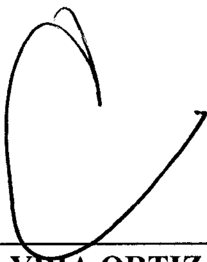
Ortiz v 424 Sheva Realty Assoc. LLC
2014 NY Slip Op 32089(U)
July 2, 2014
Sup Ct, Bronx County
Docket Number: 301103/2012
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

 FILED Jul 31 2014 Bronx County Clerk



NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

LYDIA ORTIZ,

Plaintiff,

-against-

424 SHEVA REALTY ASSOCIATES LLC and LANGSAM PROPERTY SERVICES CORP.,

Defendants.

INDEX NUMBER: **301103/2012**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **3/10/14**

Notice of Motion-Exhibits and Affirmation	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, defendants 424 Sheva Realty Associates LLC (hereinafter "424 Sheva Realty") and Langsam Property Services Corp.'s (hereinafter "Langsam") motion for summary judgment is denied for the reasons set forth herein.

The within action involves plaintiff's claim that she was injured on January 14, 2012 at approximately 6:15 to 6:30 p.m. when she slipped and fell on debris in an interior staircase at 424 Grand Concourse, Bronx, New York. Plaintiff resided at the aforementioned premises which was owned by defendant 424 Sheva Realty and managed by defendant Langsam. In support of its motion for summary judgment, defendants argue that they did not have any actual or constructive notice of the alleged defective condition and their routine maintenance and inspection of the subject accident site satisfied the duty of care as a matter of law.

Defendants claim that they never observed or received any complaints or notice regarding the specific defect alleged by plaintiff at any time prior to her accident. Defendants further claim that they never heard of anyone slipping or tripping and falling on garbage in the subject stairwell. Defendants contend that they routinely walked through the premises, inspecting hallways and stairwells, including the subject stairwell, beginning at 8:00 a.m. and several times throughout the day, ending no earlier than 4:00 p.m.

Plaintiff testified at her deposition that her apartment was on the fourth floor and that the building is a walk-up with no elevator. The entrance to the building is on the first floor and plaintiff's apartment is three flights above the first floor. The stairwell between the first and fourth floors have platforms half way between each floor. From the first floor, there is a stairwell which goes down to the courtyard where the garbage cans are kept. On the date of the accident, plaintiff left her apartment and went to throw away a small bag of garbage in the courtyard. Plaintiff left her apartment and walked down to the first floor. The accident occurred on the stairwell between the first floor and the landing leading to the courtyard and garbage cans. Plaintiff testified that she slipped on the fourth step from the top of the stairwell, or the second step from the landing. Immediately prior to her accident, plaintiff was holding the handrail with her right hand and holding the small bag of garbage in her left hand. Plaintiff slipped with her left foot. Plaintiff testified that she did not have trouble seeing where she was going as she was walking down the stairs and she could see the subject stairwell as she stood on the first floor. She did not notice anything wrong with the stairs as she began walking down the stairs from the first floor. Plaintiff testified that after she fell, she first noticed the box on the steps that caused her to fall. She did not see the box on the steps before she stepped on to it. Plaintiff described the box as the size of a cracker jacks box. Plaintiff did not know how long the box was on the subject stairs, who put the box on the stairs or who owned it. Plaintiff was not aware of anyone who had complained about the subject box prior to her accident. After falling, plaintiff yelled for someone to help and Bobby, a homeless man from the neighborhood, came within two to three minutes. Plaintiff asked Bobby to call her neighbor Andrea and her daughter Janet. Andrea's daughter, Evelyn Berrios, went to see plaintiff and called the ambulance.

Prior to her accident, plaintiff had never slipped on the subject stairwell and did not know of anyone else slipping on garbage in the stairwell prior to her accident. Plaintiff testified that she had complained to the superintendent "many times" about the debris on the stairs. "I did complain about the garbage, not only there, but in the whole building. That area was dangerous because anything could happen to anybody and the

area has many children." She further testified that "[e]very time I would see garbage I would tell him or the people that are in the building that they had to clean up" and that she last complained about the garbage on the stairs two to three months before her accident.

