| **McIntosh v Tenth Church of Christ Scientist in the Borough of Manhattan** |
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| 2014 NY Slip Op 31479(U) |
| June 9, 2014 |
| Sup Ct, New York County |
| Docket Number: 402133/11 |
| Judge: Debra A. James |
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[* 1]
SCANNED ON 6/10/2014

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** DEBRA A. JAMES **PART 59**
*Justice*

MARY McINTOSH,

Plaintiff,

-v-

TENTH CHURCH OF CHRIST SCIENTIST IN THE BOROUGH OF MANHATTAN,

Defendant.

Index No.: 402133/11

Motion Date: 09/20/13

Motion Seq. No.: 001

FILED

JUN 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

| | | |
|---|---|---|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | No(s). | 1 |
| Answering Affidavits - Exhibits | No(s). | 2 |
| Replying Affidavits - Exhibits | No(s). | 3 |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers,

Defendant Tenth Church of Christ Scientist in the Borough of Manhattan moves for summary judgment dismissing the complaint.

This is a personal injury action involving a trip and fall incident. Plaintiff alleges that on May 23, 2010, she was on defendant's premises located at 43 Wooster Street, New York, New York, with her husband, who was employed by defendant to clean its facility. Members of the board of the defendant were in the process of moving the property of the defendant from the premises, which was its temporary facility, into its permanent

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

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**

facility. As she had done on prior occasions, on the day of the accident, plaintiff accompanied her husband to assist him in the cleaning responsibilities. Plaintiff claims that she was walking from the front door to the reading room, which contained various items on the floor, including mats and boxes filled with books. She did not know who had placed these items there but claims that her husband was instructed to place them outside on the street so as to be thrown away. Plaintiff, while walking, tripped over a plastic mat on the floor, which was among such garbage, and fell. Plaintiff states that she was only aware of the mat in its turned up condition after her fall. The mat was later discarded by her husband.

Plaintiff states that she suffered serious injuries as a result of the fall and brings this action against defendant for its alleged negligence in creating a dangerous condition on the premises.

Defendant moves for summary judgment dismissing the complaint, arguing that it did not create or cause a dangerous condition that resulted in the accident, and did not have actual or constructive notice of the condition prior to the accident.

Defendant contends that the mat in question, which was in a turned up form at the time of the accident, did not create an inherently dangerous condition in the reading room. According to defendant, the placement of a mat amongst items for disposal as

garbage is not a condition that would constitute a hazard. Defendant argues that, even if it can be argued that a turned up mat could create a hazard, there is no testimony to date that the mat was in a turned up position prior to plaintiff's fall.

Defendant also contends that defendant lacked knowledge of any dangerous condition. Defendant states that in the absence of evidence of defendant having either actual or constructive notice, defendant is not liable for negligence. Alternatively, defendant avers that the mat was such an open and obvious object that it could not constitute a hazard in any reasonable way.

Plaintiff opposes this motion, claiming that there remain issues of fact as to whether defendant created the condition of the turned up mat or had constructive notice of such condition. Plaintiff states that defendant has not presented any proof that indicates the last time the mat or the area in question was examined. Plaintiff also states that defendant failed to meet its burden of showing that the condition was open and obvious.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." Birnbaum v Hyman, 43 AD3d 374, 375 (1st Dept 2007). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." Flores v City of New

York, 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." Id.

In its motion, defendant relies on the deposition testimony of plaintiff and an employee of defendant, Diane Minnella.

Plaintiff testified that she had not noticed the condition of the mat in question when she was in the reading room a week earlier. On the day of the accident, she had not seen the mat until after she tripped over it. She stated that she had not been aware of the condition of the mat, its turned up appearance, prior to her fall.

Minnella testified that she saw a plastic mat under a rolling chair in the reading room, on which she was seated, on the day of the accident. She testified that she did not see a turned up mat. According to her testimony, Knight did not see plaintiff fall but sometime after Minella's arrival at the premises that day, plaintiff came into the reading room and told her that she had tripped on a rolled up carpet and hurt herself. As there was no rolled up carpet in the reading room, and Minella had only seen rolled up carpets in the basement, she understood that the accident had occurred in the basement.

Plaintiff argues that the deposition testimony of Kelly Knight, a board member of defendant church at the time of the accident, raises an issue of fact as to notice. Knight testified that she was a member of a group of parishioners who assisted in the move of the church, that she was not present on the premises on the day of the accident, and did not recall the last time she was at the premises before the date of the accident. Knight testified that she only recalled that sometime prior to the accident she saw one plastic mat under the desk chair in the reading room, but recalled neither its condition nor any further details about the mat.

Defendant argues that there is no evidence that shows that defendant was responsible for a defective condition leading to plaintiff's injuries. Defendant states that plaintiff cannot identify the condition of the mat prior to the accident and whether the mat was defective. With respect to constructive notice, there must be a showing that a visible and apparent defect existed "for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). Defendant contends that plaintiff's testimony demonstrates that she was not aware of the mat prior to the fall and, from this, it would only be a matter of speculation that the

mat was there for a sufficient time to provide any notice for defendant.

Plaintiff argues that, contrary to what defendant has asserted, defendant has the burden to show that it lacked actual or constructive notice of a dangerous condition. Plaintiff avers that defendant fails to meet this burden as it offers no evidence concerning the last time the mat was cleaned or inspected prior to the accident. Plaintiff also states that defendant has not offered evidence that the mat was in a flat position prior to the accident. Plaintiff states that she alleges in her complaint that defendant created a dangerous condition in the form of a turned up mat, and that the element of notice, actual or constructive, is not essential.

"An owner of property has a nondelegable duty to maintain its property in a reasonably safe condition, taking into account the foreseeability of injury to others [citation omitted]." Fuller-Mosley v Union Theol.Seminary, 10 AD3d 529, 530 (1st Dept 2004).

The court disagrees with defendant's argument that since the condition is open and obvious defendant must prevail on its motion for summary judgment. "An open and obvious hazard may negate the duty to warn, but it does not negate liability in negligence, because an owner still has a duty to ensure that its premises are maintained in a reasonably safe condition [citations

omitted]." Caicedo v Cheven Keeley & Hatzis, 59 AD3d 363, 363 (1st Dept 2009).

Nonetheless, the court finds that defendant has met its prima facie burden that negates its liability in negligence on the basis of evidence that it neither created the putative defect, nor had actual or constructive notice of such defect. The deposition of the testimony of defendant's employee and of plaintiff, which were submitted by defendant, show a lack of evidence either that defendant (1) created the defective condition, i.e. the turned up edge of the mat, (2) had actual knowledge of such defective condition or (3) should have had knowledge of such defective condition in time to remedy it. See Early v Hilton Hotels Corp., 73 AD3d 559 (1st Dept 2010); Aniello v 1370 Broadway Associates Corp, 28 AD3d 383, 384 (1st Dept 2006). Plaintiff comes forward with no evidence that raises an issue of fact that the mat in question was turned up prior to her fall, let alone that defendant placed such mat in that condition or had knowledge that it was in that condition prior to her fall.

Accordingly, it is

ORDERED that defendant Tenth Church of Christ Scientist in the Borough of Manhattan's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

**Dated:** June 9, 2014

ENTER:

DEBRA A. JAMES J.S.C.