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

KATIA REYES,

Plaintiff,

-against-

LIVINGSPRING VENTURES, INC. d/b/a V&T HALL and CON SAZON, INC.,

Defendants.

Index No. 311472/2011
DECISION AND ORDER

LIVINGSPRING VENTURES, INC.,

Third-Party Plaintiff,

-against-

SULEYKA MIRANDA,

Defendants.

Index No. 84032/2012

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

Defendant LIVINGSPRING VENTURES, INC. (Livingspring) moves for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff submits written opposition. Defendant Con Sazon, Inc., and third-party defendant Suleyka Miranda[1] have not appeared on the motion or submitted opposition. The motion is granted.

On February 27, 2011, plaintiff was allegedly injured at premises known as the V & T Hall located at 1940 Webster Avenue in Bronx County when plaintiff slipped and fell on a puddle of water during a "Sweet 16" party. Plaintiff did not see the condition prior to her fall. The V & T

[1]Third-party defendant Suleyka Miranda failed to answer the third-party complaint, as a result of which a default judgment was granted.

Hall, which is owned by defendant Livingspring, is used for parties and other events, and is rented on a short term basis to the hosts of those events. While tables and chairs are provided, the hosts supply their own food, decorations, and entertainment. Livingspring employs security guards to maintain order, but no other employees are present during the events. The one-page contract for the event being held on the night that the plaintiff was allegedly injured provided, "Suleyka [third party defendant] agree to keep the premises in good condition during the rental time and agree to pay for any damages caused by the guests. The hall MUST be left in the same condition as when rented.".

In support of the motion, defendant submits the pleadings and bill of particulars; the rental agreement; the certified, unsworn deposition testimony of the plaintiff;[2] and the affidavit of Caroline Rosado, an alleged eye-witness, sworn to April 18, 2011, and provided by plaintiff in discovery. The plaintiff's testimony was that she was an invited guest at the birthday party, and that as the event was ending, at approximately 2:00 AM, she slipped and fell on the dance floor on "something on the floor, soda, water, or whatever...." She did not see the puddle before she fell, nor the size of the puddle. She left the event in a taxi cab called by Livingspring's security guards.

The affidavit of Caroline Rosado recites that she observed the plaintiff's fall, and that "[e]arlier during the party I saw wet spots and liquid on the dance floor... I would take paper towel and clean up the wet spots. There was no one cleaning from the management of V&T Hall, and I saw no mop around the party room. After the fall, she observed a "clear liquid...wet spot."

Defendant Livingspring argues that there was no notice of the spill on the floor, and in any

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[2]A deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001].) No party has challenged the accuracy of any of the transcripts submitted in support of or in opposition to the motion.

event, the responsibility for cleaning the premises was placed entirely on the third-party defendant. Defendant Livingspring contends, in this regard, that it is an out-of-possession owner and thus not subject to liability.

In opposition, the plaintiff submits the unsworn, certified deposition testimony of Kayode Tonade, the President of defendant Livingspring. Mr. Tonade testified that each client is responsible for cleaning spills during an event, and that no staff is on-site other than security guards. Further, he testified that while he believed mops and other cleaning supplies are available at the premises, he did not have knowledge that such supplies were available during the event at issue. Plaintiff maintains that the presence of the moving defendant's security guards raises issues of fact as to whether the defendant was "in control" of the [premises, and thus not an out-of-possession owner. Further, the plaintiff argues that the defendant is liable for failing to provide cleaning equipment, such as mops. As to notice, the plaintiff relies on the affidavit of Caroline Rosado.

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, 144 N.E.2d 387, 165 N.Y.S.2d 49 [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, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) 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, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404).

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].)

Absent testimony concerning a recent inspection or recent observations of a floor by defendant's or its employees, a defendant may establish a prima facie case based on the testimony of the plaintiff, and other observers, that no dangerous condition was visible or observed prior to the accident. (*Kramer v. SBR & C*, 62 A.D.3d 667, 879 N.Y.S.2d 158 [2d Dept. 2009].) For example, in *Kramer v. SBR & C* (62 A.D.3d 667, 879 N.Y.S.2d 158 [2d Dept. 2009]), the plaintiff allegedly slipped on strawberries which were present on the dance floor of a banquet hall during an event. A

food table had been placed on the dance floor, and then moved by defendant's employees approximately 45 minutes prior to her fall. In dismissing the complaint, the Court held:

> "Under the circumstances of this case, the defendants' submissions, consisting principally of the deposition testimony of the injured plaintiff and her husband, were sufficient to establish, prima facie, that the defendants did not create the alleged dangerous condition and did not have notice, actual or constructive, of its existence. The plaintiffs' theory was that the strawberries which allegedly caused the accident fell to the dance floor from the food table and remained there for at least the 45-minute period between the time the defendants' employee removed the table and the time the injured plaintiff fell. However, the deposition testimony submitted by the defendants in support of their motion established that the injured plaintiff did not see any strawberries on the floor prior to her fall, that her husband, who had taken food from the table and had later watched the employee remove the table from the dance floor, did not see any strawberries on the floor prior to the accident and did not see any food fall from the table as it was being removed, and that neither the injured plaintiff nor her husband was aware of anyone else at the party who saw any strawberries fall from the food table, or ever saw or complained of strawberries on the floor prior to the accident." (Id at 669.)

(*See also, Haberman v. Meyer*, 120 A.D.3d 1301, 993 N.Y.S.2d 80 [2d Dept. 2014] [where defendants relied on plaintiff's deposition testimony that he did not see the ice on which he slipped, which he described as being clear, until after he fell, defendants demonstrated, prima facie, that they neither created nor had actual or constructive notice of the ice that allegedly caused the plaintiff to fall]; *Briggs v. Pick Quick Foods, Inc.*, 103 A.D.3d 526, 962 N.Y.S.2d 46 [1st Dept. 2013] [plaintiff testified that she did not see water on the floor prior to her fall and did not know how long it was there]; *Viera v. Riverbay Corp.*, 44 A.D.3d 577, 845 N.Y.S.2d 12 [1st Dept. 2007] [given plaintiff's testimony that she did not observe any ice or fluid on the stairs prior to her accident, defendant demonstrated that the condition did not exist for a sufficient period of time for defendant to discover

and remedy it]; *Gomez v. J.C. Penny Corp., Inc.*, 113 A.D.3d 571, 979 N.Y.S.2d 323 [1st Dept. 2014] [in addition to evidence of inspection by defendant, plaintiff's own testimony that she had passed by the same area within the hour preceding her accident and had not noticed any water on the floor also demonstrated that the water spot was not "visible and apparent" and did not "exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"].)

In the present case, there is no evidence of actual or constructive notice. The employees of the defendant were present only to maintain security. The affidavit of Caroline Rosado does not establish constructive notice of the particular spill on which the plaintiff allegedly fell. Rather, her affidavit as to other spills, or the presence of liquid on the floor earlier that same evening, constitutes evidence of only a general awareness of the presence of spills. "[A] general awareness that litter or some other dangerous condition may be present" is not sufficient to charge a defendant with "constructive notice of the particular condition that caused his [a plaintiff's] fall." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 838, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

As indicated in the cases cited above, the plaintiff's admission that she did not see the liquid which caused her fall demonstrated that the water spot was not visible and apparent, and did not exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. The testimony of Caroline Rosado that she observed the condition only after the plaintiff fell, and that the liquid was "clear" further supports the defendant's prima facie case that the condition was not visible and apparent. The plaintiff has not rebutted this prima facie case.

The failure to supply mops has not been shown to constitute negligence, as there is no indication that the particular spill was observed prior to plaintiff's fall, or that the use of paper towels to clean such spills as occurred, was inadequate, or that it would have been feasible to mop down the floor during the ongoing event.

In view of the absence of notice, it is not necessary to determine if the moving defendant was an out-of-possession owner.

Accordingly, the motion is granted. It is accordingly

ORDERED that the complaint is dismissed as against defendant LIVINGSPRING VENTURES, INC. d/b/a V&T HALL, and it is

ORDERED that the defendants shall serve a copy of this ORDER on the plaintiff with Notice of Entry thereon.

Dated: January 15, 2015

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