Gerald Constanza appeared at a deposition on behalf of defendant Langsam. Mr. Constanza testified that he managed thirty buildings for Langsam including the subject premises. As a managing agent, he was responsible for visiting each building, checking boiler, the cleanliness of the building and seeing if any issues had been reported. In the year before plaintiff's accident, he visited the premises for a walk-through once every two to three weeks. During his walk-throughs, he and the superintendent checked to make sure the building was kept clean. Mr. Constanza testified that his walk-through visits were unannounced and the super did not know when he would be there. He further testified that the garbage cans are located in the courtyard outside of a side door and he checked the stairwell leading to the side door and courtyard as part of his walk-through. The superintendent, Angel Gonzalez, resided in the building immediately next door to the subject premises which was separated by the common courtyard where the garbage cans were located. Mr. Constanza testified that he was the super's supervisor. Mr. Gonzalez's duties included checking the boiler and cleaning the common areas including the hallways and stairwells. His schedule each day included sweeping the hallways and stairwells and the exterior of the building to the curb line at 8:00 a.m. Mr. Gonzalez was responsible for going up and down the stairs a few times a day to ensure that nothing that would cause a trip or slip and fall was on the steps. The walk-throughs by the super began in the morning and then continued a few hours later and then in the afternoon. Mr. Constanza testified that all complaints from tenants go through the super to him or to him directly if the tenant called Langsam's office. Mr. Constanza further testified that he never received any complaints regarding garbage in the common areas, including the subject stairwell in the year before plaintiff's accident. He never heard of any slip or trip and fall accidents regarding garbage in the common areas, including staircases, inside or outside of the subject premises, in the year before her accident. In the year before her accident, Mr. Constanza never saw garbage at or about the staircase near the garbage cans and never saw garbage on the staircase leading to the garbage cans. He never saw anyone leave garbage at the top of the subject staircase.

Evelyn Berrios, a tenant in the subject premises, appeared for a non-party deposition. Ms. Berrios recalled the day of plaintiff's accident and was in the shower when Robert "Bobby" Cortez knocked on

her door and told her that the plaintiff had an accident. Ms. Berrios went down the stairs and saw plaintiff on the ground on either the first or second step from the bottom of the staircase. Ms. Berrios testified that plaintiff told her that she slipped and fell on garbage but that she never mentioned a box. When she went to see the plaintiff, Ms. Berrios did not see any trash, garbage or boxes on the stairs. Ms. Berrios further testified that she was not aware of anyone else slipping on a box or paper in the stairs in the year before plaintiff's accident.

In support of their motion, defendants also submit the affidavit of the superintendent, Mr. Gonzalez who states that at the time of plaintiff's accident, he would ensure that the common areas in the premises, including the subject stairwell, were cleaned and swept every morning between 7:00 and 8:00 a.m. In addition, he did walk-throughs and inspected all of the common areas, including the subject stairwell, six to eight times a day on weekdays and three to for times a day on weekends. If during those walk-throughs he notice any defective or dangerous conditions, including garbage, liquid or any other debris, he would immediately clean the area. His last walk-through was at approximately 4:00 p.m. on both weekdays and weekends. He further states that on Mondays, Wednesdays and Fridays, all common areas, including the subject stairwell, were mopped. In the 21 years he has been the superintendent of the premises, he has never heard of anyone slipping or tripping and falling on garbage at the accident site. He also states that at no time prior to plaintiff's accident, did anyone, including the plaintiff, complain to him about a small box on the steps.

Defendants move for summary judgment on the grounds that there is no evidence of any negligence on its part. Defendants argue that there is no actual or constructive notice of any alleged defective and/or dangerous condition. Plaintiff opposes the motion arguing that defendants failed to meet their burden because defendants cannot offer evidence regarding when it last cleaned or inspected the subject staircase relative to the time of plaintiff's accident. Plaintiff argues that defendants fail to offer evidence regarding any particularized or specific inspection or stair cleaning procedure in the area of plaintiff's fall on the date of the accident. Plaintiff contends that Mr. Gonzalez was never produced for a deposition and now in support of the motion for summary judgment, defendants offer an affidavit that does not clearly the detailed protocol of cleaning and inspecting the stairs that was actually followed on the day before plaintiff's fall or the day of her fall, prior to her accident. Plaintiff argues that Mr. Gonzalez states in his affidavit that "[b]elow are my current cleaning and inspection procedure for the Premises both today and on January 14, 2012" but does not state that he in fact followed those procedures on the date of, or prior to, plaintiff's accident. Plaintiff further argues that

