To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 3/14 2014
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

----------x

DORIS L. KNECHT,

Plaintiff,

Index No. 54546/2011

-against-

Decision & Order
Seq #1

FRAKEN BUILDERS, INC.,

Defendant.

----------x

The following papers were read on Defendant's motion for an order of summary judgment pursuant to CPLR §3212:

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Memo of Law/Exhibits A-J	1-13
Affirmation in Opposition/Exhibits 1-8	14-22
Reply Affirmation	23

Upon the foregoing papers it is ordered that the motion is GRANTED.

Plaintiff alleges that due to defendant's negligent and careless ownership, operation, maintenance and control of the property, commonly known as 769 Pelham Road, New Rochelle, New York (the "Premises"), the plaintiff sustained serious and permanent personal injuries and other damages. On the date of the incident, defendant Fraken Builders, Inc., was the record owner of the Premises.

The incident occurred on November 4, 2009, in the lobby of the Premises where the plaintiff lived and still lives. As the plaintiff walked down the stairs into the lobby of the Premises, and stepped out of the last step onto the lobby floor, she slid and fell and her foot went under her ankle, causing injury to her leg. Plaintiff alleges that she fell because of defendant's negligence in having an unsafe wet condition of the floor where the plaintiff stepped.

Plaintiff commenced this action on August 19, 2011 by filing a summons and complaint and an amended complaint on October 7, 2011. The defendant filed an answer and issue was joined. Defendant now files this motion seeking dismissal of the action , arguing that the plaintiff's theory of liability is fatally flawed. Plaintiff opposes the motion.

Discussion

A party moving for summary judgment must assemble affirmative proof to establish its entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, (1980). "As general rule, a party does not meet its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense". *Doe v. Orange-Ulster Bd. of Co-op. Educational Services,* 4 A.D.3d 387, 388,(2d Dept., 2004), *quoting*, *Larkin Trucking Co. v. Lisbon Tire Mart*,185 A.D.2d 614, 615, 585 N.Y.S.2d 894. It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361(1974). "It is nevertheless an appropriate tool to weed out meritless claims." *Hamawi Deli, Inc. v. Psaras*, 2006 WL

3734554, 2 (N.Y.Sup.,2006), *citing*, *Lewis v. Desmond,* 187 A.D.2d 797 (3d Dept.,1992); *Gray v. Bankers Trust Co. of Albany, N. A.,* 82 A.D.2d 168 (3d Dept.,1981).

In order to meet its *prima facie* burden of proof on this summary judgment motion, defendant had an affirmative duty to establish either (1) that there was no defective condition or (2) that they did not create the condition, nor did they have notice, whether actual or constructive, of a defective condition on the Premises as a matter of law. *Jackson v. Fenton*, 38 A.D.3d 495 (2d Dept., 2007).

Here, defendant has provided three witnesses stating in their examination before trial ("EBT"), that the floor where the plaintiff stepped into the lobby, was not wet at the time that she stepped onto it. Additionally, plaintiff testified at her EBT that, on the date of her accident she did not see any water when she stepped onto the floor, nor did she feel any water on her hands or clothes, but speculated that there must have been water because of the personnel in the lobby at the time (Knecht Dep. 45:22 - 47:2, November 14, 2012).

Plaintiff in return, has not shown that there was a defective condition that caused her to fall. She did not offer any non-speculative evidence upon which this Court can deny this motion. Plaintiff stated that the floor was slippery and that because certain personnel were in the lobby that they must have been mopping, causing the floor to be wet. However, even if the floor was wet, which plaintiff has not definitively shown, plaintiff also did not provide any evidence to show that the defendant was the cause of the floor being wet. Plaintiff's allegations are "unsubstantiated and speculative and are insufficient to raise a triable issue of fact as to the defendant's responsibility in creating the alleged condition...." *Sanchez-Acevedo v. Mariott Health Care Service*, 270 A.D.2d 244 (2d Dept., 2000).

Further, plaintiff was an elderly woman, who could just have easily slipped from losing her balance. "Where it is just as likely that some factor other than negligence by the defendant, such as a misstep or loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation." *Califano v. Maple Lanes*, 91 A.D.3d 896 (2d Dept., 2012); *See also, Glorioso v. Schnabel*, 253 A.D.2d 787(2nd Dept., 1998); *Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104 (1st Dept.,2006).

Accordingly, defendants motion is GRANTED and it is

ORDERED that the action is DISMISSED.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
March 14, 2014

HON. SAM D. WALKER J.S.C.