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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 110259/2009
FAVUZZA, ANTONETTE
vs.
201 CHRYSTIE STREET
SEQUENCE NUMBER : 002
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).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: July 9, 2013

_____, **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
NEW YORK COUNTY

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ANTONETTE FAVUZZA,

Index No.: 110259/09

Plaintiff,

-against-

201 CHRYSTIE STREET CORP. and CONTINENTAL GROUP,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant 201 Chrystie Street Corp. ("Chrystie Corp") moves, and defendant Continental Group cross moves, for summary judgment dismissing the complaint. Plaintiff Antonette Favuzza ("Favuzza") opposes the motion and cross motion. For the reasons set forth below, the motion is granted, and the cross motion is denied.

BACKGROUND

Favuzza seeks damages for personal injuries she allegedly sustained on October 6, 2008, when she tripped and fell on an interior stairwell made of marble at 201 Chrystie Street ("the building"), which was leased by Favuzza's former employer, non-party Lehmann Maupin. The building is an art gallery where Favuzza worked as Lehmann Maupin's Chief Financial Officer and Chief Operating Officer. 201 Chrystie Street Corp. ("Chrystie Corp") owns the building. Continental Group ("Continental") contracted with Lehmann Maupin to renovate the gallery and had workers at the building on the day of the incident.

At her deposition, Favuzza testified that the accident occurred at about 11:00 am as she was walking from her office on the second floor to the first floor down an interior staircase while holding a glass (Fav. Dep., 47) and she felt her right foot slip on something underneath her foot in give way.(Id., at 52). She testified that she slipped on

the third or fourth step on "some cementy grout" (Id., 54). She had not noticed any such substance at any time either before her accident, including the "couple of times" she had used the stairs earlier that same morning (Id., 92), or immediately after (Id., 54-6). Rather, she concluded later that evening after she was released from the hospital and went to pick up her shoes from her office that this "grayish...cement-like" substance had been the cause of her fall after she inspected one of the high-heeled shoes she had been wearing (Id., 45, 54) and noticed a three inch long smear on the top portion of the bottom of the heel (Id., 57). Favuzza stated that a "Jose," who was working for Continental replacing some tiles in the bathroom outside of her office, (Id., 59) had been working with a similar material (Id., 58). According to Favuzza, he had been "mixing stuff" while going up and down the stairs on which she slipped (Id., 55).

At his deposition, Brian Donohue ("Donohue"), project manager and vice president for Continental stated that Continental was a construction company which had a contract to renovate the premises with 201 Chrystie, LLC, a company related to Lehman Maupin who Donohue described as "the owners of the lease of the building." (Donohue Dep. at 25-26). Donohue testified that a Jose Alvarez ("Alvarez") was working on the date of the accident (Id, 32). Donohue stated, however, that Alvarez must have been working in the basement on that day, as the gallery did not wish work to be done on the second floor until they could put up protection for the artwork (Id., 36), and any work to be done on the second floor would have been included on the "punch list," which he had not yet been given (Id., 32-3). Additionally, he stated that if Alvarez had been working in a bathroom or on the second floor, he would have been supervised (Id.). Donohue conceded that there are no written records detailing the exact area in which Alvarez was working at the time (Id., 33-4)

Donahue also testified that there would have been no substances on the staircase on the day of the accident (Id., 56) and that, to the best of his knowledge, Alvarez had not

been working with anything on that day that could be described as "gray cement-like," as all such material had been thrown out before the artwork was installed (Id., 59). Additionally, Donohue stated that he spoke to Alvarez on the day of the accident, and that Alvarez made no mention of any substance that might have played a role in the accident. According to Donahue, Alvarez implied that Favuzza slipped and fell because she was wearing "ridiculous five-inch heels" (Id., 52).

At his deposition, Drew Moody ("Moody"), an employee at Lehman Maupin, testified that he accompanied Favuzza to the hospital in an ambulance (Mood. Dep., 38). According to Moody, Favuzza did not describe how the accident happened; she said only that her ankle hurt (Id.).

At his deposition, David Maupin ("Maupin"), one of two members of Lehman Maupin, LLC., testified that he did not see the accident (Maup. Dep., 44) and does not know what caused it (Id., 42).

In support of its motion for summary judgment, Chrystie Corp submits a surveillance video ("the video") (see Exhibit A) depicting the incident. The video shows Favuzza enter the stairwell. As she descends down the stairs, she slips and falls on the third or fourth step. The video does not reveal if some type of substance was present in the vicinity of Favuzza's fall. Two women come to her aid, one of whom begins collecting pieces of a glass which Favuzza dropped during the fall. At the 1:16 mark, Alvarez enters the stairwell, wearing one work glove while holding the other glove and a small plastic container in his left hand. After assessing the situation, he removes his cell phone and calls emergency services. Alvarez re-enters the stairwell at the 11:55 mark. He can be seen using his left leg to make several "rubbing" motions at the bottom step. He then bends over and makes a "brushing" motion with his right hand on the third step from the bottom. Shortly after, emergency service personnel enter the stairwell and assist in providing medical attention and removing Favuzza from the stairwell.

Chrystie Corp argues that it is entitled to summary judgment on the grounds that, as an "out-of-possession landlord," it had no contractual obligation to maintain the premises and, in fact, had delegated maintenance of the premises to Lehman Maupin. Additionally, it argues that Favuzza has not identified an actionable dangerous condition that would suggest negligence and that, if any condition existed, Chrystie Corp had no notice of the condition and did not create it.

Continental cross moves for summary judgment, arguing that Favuzza's claim that she slipped on grout dropped by Alvarez is nothing more than conjecture and speculation, and thus insufficient to defeat a motion for summary judgment. Moreover, Continental argues that, as indicated in the video, Alvarez was not cleaning grout off the stairway with his foot but rather sweeping away some shards of the glass that Favuzza had dropped when she fell. Continental also argues that although its cross motion is untimely, as Chrystie Corp made a timely motion for summary judgment on similar grounds the court should consider its cross motion.

Favuzza opposes both the motion and cross motion. She argues that Chrystie Corp has failed to produce any evidence or testimony establishing its status as an out-of-possession landlord. In particular, she notes that Chrystie Corp. has not produced any lease that would indicate the terms of the agreement between Chrystie Corp. and her employer and has also failed to provide deposition testimony or an affidavit from anyone with authority to represent Chrystie Corp. Favuzza further argues that the video submitted by Chrystie Corp as exhibit A, which shows Alvarez moving his foot along one of the steps at the bottom of the staircase, "as if to kick something away," which could possibly have been the grout described in her deposition, is sufficient to raise a question of fact as to whether Continental Group created a dangerous condition. Favuzza also argues that Continental Group's cross motion is untimely.

Favuzza also submits an affidavit from Alvarez dated September 6, 2011 in which he states that on the day of the accident his job was to "complete a punch list of final things" and that the night before or early on the morning of the accident he and two co-workers had been cleaning and "put water down on grout" at second floor "trying to blend colors of grout [and that] the bathroom door is about 4 feet from the stairwell [and that] we were sponging grout down with water" (Alvarez Aff., p.2).

In reply, Chrystie Corp argues that the evidence establishes that it is an out-of-possession landlord pointing to Favuzza's deposition testimony that Lehman Maupin occupies the entire premises owned by Chrystie Corp (Fav. Dep., 46-48), to Maupin's deposition, at which he testified that Lehman Maupin pays rent to Chrystie Corp as the sole tenant (Maup. Dep., 9), and to a certified copy of the deed to the premises, attached to their response as Exhibit "A," establishing that Chrystie Corp was the owner of the premises on the date of the accident. Chrystie Corp also argues that even in the absence of a formal lease, the testimony of Maupin makes it clear that Chrystie Corp's duties were limited to holding title and collecting rent, and that it conducted no other business at the premises.

Chrystie Corp further argues that even assuming arguendo that it did not relinquish control of the premises, Favuzza has not shown that Chrystie Corp had any actual or constructive notice of any dangerous condition or that it created such condition. Further, Favuzza testified that she did not observe anything unusual about the steps before her accident or alert anyone to the presence of a potentially dangerous condition (Fav. Dep., 92), and Favuzza has not provided any evidence indicating prior complaints.

In reply, Continental submits an affidavit from Alvarez dated October 24, 2012, in which Alvarez states that he brushed away several pieces of broken glass at the bottom of the steps, that he was one of the first people to enter the stairwell after the accident, and that he had the opportunity to examine all of the steps but found no debris, slipping

hazards, or foreign substances of any kind (Alvarez Aff., ¶¶ 9, 10). Alvarez also states that he did not do any work in or about the stairwell on the day of the accident, that he had not entered the stairwell before the accident on that day, and that he had not dropped anything on the stairwell the night before (Id., para. 6).

DISCUSSION

On a motion for summary judgment, the proponent "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." Wingard v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

In regards to Continental, although its cross motion is untimely, the court will consider it as Chrystie Corp's motion, which raised almost identical arguments was timely submitted. See Grande v. Petroy, 39 A.D.3d 590, 592 (2nd Dept., 2007)(holding that when "the issues raised by the untimely motion or cross motion are already properly before the court, the nearly identically nature of the grounds may provide the requisite cause to review the untimely motion or cross motion on the merits"); Rosa v. R.H. Macy Co., Inc., 272 A.D.2d 87 (1st Dept 2000)(defendants' untimely cross motion for summary judgment should have been considered together with timely main motion on same grounds).

However, Continental has not demonstrated its entitlement to summary judgment on the ground that Favuzza did not know what caused her to fall. Even if Continental had met its burden on this issue based on Favuzza's testimony that she did not know what substance caused her to slip at the time that she fell, Favuzza has controverted this showing based on later testimony that her fall was caused by a concrete like substance

which she identified as grout on the bottom of her shoe when she returned to retrieve the shoe from the gallery. Such testimony together with the evidence that Alvarez and other Continental workers had used grout on the second floor near the stairwell on the evening before or the morning of the accident, and Favuzza's testimony that Alvarez had been working with a similar material outside her second floor office on the date of the accident, are sufficient to raise an issue of fact as to whether the grout caused Favuzza to fall See Tomaino v. 209 East 84th Street Corp., 72 A.D.3d 460, 461 (1st Dept 2010)(holding that although plaintiff did not know that she fell as a result of worn treads on the stairs at the time of the accident, evidence that the treads were worn based on photographs taken after the accident were sufficient to raise a triable issue of fact); Sweeney v. D& J Vending, Inc., 291 A.D.2d 443 (2nd Dept 2002)(although plaintiff testified that he did not see what caused him to fall, his testimony as to his observations after the accident together with the affidavit of his supervisor provided sufficient circumstantial evidence to raise a triable issue of fact as to whether his injuries were proximately caused by liquid from the defendants' vending machine); Panagakos v. Greek Archdiocese of North and South America, 213 A.D.2d 336 (1st Dept 1995)(plaintiff's affidavit in which she stated that she fell due to wax on the floor and that her clothes and shoes were covered with wax were sufficient to preclude a grant of summary judgment); compare Smith v. City of New York, 91 A.D.3d 456, 457 (1st Dept 2012), lv denied, N.Y.3d ___, 2013 WL 2476556 (2013) (defendants sustained their burden on summary judgment motion where plaintiff testified that she had "no idea" how she tripped and fell and could not identify or mark on photographs the defective condition).[1]

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[1]Furthermore, this case is distinguishable from Green v. Gracie Muse Restaurant Corp., 105 A.D.3d 578 (1st Dept 2013) and Acevedo v. York International Corp., 31 AD3d 255 (1st Dept 2006). In these cases, the Appellate Division found that summary judgment should have been granted as there was no evidence connecting the substance on which

In this connection, the court notes that although Continental's witness testified that Alvarez did not work on the second floor, this testimony was not based on direct knowledge but on an assumption that the gallery would not allow work there until it protected the art work. Moreover, while in Alvarez's second affidavit submitted by Continental in reply, Alvarez denies dropping anything on the relevant staircase, he does not controvert his statements in his earlier affidavit that he worked with water and grout on the second floor bathroom near Favuzza's office, and the stairway at issue.

In addition, while the videotape does not reveal any substance on the stairway where Favuzza fell, such evidence is insufficient to warrant a grant of summary judgment in Continental's favor, particularly as the color of the grout that allegedly caused Favuzza to fall and the quality of the videotape are such that the grout may not have been apparent. Likewise, it cannot be said from the video the nature of the substance being brushed away by Alvarez at the bottom of the stair case. Nor does the videotape eliminate triable issues of fact as to whether Favuzza stepped in the grout outside her office prior to walking down the stairs or whether the grout was on her shoe.

Next, even assuming there is no evidence that Continental had notice of the condition, the record raises triable issues of fact as to whether its worker caused or created the condition by spilling grout on the floor near . See Ohanessian v. Chase Manhattan Leasing Realty Corp., 193 A.D.2d 567, 567 (1st Dept 1993).

In regards to Chrystie Corp, "the owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either

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plaintiff allegedly fell with the defendant. In contrast, in this case, there is evidence that the substance at issue on the bottom of the plaintiff's shoe was caused by the activities of the defendant's employee who admitted that he used grout on the second floor near the stairs where the accident occurred in the hours leading up to the fall. In addition, unlike in Green supra, where the shoe with the substance on it was taken to the hospital, the shoe involved here remained at site of the accident.

created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2nd Dep't 2000); see also O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996). Here, even assuming *arguendo* that there are factual questions as to whether Chrystie Corp is an out-of-possession owner, there is no evidence in the record that it had any notice of, or caused or created, the condition on which Favuzza fell.

Based on the analysis above, summary judgment should be denied with respect to Continental and granted with respect to Chrystie Corp.

CONCLUSION

In view of the above, it is

ORDERED that the motion for summary judgment by defendant 201 Chrystie Street Corp is granted, and the Clerk is directed to enter judgment dismissing the complaint against it; and it is further

ORDERED that the cross motion for summary judgment by defendant Continental Group is denied; and it is further

ORDERED that the remaining parties shall proceed to mediation.

Dated: July 9, 2013

J.S.C.