SHORT FORM ORDER

INDEX # 28400-07
RETURN DATE: **10-8-09**
MOT. SEQ. # **003**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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JOANNE FESTA,

Plaintiff,

-against-

7 BLUE POINT CORP., d/b/a BLUE RESTAURANT, BLUE POINT, INC. d/b/a BLUE RESTAURANT, and MAZZEI'S RESTAURANT LLC.,

Defendants.

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CALENDAR DATE: January 20, 2010
MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:

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Bay Shore, NY 11706

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-10 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 11-17 ; Replying Affidavits and supporting papers 18-20 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, 7 Blue Point Corp., d/b/a Blue Restaurant, for summary judgment and dismissal of the plaintiff's slip and fall negligence action pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiff's action as against 7 Blue Point Corp., d/b/a Blue Restaurant is dismissed.

The plaintiff instituted this action for personal injuries allegedly sustained on September 17, 2006 at approximately 4:30 pm at the defendant's restaurant (hereinafter Blue Restaurant) located at 7 Montauk Highway in Blue Point, Suffolk County on Long Island, New York. The plaintiff and her husband were celebrating their 25th wedding anniversary at a luncheon with friends at Blue Restaurant in the catering hall when the plaintiff alleges that she slipped and fell on the hardwood floor. The plaintiff claimed that the area where she fell was slick and slippery. However, Blue Restaurant maintains not only that no one saw or witnessed the plaintiff fall but that the area where plaintiff claims to have fallen was both clean and dry. This lawsuit was thereafter commenced.

Blue Restaurant now moves for summary judgment pursuant to CPLR §3212 arguing that as a matter of law there was no dangerous or defective condition on the hardwood floor, nor was it put on notice, either actual or constructive, that there was a dangerous condition and/or a foreign or slippery substance on the floor upon which to impose

liability. The Blue Restaurant further argues that the area where the plaintiff fell was clean and dry, the alleged accident was unwitnessed and that the plaintiff claimed during her deposition only that the area where she fell looked "shinier" though she did claim that her leg was wet from the fall. The plaintiff in opposition claims that Blue Restaurant failed to support its motion with any testimony regarding when the floor was last "finished" and or maintained though Blue Restaurant disputes this assertion.

For the following reasons, Blue Restaurant's motion for summary judgment and dismissal of plaintiff's action pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiff's action is dismissed.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News***, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

In ***Farrar v. Teicholz***, 173 AD2d 674, 570 NYS2d 329 (2nd Dept.1991), it was stated:

> " To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that the defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (see, ***Boltax v. Joy Day Camp***, 67 NY2d 617, 499 NYS2d 660, 490 NE2d 527; ***Soloman v. City of New York***, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294). An owner or tenant in possession of realty owes a duty to maintain the property in a reasonable safe condition (see, ***Basso v. Miller***, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868)."

However, while a land owner has a duty to maintain its property in a safe condition, it is not an insurer of the safety of all those present on its property. ***Prairie v. Sacandaga Bible Conference Camp***, 252 AD2d 940, 676 NYS2d 352 (3rd Dept. 1998).

For a defendant to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon its property, it must be established that a defective condition actually existed, and that the land owner either affirmatively created the condition or had actual or constructive notice of its existence. ***Fargot v. Pathmark Stores***, 264 AD2d 708, 694 NYS2d 743. Here, in the case at bar, the plaintiff slipped on the hardwood floor while traversing it to go to the rest room. An examination of the floor by Blue Restaurant's manager, Scott Hansen (hereinafter Hansen), established no foreign substance, no dangerous or defective condition as to the floor other than plaintiff's statement that the floor was slippery. Further, no complaints were made about the condition of the hardwood floor by any patron in the room. Further, Hansen testified that the hardwood floor was cleaned and inspected by him every day and that his inspection and examination of the area where plaintiff fell showed it to be clean, dry and nothing in the nature of water or a foreign substance was present on the floor. Hansen also viewed the area after the accident and found no condition requiring cleanup by the staff.

As the Court noted in ***Mroz v. Ella Corporation d/b/a Days Inn***, 262 AD2d 465, 692 NYS2d 156 (2nd Dept. 1999)

> " It is well settled that in the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence"

Blue Restaurant having established a prima facie case in support of its motion for summary judgment to dismiss the plaintiff's cause of action, it is incumbent on the plaintiff to rebut Blue Restaurant's prima facie showing. ***Guarino v. La Shellda Maintenance Corp.***, 252 AD2d 514, 675 NYS2d 374 (2nd Dept.1998). The plaintiff has failed to establish that the hardwood floor was negligently maintained or polished and absent evidence of the reason for plaintiff's fall, the plaintiff's complaint should be properly dismissed. ***Duffy v. Universal Maintenance Corp.***, 227 AD2d 238, 642 NYS2d 282 (1st Dept.1996).

As the Court noted in ***Hartley v. Waldbaum, Inc.***, 69 AD3d 902, 893 NYS2d 272 (2nd Dept. 2010) in dismissing the plaintiff's lawsuit, "the plaintiff failed to proffer any evidence that would tend to show" the water alleged to have been on the floor had a source or was there with actual or constructive knowledge of the defendant. Here, the plaintiff's equivocation on the condition of the floor not as wet or damp but more as "shinier" than other areas of the floor and the inability to produce or present any evidence of a spill, foreign substance, improper application of wax or other dangerous condition as well as the failure to establish any fact pattern to support actual or constructive notice to defendant of the condition where she fell is fatal to plaintiff's claim.

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. ***V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). The plaintiff is unable to generate a genuine issue of fact which would warrant a denial of Blue Restaurant's motion and as a matter of law, has been unable to establish that the floor was negligently maintained or that the defendant was on notice of the alleged dangerous condition. Further, Blue Restaurant has established that no complaints were made about the hardwood floor, that the plaintiff's slip and fall was unwitnessed and the that plaintiff's claim that the floor was shinier was disputed by Hansen, its manager, who claimed the floor was clean and dry and no maintenance was required and also that neither the plaintiff nor anyone else could substantiate a foreign substance on the floor where the incident is alleged to have occurred. See, ***Hagan v. P C Richards & Sons, Inc.***, 28 AD3d 422, 813 NYS2d 167 (2nd Dept 2006).

As the Court noted in ***Andre v. Pomeroy***, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

> "[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence

> of triable issues (***Millerton Agway Co-op v. Briarcliff Farms***, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, Blue Restaurant's motion for summary judgment and dismissal of the plaintiff's slip and fall negligence action pursuant to CPLR §3212 is hereby granted in its entirety and the plaintiff's action as against Blue Restaurant is dismissed.

The foregoing constitutes the decision of the Court.

Dated: July 27, 2010

J.S.C.