there is no evidence of the condition of the steps on the day before the accident or the day of the accident, or that the cleaning and inspection protocol was actually followed on January 13th or January 14th, 2012. Plaintiff contends that those statements are the type of cleaning "general practice" evidence that is insufficient to meet defendants' burden.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that the defendant had a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury...". Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the defendant created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum

of Natural History, 67 N.Y.2d 836, 837 (1986).

A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Rodriguez v. 705–7 E. 179th St. Housing Development Fund Corp., 913 N.Y.S.2d 189 (1st Dept. 2010). To prevail on a motion for summary judgment for lack of notice, defendants are required to make a prima facie showing which affirmatively establishes the absence of notice as a matter of law. Fox v. Kamal Corp., 706 N.Y.S.2d 142 (2d Dept. 2000). Where there is a recurrent condition known to defendants, they may be charged with constructive notice of each specific reoccurrence of the hazardous condition. Simoni v. 2095 Cruger Associates, 285 A.D.2d 431 (1st Dept. 2001).

Once an issue of fact regarding a recurring condition is established, the Court must consider whether defendant had an established procedure and/or schedule for the cleaning of the stairs. See, Seleznyov v. New York City Transit Authority,979 N.Y.S.2d 44 (1st Dept. 2014)(Defendant failed to establish entitlement to judgment as a matter of law where it did not submit any evidence showing when the stairway was last cleaned or inspected before the accident); Raposo v. New York City Housing Authority, 942 N.Y.S.2d 337 (1st Dept. 2012)(Defendant established entitlement to summary judgment by establishing that it did not have notice of the condition that allegedly caused plaintiff to fall. Defendant's caretaker testified that he followed the janitorial schedule pursuant to which he would have inspected all the staircases in the morning and afternoon, mopped the stairs any time he encountered a wet condition, replaced any light bulbs that were not functioning, and reported the condition to his supervisor); Torres v. New York City Housing Authority, 924 N.Y.S.2d 782 (1st Dept. 2011)(Defendant established its entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the allegedly defective condition where the building's supervisor of caretakers stated that the janitorial schedule for the building included that the subject stairs be cleaned in the hour before plaintiff's accident); Love v. New York City Housing Authority, 919 N.Y.S.2d 149 (1st Dept. 2011)(Defendant established its prima facie entitlement to judgment as a matter of law by establishing that it did not have notice of the condition that allegedly caused plaintiff to fall. Defendant's caretaker testified that she followed the janitorial schedule pursuant to which she would have swept all the staircases in the morning, mopped the stairs any time she encountered a wet condition and informed the supervisor of any complaints she would receive); Raghu v. New York City Housing Authority, 897 N.Y.S.2d 436 (1st Dept. 2010)(Defendant met

its burden of demonstrating that it neither created the hazardous condition, nor had actual or constructive notice of its existence. The janitor's testimony that his regular routine included cleaning the stairwell between 8:00 A.M. and 8:30 A.M., and that he did not observe any powder, was sufficient to shift the burden to plaintiff of demonstrating the existence of questions of fact); Vilomar v. 490 East 181st Street Housing Development Fund, 858 N.Y.S.2d 10 (1st Dept. 2008)(Defendant entitled to summary judgment where deposition testimony of the building's superintendent established that he cleaned the stairs twice a day, on arriving for work between 6:00 and 6:45 a.m. and after 4:00 p.m. before leaving work, that there was no garbage on the stairs when he left the building the evening before the accident, and that the accident happened shortly before he arrived for work); Strowman v. Great Atlantic and Pacific Tea Co., Inc., 675 N.Y.S.2d 82 (1st Dept. 1998)(Defendant granted summary judgment where store manager testified that the store is maintained at all times and that a porter is available in case sweeping is needed, and further testified that he would walk around the store, particularly in the front area, which he would pass by at least every hour, to make sure there was no debris on the floor).

In Gautier v. 941 Intervale Realty LLC, 970 N.Y.S.2d 191 (1st Dept. 2013), the First Department held that defendants must offer proof that the janitorial schedule was followed on the day before the accident, or on the day of the accident, prior to the accident. Evidence of cleaning and inspection procedures alone do not prove acting in conformity with those procedures the day before the incident.

> ...defendant submitted the deposition testimony of its superintendent about the building's regular janitorial schedule. However, it offered no evidence that the schedule was followed on the day of the accident (see Williams v. New York City Hous. Auth., 99 A.D.3d 613, 952 N.Y.S.2d 554 [1st Dept. 2012]). Moreover, constructive notice remains an issue in this case because defendant made no showing as to when the stairway was last inspected before plaintiff's accident (see e.g. Aviles v. 2333 1st Corp., 66 A.D.3d 432, 887 N.Y.S.2d 18 [2009]). In Williams, we reversed an order granting a property owner's motion for summary judgment holding that because the owner "failed to present competent evidence that [its] janitorial schedule was followed on the day of the accident, it did not show that it lacked constructive notice of the complained-of condition" (id.). Defendant's proof that a janitorial schedule merely existed does not suffice for purposes of showing that it was followed. Love v. New York City Housing Authority, 82 A.D.3d 588, 919 N.Y.S.2d 149 [1st Dept. 2011], which the dissent cites, is distinguishable inasmuch as we noted in that case testimony by the Housing Authority's caretaker that "she *followed* the janitorial schedule" (id. [emphasis added]).

> Standing alone, proof that "stairs were routinely cleaned on a daily basis" is not germane to the dispositive issue of lack of notice of an alleged defective condition (Rivera v. 2160 Realty Co., L.L.C., 10 A.D.3d 503, 505, 781 N.Y.S.2d 645 [1st Dept. 2004, Sullivan J., dissenting], revd. on other on other grounds, 4 N.Y.3d 837, 797 N.Y.S.2d 369, 830 N.E.2d 267 [2005]). This proposition is even supported by other cases the dissent cites. For example, it is no coincidence that in Rodriguez v. New York City Housing Authority, 102 A.D.3d 407, 959 N.Y.S.2d 127 [1st Dept. 2013], we based a finding of a lack of constructive notice of a dangerous condition on the testimony of a "caretaker who cleaned the building on the day before the early-morning accident" (id.). Accordingly, in Rodriguez the Housing Authority made a prima facie showing that a janitorial schedule not only existed but was followed at around the time of the accident. Similarly, in Pfeuffer v. New York City Housing Authority, 93 A.D.3d 470, 940 N.Y.S.2d 566 [2012], another case the dissent cites, the record included a caretakers' logbook from the date of the accident. We noted that the logbook "[did] not indicate that a hazardous condition existed in any stairwells" within, at most, three hours before the accident (id. at 470–472, 940 N.Y.S.2d 566).

In the instant matter, defendants' motion for summary judgment must be denied. Defendants have failed to set forth that the superintendent actually followed his "cleaning and inspection procedure" prior to the plaintiff's accident. Mr. Gonzalez states that he had certain procedures but does not specifically state that he followed these procedures either on the day of or the day before plaintiff's accident. Defendants have failed to set forth the condition of the steps before plaintiff's accident and there is no evidence as to when the stairs were last inspected. There was no written schedule setting forth when the subject staircase was cleaned. Plaintiff's testimony that she complained many times prior to her accident regarding garbage on the stairs creates an issue of fact as to whether there was a recurring condition and where defendants were or should have been aware of it. Although Ms. Berrios testified that she did not see any box at the scene following the accident, plaintiff had testified that when Bobby found her on the stairs, "[h]e tried to pick me up and then I told him that I had slipped, that I had stepped on the box because I saw that the box was there. Then, Bobby picked up the box and threw it away..."

Accordingly, for the reasons set forth herein, defendants' motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: July 2, 2014