[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Index Number : 100180/2011
CANTURENCIA, VERONICA
vs
LOWER EAST SIDE I ASSOCIATES
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 100180/11
MOTION DATE
MOTION SEQ. NO. 003

The following papers, numbered 1 to 17, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1-12

Answering Affidavits — Exhibits No(s). 13-15

Replying Affidavits No(s). 16-17

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 4/3/13

, J.S.C.
JOAN M. KENNEY
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: IAS Part 8

----------X

Veronica Canturencia,

Plaintiff,

-against-

Lower East Side I Associates, LP,

Defendant.

----------X

DECISION AND ORDER
Index Number: 100180/11
Motion Seq. No.: 003

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-12
Opposition Affirmation, and Exhibits	13-15
Reply Affirmation, Exhibits	16-17

In this personal injury action, defendant, Lower East Side I Associates, LP, moves for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On October 27, 2010, at approximately 10 a.m., plaintiff left her apartment located on the 5th floor of 610 East 11th St, New York, NY (the premises) to take her son to an appointment and as plaintiff descended down the staircase, she slipped and fell between the 2nd floor and the 1st floor, falling down the remaining stairs to the lobby below (the accident).

Plaintiff alleges that after the accident, her pants, the stairs, and the landing were wet. Plaintiff stated at her examination before trial (EBT) that she had last walked over the location of the accident the afternoon prior to the date of the accident. (Plaintiff's EBT, pg. 96, lines 11-22). Plaintiff also stated that when she looked up after the accident, the landing was "wet, like somebody cleaned up." (Plaintiff's EBT, pg. 85, lines 18-21; pg. 88, lines 20-22).

Mark Guzman (Guzman) was the superintendent of the premises owned, operated, and managed by defendant. Guzman stated at his EBT that at the time of the accident, the premises employed a porter who was responsible for mopping the premises. (Guzman EBT, pg. 14, lines 16-21; pg. 15, lines 4-7; pg. 28, lines 14-18). Guzman was the porter's immediate supervisor, and would inspect the premises once per week on average. (Guzman EBT, pg. 30, lines 10-24). Guzman further testified that the porter would be at the premises from 8 a.m. until 5 p.m. five days per week. (Guzman EBT, pg. 15, lines 16-18). Guzman did not recall whether or not the porter was at the premises on the date of the accident. (Guzman EBT, pg. 33, lines 5-9).

Arguments

Defendant contends that this action must be dismissed because defendant did not create and/or have notice of any alleged dangerous condition that allegedly caused plaintiff's accident.

Plaintiff argues that defendant failed to present a prima facie entitlement to the relief sought and questions of fact preclude the granting of summary judgment in defendant's favor.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall

appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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 eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept. 2009]; *Baez-Sharp v New York City Tr. Auth.*, 38 AD3d 229 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition." To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (see *Strowman v Great Atl. & Pac. Tea Co., Inc.*, 252 AD2d 384 [1998]).

Here, movant fails to eliminate all material issues of fact. Plaintiff maintains that she slipped on the landing because of a wet/dangerous condition. The plaintiff had last been by the location of the accident the day prior. Defendant's superintendent, Guzman, could not recall if he inspected the

location of the accident, or the premises in general, on the day of the accident. Although Guzman claimed that it was the porter's duty to mop the premises, and that the porter was hired to be at the premises from 9 a.m. to 5 p.m. on weekdays, the porter was not deposed and thus defendant left open the possibility that a wet/dangerous condition could have been cured by defendant and/or that defendant had constructive notice of the alleged dangerous condition. Summarily, Guzman has no personal knowledge of the facts attested to by plaintiff because he was not there, could not recall if he was even present at the premises on the date of the accident, and could not recall if the porter was scheduled to be at the premises fulfilling his duties of mopping and cleaning.

As defendant has not made out a prima facie showing of entitlement to summary judgment as a matter of law, plaintiff is under no obligation to come forward with evidentiary proof creating a triable issue of fact. (See *Marie Christiana v Joyce International Inc.*, 198 AD2d 690, 691 [3rd Dept. 1993]). A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065; *Cugini v System Lumber Co.*, 111 AD2d 114 [1st Dept, 1985]). Accordingly, it is hereby

ORDERED, that defendant's motion is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation forthwith.

Dated: 4/3/13

ENTER:

Joan M. Kenney, J.S.C.