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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JULIA ATTERITANO,

Plaintiff(s),

-against-

SF & G ASSOCIATES, ROCKVILLE CENTRE OFFICE CENTER ASSOCIATES, ATLANTIC MEDICAL ANESTHESIA and PAIN MANAGEMENT, ISLAND PAIN MANAGEMENT SERVICES, P.C. a/k/a LONG ISLAND PAIN MANAGEMENT, LEONARD INGBER, M.D., as a Tenant in Suite 207, and STEVEN FRIEDMAN, M.D., P.C., as a Tenant in Suite 207, and MILL RIVER MANAGEMENT CORP.,

Defendant(s).

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Index No. 20865/09

Motion Submitted: 12/21/11
Motion Sequence: 001, 002, 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXXX
Answering Papers.....XXXXX
Reply.....XXXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants: SF&G Associates ("SF&G"), Rockville Centre Office Center Associates ("Rockville Centre"), Mill River Management Corp. ("Mill River"); Steven Friedman, M.D., P.C.; Atlantic Medical Anesthesia and Pain Management ("Atlantic Medical"), Island Pain Management Services, P.C. a/k/a Long Island Pain Management ("Long Island Pain

Management"); and Leonard Ingler [sic][1], M.D. move for an Order granting Summary Judgment dismissing the complaint of plaintiff, Julia Atteritano, and dismissing all cross claims against them.

Defendant Rockville Centre Office Associates was the owner of the subject premises on May 8, 2008, the date of the accident. Mill River Management is a property management company that managed the subject premises for 37 years, including at the time of the accident.

SF & G Associates is a subsidiary of Mill River, with offices at the subject premises. It denies having anything to do with the management or ownership of the premises.

Dr. Ingber is a named tenant for Suite 207 at the subject premises and he sub-leases space to Dr. Friedman.

Pain Management of Long Island is a sub-corporation of defendant Atlantic Medical Anesthesia Associates, P.C.. Long Island Pain Management is a tenant in the subject building and the medical office, Suite 201 where Plaintiff was treated by Dr. Iadevaio on the date of the occurrence.

The instant motions arise from an underlying personal injury action where plaintiff sustained injuries from a slip and fall in the hallway of a medical office building. Plaintiff alleges acts of negligence against defendants, in that they breached their duty to provide a reasonably safe facility, and that defendants willfully and recklessly disregarded the safety of their patrons and/or visitors.

On May 8, 2008, at 4:45 p.m., plaintiff, a long-term patient of the Long Island Pain Management facility, located in Suite 201 of the subject premises was present for an appointment with her treating physician, Robert Iadevaio, M.D.. According to plaintiff, after receiving a steroid injection in her back, she exited the procedure room and as she entered the hallway of the subject premises, she immediately tripped and fell. Plaintiff attributes the cause of her fall to the white specimen boxes, which she alleges were placed in the hallway at the right of the procedure room doorway.

The site of the accident was in the hallway outside Suite 201, on the second floor of

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[1]That caption was changed pursuant, to an Order of this Court, dated June 20, 2011, to reflect the correct spelling of co-defendant's, Leonard Ingber's name. Accordingly, the name has been changed from Leonard Ingler M.D. to Leonard Ingber, M.D, and the caption has been so modified.

the subject premises and the other office suite in the immediate area was Suite 207. At all times referred to herein, Suite 207 contained the medical offices of defendants and building tenants, Dr. Ingber and his subleasee, Dr. Friedman. It is conceded that Ingber and Friedman utilized white specimen boxes that were one foot tall, one foot wide and one foot deep, placed in the hallway. Defendants maintain that the specimen boxes were to the left of the doorway, if one was looking at the door to Suite 207. Plaintiff denies seeing the specimen boxes at any time prior to her fall, including upon entering the treatment room 12-20 minutes prior to her fall or upon any earlier visit to the building for her ongoing treatment.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A property owner is charged with the duty to maintain the premises in a reasonably safe condition. (***Katz v. Westchester County Healthcare Corp.***, 82 A.D.3d 712, 713, 917 N.Y.S.2d 896 [2d Dept., 2011]). Of course, a property owner may be held liable for damages resulting from a hazardous condition on its premises if it created the hazardous condition or had either actual or constructive notice of the condition in sufficient time to remedy it. (***Gordon v. American Museum of Natural History***, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). To constitute constructive notice the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. (***Borenkoff v. Old Navy,*** 37 A.D.3d 749, 750, 831 N.Y.S.2d 220 [2d Dept., 2007]). To be entitled to summary judgment in a trip and fall case, a defendant is required to show, *prima facie*, that it maintained the premises in a reasonably safe condition and she did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. (***Villano v. Strathmore Terrace Homeowners Assn., Inc.***, 76 A.D.3d 1061, 908 N.Y.S.2d 124 [2d Dept., 2010]). A property owner has no duty, however, to protect or warn against a condition that is not inherently dangerous and/or is readily observable by the use of one's senses. (***Neiderbach v. 7-Eleven, Inc.***, 56 A.D.3d 632, 633, 868 N.Y.S.2d 91 [2d Dept., 2008]).

Although the open and obvious nature of a dangerous condition will not preclude a finding of liability against a landowner who causes a foreseeable risk of harm through a failure to maintain the property in a reasonably safe condition, summary dismissal is appropriate where the complained of condition was both open and obvious and, as a matter

of law, was not inherently dangerous. (***Rao-Boyle v. Alperstein***, 44 A.D.3d 1022, 844 N.Y.S.2d 386 [2d Dept., 2007]).

While, it is true that whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide, summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous. Here, defendants have all indicated that there were no prior complaints regarding the placement of the boxes, nor has anyone reported any accidents where anyone has been injured as result of the placement of the boxes (see ***Przybyszewski v. Wonder Works Const., Inc.,*** 303 A.D.2d 482, 755 N.Y.S.2d 435 [2d Dept., 2003]). Furthermore, testimony established that the specimen boxes had been in the hallway to the left of suite 207 for decades, without incident.

Further, there is no evidence that the specimen boxes were moved or placed in the doorway of suite 201 or in the middle of the hallway. Although plaintiff alleges that she tripped over them, that does not in and of itself mean that a dangerous condition existed. Further, the photographs submitted in support of the defendants' motion, established that the position of medical boxes in the hallway along the wall to the left of suite 207 was not an inherently dangerous condition. The specimen boxes were clearly visible and not unexpected in a medical office building.

This Court finds that Defendants have met their burden. Where a condition that causes injury is open and obvious and readily observable by those employing the reasonable use of their senses, it is not inherently dangerous as a matter of law so as to create liability. (***Gagliardi v. Walmart Stores, Inc.***, 52 A.D.3d 777, 860 N.Y.S.2d 207 (2d Dept., 2008);***Sclafai v. Washington Mutual***, 36 A.D.3d 682, 829 N.Y.S.2d 553 [2d Dept., 2007]). Here, the white specimen boxes placed on blue carpeting in the hallway, outside of a medical office, are not inherently dangerous and were readily observable by those employing the reasonable use of their senses. Having satisfied their burden, the burden now shifts to the Plaintiff to establish a triable fact with respect to liability (***Felix v. New York City Transit Auth.***, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]), by tendering evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein Plaintiff. ***(Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant, as proximate cause may be inferred

from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone (see ***Thompson v. Commack Multiplex Cinemas***, 83 A.D.3d 929, 921 N.Y.S.2d 304 [2d Dept., 2011]).

Plaintiff avers that she fell upon taking her first step out of the procedure room and that the boxes were the cause of her fall. She argues that Cynthia Stackler-Ziegler's testimony is contradictory in that she states in her sworn affidavit that the boxes belonged to Dr. Ingber and Dr. Friedman and the only area where the specimen boxes were located was outside of Suite 207, yet while testifying at her earlier deposition, she did not know which tenants placed or maintained specimen boxes in the hallway. The plaintiff further posits that Stackler-Stiefler's lack of credibility raises a question of fact that can only be resolved by a jury as to these defendants. Ms. Stackler-Ziegler's testimony does not raise a triable issue of fact in light of the other circumstances in this record.

It is noted that the plaintiff does not address the statement recorded in the Long Island Pain Management's chart where she initially attributed her fall to her toe being "caught" in the carpet: ". . . [p]t. stated she caught her toe on carpet [and] tripped. Pt. noted no[t] unusual with sneakers . . . ." (See Notice of Motion, SF&G, Rockville Centre, and Mill River, Exhibit U). The author of the note, Dr. Iadevaio, during his deposition, confirmed that plaintiff made this statement. There is no mention therein of any specimen boxes, and it is also noteworthy that the note is contemporaneous with the date of the subject accident.

The plaintiff's only attempt to refute this evidence is her contention that she repeatedly and unequivocally contended that she tripped over the boxes (see Affirmation in Opposition to SF&G, Rockville Centre, and Mill River). However, plaintiff's testimony as to the cause of her accident, is anything but unequivocal: ". . .Well, when I opened up the door, I took a step out and I tripped and fell over, I don't know how, you know . . ." and ". . . At the time of my accident, I hadn't seen boxes. I know I tripped and fell, that's all I know . . ." (see Notice of Motion, Atlantic Medical, Long Island Pain Management, Exhibit G, p. 21, ln. 12-14, p. 31, ln.13-15).

Plaintiff's admission at her deposition that she could not identify the alleged defect that caused her to fall is fatal to the complaint since the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation. Further, other than her testimony, there is no other evidence to support her claim that the specimen boxes were placed outside the procedure room, and even if they were so placed, that such a condition created or caused a hazard or a danger. As such, her affidavit, dated December 1, 2011, submitted in opposition to the defendants' motion was clearly designed "to avoid the consequences of the earlier admissions" (see ***Israel v. Fairharbor Owners, Inc.***, 20 A.D.3d

392, 798 N.Y.S.2d 139 [2d Dept., 2005]).

Plaintiff's self-serving affidavit does little to overcome her burden of proving a triable issue of fact ***(Fisher v. Williams***, 289 A.D.2d 288, 734 N.Y.S.2d 497 [2d Dept., 2001]). Moreover, the speculative and conclusory assertions as set forth by the plaintiff are insufficient to defeat summary judgment. In opposition to the defendant's *prima facie* showing of its entitlement to judgment as a matter of law, the plaintiff failed to submit any competent evidence establishing that the defendant's alleged negligence was a substantial cause of the events leading to her injuries or that the specimen boxes were inherently dangerous. This Court finds the plaintiff has failed to meet her burden

In light of this determination, this Court does not have to reach the remaining contentions as set forth by the parties.

Accordingly, the defendants' motions are granted in their entirety, the plaintiff's complaint is dismissed as against all defendants, and all cross claims are rendered moot.

The foregoing constitutes the Order of this Court.

Dated: March 6, 2012
Mineola, N.Y.

J. S. C.
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ENTERED
MAR 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE