SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

HILDEGARD PADUANO, individually and as Administratrix of the Estate of JOHN JOSEPH PADUANO, deceased,

Plaintiffs,

-against-

686 FOREST AVENUE, LLC, and BRAISTED & BRAISTED,

Defendants.

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 102142/2009

Motion Nos. 664-002
737-003

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686 FOREST AVENUE, LLC,

Third-Party Plaintiff,

-against-

BRAISTED & BRAISTED,

Third-Party Defendant.

TP Index No.: A102142/2009

The following papers numbered 1 to 4 were fully submitted on the 10th day of May, 2012.

	Papers Numbered
Defendant BRAISTED & BRAISTED's Notice of Motion, dated February 29, 2012, with Exhibits and Supporting Papers	1
Defendant/Third-Party Plaintiff 686 FOREST AVENUE, LLC's Notice of Motion, dated February 29, 2012, with Exhibits and Supporting Papers	2
Plaintiff HILDEGARD PADUANO's Affirmation in Opposition, dated March 15, 2012, with Exhibits and Supporting Papers	3

Defendant BRAISTED & BRAISTED's Reply Affirmation, dated April 17, 2012, with Exhibits _____ 4

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In this wrongful death action, defendants 686 FOREST AVENUE, LLC. (hereinafter "686 FOREST") and BRAISTED & BRAISTED (hereinafter "BRAISTED") move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint. Plaintiff HILDEGARD PADUANO is the Administratrix of the Estate of JOHN JOSEPH PADUANO (hereinafter "PADUANO").

PADUANO suffered injuries when he slipped and fell as he entered the vestibule of an office building owned by 686 FOREST and maintained by BRAISTED. Plaintiff contends that on the date of the accident and "for a period of time prior thereto" the floor in the vestibule area was "excessively wet, slippery, unguarded, unprotected and unsafe"; that there was an accumulation of water due to tracked-in snow or rain; and that there was a failure by the defendants to maintain the vestibule in a reasonably safe condition. It is uncontroverted that there were no witnesses to the accident. PADUANO was taken by ambulance directly from the office to a hospital and died two months later.

Both defendants claim that plaintiff is unable to prevail in this matter because there is no specific evidence as to the defective or dangerous condition which caused PADUANO to trip and fall. In addition, the defendants assert that PADUANO is unable to demonstrate that either defendant had actual or constructive notice of any defective or hazardous condition in the vestibule.

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" *(Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and

demonstrate the existence of a triable issue of fact" *(Chance v. Felder,* 33 AD3d 645, 645-646 [2006]). "'A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it'" (*Sloane v. Costco Wholesale Corporation,* 49 AD3d 522 , 523, quoting *Frazier v. City of New York,* 47 AD3d 757, 758 [2008]).

Plaintiff asserts that PADUANO was caused to fall on a "wet spot" in the vestibule of the premises and claims that this allegation is confirmed by the information contained within the certified hospital records (including the ambulance call report and the intake and treatment notes). Specifically, the FDNY Prehospital Care Report sets forth that ". . . pt. had fallen in lobby of lawyer office. Pt. had slipped on a wet spot". In addition, a Physician Note provides that PADUANO "reports sustaining injury to right hip when he slipped and fell on the marble floor while he was in his lawyer's office" and the category of Health History (Patient's Reason For Hospitalization - Patients Own Words) as contained in the Hospital's Inpatient Admission Assessment - it indicates "s/p fall in office vestibule slipped on wet marble floor". Plaintiff also supplies an affirmation from a physician who opines that, based on his review of the aforesaid medical records, the information contained therein was germane to the diagnosis and treatment of PADUANO. Plaintiff contends that these statements "at the very least, raise a question of fact as to whether there was a defective condition in the vestibule area of the defendants' premises and whether said premises was properly maintained".

Defendants claim that the information related to the description of the accident that is contained in the hospital records is inadmissable as hearsay because it cannot be confirmed that it

was PADUANO who provided the information to the reporter. However, information contained in a hospital record regarding the manner in which the accident occurred may be afforded the business record exception to the hearsay rule if the records are "germane to the diagnosis and/or treatment of the plaintiff" (*Kamolov v. BIA Group, LLC,* 79 AD3d 1101 [2010]). Accordingly, as it may be reasonably inferred that the description of the accident as contained in the aforesaid hospital records was germane to the diagnosis and/or treatment of PADUANO, plaintiff will be afforded the presumption that PADUANO stated that he fell on a "wet tile floor" in the vestibule of the subject premises.

However, plaintiff is unable to establish that either defendant had actual or constructive notice of the defective condition (the alleged wet tile floor) which caused PADUANO to fall. Employees of the tenants in the building testified that it was "snowy and wet" on the day of the accident and the vestibule "was clean" at the time PADUANO fell. There is no evidence that the alleged wet condition was present for a sufficient period of time for either defendant to have discovered and remedied it. There is no evidence that defendants created the alleged wet condition, and the defendants are "not required to cover all of its floors with mats, nor to continuously mop up all moisture from tracked-in rain" (*Zerilli v. Western Beef Retail, Inc.,* 72 AD3d 681 [2010] quoting *Negron v. St. Patrick's Nursing Home,* 248 AD2d 687 [1998], see also, *Gullo-Georgio v. Dunkin' Donuts Incorporated*, 38 AD3d 838 [2007]). In addition, plaintiff's contention that the accident was caused by defendants' failure to have a mat in place on the day of the accident or that the placement of the mat in some way contributed to PADUANO's fall is purely speculative. There is simply no evidence proffered by plaintiff which supports any finding that defendants had actual or constructive notice of any alleged defective condition which contributed to PADUANO's fall. *(Kokin v. Key Food*

Supermarket, Inc., 90 AD3d 850 [2011]).

Accordingly, it is

ORDERED that defendant 686 FOREST AVENUE, LLC's and BRAISTED & BRAISTED's motions, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint are granted in their entirety.

This shall constitute the decision and order of the Court.

E N T E R,

/s/ Philip G. Minardo
HON. PHILIP G. MINARDO

Dated: July 24, 2012