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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. Justice

PART 17

Index Number : 105724/2010
DIDIEGO, DIANA
vs.
104 WEST 27TH STREET REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits + cross motion | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is granted and cross-motion denied.

THIS MOTION/ORDER TO SHOW CAUSE IS DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

FILED

JUL 05 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/1/13

_____, J.S.C.
SHLOMO HAGLER 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 17
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DIANA DIDIEGO,

Plaintiff,

-against-

104 WEST 27TH STREET REALTY INC.,

Defendant.

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Index No. 105724/10

DECISION/ORDER

SHLOMO S. HAGLER, J.:

In this personal injury action, defendant moves, and plaintiff cross-moves, pursuant to CPLR § 3212, for summary judgment.

FACTS

On June 18, 2007, plaintiff Diana Didiego ("Didiego") stepped out of her eighth floor office located at 104 West 27th Street, New York, NY ("Building"), onto the exterior staircase of the Building to smoke a cigarette. Plaintiff asserts that suddenly, and without warning, the step that she was standing on collapsed, and she fell through to her armpits. A co-worker helped to pick her up.

The Building is owned by defendant 104 West 27th Street Realty Inc., which is controlled by Milton and Martin Davis. Milton Davis ("Davis") acted as property manager for the Building. (Davis deposition at pages 8 and 11-12, attached as

exhibit "E" to the Motion).

The Building is a commercial building containing 12 floors, is serviced by three elevators, and has an interior and exterior stairwell. *Id.* at 8-9, 23-24. Davis maintained an office on the 11th floor of the Building. *Id.* at 15. If any portion of the Building required maintenance, Davis would have one of his employees take care of it. Personal observation, tenant complaints, porter complaints, or complaints from the fire safety director of the Building could be the predicate for a maintenance request. Davis went to the Building approximately every day or every other day to ascertain the physical condition of the Building and make general inspections. *Id.* at 15-16. Davis is a licensed fire safety director and would conduct fire drills. *Id.* at 17, 20.

Didiego was one of approximately twelve employees of RMG Investigation ("RMG") at the time of the accident.[1] *Id.* at 28-29, 31. RMG informed Davis of the accident within a couple of days after the occurrence, after which Davis conducted an investigation. *Id.* at 32, 38. Davis observed that one of the steps of the exterior stairwell was hanging. *Id.* at 39. He did not observe any rust or worn out portions of the tread. *Id.* at 40-41.

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[1] Neither party submitted a copy of the lease, if any, between defendant and RMG.

Two or three years before the accident, Davis had his employees scrape and clean the stairs, with instructions to weld any loose components, before painting the entire stairwell. *Id.* at 43. Davis did not know whether any portion of the stairwell in fact needed to be welded. After the accident, Davis did not observe any broken parts of the step, and opined that the hang of the step was caused by excess weight. No screws or bolts were missing, nor was the step broken. *Id.* at 48-49. Davis testified that, prior to the accident, he was unaware that employees used the stairwell to smoke, nor had he seen any cigarette butts or chewing gum on the stairwell. *Id.* at 37, 47. He also denied ever receiving complaints about the condition of the stairwell. *Id.* at 45. Davis testified that after he had his maintenance people scrape and clean the stairs, he had probably walked up and down the stairs, but could not remember the exact time period. *Id.* at 43.

Didiego testified at her deposition that she routinely went out on the exterior stairway, approximately twice a day, to smoke a cigarette. She did not notice anything wrong with the step at any time before it collapsed. Co-workers of hers also used the stairway for smoking breaks. No one ever said anything to her about any problem with the condition of the stairs. (Didiego deposition at pages 25-26 and 47-48 attached as exhibit "D" to the Motion).

ARGUMENTS

Defendant seeks summary judgment, arguing that it never had any notice of a dangerous condition, nor did it breach any duty of care. Plaintiff seeks summary judgment as to liability, based on the theory of res ipsa loquitur.

SUMMARY JUDGMENT

The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR § 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Freedman v Chemical Construction Corp., 43 NY2d 260 [1977]; Spearmon v Times Square Stores Corp., 96 AD2d 552 [2d Dept 1983].) "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." Spearmon, 96 AD2d at 553 (quoting Di Sabato v Soffes, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no

triable issue of fact exists. (Kuehne & Nagel, Inc. v F.W. Baiden, 36 NY2d 539 [1975].)

DISCUSSION

Res Ipsa Loquitur

Plaintiff cross-moves for summary judgment on a theory of res ipsa loquitur. Plaintiff argues that the step on which she was standing would not ordinarily collapse without negligence, that it was within the exclusive control of defendant, and that she did not contribute to the occurrence in any way. *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 (1986).

Plaintiff contends that if the steps had been properly maintained and/or repaired, the step would not have collapsed. The only testimony in this record is Davis' observation that there was no sign of wear or damage to the step, and his conjecture that excessive weight caused the step to collapse. However, Davis has not been proferred as an expert witness, and the record does not offer any explanation as to what caused the step to fail, whether it had been tampered with or whether the fault could have been discovered by prior inspection. Thus, plaintiff's conclusory assertion that a step does not collapse in the absence of negligence is unsupported.

Plaintiff also asserts that defendant had exclusive control over the stairway. However, it is undisputed that plaintiff, as well as some of her co-workers, regularly used the stairway to take smoking breaks. The area was accessible to them, and to others who had access to the stairway from their offices in the 12-story building. There is no evidence that the stairway was locked. In fact, plaintiff and Davis both testified at their depositions that it was not locked. (Didiego deposition at page 20 and Davis deposition at page 35). Thus, plaintiff has failed to demonstrate that defendant had exclusive control over the stairway, or that the accident resulted from negligence, thereby failing to make a prima facie showing of entitlement to summary judgment on the basis of res ipsa loquitur. Consequently, the cross motion is denied.

Motion for Summary Judgment

Defendant contends that it neither had actual nor constructive notice of any defective condition on the stairway. Therefore, defendant concludes that it cannot be held liable for plaintiff's injuries. Defendant points out that, not only were there no prior complaints with respect to the stairway, but plaintiff herself stated that she neither noticed any dangerous condition on the stairs, nor had she heard of any complaints regarding the stairs.

In attempting to demonstrate that defendant did not meet its burden, plaintiff argues that defendant was obligated to prove when it last inspected the stairway prior to the accident, and when it last cleaned the area. However, the cases on which plaintiff relies for this proposition involve store aisles that have constantly changing conditions, and plaintiffs who slipped on a substance in the aisle. There is nothing in the record that indicates that the condition of the stairway was subject to any of the dangers that can be present in store aisles. In fact, plaintiff herself testified that she would go out onto the stairway twice a day, and had never noticed anything amiss. Further, plaintiff does not claim that she fell on a substance that was on the stairs. Plaintiff claims that the stair collapsed, and offers no explanation for what caused the collapse.

Neither party presented any expert evidence with respect to the cause of the stair collapse. Additionally, plaintiff has not presented any basis upon which to conclude that defendant had any obligation to inspect the staircase at any particular time, nor has she presented any evidence that an inspection would have resulted in discovering the alleged defect that caused the collapse. While Davis did not recall the last time that he inspected the staircase, he testified that neither the building department nor the fire department required him to make regular

inspections. Plaintiff has failed to offer any evidence that any inspections were required, much less frequently enough or thoroughly enough to have discovered the danger presented.

"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." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). Davis' testimony that defendant did not receive any complaints about the stairs, and plaintiff's testimony wherein she admits that she never noticed any problem with the steps, combine to make a prima facie showing that defendant did not have any notice of any defect. *Savio v Rose Flower Chinese Rest., Inc.*, 103 A.D.3d 575 (1st Dept 2013) (worn and slippery step not actionable where there were no complaints or injuries and no claimed structural defect). Plaintiff has failed to rebut that showing by demonstrating that any defect existed long enough to be discovered and remedied. *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994). Consequently, the complaint must be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff's cross motion for summary judgment as to liability is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 1, 2013

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.