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SHORT FORM ORDER

INDEX No. 08-4733

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-22-10
ADJ. DATE 9-16-10
Mot. Seq. # 002 - MD
003 - MD

RITA L. LAWRENCE, Plaintiff, - against - FRANK NORBERTO, JR., NORBERTO INC., "LMN" INC., d/b/a NORBERTO POOLS, INC., NORBERTO POOLS, INC., JOSEPH RUSSO, "XYZ", INC., d/b/a GOODFELLOWS DELI, INC., GOODFELLOWS DELI, INC., KATHLEEN "DOE" (Manager and Owner of LADIES WORKOUT EXPRESS), "ABC", INC., d/b/a LADIES WORKOUT EXPRESS and LADIES WORKOUT EXPRESS, Defendants.	JOSEPH C. STROBLE, ESQ. Attorney for Plaintiff 40 Main Street, P.O. Box 596 Sayville, New York RICHARD T. LAU & ASSOCIATES Attorney for Defendant Frank Norberto, Jr. P.O. Box 9040 Jericho, New York 11753-9040 GREENFIELD & RUHL Attorney for Defendant Kayce Fitness d/b/a Ladies Workout Express 626 RXR Plaza, 6th Floor Uniondale, New York 11556 GOODFELLOWS DELI INC. 600 Montauk Highway Bayport, New York 11705 JOSEPH RUSSO 600 Montauk Highway Bayport, Ne York 11705

Upon the following papers numbered 1 to 53 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 32; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 33 - 51; Replying Affidavits and supporting papers 52 - 53; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Kayce Fitness, d/b/a Ladies Workout Express and s/h/a Ladies Workout Express, and the motion (#003) by defendant Frank Norbeto, Jr. are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Kayce Fitness for summary judgment dismissing plaintiff's complaint and all cross claims against it denied, as moot; and it is further

ORDERED that the motion by defendant Frank Norberto, Jr. for summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Rita Lawrence commenced this action to recover damages for injuries allegedly sustained as a result of a slip and fall accident that occurred on December 20, 2007 in a parking lot located at 600 Montauk Highway in Bayport, New York. By her complaint, plaintiff alleges that defendant Frank Norberto, Jr. (hereinafter "Norberto") is the owner of the subject premises and that Norberto Pools, Inc. is a business located on the premises. Defendant Goodfellows Deli, Inc. (hereinafter "Goodfellows Deli") and defendant Ladies Workout Express are also businesses located at the subject premises. Plaintiff alleges that defendants failed to maintain the premises in a reasonably safe and proper condition, and allowed an icy and snowy condition to exist in the parking lot.

Kayce Fitness, d/b/a Ladies Workout Express and s/h/a Ladies Workout Express (hereinafter "Workout Express"), now moves for summary judgment on the grounds that it does not own the property and that co-defendant Norberto is responsible for maintaining the subject area where plaintiff fell. The motion by Workout Express is denied as moot, as the Court's computerized records indicate a stipulation discontinuing the claims against Kayce Fitness was filed with the Clerk of the Court on July 27, 2010.

Norberto also moves for summary judgment in his favor, arguing that plaintiff is unable to identify what caused her to fall. In support of his motion, Norberto submits a copy of the pleadings and a transcript of plaintiff's deposition testimony. Plaintiff opposes Norberto's motion, arguing that she can recover if she proves the injury was sustained wholly or in part by a cause for which defendant was responsible, even if there are several possible causes of injury. In opposition, plaintiff submits photographs of the subject parking lot, an excerpt of her deposition testimony, her own affidavit, and an affidavit of Paul Dula, an architect.

At her examination before trial, plaintiff testified that on the day of the accident she arrived at the subject parking lot at 6:45 a.m., intending to go to Goodfellows Deli to purchase breakfast. She testified that it was dark outside and that there was no artificial lighting in the parking lot other than the lighting coming from the deli. She testified that while she was still sitting in her vehicle with the door open, she scraped her shoe against the ground to determine whether it was "slick." She testified that as she did not notice anything, she got out of her car and walked slowly towards the deli. She testified that after she took four steps, she slipped and fell backwards onto the ground. Plaintiff testified that she was looking towards the deli and did not look down at the ground before her fall. She testified that her body was wet from her shoulders to her thighs after her fall, but that she did not observe the cause of her fall. She testified that she tried to stand up after her fall, but her feet kept "slipping on this ice and water," and that

someone assisted her in getting up. She testified that she does not recall when it last rained or snowed prior to the accident. She further testified that she observed several times when the parking lot area was flooded prior to the subject accident.

At his examination before trial, Norberto testified that he is the owner of premises known as 600 Montauk Highway, and that the two tenants, Workout Express and Goodfellows Deli, were collectively responsible for maintenance of the parking lot area. He testified that Mr. Russo, owner of the deli, paid for snow removal services and inspected the snow removal work that was performed. He testified that he and Workout Express would reimburse Goodfellows Deli for the snow removal service. He further testified that in September of 2007, he observed that when there was heavy rain, the parking lot filled up with water. He testified that he called someone to clean out the drain, and that the parking lot area did not flood again prior to the subject accident. He testified that there were no complaints regarding flooding the parking lot area prior to the subject accident, and no complaints regarding anyone falling in the parking lot. He also testified that either he or one of his employees would use a leaf blower to clear leaves from the parking lot area every other week.

At her examination before trial, Kathleen Gartner testified that she was the owner of Workout Express and that its corporate name is Kayce Fitness. She testified that at the time of the subject accident, Kayce Fitness was not responsible for the removal of snow or for spreading salt in the parking lot. She testified that the company that plowed the snow did not spread salt, but that Norberto would sometimes spread salt in the parking lot area. She testified that she shared in the costs of the snow removal with co-defendants at the request of the landlord, Norberto. She testified that the landlord was responsible for snow removal and for spreading salt in the parking lot area. She testified that Kayce Fitness was not responsible for repairing holes or damages to the parking lot area. She further testified that she observed flooding in the parking lot area when it was raining very hard.

At his examination before trial, Joseph Russo testified that he is the owner of Goodfellows Deli and that plaintiff was his customer. He testified that Norberto arranged for the snow removal service, but that he made the payment because he was there the earliest. He testified that he was reimbursed by Norberto and Workout Express for snow removal services. He testified that when it snowed over two inches, a person named "Paul" would automatically come to remove the snow. He further testified that there was a problem with the drainage in the parking lot area when there was heavy rain.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve

issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a *prima facie* case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Scoppettone v ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2007]; ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [1995]). 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 the defendant's employees to discover and remedy it (*see* ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2004]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]).

Further, to establish a *prima facie* case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747, *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see*, ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see* ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 550, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Hwy. Hosp. Ctr.***, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, *supra*, at 937, 680 NYS2d 900; *see* ***Grob v Kings Realty Assocs.***, 4 AD3d 394, 771 NYS2d 384 [2004]; ***New York Tele. Co. v Harrison & Burrowes Bridge Contrs.***, 3 AD3d 606, 771 NYS2d 187 [2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see* ***Gayle v City of New York***, *supra*; ***Bernstein v City of New York***, *supra*; ***Bardi v City of New York***, *supra*).

Here, contrary to Norberto's assertions, plaintiff has set forth sufficient proof to permit a finding based on logical inferences from the record and not upon speculation alone the cause of her accident (*see* ***Timmins v Benjamin***, __ AD3d __, 2010 NY Slip Op 7652 [2010]; ***Macri v Smith***, 12 AD3d 896, 784 NYS2d 734 [2004]). While plaintiff testified at her deposition that she did not observe what caused her

fall, she did testify that when she tried to get up she was unable to do so because she kept slipping on ice and water. Furthermore, she testified that her body was wet after the accident, and that the parking was very dark. The evidence presented by Norberto failed to demonstrate that the lighting was adequate and that there was no notice of a defective or dangerous condition in the parking area (*see* ***Gestetner v Teitelbaum***, 52 AD3d 778, 860 NYS2d 208 [2008]; ***Shalamayeva v Park 83rd St. Corp.***, 32 AD3d 387, 820 NYS2d 607 [2006]). Significantly, triable issues of fact remain as to whether the lighting in the parking lot was adequate, and whether anyone inspected the parking lot and spread salt or sand on the ground prior to the subject accident. Accordingly, the motion by Norberto for summary judgment dismissing the complaint against him is denied.

Dated: December 14, 2010

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**