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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 100628/2009

RIZZOTTO, ROBERT

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

CAL # 95

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

otion to/for _____

_____ | No(s). 1

_____ | No(s). 2

_____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/3/12
JAN 03 2012

_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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ROBERT RIZZOTTO,

Plaintiff,

-against-

CITY OF NEW YORK, TIMES SQUARE HOTEL, INC., TIMES SQUARE MARQUIS HOTEL, L.P., HMC TIMES SQUARE HOTEL LLC, TIMES SQUARE HMC HOTEL, L.P., SEVEN C'S BUILDING MAINTENANCE, INC., and MARRIOTT INTERNATIONAL, INC., d/b/a NEW YORK MARRIOTT MARQUIS,

Defendants.

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Index No. 100628/09

Argued: 10/11/11
Motion seq. nos.: 002,

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
John D. Pontisakos, Esq.
Pontisakos & Rossi, P.C.
1025 Northern Blvd., Ste. 305
Roslyn, NY 11576
516-627-5888

For Hotel defendants:
Robert B. Weissman, Esq.
Saretsky Katz *et al.*
475 Park Ave. S., 26th Fl.
New York, NY 10016
212-973-9797

For City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
212-442-6851

By notice of motion dated July 5, 2011, defendants Times Square Hotel, Inc., Times Square Marquis Hotel, L.P., HMC Times Square Hotel, LLC, Times Square HMC Hotel, L.P., and Marriott International, Inc. (collectively, Hotel defendants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes.

By notice of motion dated July 6, 2011, defendant City moves pursuant to CPLR 3211(a)(7) and/or 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

I. BACKGROUND

On July 31, 2008, at approximately 2 a.m., plaintiff, a New York City Police Officer, allegedly slipped and fell while descending a loading dock ramp at the Marriott Marquis Hotel (Hotel). (Affirmation of Robert B. Weissman, Esq., dated July 5, 2011 [Weissman Aff.], Exh. A).

In his notice of claim, served on City on October 20, 2008, plaintiff alleged that he fell as a result of a dangerous, defective, wet, and slippery condition on the Hotel's loading dock ramp, and that his action against City was based on General Municipal Law (GML) § 205-e and predicated on violations of various statutes relating to ramps including New York City Building Code §§ 27-377 and 27-377(c)(6). (*Id.*, Exh. C).

At a 50-h hearing held on January 8, 2009, plaintiff testified that he was on duty the day of the accident, was assigned to work at a temporary command center inside the Hotel, and that the loading dock was inside the Hotel. (*Id.*, Exh. B).

At an examination before trial (EBT) held on March 9, 2010, plaintiff testified that on the day of the accident, he was given the task of moving equipment from the command center to police vans located in the loading dock, that before he fell he had walked up and down the ramp three to four times but could not remember if he had noticed then that the ramp was wet, and that at some point, perhaps just before he fell, he noticed that the ramp was getting wet from people tracking dirty water on it, but made no complaint about the wet condition. (*Id.*, Exh. D). Plaintiff also testified that his foot had become caught on the ramp's upper lip, and that as he fell forward, his foot remained caught behind him. (Affirmation of John D. Pontisakos, Esq., dated Sept. 2, 2011 [Pontisakos Aff.], Exh. E).

On June 16, 2010, Police Officer Jonas Guisao testified at an EBT that on the date of plaintiff's accident, four or five police officers were stationed at the loading dock, that he made no complaints about the ramp, that he had walked up and down the ramp approximately ten times before plaintiff fell, and that he did not recall whether it was wet. (Weissman Aff., Exh. E).

On August 16, 2010, Wilbert Sarvis, the Hotel's loss prevention supervisor, testified at an EBT that he had never slipped or fallen on the ramp nor had he observed anyone else doing so, and that no one told him of any slip and fall on the ramp or that the ramp became slippery when wet. (*Id.*, Exh. J).

At an EBT held on September 3, 2010, Police Lieutenant Shamik Walton testified that after plaintiff fell, he went to the ramp and saw that it was damp, that he made no complaints about the ramp being damp or wet, and that he did not believe that the wet condition of the ramp rendered it dangerous or unsafe. (*Id.*, Exh. F).

