SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

EDWIN CHANDLER

Plaintiff,

-against-

Index No. 308997/2012
DECISION AND ORDER

ANTHONY PERRUZZA and DANIEL PERRUZZA,

Defendant(s).

HON. SHARON A.M. AARONS. J.S.C.:

Defendants Anthony Perruzza and Daniel Perruzza move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff submits written opposition. The motion is denied.

On September 14, 2012, at approximately 3:00 PM, plaintiff was allegedly injured while descending a staircase at 3034 Hone Avenue in Bronx County, a residential apartment building owned by the defendants, where he resides on the fourth floor. The plaintiff's deposition testimony indicates that he observed garbage bags on the stairway at least ten times before the date of his accident, and that he had complained to defendant Anthony Perruzza about the condition. Plaintiff allegedly slipped on the last step before the third floor landing. He testified that he had observed a black garbage bag, which was leaking an oily substance, to the left side (as viewed from the perspective of a person descending the stair) on the same step at approximately 7:00 AM that same morning; that he observed that the bag was removed when he ascended the same step after work at approximately 3:00 PM; and that he fell as he was leaving the building at approximately 3:30 PM.

In support of the motion, defendant submits the pleadings and bill of particulars; the

deposition testimony of the plaintiff;[1] the deposition testimony of the defendants; the deposition testimony of non-party Leon McLeod; and photographs of the accident site. The defendants testified that they are the co-owners of the building, which is cleaned by one of the tenants, who is given a reduction in rent in exchange for these services. The defendants denied the presence of garbage on the steps or in the landings prior to the accident. Defendant Daniel Perruzza testified that within minutes after the accident he arrived at the building and did in fact find a slippery condition, but the condition was on the right side of the step (as viewed from the perspective of a person descending the stair). He cleaned the area with an abrasive cleaner, but he qualified his earlier testimony and stated that, "He [plaintiff] says that there was an oily substance there. If there was, I didn't really feel anything that was really oily and slippery, but I cleaned it anyways." Mr. McLeod, who cleans the building, testified that he inspects the building twice daily, at noon and at 4:00 PM. He had no recollection of the specific events on the date of the accident.

Based on the foregoing, defendant asserts that they did not create, and had no notice of, the condition which allegedly caused plaintiff's fall. Defendants argue that there is no proof that the liquid the plaintiff observed earlier was the same liquid which caused his fall, and that the plaintiff's claims are thus based on speculation and surmise.

In opposition, plaintiff relies on the same evidence to argue that the defendants did not

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[1]Only the deposition transcript of the plaintiff is sworn. The remaining transcripts are unsworn but certified. However, no party has challenged the accuracy of any of the transcripts. Under these circumstances these deficiencies are deemed waived by the parties. *See Rosenblatt v. St. George Health & Racquetball Assoc., LLC,* 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 (2d Dept. 2014) (failure to submit to the Supreme Court a certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect); *Gomez v. Shop-Rite of New Greenway*, 110 A.D.3d 483, 973 N.Y.S.2d 65, 2013 N.Y. App. Div. LEXIS 6489 (1st Dept. 2013) (appropriate to rely on unsigned, certified deposition transcript where transcript was not challenged as inaccurate).

establish a prima facie case

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 646 NE2d 795, 622 NYS2d 493 [1994]. "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 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [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" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 [1st Dept 2008]). "To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *(Mei Xiao Guo v. Quong Big Realty Corp.*, 81 A.D.3d 610, 611, 916 N.Y.S.2d 155 [2d Dept. 2011] [citations omitted]; *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 118 A.D.3d 455, 987 N.Y.S.2d 68 [1st Dept. 2014] [defendant failed to establish a lack of constructive notice of the wet condition on steps where the moving papers contained no indication of when the area was last inspected prior to the accident]; *Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d 11 [1st Dept. 1996] [issue of fact as to whether existence of condition on steps for 90 minutes constituted constructive notice].)

"[P]laintiff may satisfy [its burden on summary judgment] by evidence that an ongoing and

recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the [defendant]." (*O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1st Dept. 1996] [emphasis added]; *Molina v. New York City Tr. Auth.*, 115 A.D.3d 416, 981 N.Y.S.2d 510 [1st Dept. 2014] [affirming jury's award which was "supported by testimony... that debris on the stairs of the subway station was a recurring condition, of which defendant was aware, that was left unaddressed"] [emphasis added]; *Cignarella v. Anjoe-A.J. Mkt.*, Inc., 68 A.D.3d 560, 890 N.Y.S.2d 542 [1st Dept. 2009] [where plaintiff tripped and fell at a local supermarket when her foot became entangled in a plastic or nylon looped tie wrap, used by defendants to secure newspapers, "plaintiffs established, through the testimony of their nonparty witness, a triable issue of fact as to whether an ongoing and recurring dangerous condition existed in the area that was routinely left unaddressed by defendants"] [emphasis added].)

In the present case, while the defendants have demonstrated that they did not cause or create the condition, they have not demonstrated the absence of constructive notice. Mr. McLeod did not have any recollection of the day of the incident, and instead testified that he was not present at the time of the accident, and was not aware of the happening of the accident until that evening. Indeed, had he followed his asserted regular schedule, and performed an inspection at 4:00 PM, he would have been present in the building at the approximate time of the accident, or shortly after the occurrence of the accident. In any event, in view of his asserted lack of memory, he did not establish that he in fact inspected the premises on the day of the accident. (*Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 598-99, 869 N.Y.S.2d 222 [2d Dept. 2008] [[defendant failed to meet its burden on the issue of lack of constructive notice where it offered evidence of "general daily cleaning practices," but failed to offer "evidence as to when the area in question was last cleaned and inspected relative to the time when the plaintiff fell," including any "evidence regarding any

particularized or specific inspection or stair-cleaning procedure in the area of the plaintiff's fall on the date of the accident."])

Even if the defendants had established a prima facie case, the plaintiff's testimony is sufficient to raise an issue of fact as to constructive notice. Plaintiff 's testimony was sufficient to raise a triable issue of fact as to whether the defendants can be charged with constructive notice on the theory that they were aware of a particular recurring condition in the area where the accident occurred which they failed to adequately address. Plaintiff's evidence was that garbage was routinely left on the landings and stairway, and was unaddressed by defendants. Further, the plaintiff's testimony that he observed an oily substance in the same location earlier in the day raises a permissible inferences that he fell on the same condition later that same day.

Accordingly, the motion is denied.

This constitutes the Decision and Order of the Court.

Dated: September 26, 2014

SHARON A.M. AARONS. J.S.C.