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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 116922/2005

THOMAS, KEISHA

VS.

BOSTON PROPERTIES

SEQUENCE NUMBER : 005

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 denied

per attached

FILED
FEB 11 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/7/10

EMILY JANE GOODMAN 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 17

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KEISHA THOMAS,

Plaintiff,

-against-

Index No. 116922/05

BOSTON PROPERTIES, ALLIED PARTNERS, CITICORP, CITIGROUP CENTER CONDOMINIUM and CITIGROUP,

Defendants.

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BOSTON PROPERTIES,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590045/08

CMS ELECTRICAL SERVICES, INC.,

Third-Party Defendant.

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EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 005 and 006 are consolidated for disposition.

In this action for personal injuries, plaintiff Keisha Thomas alleges that she slipped and fell on ice at 153 East 53rd Street, New York, New York, known as the Citigroup Center (the premises), while exiting the building through a revolving door. In motion sequence number 005, defendant/third-party plaintiff Boston Properties, Inc. s/h/a Boston Properties (Boston Properties)[1] moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it. In motion sequence number 006, defendant Citigroup Center Condominium moves for summary judgment dismissing the

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[1]On March 12, 2008, the court severed the third-party action from the main action.

complaint as against it.

BACKGROUND

Pursuant to a management agreement executed in April 2001, Citigroup Center Condominium, BP/CG Center I LLC, and BP/CG Center II LLC, collectively referred to as the "owner," hired Boston Properties Limited Partnership[2] as the managing agent of Citigroup Center Office Unit One, Citigroup Center Office Unit Two, the common elements, and the limited common elements at the Citigroup Center Condominium located at 153 East 53rd Street (Maida Affirm., Exh. I). Boston Properties Limited Partnership was responsible for snow and ice removal at the premises under the management agreement (*id.*, Exh. I, at 5).

Plaintiff testified at her deposition that, at approximately 5:30 P.M. on January 27, 2003, she slipped while exiting the premises through an exit at Lexington Avenue and 53rd Street (Plaintiff Dep., at 14, 15, 22). She testified that she had previously gone into a bookstore within the premises for about ten minutes (*id.* at 15, 21, 77). According to plaintiff, while she was in the revolving door, her right foot slipped on ice, causing her to fall backwards against the door (*id.* at 21, 31, 84). She did not see the ice before she slipped, but knew that it was ice because of the way it felt under her feet (*id.* at 34, 91). Although plaintiff did not know the size of the ice, she stated that it could not have been that big within the revolving door (*id.* at 95). She believed that the ice was "thin" (*id.* at 42). After she fell, she observed patches of ice extending from inside the revolving door to the outside of the building (*id.* at 95). An individual who she believed was a security guard came out to speak with her after her accident (*id.* at 37). Plaintiff also testified

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[2]Although the agreement identifies the managing agent as "Boston Properties Limited Partnership," Boston Properties does not dispute that it was the managing agent of the premises (Maida Affirm., ¶ 31).

that there was no light within the vicinity of the door, and that the only light came from a nearby subway station (*id.* at 22, 23). There was dim light within the building at the time (*id.* at 24).

The property manager employed by Boston Properties, John McMahon, testified that he is responsible for the building's daily operations (McMahon Dep., at 6, 7). McMahon stated that Citigroup Center Condominium did not have an office at the premises (*id.* at 29). McMahon inspected the building's entrances two to three times per day; the inspections were conducted once in the morning, once in the afternoon, and occasionally once in the evening (*id.* at 58-61). According to McMahon, Boston Properties entered into a services contract with Temco Services Industries, Inc. (Temco) to provide janitorial services at the building (*id.* at 21, 22; Maida Affirm., Exh. K). McMahon testified that if he ever saw, or was told of, a snow or ice condition outside the building, he would contact Temco's supervisor to have the condition immediately remedied (*id.* at 61). He did not recall receiving any complaints about snow or ice on January 27, 2003 or the week prior to plaintiff's accident (*id.* at 62). McMahon stated that the exterior lights in the sunken plaza were on a timer that was set to turn the lights on one hour before dark (*id.* at 47).

In the bills of particulars, plaintiff alleges that defendants were negligent in: (1) failing to remove ice in the revolving door entrance; (2) failing to place salt or sand on the ice; and (3) failing to provide sufficient artificial lighting (Maida Affirm., Exh. H; Megna Affirm., Exh. C).

DISCUSSION

Motion by Boston Properties

In moving for summary judgment, Boston Properties argues that it neither created nor had notice of the ice. Boston Properties contends that there is no evidence that the ice was visible or

apparent, or evidence as to how long the ice was present in the door prior to plaintiff's fall. To support its position, Boston Properties submits the deposition testimony of plaintiff and McMahon. Boston Properties also submits an affidavit from Pjeter Rukaj, a porter employed by Temco, who worked at the building in January 2003 (Rukaj Aff., ¶ 2). Rukaj avers that, in the event of a forecast of snow, it was his duty to spread salt at all building entrances and sidewalks in anticipation of the snow (*id.*, ¶ 5). During a snowfall, he inspected the building entrances and sidewalks to ensure that the areas were clear of snow and ice (*id.*). Any snow or ice in the sunken plaza area, including the revolving door entrances, was cleared immediately (*id.*, ¶ 7). To clear the area, Rukaj shoveled the snow, swept the area with a broom, and then applied a layer of salt (*id.*). After a snowfall, if any residual snow or ice was present, Rukaj immediately cleared it and applied a layer of salt (*id.*, ¶ 8). Rukaj did not receive any complaints about the presence of ice in the revolving door area of the sunken plaza area of the building in January 2003 (*id.*, ¶ 10).

Boston Properties also submits a weather report prepared by the National Climatic Data Center, which reveals that it had snowed in trace amounts at 5:00 A.M. on the morning of plaintiff's accident (Maida Affirm., Exh. N, at 2). However, all precipitation had stopped over 12 hours before the accident (*id.*). The temperature on January 27, 2003 reached a high of 29 degrees and a low of 10 degrees (*id.* at 1).

In opposition, plaintiff contends that there is an issue of fact as to whether Boston Properties had notice of the icy condition. According to plaintiff, the snow stopped over twelve hours prior to the accident and the temperature was below freezing throughout the day. Therefore, a jury could conclude that the ice existed for at least 12 hours prior to the accident.

It is well established that premises must be kept in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]). In a slip-and-fall case, the plaintiff has the burden of demonstrating that the defendant either created or had actual or constructive notice of the dangerous condition which caused the injury (*Garcia v Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept 2009]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Matias v Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]). "'To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'" (*Hauptner v Laurel Dev., LLC*, 65 AD3d 900, 902 [1st Dept 2009], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). A general awareness that icy conditions may exist is insufficient to establish constructive notice of the specific condition which caused the plaintiff's injury (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]).

Here, Boston Properties does meet its burden to obtain summary judgment by submitting evidence that the ice was not visible or apparent based upon a reasonable inspection of the door. In light of the meteorological evidence that precipitation ended at around 5:00 A.M. – over 12 hours before plaintiff's accident – and that it remained below freezing that day, the court concludes that there are issues of fact as to whether the icy condition existed for a sufficient period of time to be discovered and remedied (*see Managault v Rensselaer Polytechnic Inst.*, 62 AD3d 1196, 1198 [3d Dept 2009] [issue of fact existed as to whether defendant had actual or constructive notice of icy condition, where ice existed for six to eight hours before plaintiff's

fall]; *Kaehler-Hendrix v Johnson Controls, Inc.*, 58 AD3d 604, 606 [2d Dept 2009] [given evidence of 17-hour gap between blizzard and plaintiff's accident, there were triable issues of fact as to whether maintenance contractor had constructive notice of the icy condition]; *cf. Espinell v Dickson*, 57 AD3d 252, 253 [1st Dept 2008] [owned did not have actual or constructive notice of icy condition on sidewalk, where icy condition was not readily visible, and accident occurred less than two hours after storm ended]).

Although Boston Properties relies upon *Deegan v 336 E. 50th St. Tenants Corp.* (216 AD2d 59 [1st Dept 1995]), this case is distinguishable. In *Deegan*, the plaintiff allegedly fell on food waste in front of defendant's cooperative. There was no evidence that the debris existed for a sufficient time before the accident. The Court stated that the inability to make the required showing "'creates the possibility that the condition may have emanated only moments before the accident, through no fault or with no knowledge of the defendant, any other conclusion being pure speculation'" (*id.* at 60, quoting *Grier v Macy & Co.*, 173 AD2d 238 [1st Dept 1991]). Viewing the evidence in the light most favorable to plaintiff, there is evidence that the ice existed for a sufficient length of time before the accident.

Boston Properties also argues that it neither created nor knew of any inadequate lighting condition. To support this assertion, Boston Properties provides an affidavit from McMahon, in which he avers that, in January 2003, Boston Properties utilized CMS Electrical Services, Inc. to perform daily light maintenance services at the premises (McMahon Aff., ¶ 4). If McMahon found a burned out bulb in a common area, or received a complaint, he would complete a work order requesting service (*id.*, ¶ 5). After conducting a search, McMahon did not find any such work orders (*id.*, ¶ 6).

Additionally, Boston Properties proffers an affidavit from Jeffrey J. Schwalje, P.E., who conducted an inspection of the lighting in and around the revolving doors on March 12, 2008, at 8:00 P.M., after the sun had already set (Schwalje Aff., ¶ 2). After reviewing the record, Schwalje concludes that the lighting configuration and bulbs had not changed since the time of the accident (*id.*, ¶ 4). Schwalje measured the lighting intensity using a professional calibrated light meter, and took measurements and photographs of the revolving doors (*id.*, ¶ 3). Schwalje states that the light measured at the accident location exceeded two foot candles of illumination at floor level, as required by New York City Administrative Code (Building Code) § C26-605.1 (now renumbered § 27-381), and, therefore, concludes that the lighting safely illuminated the interior walking space of the revolving doors (*id.*, ¶¶ 5, 6).

In response, plaintiff submits an affidavit in which she avers that, at the time of the accident, she could not see the ice on which she slipped because the area was dark (Plaintiff Aff., ¶ 5). Although the pedestrian plaza had lights, they were not on at the time of the accident, and the revolving door had no light in the ceiling or elsewhere (*id.*). In her affidavit, plaintiff also states that a security guard came out of the building to help her after her accident (*id.*, ¶ 4). Plaintiff argues that the guard had notice of the darkness and the lack of working lights in the area.

New York City Building Code § 27-381 (exit lighting), upon which Boston Properties relies, states in subsection (a) that exits shall be provided with artificial lighting, in accordance with the following:

> "Illumination of at least two foot candles measured at the floor level shall be maintained continuously, during occupancy, in exits and their access facilities for their full length, at changes in direction in and intersections of corridors, balconies,

> exit passageways, stairs, ramps, escalators, bridges, tunnels, landings, and platforms, and as provided in subchapter eight of this chapter for places of assembly, except that this requirement shall not apply to dwelling units."

Initially, the court notes that plaintiff has not contested the applicability of this section of the Building Code. Although Boston Properties has submitted an opinion from a purported expert, indicating that the lighting around the doors complied with section 27-381, his opinion is not probative of whether the light output was the same at the time of the accident, five years before the inspection (*see Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [1st Dept], *affd* 5 NY3d 574 [2005] [plaintiff's expert's measurement of light output performed almost two years after the accident was not probative of whether the measure was the same at the time of the accident]). In any event, there is evidence that the lights were not on at all. The building's property manager, John McMahon, testified that engineers employed by Boston Properties set the pedestrian plaza lights to turn on one hour before dark (McMahon Dep., at 38, 47). However, plaintiff testified at her deposition that there were no lights on within the vicinity of the door (Plaintiff Dep., at 22, 23). In her affidavit, plaintiff states that the pedestrian plaza lights were not working at the time, and that the revolving door had no lights (Plaintiff Aff., ¶ 5). In view of this evidence, there are issues of fact as to whether there was an inadequate lighting condition, and whether Boston Properties created the condition through an affirmative act of misfeasance, or had actual or constructive notice of the condition (*see Sontag v Holiday Val., Inc.*, 38 AD3d 1350, 1352 [4th Dept 2007]; *Resto v 798 Realty, LLC*, 28 AD3d 388 [1st Dept 2006]; *Arias v St. Rosalia's R.C. Church*, 286 AD2d 311 [2d Dept 2001]).

Therefore, Boston Properties is not entitled to summary judgment in its favor.

Motion by Citigroup Center Condominium

Citigroup Center Condominium contends that, at the time of plaintiff's accident, there was no duty owed by an owner to remove naturally-accumulated snow and ice on a sidewalk.

The court rejects Citigroup Center Condominium's contention that it owed no duty of care to plaintiff. Prior to the adoption of Administrative Code § 7-210[3], a property owner owed no duty to pedestrians to remove snow and ice that naturally accumulated on the sidewalk in front of its premises (*Ortiz v Citibank*, 62 AD3d 613 [1st Dept 2009]; *Sanders v City of New York*, 17 AD3d 169 [1st Dept 2005]; *Rios v Acosta*, 8 AD3d 183, 184 [1st Dept 2004]). The owner could only be held liable if it rendered the sidewalk more hazardous (*Palmer v City of New York*, 287 AD2d 553, 554 [2d Dept 2001], *lv denied* 98 NY2d 611 [2002]). Here, in contrast, plaintiff claims that she fell *within* one of the building's revolving doors, not on the sidewalk (Plaintiff Dep., at 21, 31).[4]

Next, Citgroup Center Condominium contends that Boston Properties was responsible for managing the condominium units and the common elements of the condominium. Thus, it is akin to an out-of-possession landlord. Citigroup Center Condominium further contends that it had no actual or constructive notice of the thin piece of ice within the revolving door.

"Liability for a dangerous condition on property is predicated upon occupancy,

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[3]Administrative Code § 7-210 requires owners of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition. This section became effective on September 14, 2003, and applies to accidents occurring on or after such date (Administrative Code of the City of NY § 7-210, historical note).

[4]McMahon testified that the revolving doors were "part of the condominium" (McMahon Dep., at 56).

ownership, control or a special use of such premises . . . . The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1st Dept], *lv dismissed in part and denied in part* 73 NY2d 783 [1988] [citations omitted]). Here, Citigroup Center Condominium has failed to establish, as a matter of law, that it lacked control over the revolving doors and the sunken plaza. Pursuant to the management agreement, Citigroup Center Condominium, BP/CG Center I LLC, and BP/CG Center II LLC were identified as the "owner" (Megna Affirm., Exh. F). Boston Properties Limited Partnership, identified therein as the managing agent, was not required to make any capital expenditures to maintain the premises in first-class condition and in compliance with all relevant building codes, except upon the owner's direction to do so, and at the sole cost and expense of the owner (*id.*, § 5 [a]). Boston Properties Limited Partnership was not to expend funds or sign contracts which committed the manager to pay in excess of $10,000 per annum, without prior approval of the owner (*id.*, § 5 [c]). Boston Properties Limited Partnership was also required, if at all possible, to consult with the owner prior to making any measures or expenditures for emergency repairs, or as soon as practicable thereafter (*id.*, § 5 [e]). While McMahon testified that Citigroup Center Condominium did not have an office at the premises, he also testified that Citigroup Center Condominium "controlled" the entire building (McMahon Dep., at 29, 43). Therefore, Citigroup Center Condominium has failed to demonstrate that plaintiff's negligence cause of action has no merit (*see Bucalo v City of New York*, 189 AD2d 656, 657 [1st Dept 1993] [issues of fact as to control or special use of sidewalk where plaintiff fell]). As noted above, there are also issues of fact as to constructive notice, i.e., whether the ice

existed for a sufficient period of time to be corrected by defendants.

Finally, Citigroup Center Condominium contends that plaintiff cannot prove that her injury was caused by the ice. Citigroup Center Condominium maintains that, before the accident, plaintiff walked over City sidewalks and crosswalks that were covered with a layer of snow, ice, and slush. It urges that snow, slush, or ice could have been tracked into the revolving door by anyone using the door.

To establish proximate causation, the plaintiff must establish that "the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]; *see also* Restatement [Second] of Torts § 431, Comment *a* [the word "substantial" is used in the sense that reasonable people would regard it as a cause]). "There may be one, or more than one, substantial factor" (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept], *lv denied* 95 NY2d 769 [2000]).

As noted by the Appellate Division, First Department, in *Lynn v Lynn* (216 AD2d 194, 195 [1st Dept 1995]),

> "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury."

(internal quotation marks and citations omitted). The plaintiff's evidence "must be sufficient to permit a finding of proximate cause based [upon] logical inferences, not speculation" (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]; *see also Listopad v Sherwood Equities, Inc.*, 52 AD3d 300 [1st Dept 2008]; *DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]).

Here, plaintiff's deposition testimony is sufficient to give rise to an inference of negligence. Plaintiff testified that the revolving door was icy, that she slipped on ice while exiting through the door at night, and that the area was dark (Plaintiff Dep., at 14, 15, 21, 31). Based on the weather report, including the temperature the day of the accident, plaintiff has offered proof that any alternative causes are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences from the evidence, rather than speculation (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]; *see also Warfield v Shan Assoc. of Syosset, LLC*, – AD3d –, 2010 WL 114371, *1, 2010 NY App Div LEXIS 244, **2 [2d Dept 2010] [summary judgment was improperly granted given issues of fact as to whether lighting condition was adequate and proximate cause of accident]). Thus, Citigroup Center Condominium's motion for summary judgment must be denied. Accordingly, it is

ORDERED that the motion (sequence number 005) of defendant/third-party plaintiff Boston Properties, Inc. s/h/a Boston Properties for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 006) of defendant Citigroup Center Condominium for summary judgment is denied; and it is further

ORDERED that the parties appear to select a jury on March 22, 2010, which is a firm trial date.

This Constitutes the Decision and Order of the Court.

Dated: February 7, 2010

ENTER: