Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MARLENE NEHHAS,

Plaintiff,

-against-

LIFE LEASING LIMITED PARTNERSHIP,

Defendant.

Index No. 30744/08

Motion
Date February 1, 2011

Motion
Cal. No. 24

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's Complaint is hereby denied.

This is a personal injury action occurring on August 1, 2008, whereby plaintiff, Marlene Nehhas while on the premises at 43-24 43rd Street, Sunnyside, New York, in the 6th floor hallway, was caused to slip and fall on said premises and be violently precipitated to the ground causing her to sustain serious and permanent personal injuries due to the negligence of defendant. Pursuant to the verified bill of particulars, defendant was negligent in, inter alia, allowing wax or other slippery substances to accumulate on the floor of the premises and remain there for an unreasonable length of time, in failing to warn plaintiff that the floor of the premises was slippery, and in failing to properly light the location of the accident.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a

triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see, id.*)

Defendant established a prima facie case that there are no triable issues of fact. Defendant established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof *(see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]). In support of the motion, defendant presented, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testified that: prior to her alleged accident, she had never heard of any other accidents on the sixth-floor hallway of the building, when she fell, she was looking straight down the hallway, she heard the noise of a buffing machine when the elevator door opened all the way, when she stepped out of the hallway, she saw two men in uniform working in the hallway, she witnessed one man mopping the hallway

floor, the hallway was not slippery for her first two steps off the elevator, as she fell, she was approximately three feet away from the man holding the buffing machine, his back was to her with the machine in front of him, she fell into the machine which was on the worker's front side, not back, and she did not make contact with the man working with the machine when she fell; photographs of the hallway where the accident occurred; the examination before trial transcript testimony of Ricardo Antommarchi, who testified that he has been the Superintendent of the building at 43-24 43rd Street in Sunnyside, New York, on the day of the accident, he worked on a portion of the hallway where the plaintiff claims she fell, he mopped the floor on the sixth floor hallway and used stripper solution and the buffing machine, warning signs were placed in the hallway at the time, one in front of the elevator and one where he was working, which signs read "Caution-Wet Floor" at the time of the accident, and the lights were on in the hallway; the examination before trial transcript testimony of Felipe Rodriguez, who testified that: he worked in the building located at 43-24 43rd Street in Sunnyside, New York, on the day of the accident, there was a caution sign in front of the elevator, which sign read "Caution Wet Floor" he saw the plaintiff fall, at the time of the accident, he was using the buffing machine approximately four feet away from the elevator, and he saw the plaintiff's foot try to go around him and saw her fall as soon as she planted her right foot; the examination before trial transcript testimony of non-party witness, Virdiana Coronel, who testified that: she lives in an apartment at 43-24 43rd Street in Sunnyside, New York, she was not aware of any other people slipping and falling in the sixth-floor hallway, on the day of the accident, she saw two men mopping and using a machine on the hallway floor, one of the men told her to "be careful, the floor is wet" and she had no problems navigating the hallway; and the examination before trial transcript testimony of non-party witness, Maricruz Vasquez, who testified, inter alia, that she resides in the building located at 43-24 43rd Street, Sunnyside, New York, she did not have any difficulty walking through the hallway both when she arrived home and when she left later on in the afternoon, she has never called management to complain about the floor being too slippery, never heard of anyone else calling management to complain about the hallway floor, never witnessed anyone slipping on the hallway floor, and she had never had anyone complain to her about the hallway floor being too slippery.

In opposition, plaintiff cross-moves for an order pursuant to 22 NYCRR 130-1.1 granting plaintiff costs and sanctions against the defendant for fling a frivolous motion,

pursuant to CPLR 3212 granting plaintiff partial summary judgment on the issue of whether or not a dangerous condition existed at the time of plaintiff's accident, granting plaintiff partial summary judgment on the issue of whether defendant created a dangerous condition, granting plaintiff partial summary judgment on the issue of whether the condition was the proximate cause of plaintiff's fall. In support of the cross motion, plaintiff presents, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testified that: there were no warning signs present, and she observed a wet or waxy condition on the hallway floor and her clothes after her fall; the examination before trial transcript testimony of Ricardo Antommarchi, who testified that, at the time of the accident, a stripping solution of soap and acid had been applied to the hallway floor, he saw her slip on the solution, the solution was slippery, and she appeared to be injured as a result of the fall; and the examination before trial transcript testimony of Felipe Rodriguez, who testified that he was working with Mr. Antommarchi at the time of the accident, and that the plaintiff fell in an area of the hallway that was slippery on account of the cleaning solution they had applied.

There is a triable issue of fact as to whether the condition was open and obvious and therefore, whether plaintiff was comparatively negligent (*see, Cup v. Karfunkel*, 1 AD3d 48 [2d Dept 2003]).

Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]). Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether defendant had either actual or constructive notice of a defective condition, whether defendant created a defective condition causing plaintiff's accident, and whether defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, both the motion and cross motion are denied.

That branch of plaintiff's motion for an order pursuant to 22 NYCRR 130-1.1 awarding plaintiff's counsel attorneys' fees due to the frivolous conduct of defendant's counsel is denied. Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to

delay or prolong the resolution fo the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". At this stage, the court finds that the plaintiff has not demonstrated that defendant's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor has plaintiff established sufficient cause to warrant sanctions *(see, Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the defendant has not risen to the level of frivolous. Accordingly, that branch of plaintiff's cross motion for attorneys fees is denied.

This constitutes the decision and order of the Court.

Dated: April 4, 2011

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Howard G. Lane, J.S.C.