

Deopsomer v Agawani Intl., Inc.

2011 NY Slip Op 33773(U)

May 17, 2011

Sup Ct, NY County

Docket Number: 104597/2008

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 104597/2008
DEOPSOMER, CAROL
 vs.
AGAWANI INTERNATIONAL
 SEQUENCE NUMBER : 002
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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 sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of the defendants Agawani International, Inc. and Off Soho Suites Hotel for an order, pursuant to CPLR §3212, granting defendants judgment as a matter of law and dismissing the Complaint of plaintiff Carol Deopsomer and Jon Deopsomer, plaintiffs) in its entirety, is granted and said Complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 5/17/11


HON. CAROL EDMEAD 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: PART 35

CAROL DEOPSOMER and JON DEOPSOMER

Index No. 104597/2008

Plaintiffs,

-against-

DECISION/ORDER

AGAWANI INTERNATIONAL, INC., and OFF SOHO
SUITES HOTEL

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Agawani International, Inc. (Agawani) and Off Soho Suites Hotel (Off Soho) (collectively, the moving defendants), move for an order, pursuant to CPLR §3212, granting moving defendants judgment as a matter of law and dismissing the Complaint of plaintiff Carol Deopsomer (plaintiff) and Jon Deopsomer (collectively, plaintiffs) in its entirety as there exists no issue of fact in this case. Plaintiffs have not and cannot set forth a *prima facie* case and have only offered speculation and self-serving testimony in support of their allegations.

Background

Plaintiff's accident occurred on the night of October 21, 2005, when she fell down interior steps while a guest at the Off Soho Suites Hotel, which is located at 11 Rivington Street in New York, New York and owned by defendant, Agawani.

Defendants' Contentions

As set forth in the Complaint, plaintiff's alleged accident was caused by her own actions and does not arise out of any negligence attributable to the moving defendants. Only speculation and self-serving testimony has been offered in support of the plaintiff's claims and this does not constitute sufficient evidence to defeat the moving defendants' entitlement to judgment as a matter of law.

The plaintiffs' Complaint and Bills of Particulars allege negligence on the part of the moving defendants in regard to *inter alia*, their ownership, maintenance and control of interior steps at issue in this litigation, which led from a hotel lobby to a restroom area. Nowhere in the plaintiffs' Complaint or in their Bills of Particulars are any statutory or code violations alleged against the defendants. (See, e.g., Exhibits "A" and "C").

As set forth in the Affidavit of Zeyad Aly (Aly Affidavit), the president of Agawani, which was the owner of the subject premises at issue, Agawani had owned the premises since 1987 up to and including October 21, 2005. The Off Soho Suites Hotel has been in operation as a hotel since 1991 and the New York City Department of Buildings issued a certificate of occupancy that allowed the subject premises to be used as a hotel in 1990. (See, Exhibit "G" and Exhibit "1" thereto). Between the time Agawani purchased the building and the plaintiff's alleged incident on October 21, 2005, no structural alterations were made to the steps on which the plaintiff alleges to have tripped. Those steps were already in existence at the time the building was purchased by Agawani (*id.*).

The Aly Affidavit further sets forth that moving defendants never received any violations related to the steps and had not been made aware of any prior incident(s) or complaint(s) about

the steps prior to the plaintiff's alleged incident. Moreover, the hotel staff was required to make periodic inspections of the hotel and remedy any dangerous conditions discovered. Nobody ever complained about the steps before the alleged occurrence. (Id.). As of October 21, 2005, the subject steps were in good condition and there were warning signs posted on the door that led to the steps which conspicuously stated in large letters "REST ROOM" and "WATCH YOUR STEP." (See, Id. and Exhibit "2").

As set forth in the FDNY ambulance call report (Exhibit "H"), emergency personnel arrived at the hotel at 11:36 p.m. and per the report, the cause of injury indicated was "alcohol" and "fall". (Id.) The narrative history set forth therein indicates that they had found the plaintiff sitting and that prior to returning to the hotel, she had taken a Xanax and drank alcohol before eating. The report further indicates that plaintiff complained of headache and "feeling sleepy." Id.

Plaintiff was transported *via* ambulance to the emergency department of NYU Downtown Hospital and the records from her visit indicate that she arrived at 12:10 a.m. on October 22, 2005. Of significance, the records specifically note the presence of alcohol on her breath and indicate that plaintiff took Xanax. (See, Exhibit "I").

The deposition of the plaintiff, was conducted on March 24, 2009 as to her theory of liability and damages and the original transcript was sent to her for review and execution on or about April 8, 2009. (A further deposition of Carol Deopsomer was conducted on December 6, 2010 but only pertained to her alleged injuries).

The alleged incident occurred on the evening of October 21, 2005 at the Off Soho Suites Hotel. At that time, plaintiff was a hotel guest and was sharing a room with four others on the sixth floor. She is a resident of Florida and was visiting New York for vacation purposes.

(Pltf. Depo. Trans., P.8 and 20-24, Exhibit "E"). At the time of the accident, plaintiff had just returned back to the hotel after a night out, which included dinner and drinks. From the street, she had entered the hotel lobby and had asked where the nearest restroom was. After being told it was through the first door on the left of the lobby, she attempted to pull the door open. She then asked the man working behind the lobby desk whether anybody was inside the bathroom and he told her that she had to push the door open. After she pushed the door open she fell and landed on the ground. (*id.* at. pp 24-27). Apparently, plaintiff missed the steps.

Although she could not approximate the dimensions of the three steps, she confirmed that the heights of each step were the same as were their widths. (*Id.* at. pp 34-37 & 46-47). At the time of the accident, plaintiff was not looking at where she was stepping. (*Id.* at. pp 37-38).

Within minutes of the alleged incident, plaintiff went to her hotel room and within twenty-five minutes, an ambulance arrived. The EMS workers who came to the plaintiff's room attended to the plaintiff, including taking her vital statistics, before transporting her to the hospital. (*Id.* at. pp 42 and 54-56). At no time after the accident, did plaintiff ever tell anybody at the hotel that she had fallen. Before the ambulance arrived, neither the plaintiff nor her fellow vacationers discussed her fall with the hotel staff and plaintiff never completed an incident report. (*Id.* at. pp 42 and 47).

Prior to the accident, neither plaintiff nor any of her companions made any complaints about any condition in the hotel.

Gabra Awad has worked at the Off Soho Suites Hotel since 1993 and was an assistant manager on October 21, 2005. (Depo Trans. of Gabra Awad, pp. 7-8, annexed as Exhibit "F"). The premises are comprised of six stories and 38 rooms. In 2005, upon entering the lobby via the

main entrance from the street, there was a hallway with a front desk on the right side and a door leading to a bathroom on the left. (Id. at pp 13-18 & 75). If one was standing behind the front desk and facing the lobby, the door to the bathroom was about six feet away from the desk. (Id. 76-79).

The steps involved in the plaintiff's accident had been present since Mr. Awad started working at the hotel and were covered with carpet. (Id. at pp. 48 & 52-53). From the lobby, there was a 4-foot wide door that had to be pushed open before one could traverse the subject steps down into a room/hallway, whose dimensions were 4-feet by 3-feet. On the outside of the door that led to the subject steps,, there was a posted warning sign that stated in conspicuous letters: "WATCH YOUR STEP." (Id. at p. 114 and also see, Exhibit "1" to the Affidavit of Zeyad Aly, annexed as Exhibit "C"). There were handrails on both sides of the subject steps and the room/hallway area was "very bright" as it was illuminated by an overhead light fixture. (Id. at pp. 36-37, 47, 50-51 & 54-55)'.

Mr. Awad first met the plaintiff when she checked into the hotel. He had been working at the front desk at the time with his former co-worker, Amr Saad, who was the housekeeping manager in 2005. (Id. at pp. 59-62). Plaintiff and her companions checked into one suite, which was located on an upper floor. (Id. at pp. 62-63). On the day of the plaintiff's alleged incident, Mr. Awad was working at the hotel. He had observed the plaintiff leave the hotel around 8:30 p.m. and also, saw her return to the hotel later that evening while he and Amr Saad were at the front desk in the lobby. (Id. at pp. 64- 66). Mr. Awad's pertinent testimony as to his observations of the plaintiff are as follows:

Q. When [plaintiff] came in to the lobby with her friends, do you remember whether

or not she said anything to you?

A. On that day, she came from the bar, something like that, and her friend was holding her hand and she was unbalancing when she was walking. I asked her if she was okay and her friend said she's fine, she's okay, and after that ----

.

A. What leads you to believe that she came from the bar? Did she tell you that?

A. No, she didn't.

Q. What leads you to believe that?

A. She was like a little bit drunk.

Q. When you say she was a little bit drunk, what leads you to believe that?

A. Because she's unbalancing with walking and her friend is holding her hand.

Q. When Ms. Deopsomer spoke to you, was she slurring her words at all?

A. Yes

[Id. at p. 67, L8 to p. 68, L. 16)

After plaintiff spoke to Mr. Awad, she and a companion walked towards the bathroom and immediately thereafter, he heard someone fall. (Id. at pp. 70-71). In response, he told Amr Saad to go see what had happened and to see if the plaintiff needed any help. (Id. at pp. 72-73). Mr. Saad complied and went to the bathroom area. Afterward, he returned to the front desk and reported that he had offered the plaintiff and her companion medical assistance, which they declined. They said that they were fine and did not need medical assistance. (Id. at pp. 80-81&85). As for what had happened, Mr. Saad reported that the plaintiff had fallen down the steps. (Id. at pp. 81-82). Mr. Awad never spoke with the plaintiff or any of her travel companions

about the alleged accident. (Id. at pp. 83-84).

Plaintiff's Opposition

The uncontested facts in the instant action are that on October 21, 2005, the plaintiff, and some members of her family, including her sister, Ginny Brooks, were visiting from Florida. During their visit to New York City they stayed in a suite in a hotel owned and being operated by defendant, Agawani. On that date, after doing some sightseeing, they returned to the defendant's hotel around 11:00 p.m. Plaintiff testified at her deposition that upon entering the hotel lobby, she inquired of the hotel lobby desk clerk as to the location of the nearest restroom. He directed her to a door in the lobby. She opened the door but, instead of entering a restroom, she was immediately and unexpectedly confronted by three steps, each about nine inches high, descending to a lower room. She fell into the lower room sustaining serious personal injuries. (Transcript of Examination Before Trial of Carol Deopsomer annexed as Exhibit "E" to defendants' motion papers, Page 24, Line 11 — Page 27, Line 17. Page 35, Lines 11-23)

Liability against the defendants is predicated upon its negligence and, more particularly, its failure to maintain its premises in a reasonably safe condition, free of unnecessary hazards, compounded by the defendants' failure to provide any warning to the plaintiff as to the existence of this dangerous condition on the defendants' premises.

Initially, the defendants allege in their motion papers that no statutory violations were ever issued to the defendants for these steps since the hotel was first issued a Certificate of Occupancy in 1991. Predicated upon this contention, the defendants would like us to infer that the design and location of these stairs were in compliance with the provisions of the New York City Building Code in effect in 2005 on the date of the plaintiff's accident. The defendants, however, have

not offered any affirmative evidence in support of this contention. The Certificate of Occupancy issued in 1991 annexed to the defendants' motion paper states that this Certificate of Occupancy for this building was issued pursuant to the provisions of the "OLD CODE." As such, the defendants have offered absolutely no evidence that these steps were in compliance with the provisions of the New York City Building Code as it existed in 1991, or, more importantly, in 2005 when the plaintiff had her accident.

More significantly, the defendants have deprived the plaintiffs of the opportunity to ascertain whether or not these steps were in compliance with the provisions of the 2005 New York City Building Code on the date when the plaintiff had her accident. During the course of Discovery, the plaintiffs obtained an order permitting the plaintiffs' engineering expert to inspect the defendant's premises and, more specifically, the design and construction of the steps to the restroom, to determine if any statutory violations existed. However, when plaintiff's counsel met the plaintiffs' engineering expert together with the plaintiff at the defendant's hotel, it was learned for the first time that the defendant had structurally renovated its hotel since the plaintiffs October 21, 2005 accident. The lobby door to the restroom, the steps leading from the lobby door, and even the room into which the steps lead, had all been totally demolished and were no longer in existence. As such, the plaintiffs were deprived of the opportunity to have their engineering expert inspect the stairs to determine if these stairs were in compliance with the provisions of the 2005 New York City Building Code, or not.

Nonetheless, based upon the lack of evidence of statutory violations and the alleged lack of prior complaints concerning these steps, the defendants now argue that the plaintiffs cannot establish notice to the defendants of the unreasonably dangerous design and construction of these steps. This argument, however, is irrelevant since, on the defendants' motion for summary

judgment, it is not the plaintiffs' burden to establish notice, it is the defendants' burden to establish lack of notice as a matter of law.

A review of the defendants' motion papers reveals that, as the basis for the defendants' belief that it is are entitled to an order of summary judgment, the defendants rely exclusively upon the biased, self-serving contentions of the defendants' president and assistant manager as if they were stipulated facts. They are not. There are numerous points of conflicting, and even contradictory, evidence and testimony which can only be resolved by a jury, thus precluding an order of summary judgment as a matter of law.

Defense counsel recites in paragraph 19 of her affirmation that Mr. Awad testified during his deposition that after he heard the plaintiff fall he sent another hotel employee, Amr Saad, to see what happened and to see if the plaintiff needed any help. He further testified that when Mr. Saad returned from the restroom, Mr. Saad reported to Mr. Awad that he had offered the plaintiff medical assistance, but that the plaintiff declined medical assistance and said she was "fine."

In diametric contradiction of this testimony, the plaintiff states in her affidavit (Ex. "A") that far from feeling "fine" she sustained a fractured patella and a torn ligament in her left thumb. Both Carol Deopsomer and Ginny Brooks state in their affidavits that the plaintiffs family was required to drag the plaintiff up the stairs and into the elevator so she could get to her room and call for an ambulance because nobody from the hotel came to find out what had happened or offer any degree of assistance.

More significant to the issue of liability is the defendants' contention that the plaintiff was drunk when she returned to the defendant's hotel. This contention is based upon the alleged subjective observation of the defendant's lobby desk clerk and a notation in the alleged hospital

record of "alcohol on breath." The plaintiff does not deny that earlier that evening she had consumed one beer and had a sip of sake. The plaintiff reiterates her EBT testimony in this regard in her sworn affidavit. (Ex. "A") She had one beer and a sip of sake when she ate supper, approximately six hours before her accident. (Exhibit "E" annexed to the defendant's motion papers, Page 23, Lines 6-8; Page 24, Lines 2-7) Both the plaintiff and her sister, Ginny Brooks, emphatically deny in their sworn affidavits (Ex. "A", Ex. "B") that the plaintiff was intoxicated when she returned to the defendant's hotel.

Neither the Ambulance Call Report nor Hospital Record annexed to the defendants' motion papers are certified or are otherwise submitted in admissible form. Consequently, this Court may not consider them in support of the defendants' motion since they do not constitute evidentiary proof in admissible form. Even if these documents were in admissible form, however, they provide no evidence of any alleged intoxication on the part of the plaintiff

Defendants' Reply

In reply defendants argue that plaintiffs have not and cannot dispute the fact that they have not presented any evidence to dispute the defendants' affirmative showing that there were no violations ever assessed against the allegedly defective condition, the stairs on which plaintiff fell, as plaintiffs have not even alleged one statutory or code violation. In addition, plaintiffs have not set forth any expert evidence in support of their baseless allegations of negligence against the defendants.

As for plaintiffs' attorneys' decision not to even allege any violation, that was done because there is and never was any violation that could be assessed against the subject stairs. The fact that the hotel was remodeled approximately three years after the alleged incident, by a tenant

that leased the space, is immaterial and does not eradicate the fact that plaintiff cannot establish negligence against the defendant for the alleged incident.

Since no regulatory violations were issued against the subject steps on or before the alleged occurrence, liability may only be premised on the existence of a dangerous condition of which the defendants had prior notice. On this record, in addition to the defendants having met their burden of proving that they never received any violations related to the stairs, the moving defendants have further proved that they never received any prior complaints about the stairs or any conditions related thereto and that there were no prior incidents of which the defendants were made aware. Therefore, the defendants' lack of notice has been indeed, proven and the plaintiffs' speculative allegation that it is *possible* that the subject stairs were not in compliance with the New York City Building Code in effect in 2005 and/or 1991 lacks merit and certainly cannot defeat the defendants' entitlement to summary judgment. Certainly, plaintiffs cannot prove their speculative theories without any expert proof.

As to plaintiffs newly alleged theory of inadequate lighting, plaintiffs' arguments must not be considered. For the first time, plaintiff alleges that the lighting in the subject location of the incident may not have been "adequate". At plaintiff's Examination Before Trial, she testified that she did not remember any lighting issues related to the subject location. (See, Carol Deopsomer Depo. Trans. at p.33). The defendants affirmatively established that the lighting was adequate by the testimony of the hotel's assistant manager, Gabra Awad, who testified that the location of the accident was "very bright" as it was illuminated by an overhead light fixture. Mr. Awad further testified that the subject stairs had a handrail on the date of the accident. (See, Gabra Awad Depo. Trans. at pp.49-51). In fact, the moving defendants had previously demanded that plaintiffs "specify each and every acts or omission on the part of the defendants, its agents,

servants or employees, which s alleged to have caused or contributed to plaintiffs accident. Yet, in their Bill of Particulars and two supplemental bills of particulars, not once do the plaintiffs allege any negligence related to the lighting conditions of the subject location or the purported lack of a handrail.

As for the allegation that there was no warning sign on the door, while moving defendants dispute the existence of any dangerous condition at the subject location for which they had a duty to warn, the evidence on this record clearly establishes that there indeed, was a sign on the door. The hotel's assistant manager testified under oath that the sign was posted on the door in the hotel lobby that led to the step and that it conspicuously stated "Watch Your Step.". (See, Gabra Awad Depo. Trans. at p. 114). In addition, the Affidavit of Zeyad Aly, the president of Agawani International, Inc., further proves that the sign had been present at the time of the accident and he authenticated a copy

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs.*, P.C., 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st

Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at ; 927; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v. Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Admissible Evidence\

Plaintiffs correctly point out that neither the Ambulance Call Report nor Hospital Record annexed to the defendants’ motion papers are certified or are otherwise submitted in admissible form. Consequently, this Court may not consider them in support of the defendants’ motion since they do not constitute evidentiary proof in admissible form. On this issue the Court of Appeals

has stated: [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. *Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 N.Y.2d 1065, 1067-1068 (1979).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; see *Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; see also *Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Gutierrez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (see *Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; see also *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is

legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Plaintiffs do not allege actual notice. Further, defendants sufficiently establish a lack of constructive notice.

It is uncontroverted that the moving defendants never received any prior complaints about the stairs or any conditions related thereto and that there were no prior incidents of which the

defendants were made aware. Further, plaintiffs do not dispute the fact that neither the plaintiff, nor any of her companions had ever complained about any condition in the hotel prior to the accident. Plaintiffs do not counter the Aly Affidavit which sets forth that moving defendants never received any violations related to the steps and had not been made aware of any prior incident(s) or complaint(s) about the steps prior to the plaintiff's alleged incident.

The plaintiffs have further failed to raise a triable issue of fact to dispute the defendants' proof that they lacked notice of any dangerous condition that proximately caused the plaintiffs' accident.

Cause and/or Create

On the defendants' motion for summary judgment to dismiss the complaint, the defendant is required to make a *prima facie* showing affirmatively establishing that he neither created nor had actual or constructive notice of the dangerous condition that caused plaintiff's accident (*Mitchell v Consolidated Edison*, 27 AD3d 430 [2nd Dept., 2006], citing *Curzio v Tancredi*, 8 AD3d 608 [2nd Dept., 2004]; see also, *Baines v G & D Ventures, Inc.*, 64 AD3d 528 [2nd Dept., 2009]). Defendants have met their burden of showing that they did not cause and create a defective condition.

The plaintiffs have not presented any triable issue of fact as to the defendants' *prima facie* proof that they neither caused, created nor contributed to the alleged condition. The fact that a plaintiff had an accident is not a sufficient showing upon which to impose liability on a defendant. There has been no evidence that there was any defect with the steps, which were in existence at the time that the premises were purchased in 1987 and when the hotel was issued a certificate of occupancy in 1991. Plaintiffs have not shown that there were any prior code violations related to the steps or even more glaring, have not even alleged that any existed at the

time of the accident. As such, plaintiffs have failed to raise a triable issue of fact that defendants were on notice, actual or constructive, of the purported presence of a defective condition prior to the alleged occurrence or caused and/or created a defective condition.

Plaintiffs argue that they were deprived of the opportunity to have their engineering expert inspect the stairs to determine if these stairs were in compliance with the provisions of the 2005 New York City Building Code, or not, because the defendant had structurally renovated its hotel since the plaintiffs October 21, 2005 accident, and that the lobby door to the restroom, the steps leading from the lobby door, and even the room into which the steps lead, had all been totally demolished and were no longer in existence. Plaintiffs never sought an order finding defendants liable for spoliation, nor have plaintiffs cross moved herein for such relief. Also, plaintiffs never complained to the court that they were denied access to inspect during the three years after plaintiff's accident, prior to the hotel renovation. In their Bill of Particulars and two supplemental bills of particulars, not once do the plaintiffs allege any negligence related to the lighting conditions of the subject location or the purported lack of a handrail. Finally, plaintiffs never identified a Building Code violation.

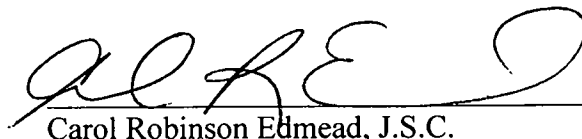
Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of the defendants Agawani International, Inc. and Off Soho Suites Hotel for an order, pursuant to CPLR §3212, granting defendants judgment as a matter of law and dismissing the Complaint of plaintiff Carol Deopsomer and Jon Deopsomer, plaintiffs) in its entirety, is granted and said Complaint is dismissed; and it is further

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Dated: May 17, 2011



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD