attend a preliminary conference, Biton's counsel, in response to a demand for names and addresses of witnesses, stated, on January 2, 2007, that other than the parties and those listed in the police accident report (a copy of which has not been provided here), there were no witnesses. Reply aff., exh. B. In a subsequent demand (in the instant action) for names and addresses of witnesses, the response of April 26, 2007 was the same. *Id.*, exh. D. In an August 30, 2007 order all parties were directed to provide the names and addresses of all witnesses, including notice witnesses by October 1, 2007. At her October 16, 2007 deposition Biton indicated that she knew Hevi through an Israeli friend (Biton ebt at 31), that Danny, whose last name she did not know, was Hevi's friend (*Ibid.*), and that she had not seen either Danny or Hevi since the accident (*Id.* at 32). In a response to defendants' combined demands dated March 20,2008, about a month before the instant motion was served, Biton's counsel stated that Biton was not currently in possession of the phone numbers or addresses for various people, including her brother, Danny, Sivan and "Hezi." Whether Hezi is the same person as Hevi is not specifically stated on this motion, although it seems that he is the same individual.

A1 seeks summary judgment on the ground that it did not have actual or constructive notice of the floor's wet condition and that there is no evidence that the area where Biton fell had been mopped before the fall. Clearly Biton's testimony of what Danny allegedly told her about the area of the fall having been mopped is inadmissible hearsay, as is Biton's testimony that Hevi allegedly told her he saw someone mopping, although he admittedly did not at that time indicate that it had been in the same area of the fall.

Biton opposes the motion with her affidavit, in which she claims that Hezi Torati told her, at the time that she fell, that the floor had been mopped about 10 minutes before. She claims that after she fell, she noticed that her shirt and pants were not only wet, but also claims that they were soapy, a claim she did not make at her deposition. She also offers the affidavit of Hezi Torati, who asserts that when he arrived at the nightclub, he noticed that the floor where Biton fell was wet and slippery, so he complained to a worker. Shortly thereafter, he observed a short, dark haired, Hispanic male mopping the floor with one or two brushing motions and then walking away, without placing any signs or advising anyone that the floor was wet. Torati then claims that he saw Biton walk near that area and

fall in the area that had just been mopped about 10 minutes earlier. He noticed after she fell that her clothes were wet because of the recently mopped floor. He further asserts that the area where Biton fell was poorly lit. Biton does not indicate in her opposition papers how she was able to contact Torati or why she was unable, before she filed her note of issue, to provide the requested witness information.

Biton's counsel asserts that A1 has merely alleged a lack of actual or constructive notice, but that it has failed to establish that it did not create the dangerous condition by its mopping activities, and has thus failed to prima facie establish its entitlement to summary judgment.

In reply, A1 maintains that Torati's affidavit is inadmissible because of Biton's repeated failure to provide the names and addresses of witnesses before she filed her note of issue. A1 states that the law is well settled that affidavits from undisclosed witnesses cannot be used to oppose a summary judgment motion. A1 observes that Biton chose to file her note of issue without obtaining and providing the witness' full name and address, and never attempted to vacate the note of issue after locating him. A1 concludes that this was a ploy to prevent A1 from

deposing Torati before A1 filed its summary judgment motion. Thus, A1 urges the court not to consider his affidavit. A1 further asserts that Torati's affidavit is substantively inadequate because Torati does not identify to whom he complained at the nightclub about the wet spot or how he knew he was an employee. A1 maintains that Torati's affidavit only presents a feigned issue of fact, which is inadequate to avoid summary judgment.

Following a review of the papers and the applicable law, A1's motion is denied. The law is well settled that the proponent of a summary judgment motion has the prima facie burden of establishing its entitlement to the relief sought by eliminating all material issues raised by the pleadings. ***Alvarez v Prospect Hospital***, 68 NY2d 320 (1986). The movant's failure to meet its burden requires the denial of the motion irrespective of the adequacy of the opposing papers. *Id.* at 324. In the instant case, A1 has simply provided Van Leyden's affidavit in which he baldly states that for a year prior to the incident A1 did not have any complaints regarding liquids being on the floor. This does not meet A1's prima facie burden. Van Leyden does not reveal the source of this statement, does not claim that he was present on the night in issue and does not provide the affidavit of any employee with personal knowledge regarding

a lack of actual or constructive notice of the allegedly dangerous condition, how often the floors were inspected and mopped by the six sweepers, or regarding the claimed cleanup, which was allegedly negligently performed (*see*, ***Henricks v 691 Eighth Ave. Corp.***, 226 AD2d 192 [1st Dept 1996]; ***Van Dina v St Francis Hospital***, 45 AD3d 673 [2d Dept 2007]). Moreover his statement is improbable, since A1 is engaged in serving drinks, which are spilled, as noted by Van Leyden in his deposition, and employs multiple sweepers to deal with such problems. Further, Van Leyden fails to address the main allegation in the pleadings that A1 created the dangerous condition by negligently mopping the floor. A movant does not meet its burden on a summary judgement motion simply by alleging that the plaintiff at trial will be unable to meet her burden of establishing a prima facie case. In light of the foregoing, A1 has failed to establish its entitlement to summary judgment. Accordingly, A1's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the motion seeking summary judgment is denied as to defendant A 1 Entertainment LLC d/b/a Guest House, i/s/h/a Guest House, and it is further

ORDERED that the motion seeking summary judgment on behalf of Gaiety Investments, Ltd. is granted and the

complaint is hereby severed and dismissed as against defendant Gaiety Investments, Ltd, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 4/15/09

ENTER:

J.S.C.

LOUIS B. YORK J.S.C.

FILED

APR 23 2009

COUNTY CLERK'S OFFICE
NEW YORK