[* 1] INDEX NO. 111442/2009 RECEIVED NYSCEF: 07/12/2011

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

LOUIS B. YORK J.S.C.

PART _____

Index Number : 111442/2009

COLEMAN, LONNIE

VS

FENTON ASSOCIATES

Sequence Number : 001

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/7/11

LOUIS B. YORK 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: IAS PART 2

----------x

LONNIE COLEMAN,

Plaintiff,

Index No. 111442/09

-against-

FENTON ASSOCIATES, LLC,

Defendant.

----------x



LOUIS B. YORK, J.:

In this action for negligence, defendant Fenton Associates, LLC ("Fenton") currently moves for summary judgment against plaintiff Lonnie Coleman ("Coleman"). For the following reasons, the Court denies defendant's motion.

Facts

Defendant is the owner and manager of 3376 Fenton Avenue, a residential building in Bronx County, New York. On August 21, 2008, plaintiff was an invitee on the premises, having just visited building resident Josiah Spellman, when he slipped and fell in a hallway on the second floor, near the landing of a stairwell. He alleges that as a result of his fall, he sustained injuries to his left shoulder that required surgery and extensive treatment. This resulted in the reduction of his ability to use his left arm. Plaintiff alleges that he slipped on a greasy spot on the floor that he identified by smell as insecticide. He also claims that, prior to visiting his friend in apartment #3F, as he was ascending the staircase, he saw a man whom he identified as the superintendent of the building spraying insecticide in the second floor hallway. Plaintiff claims that a hazard was created which was a direct result of defendant's actions, and as a result defendant was negligent and is liable for damages.

In its motion for summary judgment, defendant alleges that there are no triable issues of fact, and, therefore, it is entitled to dismissal as a matter of law. Defendant argues that as it

neither created the hazard nor had actual or constructive notice of it, it may not be held liable for plaintiff's injuries. In support of this assertion, defendant offers the deposition testimony of Pedro Toraya, the building superintendent, in which Mr. Toraya states that he never performed exterminator duties in the public spaces of the building and did not spray the insecticide in question. The superintendent also states that he made regular inspections of the building, usually once in the morning and once in the evening, and that the hazard was not present at the time of his last inspection prior to the accident. He claims that the extermination company engaged by Fenton had not visited the building in August of 2008, and speculated that another tenant may have sprayed the insecticide. Defendant also submits receipts from the extermination company that services the building, showing that the company did not visit the building in August of 2008. Defendant claims that for these reasons, it did not cause the hazard and could not have been aware of the hazard prior to the accident. It asserts that since it has submitted evidence that it neither created nor had actual or constructive notice of the hazard, it is entitled to summary judgment.

Plaintiff opposes the motion, claiming that defendant has failed to make a prima facie case for judgment as a matter of law, because the case presents triable issues of fact concerning the identity of the person who sprayed the insecticide, and therefore must be decided by jury.

Analysis

Defendant claims that it cannot be held liable for damages, based on established criteria for negligence in slip and fall cases. In this situation, a plaintiff must demonstrate that the defendant either created the hazard or had actual or constructive knowledge of it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 646 (1986); Snauffer v. 1177 Ave. of Americas LP, 78 A.D.3d 583, 913 N.Y.S.2d 26 (1st Dept. 2010). If the moving party makes a prima facie case for summary judgment, to defeat the motion, the

opposing party must present evidence that there is a triable material issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980). Defendant asserts that plaintiff's identification of the superintendent is hearsay because it was based on an unverified statement by Josiah Spellman, the tenant that he visited on the night of the accident. It also claims that the testimony of its witness Pedro Toraya proves that defendant did not have notice of the hazard. As a result, defendant has met its initial burden for summary judgment. However, the Court must determine if plaintiff has presented a question of fact that will defeat defendant's motion.

Defendant alleges that plaintiff's identification of the superintendent is hearsay, but this claim cannot be supported. On its own, the statement of an outside party who is not offering sworn testimony should be excluded. N.Y. COMP. CODES R. & REGS. tit. 9, § 517.8(b). In this case however, Mr. Spellman's statement to Mr. Coleman identifying the superintendent falls within the present sense impression exception to the hearsay rule. Under this rule, "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible. N.Y. COMP. CODES R. & REGS. tit. 9, § 517.8(c)(1). Mr. Spellman was standing next to plaintiff at the time of his statement, and was directly pointing out the superintendent. Mr. Spellman and plaintiff both perceived the condition at the moment that the statement was made. This reduces the chance of intentional falsehood or memory loss. See People v. Vasquez, 88 N.Y.2d 561, 574, 647 N.Y.S.2d 697, 703 (1996). As a result, his statement is not hearsay, and may be admissible.

In support of its position, defendant largely relies on the testimony of Pedro Toraya, the building superintendent, which conflicts with plaintiff's. Nonetheless, the Court must still consider Mr. Coleman's testimony as potentially genuine. In consideration of a motion for summary judgment by a defendant, all evidence must be viewed in a light most favorable to the

plaintiff. Insurance Co. of New York v. Central Mut. Ins. Co., 47 A.D.3d 469, 472, 850 N.Y.S.2d 56, 58-59 (1st Dept. 2008). The mere presentation of contradictory testimony by defendant's agent is insufficient to discount plaintiff's testimony. Valerio v. City of New York, 23 A.D.3d 308, 308, 804 N.Y.S.2d 312, 312 (1st Dept. 2005) (holding that speculative, contradictory deposition testimony of defendant's officer/employee was insufficient to justify summary judgment). In addition, it is not the Court's function on a motion for summary judgment to assess witness credibility. MJM Advertising, Inc. v. Panasonic Industrial Co., 2 A.D.3d 252, 252-53, 770 N.Y.S.2d 10, 12 (1st Dept. 2003). Plaintiff has presented evidence that a dangerous hazard existed, and that the defendant's agent created it. This constitutes a triable issue of fact requiring a jury to evaluate the credibility of both witnesses. See Majcher v. Federal Mach. Co., 234 A.D.2d 921, 921, 651 N.Y.S.2d 795, 796 (4th Dept. 1996). For a moving party to be granted summary judgment, the determination of liability must be able to be made as a matter of law; if there is a genuine issue of fact to be determined, the jury must make that determination. CPLR § 3212(b). Defendant's assertion that Mr. Coleman's testimony was unsound should be a matter for the jury.

Even if plaintiff fails to prove that the superintendent created the hazard, the fact remains that it was present four hours prior to the accident. This creates a question of whether the superintendent should have noticed it, which results in a triable issue of fact. See Munoz v. Uptown Paradise T.P. LLC, 69 A.D.3d 401, 401-02, 890 N.Y.S.2d 829, 829 (1st Dept. 2010) (holding that presence of hazard on floor of flower shop for fifteen minutes created triable issue of fact as to notice).

Furthermore, the evidence submitted by defendant to prove that the extermination company did not visit the building in August, 2008 is questionable. It did not submit affidavits or depositions in support of the assertion. Instead, it only offered receipts for past visits which did

not include the month in question. It is also suspicious that the usual date for servicing the building was the third week of the month, which is when plaintiff fell. On the whole, defendant has not proven that there was no way that its agents could have sprayed the insecticide, and as such, it has not carried its burden on this motion.

Based on the above, therefore, it is

ORDERED that defendant's motion for summary judgment is denied.

Dated: 7/7/11

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE