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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

BEVERLY DRIMMER and ALAN DRIMMER,

INDEX NO.: 022360/08

Plaintiffs,

MOTION DATE:5-19-10
SUBMIT DATE:7-22-10
SEQ. NUMBER - 002

-against-

JERICHO TERRACE and CINTAS CORPORATE SERVICES, INC.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 4-19-10.....1
Affirmation in Opposition, dated 6-28-10.....2
Reply Affirmation, dated 7-20-10.....3

The motion of defendant Jericho Terrace for summary judgment pursuant to CPLR §3212 is granted and the action and all cross claims are dismissed as to Jericho Terrace.

Beverly Drimmer (plaintiff) slipped and fell at the defendant catering hall. In her bill of particulars, which is signed by her attorney, she states that she fell on a "flipped over carpet and/or mat located at the interior of the front door." At her deposition, she makes no mention that the mat was flipped over or in any other way in an irregular state. She also testified that moments before her fall, she told an employee that the mat was "soaked". She also testified that "it was raining".

In this motion, defendant contends that there was no dangerous condition present but if there was, it did not have either constructive or actual notice thereof in a time sufficient to effect remediation and that in any event, the condition was open and obvious to plaintiff. Defendant's motion is supported by deposition testimony of both plaintiffs, defendant's general manager, a non-party witness, pleadings (including discovery material) and various conference orders of this Court.

Plaintiff relies on th same evidence but also submits an affidavit of Gary Kashkin, plaintiff's nephew who claims to be a witness. His name was mentioned in plaintiff's deposition but his address was not disclosed until a letter dated March 2, 2010. The preliminary conference order required disclosure of eyewitnesses and contact information within 30 days of its March 9, 2009 date and a stipulation dated December 22, 2009, requires disclosure of this information within 20 days. Neither plaintiff nor her attorney has offered any reason for the failure to disclose this information, although she stated that she has "known him since he was about 12." Kashkin's affidavit states that he saw plaintiff trip on an "overturned" and "bunched up" mat inside the building. He makes no mention of the mat being soaked.

The Court has not considered the Kashkin affidavit because his contact information was not timely provided to the defendant. The failure to disclose his contact information violates two orders of this Court and cannot be countanced. That the Note of Issue was not yet filed until after the disclosure (eight days later) does not cure plaintiff's discovery violation. *See Ravagnan v. One Ninety Realty Co.*, 64 AD3d 481 (1st Dept. 2009); *Muniz v. New York City Housing Authority*, 38 AD3d 628 (2d Dept. 2007); *Williams v. ATA Housing*

Corp., 19 AD3d 406 (2d Dept. 2005); *Concetto v. Pedalino*, 308 AD2d 470 (2d Dept. 2003) *cf*; *Michalowitz v. Friedman*, 43 AD3d 1007 (2d Dept. 2007), affidavit considered where information had previously been disclosed while discovery still in progress.

In any event for the reasons that follow consideration of the Kashkin affidavit would not alter the result.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*,

187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Defendant raises the issues and argues that it did not create the condition and did not have any notice thereof. In order for a defendant to successfully move for summary judgment in a slip and fall case where the foregoing principles are applicable the defendant "has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice." *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2d Dept. 2004); *Valdez v. Aramark Servs.*, 23 AD3d 639, (2d Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635 (2d Dept. 1999). 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 a defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History,* 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of regular inspection of the area in question and "any remedial action just prior to the incident." *Hagin v. Sears,* 61 AD3d 1264, 1266 (3d Dept. 2009).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Stony Brook, Inc.*, 34 AD3d 732, 733 (2d Dept. 2006); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598, 598-99 (2d Dept. 2008). In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2d Dept. 2006), the Court held that defendant did not make a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

It has been held that a defendant's burden on a summary judgment motion cannot be satisfied merely by pointing out gaps in a plaintiff's case. *Totten v. Cumberland Farms, Inc.*, 57 AD3d 653 (2d Dept. 2008); *See also Musachio v. Smithtown Central S.D.*, 68 AD3d 959 (2d Dept. 2009); *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824 (2d dept. 2007); *cf Cerkowski v. Price Chopper Operating Co.*, 68 AD3d 1382 (3d Dept. 2009).

It is only after the moving defendant has satisfied the threshold burden of proving a *prima facie* case that the Court will examine the sufficiency of the plaintiff's opposition. *Fox v. Kamal Corp.*, 271 AD2d 485 (2d Dept. 2000).

Defendant has made a prima facie showing that whether the defect was a flipped over and bunched up mat or just one that was soaked or whether the mat was inside as argued by plaintiff or outside as contended by defendant the defendant did not have either actual or constructive notice of the condition.

The evidence submitted by defendant's general manager is largely unrebutted. He testified and avers by affidavit that the mats are kept under virtually constant surveillance by

him and other employees and that he and others walk through the lobby every 10 minutes and that he did not observe any bunched/flipped mats. He also states that he attended to the plaintiff soon after her incident and did not observe the condition described by her.

A mat that was merely soaked and not bunched or flipped over does not constitute a dangerous condition because the very purpose of installing a mat in a lobby when it is raining is to give the public a safer place to walk than that which would obtain on a hard or smooth surface. Plaintiff has not rebutted defendant's prima facie showing that it had neither constructive nor actual notice of either the soaking or the bunched/flipped condition. Although she mentioned the soaking to an unnamed, unspecified employer that was just before she fell and did not give defendant enough time to cure the problem. There is a complete absence of any notice of the bunching. *See Rubin v. Cryder House*, 39 AD3d 840 (2d Dept. 2007).

Just as a bath mat on a slippery floor is not considered a dangerous condition, so too should a wet rain mat not be considered to be a dangerous condition.

That a mat is wet or as described here is "soaked" does not, standing alone, constitute a dangerous condition. *Scarpinito v. Pathmark Stores, Inc.* 26 AD3d (2d Dept. 2006); *Portanova v. Trump Taj Mahal Assocs.* 270 AD2d 757 (3d Dept. 2000), bath mat on a slippery floor.

The Court has considered the defendant's contention that a dangerous condition did not exist only insofar as finding that a "soaked" mat as to which there is no other evidence of any irregularity, does not constitute a dangerous condition.

It is not necessary to consider whether the defendant is entitled to dismissal on the ground of whether the condition was both open and obvious and not as a matter of law inherently dangerous. *See Cupo v. Karfunkel*, 1AD3d 48, 52 (2d Dept. 2003), because to do so requires that the Court find as a fact that the mat was not bunched or flipped or bunched and flipped in some minimal way. A soaked mat may not constitute a dangerous condition but a turned over mat could be dangerous.

In sum, defendant's have not established that the condition, be it soaking or bunching, which caused the fall was, as a matter of law, not dangerous. *Cf Bretts v. Lincoln Plaza Assoc. Inc.*, 67 AD3d 943 (2d Dept. 2009).

While this motion was pending submission, plaintiff was recently granted leave to name as an additional defendant Cintas Corporate Services, the company that supplied the mats to Jericho Terrace and plaintiff now suggests that further discovery is necessary. Although served with this motion, Cintas has not submitted any opposition. Plaintiff has not demonstrated how further discovery as to Cintas would be relevant on the issue of notice to Jericho Terrace of a dangerous condition, hence, summary judgment should not be denied because Cintas discovery is incomplete.

To defeat a motion for summary judgment pursuant to CPLR 3212(f), a party claiming ignorance of critical facts must demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover facts which would give rise to a triable issue, *Lumbsy v. Gershwin Theater*, 282 AD2d 578 (2d Dept. 2001) mere hope is not sufficient *Lightfoot v. City of New York*, 279 AD2d (2d Dept. 2001). Plaintiff has failed to make any

evidentiary showing to support the conclusion that there may be facts available that would defeat the motion and speculation or conjecture is insufficient. *Falkowitz v. Peters*, 294 AD2d 330 (2d Dept. 2002); *Firth v. State*, 287 AD2d 771 (3d Dept. 2001).

Based on the foregoing, the motion is granted and the action and all cross claims against Jericho Terrace are dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 3, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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