SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

NANCY MATOS,

Plaintiff,

- against -

MID STATE MANAGEMENT CORPORATION and PENNSYLVANIA LEASING LIMITED,

Defendants.

Index No.: 21646/2010

Motion Date: 12/18/2012

Motion No.: 63

Motion Seq.: 3

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The following papers numbered 1 to 15 were read on this motion by defendant, MID STATE MANAGEMENT CORPORATION and PENNSYLVANIA LEASING LIMITED, for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Memo of Law	1 - 8
Affirmation in Opposition-Affidavits-Exhibits	9 - 12
Reply Memorandum	13 - 15

This is an action for damages for personal injuries sustained by the plaintiff, Nancy Matos, on May 18, 2009, when she purportedly slipped and fell on a wet floor while walking inside the premises located at 31-35 Crescent Street, Long Island City, Queens County, New York. The floor was being mopped by building personnel at the time the plaintiff slipped. Plaintiff alleges that as a result of the accident she sustained, inter alia, a torn meniscus of the left knee and a herniated disc in the lumbar spine at the L4-L5 level.

The plaintiff commenced this action by filing of a summons and complaint on August 24, 2010. In her bill of particulars the

plaintiff alleges that the accident occurred in front of the second set of mailboxes located in the lobby approximately 200 feet from the front entrance doors of the building where she resides. Plaintiff claims that the defendants, the owner and manager of the premises, had actual notice of the wet floors in that the condition was reported to the defendants whose duty it was to maintain the area in a safe condition. Plaintiff also claims that the defendants had constructive notice of the hazardous condition as the wet floor was visible, apparent and existed for a sufficient length of time prior to the accident that the defendants had sufficient time to notice and remedy the dangerous condition. In addition, the plaintiff claims the defendants were negligent in creating and allowing the wet condition to exist on the floor and failed to take measures to remedy or correct the dangerous condition and in misrepresenting to the plaintiff that the area was safe and fit for use.

Issue was joined by service of the defendant's answer dated September 29, 2010. The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. The defendant contends that they are not liable for the accident as the wet floor being mopped was an open and obvious condition, that he plaintiff was aware that the floor was being mopped and that the defendants placed warning signs in the area. Defendant also claims that the porter's alleged statement to the plaintiff that she could cross the wet floor is not sufficient to sustain a cause of action for negligent misrepresentation.

In support of the motion, the defendants submits an affirmation from counsel, Jeremy D. Platek, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; and a copy of the transcript of the examination before trial of the plaintiff, Ms. Matos, and an affidavit from porter Ramon Arias, who was present at the time of the plaintiff's accident

The plaintiff, age 52, testified that she lives in the Pennsylvania Building in Long Island City and she has lived there for 18 years. She stated that there are two porters and a janitor working at the building, one of whom is named Ramon. She stated that generally when the porters waxed the floor they would block the main entrance and direct pedestrians to use the side door. She also stated that she has observed the porters mopping the floors on occasion and that they would use large yellow buckets on wheels. She doesn't recall seeing any signs on the buckets stating "wet floor, caution." on the date of her accident. Although she stated that usually there would be triangular caution signs placed on the floor when mopping or waxing was

being done. However, she stated that on the day of her accident no such warning signs had been placed on the floor.

The plaintiff testified that when she came down the elevator to the main lobby she observed that the janitor was mopping between the two sets of mailboxes. She stated he was mopping the whole area and there were no dry spots. She and another tenant stopped at the mailboxes and the janitor told the other tenant to pass and she passed fine. Then the janitor told me after I obtained my mail, he says in Spanish, "passa." So as soon as I put my foot on to continue to walk I went airborne straight up in the air, and flat on my back, and I lost consciousness for a moment." She stated that some of the floor appeared to be dry and as she was standing in front of her mailbox she was standing on dry floor. She stated that the caution signs were not opened but rather were up against the wall.

Defendants also submit an affirmation from Ramon Arias, who was employed as one of the two porters at the Pennsylvania Building on the date of the plaintiff's accident. He states that on May 18, 2009, he along with the other porter were in the midst of starting the waxing process of the floor in the lobby of the building. In connection with that process they first stripped the floor using a chemical stripper to fully clean the floor for waxing. Following the stripping process they then dry the floor with mops in order to prepare it for the application of wax. He stated that at the time of the plaintiff's fall there were wet floor signs in the lobby and a bucket in the immediate area where he was mopping which had a warning sign on the side of it. He states that the plaintiff went to her mailbox in a dry area and after getting her mail began to walk past the caution sign towards where he was mopping. Mr. Arias states that he and the mop he was holding at the time and the bucket with the sign on it were within three feet of the plaintiff at the time she fell. He states that, "I did not tell the woman to pass through the wet area to get to the front entrance of the building. She did so on her own. Further, she decided for whatever reason, to cross the wet area to get to the front door instead of using the side entrance that also accessed the street."

Defendants argue that the plaintiff's complaint should be dismissed because the plaintiff testified that she observed the porters mopping the floor and observed that the floor was wet before she decided to walk on it to get to the front door of her building. As such, defendants contend that the condition complained of was open and obvious and not inherently dangerous and defendants have no duty to protect or warn against an open and obvious condition (citing Lawson v OneSource Facility Servs.,

Inc., 51 AD3d 983 [2d Dept. 2008]; Espada v Mid-Island Babe Ruth League, Inc., 50 AD3d 843 [2d Dept. 2008]; Ramsey v Mt. Vernon Bd. of Educ., 32 AD3d 1007 [2d Dept. 2006][the wet cafeteria floor upon which the plaintiff slipped and fell was readily observable by a reasonable use of the plaintiff's senses, and the condition of the floor being mopped with water was not inherently dangerous]).

In addition defendants assert that the affidavit of the porter, Ramon Arias, stating that there were signs placed out three feet from where plaintiff was standing as a cautionary warning satisfied the defendants duty to warn of a potentially dangerous condition (citing Rivero v Spillane Enters., Corp., 95 AD3d 984 [2d Dept. 2012][the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it satisfied its duty to warn of a potentially dangerous condition by placing a warning sign in the area where the plaintiff fell]). With respect to the plaintiff's contention that the porter negligently invited the plaintiff to cross the wet floor, and represented that the floor was safe to walk on, defendant contends that the plaintiff has not established a claim for negligent misrepresentation. Counsel claims that the plaintiff's reliance on the alleged statement was not justified as she observed that the floor was wet and could reasonably infer that it was not safe to walk on despite the statement of the porter.

In opposition to the motion for summary judgment the plaintiff submits the affirmation of counsel, John S. Manessis, Esq., in which he states that the testimony of the plaintiff raises triable issues of fact such as whether there were caution signs up and whether the area where she fell appeared to be wet when she initially approached it. Counsel claims that the defendants created a dangerous condition, did not indicate that the floor was wet prior to her fall, that the condition was not open and obvious, and that defendants' employee affirmatively represented that the area in question was safe to walk through. In addition, the plaintiff contends that the evidence submitted by the defendant including the deposition testimony of the plaintiff and the affidavit of the porter, presents conflicting versions of how the accident took place which raises credibility issues to be assessed by a jury.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds as follows:

While landowners have a duty to prevent the occurrence of foreseeable injuries on their premises, they are not obligated to warn against a condition that could be readily observed by the reasonable use of one's senses, and which are not inherently dangerous (see Sniatecki v Violet Realty, Inc., 98 AD3d 1316 [4th Dept. 2012]; Gagliardi v Walmart Stores, Inc., 52 AD3d 777 [2d Dept. 2008]; Ramsey v Mt. Vernon Bd. of Educ., 32 AD3d 1007(2nd Dept. 2006]; Cupo v Karfunkel, 1 AD3d 48 [2nd Dept. 2001). The courts have consistently held that the owner of premises is not liable for a slip and fall on a wet floor where the wet area upon which the injured plaintiff allegedly slipped and fell is readily observable by a reasonable use of the injured plaintiff's senses, and that the condition of the area is not inherently dangerous (see Reiss v Ulster County Agric. Socy., 78 AD 3d 679 [2d Dept. 2010]; Lawson v OneSource Facility Servs., Inc., 51 AD3d 983 [2d Dept. 2008].

Here, the plaintiff testified that when she got off the elevator she observed that portions of the lobby floor were wet and that it was in the process of being mopped. Although this testimony is sufficient to demonstrate that the plaintiff was aware that the floor was in the process of being mopped at the time she traversed the floor, looking at the testimony in the light most favorable to the non-moving party, plaintiff’s testimony that there were no warning signs on the floor and that the porter invited her to walk on the wet floor raises a question of fact as to whether the defendant breached its duty to warn and whether the statement of the defendants’ employee was a proximate cause of the accident. In addition, the evidence submitted by the defendant raises questions of fact as to whether the porter was negligent in representing to the plaintiff that it was safe to walk on the floor after it had created a hazardous condition, whether the porter misrepresented the condition of the floor, and whether it was reasonable for plaintiff to rely on the porter’s statement and whether it was reasonable for the plaintiff to believe from the porter’s statement and the lack of warning signs that it was safe for her to walk on the floor.

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers submitted by the plaintiff (see Giraldo v Twins Ambulette Serv., Inc., 946 NYS2d 871 [2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 AD3d 1002 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the defendants' motion for summary judgment dismissing the plaintiff's complaint is denied.

Dated: March 11, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.