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

PRESENT: Marilyn Shafer PART 8

Index Number : 113359/2007
SERRANO, LISAYDEE
VS.
PRESTIGE REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 accord with the annexed memorandum.

FILED
MAY 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/8/09

MARILYN SHAFER 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 8

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LISAYDEE SERRANO,

Plaintiff,

-against- Index No.

PRESTIGE REALTY ASSOCIATES, L.P., 113359/07

Defendant.

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MARILYN SHAFER, J. :

Defendant moves for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment.

This is a personal injury action. Plaintiff lives in the premises owned by defendant located at 212 West 141st Street, New York, New York. On July 4, 2007, at approximately 12:00 p.m., plaintiff slipped and fell on a staircase and suffered serious injuries. At that time plaintiff was leaving her home with her family for the July 4th holiday. There was urine on the first staircase landing above the lobby, and plaintiff slipped on that area, falling down the entire flight of stairs. The primary issue in this case is whether defendant had sufficient notice of the allegedly dangerous condition of the staircase to be held liable.

Defendant moves for summary judgment and seeks dismissal on the ground that it had neither actual nor constructive notice of the condition. Defendant relies on the deposition testimony of plaintiff. In her deposition, plaintiff stated that prior to her accident she did not notice any water or fluids on the staircase. She also stated that any time in the past, where plaintiff noticed any problem relative to the staircase, she would have notified the superintendent and, according to her, he would promptly take care of the problem. As to any testimony of

plaintiff relating to how often she saw mopping of the staircase, it was noted that plaintiff would normally take the elevator rather than use the stairs.

Defendant submits deposition testimony of the superintendent of the premises, William Coaxum. On the day of the accident, Coaxum was employed as the superintendent and sometime between 8:30 a.m. and 9:30 a.m., he claims to have inspected the staircase and mopped the entire area, including the lobby area. There was an answering service, wherein should any tenants had any complaints, the service would be called and would contact an employee of defendant, usually Coaxum. Following the accident, Coaxum testified that he did get a call from the service and went over to the area of the accident. Upon arriving at the scene, he stated that he saw what he believed to be dog urine on a portion of the landing between the first and second floors. Moreover, he stated that he was not aware of any prior complaints of people falling in the area.

Defendant submits a copy of an Incident Report it drafted following the accident and an affidavit of Coaxum stating that on the day of the accident, prior to the accident, he was not aware of any defects or complaints made by anyone, to him or any representative of defendant regarding the condition of the staircase. Based on this evidence, defendant argues that it had no notice of the condition that resulted in the accident.

Plaintiff opposes the motion and cross- moves for summary judgment. Plaintiff states that she had a similar accident on the staircase in February 2004, and that she suffered injuries. Submitted as evidence is an Expert Report prepared by licensed engineer Richard Heimer which is based on an inspection of the staircase on July 19, 2007, two weeks after the subject accident. The Report emphasized defects on the staircase, including a broken banister. Plaintiff asserts that defendant conceded that there were complaints of certain teenagers hanging out in the

hallway and staircase. These teenagers regularly left refuse behind.

Plaintiff states that the urine on the staircase was not the particular condition causing the injury. In fact, plaintiff disputes that dog urine was on the staircase, since she asserts that there were no dogs in the apartments at that time. According to the affirmation of plaintiff's counsel, it was the broken, wobbly banister that contributed to the fall, as well as a defective tread with the black pitch that pools liquid. The constant presence of the teenagers hanging out in the area is alleged to have contributed to the fall. Plaintiff argues that defendant was aware of all these factors and did nothing to remedy the situation. Plaintiff claims that defendant had sufficient notice to be liable for allowing the condition of the staircase to be so defective and dangerous.

In reply, defendant argues that plaintiff has referred to the banister for the first time in her motion papers. Prior to the service of these papers, plaintiff, in her bill of particulars, referred to the urine that caused her to slip and fall. Defendant believes that the issue of the broken banister is a red herring and should not taken into consideration. Defendant also believes that the Expert Report is conclusory, unable to cite any specific building code violation for which defendant could be held accountable.

In response to the February 2004 accident, defendant argues that the condition of the staircase was due to the snowfall at that time, which resulted in slush on the stairs. Defendant state that the circumstances were not the same as those involving the subject accident.

Defendant states that, while defendant was aware of the condition of the banister, it was clear from Coaxum's testimony that he re-secured the subject railing on two occasions, once before plaintiff's accident and once after plaintiff's accident. Defendant submits another affidavit from Coaxum, who states that the reason that the railing had to be re-secured at the time

before plaintiff's accident was due to a tenant bringing furniture up the stairs, using the railing for leverage, causing same to come loose.

Defendant argues that the fact that it was aware of teenagers regularly hanging out at the staircase, which constituted general awareness, did not constitute notice of the specific condition which contributed to the accident.

In response to the reply, plaintiff contends that defendant has conceded that it was aware of the broken banister and did not fix it for months, that it was aware of tenants' complaints about teenagers hanging about the staircase and leaving refuse behind, and that it was aware that there was urine on the staircase on the day of the accident. Moreover, plaintiff claims that the broken banister was an open and obvious condition that should have been remedied immediately.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A finding of liability in a case like this requires evidence that defendant created the dangerous condition which caused the accident, or had actual or constructive notice of that condition. *See Cassanova v General Cinema Corp. of New York, Inc.*, 237 AD2d 155 (1st Dept 1997). To constitute constructive notice, a defective condition must be visible and apparent and

it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. *See Gordon v American Museum of Natural* History, 67 NY2d 836, 837 (1986); *see also Segretti v Shorenstein Company, East, LLP*, 256 AD2d 234, 235 (1st Dept 1998).

In its motion papers, defendant cites *Serrano v Haran Realty Co.*, 234 AD2d 86 (1st Dept 1996). In *Serrano*, plaintiff slipped on dog urine in the hallway of a building. The court specifically noted that defendant had regularly mopped the hallway. The court also noted that there was insufficient evidence as to the length of time that particular condition that caused plaintiff's fall had existed prior to the fall. There, the court held that a general awareness of a condition was not enough to constitute constructive notice and dismissed plaintiff's claims as speculative.

Plaintiff contends that sometimes a general awareness of a particular recurring safety issue would bind defendant to liability for negligence if it was reasonably within defendant's power to correct. *See Chianese v Meier*, 98 NY2d 270 (2002).

This court finds that while defendant has been aware of the recurrence of the teenagers and the refuse that they left behind on the staircase, this is not specific notice of a dangerous or defective condition of the staircase. Plaintiff has not alleged that the teenagers left refuse on the day of the subject accident. Moreover, plaintiff's assertions that the actions of these teenagers were the cause of her accident is highly speculative.

Plaintiff's reference to the condition of the banister is also speculative. She has not presented evidence that defendant was on notice of a defective banister after the banister was allegedly re-secured prior to the accident. She has not shown that there were complaints made to defendant with respect to the banister. More important, the court finds that plaintiff's moving

papers are inconsistent with plaintiff's deposition testimony and bill of particulars, where no mention of a defective banister was made. This has created a feigned issue of fact, which is insufficient to avoid summary judgment. *See Krohn v Melanson*, 298 AD2d 510 (2d Dept 2002).

The court finds that defendant is entitled to summary judgment because it has demonstrated that it did not have direct or constructive notice of the condition of the staircase that caused the accident. Defendant had no notice of the urine prior to the accident.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 5/8/09

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.