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

PRESENT: HON JOAN A. MADDEN PART 11

Index Number : 108184/2007

MATRISCIANO, KELLY

VS

909 THIRD FEE EQUITIES

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 accordance with annexed Memorandum Decision and Order.

FILED

MAR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 16, 2011

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

KELLY MATRISCIANO,

Index No.: 108184/07

Plaintiff,

-against-

909 THIRD COMPANY, L.P., VORNADO OFFICE MANAGEMENT LLC, and ELI ACQUISITIONS LLC,

Defendants.

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JOAN A. MADDEN, J.

In this personal injury action, defendants 909 Third Company, L.P. ("909 Third") and Vornado Office Management ("Vornado") move for summary judgment dismissing the complaint. Plaintiff Kelly Matrisciano ("Matrisciano") opposes the motion. For the reasons stated below, the motion is granted.

Background

Matrisciano alleges that she sustained personal injuries on March 7, 2007, when she slipped and fell near the elevator bank of 909 Third Avenue, New York, New York ("the building"), where she worked. The building is owned by 909 Third[1] and managed by Vornado. Matrisciano contends that she fell as a result of the dangerous condition of the exposed building floor, and in particular, that the defendants and/or their agents caused or permitted the floor to become and remain in a dangerous and slippery condition, and that this condition caused her to fall.

Matrisciano testified at her deposition that she fell on a wet area of exposed marble floor while attempting to catch an open elevator (See Matrisciano dep at 34-35). She testified that

[1] The Amended Complaint also alleges that Eli Acquisitions, LLC owns the building.

snow was falling on the morning she entered the building, and that warning signs had been set out advising that the floor was wet (Id. at 25, 32). She did not recall whether she had any water on her jacket or sneakers as she entered the building (Id. at 25, 29). Matrisciano also indicated that mats had been set out directly in front of the entrance to the elevator, and that she slipped in the space of exposed marble measuring approximately a foot or more between the mat and the elevator (Id. at 40-41). She testified that she did not see any water on the marble before she slipped (Id. at 38). She also did not recall noticing any pooling of water or other substances in the exposed area, and stated that she did not touch the floor after the fall (Id. at 54). She further testified that she had never complained, or heard of complaints by others, regarding the manner in which the building laid out mats in the event of storms (Id. at 54).

With respect to the maintenance of the lobby floor during inclement weather, 909 Third's head porter Tomas Beard ("Beard") testified that the building's practice was to lay out a series of interlocking mats each night before a forecast of rain the next day, while also setting up wet floor signs (Id. at 17-18, 57). These mats covered the floor of the building from the front door to the reception desk and the elevator banks (Id. at 53-58), with several inches between mats (Id. at 63), and that the mats have been laid in this same placement and configuration since Beard began working as head porter in 1999 (Id. at 18). Beard also stated that there had been no prior complaints or accidents involving the exposed sections of floor (Id. at 33).

Beard also testified that, during periods of inclement weather, 909 Third required one porter to continually check the exposed floor around the elevator entrances to ensure that they did not accumulate water (Id. at 38, 94, 105). He stated that on the day before the accident in question, he had checked the elevator entrances for moisture and found none (Id. at 94-96).

Matthew Brosnan, a security guard at 909 Third, testified that, immediately after Matrisciano reported her fall to him, he clearly observed a smudge in the shape of a footprint by

the elevator where she had fallen. (See Brosnan dep at 37). He stated that signs reading "Caution. Wet Floor" would be placed in times of inclement weather, including one directly in front of the elevator bank. (Id. at 22, 19). He also stated that building policy required the placement of mats during such weather. (Id. at 14). He also confirmed that the building's policy required a porter to go through and check the spaces between the mats and the elevator door to ensure that they were mopped and clean (Id. at 19).

Defendants move for summary judgment on the grounds that they did not create the condition that caused the plaintiff's injury. They also argue that they cannot be held liable to plaintiff, as the evidence shows that they did not have constructive or actual notice of the wet condition. Finally, they argue that they did not create the condition and that courts have not found liability based on slippery floors or a failure to cover an entire floor with mats.

Plaintiff opposes the motion on the grounds that 1) defendants caused and created a dangerous, "traplike" condition by leaving an exposed gap of potentially wet marble between the rain mats and elevator carpet which plaintiff had to cross; 2) defendants had actual notice of the recurring dangerous condition, as evidenced by Beard's deposition testimony stating that special cleaning procedures targeted the exposed marble in times of inclement weather, and can therefore be charged with constructive notice of each subsequent recurrence of the condition; and 3) that defendants have failed to make out a prima facie case for summary judgment.

In support of her position, plaintiff submits an expert affidavit from Nicholas Bellizzi, a professional engineer. Bellizzi opines that, based on his examination of the area at issue, the defendants were aware of the potential danger created by tracked-in water on the building's marble floor, and that their configuration of floor mats created a dangerous slip and fall hazard by leaving a gap of exposed marble that he measured to be 30 ½ inches (See Bellizzi Aff. at 10-11). He further states that the configuration of mats does not meet the American Society for

Testing and Materials' "Standard Practice for Safe Walking Surfaces," which provides, "Mats, runners, and area rugs shall be provided with safe transition from adjacent surfaces...." (Id. at 9-10).

Matrisciano also submits an affidavit, in which she states that, upon inspecting the location of the fall at a later date, her memory was refreshed, and that she recalled that the floor of the elevator into which she fell felt wet. (See Matrisciano Affid. at 3). She also adds that, when she entered the building, her sneakers were wet, and that she observed numerous other people tracking water into the building (Id. at 1-2). She further recalls that, at the time she walked on them, the mats and runners were wet but not slippery. (Id. at 2).

In reply, defendants argue that the expert affidavit should be disregarded because plaintiff failed to identify the expert in pre-trial disclosure, or alternatively, that the expert affidavit is insufficient to raise a triable issue of fact. They also argue that the location and configuration of rain mats fails to create a premise for liability.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324, (1986).

To demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant either created the dangerous or defective condition or had actual or constructive notice of the condition which caused the accident. Piacquadio v. Recine Realty

Corp., 84 N.Y.2d 967 (1994); Acquino v. Kuczinski, Vila & Assocs., P.C., 39 A.D.3d 216 (1st Dept 2007).

Defendants have made a prima facie showing that they did not cause or create any condition that led to Matrisciano's accident. No evidence indicates that the substance that Matrisciano slipped on was brought in by the building, and the record indicates that the building took reasonable care to ensure safety during inclement weather by laying out both mats and caution signs, as well as by requiring a porter to check and mop out exposed areas of marble.

Similarly, no evidence of actual notice of a defect exists. The record does not indicate any complaints regarding the mats on the day of the accident, or of a history of complaints suggesting a recurring danger presented by leaving some exposed spaces on the floor.

Furthermore, defendants have established that they did not have constructive notice of a defect. In order to constitute constructive notice, the dangerous condition that caused plaintiff's injuries must have been both visible and present for a reasonable time in which the defendant could have discovered and remedied it. Gordon v. American Mus. of Nat. His., 67 N.Y.2d 836, 838 (1986). Here, there is no evidence as to the visibility or length of time during which the water was present on the floor to indicate constructive notice. Matrisciano did not observe anything on the floor prior to her fall, did not observe a pool of water after she fell, and did not touch the area of marble where she fell. Even assuming that the substance on the floor described as a footprint-shaped "smudge" by Brosnan was a visible hazard before Matrisciano fell, there are no allegations as to how long it was there.

As defendants have made a prima facie showing entitling them to summary judgment, shifts to Martrisciano to controvert this showing. Martrisciano has not met this burden based on testimony that the building was aware that the floors could become slippery when wet. General

knowledge of a potentially dangerous condition is not enough to constitute actual or constructive notice. Gordon v. American Mus. of Nat. His., 67 N.Y.2d 836, 838 (1986); Piacquadio v. Recine Realty Corp, 84 N.Y.2d 967, 969 (1994). Substantial case law also demonstrates that mere knowledge that floors may become slippery when wet does not make a property owner liable, and moreover, that a property owner is "not obligated to provide a constant remedy to the problem of water being tracked into its [building] in rainy weather." Ruck v. Levittown Norse Assoc., LLC, 27 A.D.3d 444, 445 (2d Dept 2006); Sangiacomo v. State, 13 Misc.2d 1246(A) (N.Y. Ct. Cl. 2006). In a case nearly identical to the facts here, where plaintiff slipped after stepping off a runner that extended only partially to her office building's elevator banks, defendants' summary judgment motion was granted, with the court noting:

> Assuming that the defendant was aware that water on the lobby floor was a recurring condition in rainy weather, proof that the defendant was aware of this general condition would not be sufficient to establish constructive notice of the particular condition on the marble floor which caused the plaintiff to slip." Yearwood v. Cushman & Wakefield, Inc., 294 A.D.2d 568, 569 (2d Dept 2002).

Matrisciano's argument that Beard's testimony indicates knowledge that the marble floor could become slippery therefore fails to raise an issue of fact. Similarly, the fact that the building assigned a porter to keep the exposed area of floor mopped during inclement weather also fails to demonstrate the kind of knowledge necessary to establish notice, as there are no allegations that the practice was instituted because of anything more than the general knowledge that the floors might become slippery when wet.

In addition, the expert affidavit of Bellizzi is insufficient to raise a triable issue of fact.[2] Where it has been found that an expert affidavit contains "speculative, conclusory assertions as to the alleged defects, and cited to various broad or inapt engineering rules, regulations and standards," courts have refused to find that this raises an issue of fact. Amaya v. Denihan Ownership Co., LLC, 39 A.D.3d 327 (1st Dept. 2006). The affidavit here fails to support its conclusions with facts, figures, or evidence that such a standard is accepted practice. It justifies its findings by citing only generally to a broad, non-binding standard promulgated by the American Society for Testing and Materials (currently known as ASTM International, according to its website). No reference is made within the affidavit to any corresponding or similar standard within the Building Code, Multiple Dwelling Law, Administrative Code, or other statute. Sarmiento v. C & E Associates, 40 A.D.3d 524 (1st Dept. 2007) (engineer's affidavit was insufficient to raise an issue of fact as to the alleged defective condition of the stairway where plaintiff slipped when it failed to reference any specific standard).

Moreover, the expert's statement that the configuration of the mats demonstrated notice of the particular danger does not raise an issue of fact, since an expert opinion must be based on facts on the record, and here there is no evidence to support a finding of notice. See generally Hambsch v. New York City Transit Authority, 63 N.Y.2d 723 (1984).

In addition, the expert opinion that the defendants' placement and configuration of rain mats created a dangerous hazard or "trap" is insufficient to raise an issue of fact, as this opinion "was unsupported by any generally accepted engineering standard or practice." Pomahac v.

[2] Contrary to defendants' position, the court may consider Mr. Bellizzi's affidavit despite Plaintiff's failure to previously identify him as an expert since there is no indication that such failure "was intentional or willful and there is no showing of prejudice" to defendants. Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992).

TrizecHahn 1065 Ave. of Ams. LLC, 65 A.D.3d at 465, (1st Dept. 2009); see also, Tarrabocchia v. 245 Park Ave. Co., 285 A.D.2d 388 (1st Dept. 2001) (expert affidavit insufficient to create issue of fact as to liability based on negligent placement of matting). Notably, courts have consistently held that reasonable care does not demand that a property owner cover their entire floor with mats, or "...to place a particular number of mats in particular places." Pomahac v. TrizecHahn 1065 Ave. of Ams. LLC, 65 A.D.3d at 465; *see also,* Toner v. National R.R. Passenger Corp. 71 A.D.3d 454 (1st Dept. 2010); Mormile v. Jamestown Management Corp., 21 Misc.3d 1129(A), aff'd, 71 A.D.3d 748 (2d Dept 2010).

In view of the above and as the record demonstrates that defendants took reasonable precautions to remedy the hazardous condition created by their floor, summary judgment is appropriately granted. Toner v. National R.R. Passenger Corp., 71 A.D.3d 454 .

Conclusion

Accordingly, it is

ORDERED that the motion for summary judgment by defendants 909 Third and Vornado is granted and the clerk is directed to enter judgment dismissing the complaint.

Dated: ~~February 1, 2011~~ March 16, 2011

J.S.C.

FILED

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