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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 400055/2007

VALENTIN, NELIDA A.

vs

COLUMBIA UNIVERSITY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/5/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

APR 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/7/11

JANE S. SOLOMON 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 55

----------X

NELIDA VALENTIN,

Plaintiff,

-against-

COLUMBIA UNIVERSITY,

Defendant.

DECISION and ORDER

Index No. 400055/07

----------X

JANE S. SOLOMON, J.S.C.:

Plaintiff Nelida Valentin (Valentin) moves to reargue a prior motion and cross-motion for summary judgment, which resulted in an order (Prior Order) granting summary judgment in favor of defendant Columbia University dismissing the complaint. The motion to reargue is denied.

The facts are set forth in the Prior Order. Briefly stated, Valentin was walking on the campus of Columbia University in an area known as "College Walk" when she tripped and fell. The surface of College Walk is made of hexagonal stone pavers. Valentin claims that she was caused to fall when she stepped on a loose paver, and her foot became caught between that paver and an adjoining one. Valentin could not recall precisely where she fell. However, the fall was witnessed by her co-worker, Yolanda Dessus (Dessus), who happened to be walking behind her. Valentin submitted Dessus's affidavit, stating that the walkway in the area where Valentin fell had loose, uneven pavers (Dessus Aff., Notice of Motion, Ex. B). Dessus also states that she had walked in that area many times over the years, and had observed many

loose and uneven pavers. She had never complained of this problem to Columbia University or anyone else.

Columbia University produced three witnesses for deposition. In sum and substance, these witnesses testified that there was no actual notice of a defect upon which Valentin fell, and when loose or broken pavers were identified, repairs were made. Columbia University argued that the complaint must be dismissed because it had no notice of the specific defective condition that caused Valentin to fall.

In the Prior Order, I found that Columbia University was entitled to summary judgment because there was no evidence to raise a triable issue of fact that Columbia University had notice of the hazardous condition that caused Valentin's accident. The evidence that loose or broken pavers existed over the years, and that Columbia University caused them to be repaired, is not evidence of negligence. The Prior Order also found Valentin's contention that Columbia University had a "general awareness" of a dangerous condition was legally insufficient to constitute notice of the particular condition that caused plaintiff's fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

A motion to reargue is addressed to matters of law or fact allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[e]). Valentin argues that the court misapprehended her "recurring condition" argument. In plaintiff's view, Dessus's statement that she had observed loose and broken pavers in the area for many years, together with

admissions by Columbia University that loose pavers had been replaced and repaired, is sufficient not only to deny Columbia University's motion for summary judgment, but compels summary judgment as to liability in Valentin's favor. As explained below, the court did not misapprehend this argument, rather the argument is unpersuasive.

In support of her "recurring condition" theory, Valentin had relied upon the decision in *Uhlich v Canada Dry Bottling Co. of N.Y.* (305 AD2d 107 [1st Dept, 2003]) (*see* Aff. of Ernest Buonocore, Esq., part of Ex. E to motion, paragraphs 39-41). That decision involved a slip and fall victim, a deliveryman, who for many years had seen broken pavement and debris in the parking lot where he fell, and made repeated complaints to the tenant, defendant Canada Dry Bottling Co. The court found that plaintiff raised a triable issue of fact as to the existence of the hazardous condition and notice of the condition to the tenant, thereby precluding summary judgment in the tenant's favor (305 AD2d at 651-652). The instant action is distinguishable in a number of ways. Dessus alleges that, although she had observed loose and broker pavers in the area over the course of many years, she never told anyone. The evidence shows that Columbia University made repairs quickly after learning of defects, a factor absent in the *Uhlrich* case. If Dessus's statement is accepted as true, it does not present sufficient evidence that the condition she observed years earlier is the same one that caused Valentin's fall. There is evidence

that loose and broker pavers from previous years were repaired, and none to show that the alleged defect existed for enough time for Columbia University to have discovered and remedied it (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Further, it is undisputed that Valentin does not know where she fell. For these same reasons, Valentin's argument that the court misapprehended her claim that Columbia University created the offending condition when the pavers were installed many years earlier likewise is misguided.

Valentin further argues that the Prior Order failed to address her *res ipsa loquitur* argument. This is correct, but the doctrine has no relevance to her claim. To make a prima facie case under the doctrine, a plaintiff must show each of three elements: (1) the event must be a kind which ordinarily does not occur in the absence of negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*see Dermatossian v NYC Transit Auth.*, 67 NY2d 219 [1986]).

Valentin cannot meet her burden with respect to the second or third elements. According to the Dessus affidavit relied upon by plaintiff, the alleged defect was readily observable. Valentin had a duty to watch where she was going and to walk with reasonable care, so she cannot show that her fall was not due to any voluntary action or contribution on her part. Also, the College Walk is a public walkway, and plaintiff could

not show that Columbia University had exclusive control over it (*see, Dermatossian*, 67 NY2d 219, and *Hardesty v Slice of Harlem, II, LLC*, 79 AD3d 472 [1st Dept 2010). The court's failure to analyze this meritless argument in the Prior Order is not a material omission justifying reargument. The remainder of Valentin's contentions have been considered, and are unavailing. Accordingly, it hereby is

ORDERED that plaintiff's motion for reargument is denied.

Dated: April 7, 2011

ENTER:

J.S.C.

FILED

APR 07 2011

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ALICE S. SOLOMON