On November 8, 2010, Roberto Enriquez, an event services aide employed by the Hotel, testified that he was in the loading dock on the date of plaintiff's accident, and that when he walked up and down the ramp, it was dry. He had no duties related to the ramp and did not see anyone cleaning or maintaining it before plaintiff's fall, and when he had walked on the ramp in the past when it had been wet, he never slipped or fell on it, nor did he see anyone else fall or slip on it. (*Id.*, Exh. G).

The same day, Chris Iannuzzo, the Hotel's loss prevention officer, testified at an EBT that he did not recall receiving any incident or accident reports related to the ramp. (*Id.*, Exh. H).

On November 16, 2010, Rajendra Beharry, a Hotel maintenance engineer, testified at an EBT that he never received nor was he aware of any complaints about the ramp, that he had no

responsibilities related to the ramp, and that he had never slipped on it. (*Id.*, Exh. K). After reviewing a surveillance videotape from the date of plaintiff's accident showing him in the area of the ramp, he testified that the video showed him curling up a water hose that he had used in cleaning a condenser coil. (Pontisakos Aff., Exh. B).

At an EBT held the same day, Tennyson Reid, a Hotel watch engineer, denied making or being aware of any complaints related to the ramp or anyone slipping or falling on it before plaintiff's accident. (Weissman Aff., Exh. L).

By affidavit dated June 30, 2011, Reid states that he was working in the loading dock at approximately 2 a.m. the day of plaintiff's accident and does not recall seeing any water on the ramp at that time. (*Id.*, Exh. M).

By affidavit dated July 1, 2011, Iannuzzo states that he was present in the loading dock before plaintiff's accident and did not recall seeing any water on the ramp, and that had he observed an unsafe condition, he would have put up cones and warning tape and warned people not to use the ramp until it was safe. (*Id.*, Exh. I).

II. HOTEL DEFENDANTS' MOTION

A. Contentions

The Hotel defendants deny having created or having had notice of the wet condition on the ramp before plaintiff's fall, relying on plaintiff's testimony that the condition was created when he and the other police officers tracked water onto the ramp while walking on it, and the testimony of all of the witnesses that no complaints were made about the wet condition before the accident. They observe that there had been no prior complaints about any condition related to the ramp or any slips or falls on it and assert that the alleged building code violations relied on by

plaintiff are inapplicable here as section 27-377 of the New York City Building Code relates to ramps that are used as exits, whereas here, the ramp is located within the Hotel and is not used as an exit. (Weissman Aff.).

Based on Beharry's testimony that he had washed a condenser coil in the area of the ramp before plaintiff's fall, plaintiff asserts that there is a triable issue as to whether employees of the Hotel defendants created the wet condition on the ramp, thereby negating the need to prove that they had prior notice of the condition. He also contends that Iannuzzo's and Reid's affidavits should be disregarded as they conflict with their deposition testimony, and that the ramp qualifies as an exit under the Building Code. He also argues that his fall was caused not only by the wet condition but as a result of his foot getting caught on the ramp's upper lip, and that the Hotel defendants' failure to offer any evidence related to the lip warrants the denial of their motion. (Pontisakos Aff.).

In reply, the Hotel defendants argue that the ramp does not qualify as an exit as it is not the only way to access the garage floor from the loading dock, that the surveillance video shows that water was on the ramp before Beharry started using the water hose, that whether there was water on the garage floor is irrelevant as plaintiff fell on the ramp and not the floor, and that the water on the ramp was an open and obvious condition which plaintiff admitted seeing before his fall. They also assert that the ramp lip is the natural edge or side of the ramp and there is no evidence that it was defective. (Reply Affirmation, dated Oct. 7, 2011).

B. Analysis

To establish a *prima facie* cause of action for injuries resulting from a slip and fall, the plaintiff must prove that the defendant either created the condition which caused the accident or

that it had actual or constructive notice of it and reasonable time within which to correct it. (*Campanella v 1955 Corp.*, 300 AD2d 427 [2d Dept 2002]). A defendant moving for summary judgment in a slip and fall case has the initial burden of establishing, *prima facie*, that it neither created the defective condition, nor had actual or constructive notice of it. (*Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

Absent any dispute that the ramp was wet before Beharry used the water hose or any other evidence showing that anyone employed by the Hotel defendants created the wet condition, they have established that they did not create it. And based on the witnesses' testimony and affidavits, which reflect that no one observed or complained that the ramp was wet before plaintiff's fall, including plaintiff who could not recall whether he saw the condition before his fall, the Hotel defendants have also demonstrated that they had no actual notice of the condition.

However, absent any evidence of the Hotel defendants' procedures to inspect the loading dock and ramp on the date of plaintiff's accident, they have failed to establish, *prima facie*, that they did not have constructive notice of the condition. (*See Lopez v New York Life Ins. Co.*, 2011 WL 6090011, 2011 NY Slip Op 08813 [1st Dept] [defendants did not establish as matter of law that they lacked constructive notice of hazard absent evidence of inspection procedures on accident date or hazard's source or duration]; *Sabalza*, 85 AD3d at 437-438 [defendant cannot satisfy burden by pointing to gaps in plaintiff's proof but must submit evidence of when area was last cleaned and inspected before accident]; *Cruz v City of New York*, 81 AD3d 505 [1st Dept 2011] [defendant's witness failed to identify last time bathroom had been cleaned or checked before accident and lacked personal knowledge as to condition of bathroom at time of or before accident]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010] [defendant's

president's testimony not probative as to actual or constructive notice of icy sidewalk absent personal knowledge of when defendants' employees last inspected sidewalk or sidewalk's appearance before accident]).

The Hotel defendants' contention that the condition was open and obvious was improperly raised for the first time in their reply papers (*see Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645 [1st Dept 2011] [claim improperly raised for first time in reply not considered]; *Schirmer v Athena-Liberty Lofts*, LP, 48 AD3d 223 [1st Dept 2008] [court erred in considering factual argument first made in reply papers]), and, in any event, whether the condition was open and obvious is only relevant to plaintiff's comparative fault and would not relieve the Hotel defendants of liability (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011] [finding that condition was open and obvious not fatal to plaintiff's negligence claim but only relevant to plaintiff's comparative fault]).

In light of this result, I need not consider the parties' remaining arguments.

III. CITY'S MOTION

A. Contentions

City argues that plaintiff's common law negligence claim against it is barred by the "firefighter's rule" as he was allegedly injured while performing his duties as a police officer. It also contends that plaintiff's claim based on GML § 205-e must fail as he relies on building code violations which are inapplicable as City does not own the Hotel or the ramp and had no duties related to it, relying on unsigned depositions transcripts of the Hotel's manager and an employee of defendant Seven C's Building Maintenance, Inc., which are also not certified. (Affirmation of Peter C. Lucas, ACC, dated July 6, 2011).

Plaintiff maintains that City failed to prove, through admissible evidence, that it does not own the Hotel or the ramp. (Affirmation of John D. Pontisakos, Esq., dated Sept. 2, 2011).

B. Analysis

As plaintiff does not oppose dismissal of his common law negligence claim against City, it is dismissed. And, while the transcripts relied on by City are inadmissible (*see Marks v Robb*, 2011 WL 6440131, 2011 NY Slip Op 09284 [2d Dept 2011] [deposition transcripts not in admissible form as they were unsigned and not certified and no proof that they had been forwarded to deponents for review]; *In re Delgatto*, 82 AD3d 1230 [2d Dept 2011] [same]), absent any dispute by the Hotel defendants that they own the Hotel and the ramp, City is also entitled to dismissal of plaintiff's GML § 205-e claim.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by defendants Times Square Hotel, Inc., Times Square Marquis Hotel, L.P., HMC Times Square Hotel, LLC, Times Square HMC Hotel, L.P., and Marriott International, Inc. is denied; it is further

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims against it are dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiff shall serve, within 20 days of the date of

this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: January 3, 2012
New York, New York

JAN 03 2012

FILED

JAN 10 2012

NEW YORK
COUNTY CLERK'S OFFICE