

**Comtesse Suzanne De Paris v Women's Natl.  
Republican Club, Inc.**

2015 NY Slip Op 31464(U)

August 3, 2015

Supreme Court, New York County

Docket Number: 155033/12

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
Justice

**PART 7**

**COMTESSE SUZANNE DE PARIS,**

Plaintiff,

- against-

INDEX NO. 155033/12

MOTION SEQ. NO. 001

**WOMEN'S NATIONAL REPUBLICAN CLUB, INC.,**

Defendant.

The following papers were read on this motion by defendant for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

**PAPERS NUMBERED**

Cross-Motion:  Yes  No

This is a negligence "slip and fall" action brought by Comtesse Suzanne De Paris (plaintiff), to recover damages for injuries allegedly sustained when she slipped and fell on a wet and slippery condition in the ground floor ladies restroom at the Women's National Republican Club, located at 3 West 51<sup>st</sup> Street, New York, New York (the premises). The premises is a building owned by defendant Women's National Republican Club, Inc. (Club or defendant). Discovery in this matter is complete and the Note of Issue has been filed.

Now before the Court is a motion by the defendant for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that it did not create or have notice of the condition alleged to have caused the plaintiff's injuries. In opposition, the plaintiff argues that material issues of fact remain precluding summary judgment.

## BACKGROUND

Plaintiff has been a member of the Club since 1978 (Deposition of Comtesse Suzanne De Paris [De Paris Dep.], exhibit D, p. 122). On September 7, 2011 plaintiff arrived at the premises between 5:00 and 5:30 p.m. to attend an event being held on the fourth floor of the Club (*id.* at 66-67, 78). At some time between 7:30 and 8:00 p.m. plaintiff decided to leave the event and headed from the fourth floor to the first floor to exit the building (*id.* at 82-83). On her way out of the building she decided to stop in the restrooms on the first floor (*id.*). Plaintiff testified at her deposition that she fell while crossing the doorway to the room preceding the ladies room (*id.* at 91). Plaintiff further testified that she did not see anything on the floor before she fell, but when she hit the floor she “felt the wetness, the waxiness of the floor” (*id.* at 95). Plaintiff asserted her shoe made a demarcation line on the floor because the floor was over-waxed (*id.* at 110). She also testified to wearing high heels at the time of the accident (*id.* at 73-74). Plaintiff does not know how long the wax was present in the ladies restroom (*id.* at 136). She also does not recall seeing anyone waxing the floors, but claims to know the floors were waxed because in her time as a member of the club the floors have always been waxed (*id.* at 217).

Margaret O'Connor (O'Connor), General Manager of the Club since November of 2008, stated she was the manager on duty the night of the accident working from 9:30 a.m. to 6:45 p.m. (Affidavit of Margaret O'Connor [O'Connor Aff.], exhibit G, p. 1). O'Connor stated the floor of the ladies room on the first floor was cleaned with a mop and water only and that wax was never applied to the ladies restroom floor (*id.* at 1-2). Further, O'Connor stated that on September 7, 2011 the floor in the ladies room was mopped in the morning and that when she left at 6:45 p.m. the ladies room was free of any water, wax or debris (*id.* at 2). Additionally, O'Connor stated she reviewed the Club's records and found that prior to the accident neither

she nor her staff received any complaints regarding a wet slippery or slick condition in the ladies room (*id.* at 2).

Testimony was also taken of Carol Simon (Simon), Membership Director at the Club, who has been employed by the Club for eleven years as of September 2011 (Deposition of Carol Simon [Simon Dep.], exhibit F, p. 6). Simon testified at her deposition that she was on duty the day of the accident scheduled to work from 10:00 a.m. until 6:00 p.m. but she stayed later to help with the event (*id.* at 33). Simon stated when she learned of plaintiff's fall she proceeded to the ladies room and upon her arrival she observed the plaintiff lying on the ground (*id.* at 25, 38). Simon testified she asked the plaintiff what had happened and the plaintiff responded to her by saying that she had slipped but did not point out the area that allegedly caused her to slip (*id.* at 40). Simon also testified that she examined the floor in the area where the plaintiff was laying, following her fall, and that she did not perceive any wetness (*id.* at 42). Additionally, Simon stated that she did not see anyone waxing the floor of the ground floor ladies room on the day of the accident (*id.* at 28).

In support of its motion defendant argues that it is entitled to summary judgment because it did not have actual notice of the alleged condition. Specifically, defendant points to the fact that there is no evidence of complaints regarding a slippery condition in the ladies room prior the accident. Defendant also claims there is no evidence from which to asses whether it had constructive notice given that plaintiff does not know how long the condition was present. Finally, defendant maintains there is no evidence that it created the condition the plaintiff claims to be is wax because its employees' testimony establishes wax was never used on the ground floor ladies room.

In opposition to the motion, plaintiff argues that issues of fact remain which preclude the granting of summary judgment. Plaintiff maintains that a prima facie case of negligent application of wax has been established because her testimony provides some evidence of the

alleged condition. Plaintiff also argues there is no notice requirement because defendant created the dangerous condition. She asserts that a reasonable inference should be drawn that if the bathroom floor was in the over-waxed condition she observed and felt then the condition was caused by the acts of the defendant's employees. Lastly, the plaintiff argues there are issues of fact regarding the credibility of plaintiff and defendant's employees and these issues cannot be resolved on summary judgment.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

It is well established that 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 [1st Dept 2008]; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (see *Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). “Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Smith*, 50 AD3d at 500). It is well settled, however, that “rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact” (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

#### DISCUSSION

The Court finds that defendant has met its initial burden of demonstrating that it neither created the allegedly dangerous condition that caused plaintiff to slip and fall, nor had actual or constructive notice of its existence. O’Connor, defendant’s General Manager, oversaw the cleaning and maintenance activities of the Club and she stated that pursuant to the practices and procedures of the Club, wax was never applied to the ladies restroom on the ground floor. O’Connor further stated that on the day of the accident the last time the ground floor ladies room floor was cleaned was the morning of the accident and that wax was not applied to the restroom in the afternoon by the porter on duty. O’Connor herself inspected the ladies room an

hour before the accident and saw no substance on the floor. Additionally, Simon, defendant's Membership Director, worked the entire day of the accident and saw no one waxing the floor in the first floor ladies room. Simon also inspected the area immediately after the accident and saw no wetness on the floor. Plaintiff herself admits that she saw no one waxing the floor on the day of the accident or at any time prior to the accident.

Accordingly, the defendant has made a prima facie demonstration that it did not create the hazardous condition through its employee's testimony and plaintiff's deposition (*see Kalish v HEI Hospitality, LLC*, 114 AD3d 444 [1st Dept 2014] [summary judgment was properly granted to the defendant because it provided testimony from its director of housekeeping that the floors in the bathrooms were never waxed and that prior to the accident he had not received any complaints about the bathroom floor being slippery]; *Vilomar v. 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469, 470 [1st Dept 2008]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [defendant meets burden "by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"]; *see also* Dissent in *Seegars v Brunswick Yonkers Bowl*, 2002 WL 243305, at 9 [1st Dept 2002], *revd* 302 AD2d 258 [1st Dept 2003] [First Department, Appellate Division, reversed the order denying defendant's motion for summary judgment and agreed with the dissent that the defendant established a prima facie entitlement to summary judgment based upon the testimony of its Desk Supervisor that conditioner was not used on the floors, that the floor was free of any substances two hours before plaintiff arrived to the premises, and that there was no substance present on the floor after the accident]; *Collins v Mayfair Super Mkts., Inc.*, 13 AD3d 330, 330 [2d Dept 2004] [defendants met initial burden by providing the deposition testimony of the store's assistant manager that he had inspected the portion of the floor shortly before the plaintiff fell]).

In opposition, plaintiff argues there are triable issues of fact as to whether the defendant created the condition because she has established the presence of an over-waxed condition on the restroom floor and that a reasonable inference should be drawn that defendant's employees caused the condition. Yet, the only evidence plaintiff provides of the existence of the condition is her own testimony wherein she states that she knows the defendant's employees wax the floors because she has been a member of the club for many years and the floors were always waxed. Plaintiff also testified that she observed and felt the wax on the floor after falling. Plaintiff argues this testimony qualifies as evidence of an over-waxed or negligently applied wax condition. She asserts that a prima facie case of negligent application of wax may be established through evidence of dangerous wax residue on the floor. However, plaintiff's own testimony that she saw the wax and that she knows the floors are waxed is mere speculation and thus insufficient to provide some evidence of the presence of wax residue on the floor (*see Galler v Prudential Ins. Co. of Am.*, 63 NY2d 637 [1984]; *Rempe v Betts*, 8 NY2d 905 [1960]; *Goldin v Riverbay Corp.*, 67 AD3d 489, 490 [1st Dept 2009] ["plaintiff's claim that the floor was slippery because too many layers of wax were applied is speculative"]; *Mallios v B. Smith's Rest.*, 8 AD3d 117, 118 [1st Dept 2004] ["(plaintiff's) claim that she slipped on improperly applied floor wax is unsupported by evidentiary facts"]; *Acevedo v York Intl. Corp.*, 31 AD3d 255, 257 [1st Dept 2006] [plaintiff raised no triable issue of fact because his allegation that the defendant's employees created the alleged condition was a possible scenario based on speculation]; *see also Tompa v 767 Fifth Partners, LLC*, 113 AD3d 466, 468 [1st Dept 2014]).

Furthermore, even assuming plaintiff established the presence of the condition, there is insufficient evidence to establish that the defendant created the condition. Specifically, in light of the affidavit from O'Connor, who states that wax is never applied to the first floor ladies room and that an hour before plaintiff's fall she inspected the bathroom, which was free of wax. Plaintiff, in opposition, has provided no evidence that defendant's employees wax the ladies

room floor, and she even admitted that she had not seen anyone waxing the floors (see *Sanchez v Delgado Travel Agency, Inc.*, 279 AD2d 623, 624 [2d Dept 2001] [No triable issue of fact as to whether defendant created the condition where plaintiff's opposition to defendants' motion for summary judgment was based solely on her deposition testimony that she saw a man holding a bucket near the spot where she fell but she never actually saw anyone mopping]). Thus, plaintiff failed to raise a triable issue of fact in opposition as to whether the defendant created the condition.

Moreover, the plaintiff provided no evidence to show a triable issue of fact as to the question of actual or constructive notice. In opposition, plaintiff fails to proffer any evidence that establishes how long the alleged condition was present. Thus, any finding on how long the alleged condition was present would be based on speculation (see *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 520 [1st Dept 2010]; *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [1st Dept 2008] [Court rejected the plaintiff's speculative testimony as to how long the dangerous condition was present]; *Salkey v NY Racing Ass'n*, 243 AD2d 621 [2d Dept 1997] [speculation insufficient to raise triable issue of fact "that the substance had been on the floor for a sufficient length of time so as to permit the defendant's employees to discover and remedy the condition"]).

Plaintiff asserts notice is irrelevant to this case because her testimony establishes that the defendant created the condition. While it is true that notice is not a requirement when the defendant created the condition, plaintiff's evidence "provides nothing more than speculation as to the cause of the accident and offers nothing to indicate defendant created or had notice of the hazard" (*Smith*, 50 AD3d at 501). Plaintiff testified she did not notice anything on the floor prior to the accident. Her assertions that she slipped on wax are pure speculation and based on her belief that the defendant waxes the floor in the ladies room. When the only evidence the plaintiff provides is based on speculation, summary judgment is warranted (see *Tompa*, 113

AD3d at 38; *Acevedo*, 31 AD3d at 257; see also *Pagan v Local 23-25 Int'l Ladies Garment Workers Union*, 234 AD2d 37 [1st Dept 1996]; *Segretti v Shorestein Co., E., L.P.*, 256 AD2d 234 [1st Dept 1998]). Accordingly, defendant's motion is granted.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion pursuant to CPLR 3212, seeking summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed with costs and disbursements to the defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

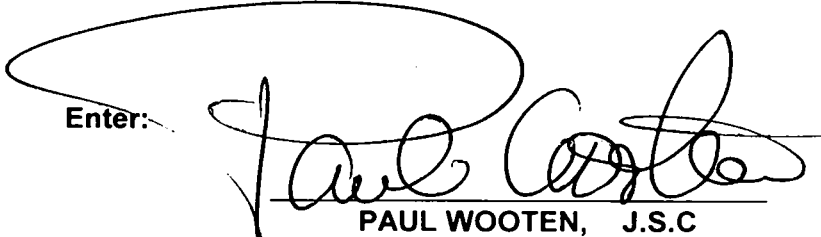
ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated:

8/3/15

Enter:

  
PAUL WOOTEN, J.S.C

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE