SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------X

SHIRLEY SCHREER,

Plaintiff,

-against-

KIPS BAY DEVELOPMENT LIMITED PARTNERSHIP and AMC LOEWS KIPS BAY 15,

Defendants.

----------X

Index No. 154470/13
Motion Seq. 002

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this personal injury action, defendants Kips Bay Development Limited Partnership and AMC Loews Kips Bay 15 (collectively, "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all claims against them on the grounds that they had no notice of the alleged hazardous condition which caused plaintiff Shirley Schreer's ("Plaintiff") injuries and that such condition was trivial as a matter of law. Plaintiff opposes on the grounds, among others, that Defendants have failed to present a *prima facie* case and there are material issues of fact outstanding. For the reasons set forth below, Defendants' motion is denied.

Plaintiff alleges that on April 24, 2011 she was caused to trip and fall by a defective carpet inside the movie theater complex located at 570 Second Avenue in Manhattan ("Kips Bay Theater") which is owned and operated by the Defendants. At the time of the accident Plaintiff was 88 years old. She suffered a comminuted femur fracture which required reparative surgery.

Plaintiff testified[1] that on the day of her accident she fell to the ground while walking to the restroom when her foot became caught on something on the carpeted floor outside the movie

[1] A copy of Plaintiff's deposition transcript is submitted as Defendants' exhibit E ("Schreer Deposition").

auditorium she had just exited (Schreer Deposition pp. 25-26):

Q. Now, as you started to walk to the right to the restroom, did something happened [sic]?

A. I started to walk straight out of the theater, and then I guess I walked south to go to the bathroom . . . . And I started to walk. I felt my foot got caught on something, and . . . boom, I went down. I went down. . . .

Plaintiff did not notice anything unusual in the vicinity in terms of lighting nor did she see any debris on the ground prior to her fall. While on the ground she scanned the area and identified a "raggedy fiber" protruding from the carpet upon which she had fallen (*id.* at 34-35):

Q. After you had fallen. Did you scan the area to see what you had fallen upon?

A. Yes, I did. . . . So I looked, and I saw this raggedy fiber in front of my eyes. . . . And I knew that was where my shoe had gotten caught.

Q. And how is it that you knew that with certainty?

A. There was nothing else around, and I felt -- I felt -- I felt something when I was falling, I said what the -- because my foot was jammed, and I couldn't move it, and it was caught in that. And it broke. I see it broke.

At her deposition Plaintiff was shown photographs taken by her son while she was in the hospital following the accident.[2] She later visited the theater with him to ensure he had photographed the proper location. Plaintiff testified that the photographs depicted "the fiber that was on the rug and what I tripped over." (Schreer Deposition p. 28).

The manager of the Kips Bay Theater, Ms. Holly Phillips-Ferguson, was deposed on behalf of the Defendants on October 2, 2015.[3] In terms of safety protocols Ms. Phillips-Ferguson explained that the Kips Bay Theater employees performed "auditorium checks" numerous times each day which included a visual inspection of all of the theaters, restrooms, floors, and anywhere else a patron might walk (Ferguson Deposition pp. 13-14, 15-16, 17-19):

---

[2] Copies of the photographs are submitted as Defendants' exhibit F.

[3] A copy of her deposition transcript is submitted as Defendants' exhibit G (Ferguson Deposition").

Q. Is there any written protocol or something verbal, how do you know what the protocol was to keep the building safe, as you say?

A. It's AMC policy.

Q. Is it a written policy or is it verbal policy?

A. It's written policy.

* * * *

Q. Now, in April of 2011, with regard to this written policy about safety and auditorium check, what did you do to make sure that that particular location was safe?

A. As you managed the building by walking around.

Q. You personally would be walking around?

A. Yes....

Q. Beside yourself, were there other managers on duty that day?

A. It has to be, I mean, I don't recall the schedule.... It could be three....

Q. Besides yourself, would the other managers also go and inspect?

A. It's policy.[4]

* * * *

Q. So tell me about this auditorium check, what does that entail?

A. It's walking around by management insuring everything is safe and operational before you open up the doors for business that day.

Q. Where do they walk around?

A. The theater.

Q. Inside the theater, outside the theater?

A. Inside the theater, the auditoriums, the restrooms, the floors, bathrooms.

Q. Is it safe to say anywhere a patron would walk to that's where the check should be?

A. That's the operational for the building. . . .

Q. And it's your testimony that these auditorium checks would be conducted prior to patrons being led in; is that correct?

A. Correct.

Q. Now, are the auditorium checks only conducted once a day or are they done after

---

[4] It is significant that Ms. Ferguson never directly testified whether she or another manager on duty on the day in question performed the required theatre check or, indeed, performed any such inspection at the place where plaintiff fell on the day in question.

initial showings?

A. It's done throughout the whole day of job operation. . . .

Q. So basically after every movie showing and the movie is finished and the patrons come out an auditorium check should be conducted?

A. Correct.

With respect to the incident in question, Ms. Phillips-Ferguson testified that she was called by an usher to the scene of "a guest that, um, fell, tripped over her own shoelaces that I can recall" (*id.* at 22). When she came upon the Plaintiff on the floor she asked for information in order to fill out an incident report. According to Ms. Phillips-Ferguson, Plaintiff informed her that "she felt like, you know, she was a little clumsy and she felt embarrassed that she tripped over her foot sneaker's laces and she felt embarrassed. . . ." (*Id.* at 31-32). In December 2015, after Ms. Phillips-Ferguson's deposition was held, a copy of the incident report which includes photographs of the area in question was provided to Plaintiff.[5] It recites, in relevant part, that an "[e]lderly woman exiting Conspirator for the 11:25 am showing in Auditorium # 6, while walking to the restroom at IMAX she trip [sic] over her foot missing her step falling to her knee losing grip of her cane. . . . No spills or dead spots on carpet". While not signed or dated, there is a notation on the report that it was prepared by Ms. Phillips-Ferguson, who has attested to the fact that she did in fact prepare the report following the incident.[6]

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the

---

[5] Defendants' exhibits H and I.

[6] Ms. Phillips-Ferguson's affidavit, sworn to December 1, 2015, is submitted as Defendants' exhibit J.

existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "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); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

In general, "[w]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997) (quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993]). As the Court of Appeals recently reaffirmed in *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 (2015), however, an owner or operator may not be deemed negligent for trivial defects "'not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection'" *id.* (quoting *Guerrieri*, 193 AD2d at 647). In determining whether a defect is trivial, "a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury." *Pennella v 277 Bronx River Rd. Owners, Inc.*, 309 AD2d 793, 794 (2d Dept 2003). This is not to say that physically small defects cannot be actionable; they can be depending upon their intrinsic characteristics. *See Hutchinson*, 26 NY3d at 79. The key is to pay attention to the specific circumstances and facts before

the court. *Id.*

In *Hutchinson*, the Court of Appeals actually decided three cases: *Leonard Hutchinson v Sheridan Hill House Corp.*[7], *Matvey Zelichenko v 301 Oriental Boulevard, LLC*[8], and *Maureen Adler* v *QPI-VIII, LLC*, et al.[9] All three appeals involved trip and fall accidents where the defendants had been awarded summary judgment by the courts below. In looking at each case, the Court explained that the "test established by the case law in New York is not whether a defect is *capable* of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances." *Id.* at 80 (emphasis in original).

Applying this standard to the cases before it, the Court affirmed the summary judgment award in *Hutchinson* and vacated the summary judgment awards in *Zelichenko* and *Adler*. The metal object over which Mr. Hutchinson tripped protruded .25 inches above the sidewalk in a well-lit area "where a pedestrian would not be obliged by crowds or physical surroundings to look only ahead. The object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as

---

7 Leonard Hutchinson fell while walking on a concrete sidewalk after his right foot became caught on a metal object protruding from the sidewalk adjacent to the defendant's building. Defendant's counsel measured the metal object after the accident and concluded that it was cylindrical in shape, projected approximately one quarter of an inch above the sidewalk, and was approximately five eighths of an inch in diameter. The Appellate Division affirmed the trial court's dismissal on both trivial defect and notice grounds. *Hutchinson*, 26 NY3d at 72-73.

8 Matvey Zelichenko fell while walking down a staircase in the lobby of a residential building when his leg became caught in a 3.25 inches wide by .5 inch deep hole left by a missing piece of nosing. The trial court denied the defendant's summary judgment motion, ruling that issues of fact existed as to both notice and the triviality of the condition. The Appellate Division reversed, finding that the hole was trivial and therefore not actionable. *Hutchinson*, 26 NY3d at 73-76.

9 Maureen Adler was caused to be injured by a protrusion in a step tread that had been painted over. Ms. Adler acknowledged that the stairway was fairly lit, that she looked down as she descended the stairs, did not recall any dirt, debris, or cracks on the stairs, and had seen the clump before on previous occasions. In reversing the trial court's decision, the Appellate Division found that the defect was trivial. *Hutchinson*, 26 NY3d at 76-77.

a hazard. Its edge was not jagged and the surrounding surface was not uneven." *Id.* The chipped step at issue in *Zelichenko* was actionable because the record showed that the missing piece was located exactly where a person might step and plaintiff's expert had explained the need for step treads to be of uniform horizontal depth. *Id.* at 81-82. For *Adler*, the Court held that the defendant failed to meet its initial burden because the summary judgment record contained indistinct photographs and no measurements of the dimensions of the "clump" in question. *Id.* at 82.[10]

As shown by the Court in *Hutchinson*, a court's decision on these issues must be fact specific and based on the totality of the circumstances. For example, in *Perez v Gasho of Japan, Inc.*, 2016 N.Y. App. Div. LEXIS 751 (1st Dept 2016), the court upheld the dismissal of a complaint which alleged that an infant tripped over a "little bump" in a restaurant's carpet runner, whereas in *Jangana v Nicole Equities LLC*, 127 AD3d 458 (1st Dept 2015), summary judgment was properly denied to a defendant where the plaintiff testified he noticed the raised carpeting upon which he fell on several prior occasions while making deliveries to the defendant's building, and the defendant's own expert testified that the carpet would move almost half of an inch upon an application of 25 pounds of horizontal force. In *Sanna v Wal-Mart Stores, Inc.*, 271 AD2d 595, 595 (2d Dept 2000), the Second Department determined that an issue of fact existed as to the triviality of an area of missing carpet that was one-half inch lower than the adjacent carpeted floor because it was similar in color to the adjacent area and located in a dimly-lit part of the defendant's store. Distinguishing *Sanna,* a trial court in Queens dismissed the case of a plaintiff who claimed to have slipped and fallen on a

---

[10] The Court explained in *Adler* that it did "not imply that there are no cases in which a fact-finding court could examine photographs and justifiably infer from them as a matter of law that an elevation or depression or other defect is so slight as to be trivial as a matter of law. . . . Photographs that are acknowledged to 'fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable.'" *Id. at 83* (quoting *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 984 [2d Dept 2011]).

defective sidewalk where the defendant produced an expert whose undisputed conclusion was that the elevation in the sidewalk was less than half of an inch. *See Rodriguez v Clearview Gardens First Corp.*, 964 NYS2d 62, 2012 NY Misc LEXIS 4653, *6-7 (Sup. Ct. Queens Co. Sept. 27, 2012).

In this case, Defendants assert that the area immediately surrounding the loose fiber on their carpet was in good condition and that the fiber could not have been more than a few inches in length. Their photos show a heavily patterned carpet which apparently was not stained, and does not appear to have any worn spots, rips or tears. However, there is no information in the record concerning the precise measurements or location of the carpeting depicted in Defendant's photographs. Also, while Plaintiff testified that prior to her fall her view was unobstructed and that the lighting in the theater was adequate, Plaintiff's photographs show that the thready condition of the carpet could easily have been obscured by its heavy pattern. The condition was not readily visible or apparent, and definitely was not so open and obvious that it would have been seen by the average person. Thus, even though the loose fiber at issue is relatively small in size, its characteristics and surrounding environment could have been conducive to it being a serious tripping hazard. Thus, the questions posed by the Court of Appeals in *Hutchinson*, "whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances", could possibly be answered in the affirmative in this case by a trier of fact. *Hutchinson*, 26 NY3d at 80. For these reasons, I find there is a question of fact in this case sufficient to overcome summary judgment.

A defendant moving for summary judgment in a trip-and-fall case also "has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." *Mitchell v City of New York*, 29 AD3d 372, 374 (1st Dept 2006); *see also Keita v City of New York*,

129 AD3d 409, 410 (1st Dept 2015). "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 v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008).

There is no evidence on this motion to show that Defendants created the condition which caused Plaintiff to trip or were actually aware of such condition prior to Plaintiff's accident. Apparently Defendants received no complaints and the record does not show that anyone, including Plaintiff, observed the loose fiber prior to her fall. *See Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . . .")

Whether Defendants had constructive notice of the condition is unclear. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 (2d Dept 2008). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice." *Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855, 856 (2d Dept 2013); *see also Hawthorne-King v New York City Hous. Auth.*, 128 AD3d 539, 540 (1st Dept 2015); *Bruni v Macy's Corporate Servs., Inc.*, 134 AD3d 870, 871 (2d Dept 2015); *Barris v One Beard St., LLC*, 126 AD3d 831, 832-33 (2d Dept 2015); *Johnson v Culinary Inst. of Am.*, 95 AD3d 1077, 1079 (2d Dept 2012); *Lorenzo v Plit Theaters, Inc.*, 267 AD2d 54, 56 (1st Dept 1999).[11]

---

[11] "Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition." *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436 (2d Dept 2005); *Dylan P. v Webster Place Assoc.*, L.P., 132 AD3d 537, 538 (1st Dept 2015). 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 the defendant to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

For example, the plaintiff in *Mahoney* slipped and fell on a puddle near a movie theater concession stand. The theater's summary judgment motion was denied because its witness could not recall the last time on the date of the plaintiff's accident he or anyone else had inspected the floor where the accident occurred. In *Lorenzo*, plaintiff alleged that she fell on a slippery substance on a movie theater floor during the 1:00pm show. The theater argued that the substance must have been either tracked in from the rain or spilled by a patron before the showing but after the cleaning crew had made their rounds. The court determined that "[s]ince defendant's witness discussed only the general cleaning routines at the theater, and not specifically when the theater was last cleaned and inspected prior to the accident, this testimony was insufficient to show as a matter of law that the slippery patch was created after patrons were admitted for the 1:00 P.M. show". *Id.* at 56. In *Wright v Nat'l Amusements*, 2003 NY Misc. LEXIS 1432 (Sup. Ct. Bronx Co. Oct. 21, 2003), by contrast, plaintiff slipped and fell on a wet substance while walking down the aisle of the movie theater looking for a seat. The court found that the theatre met its *prima facie* burden as to constructive notice based on the usher's cleaning card for the day in question which indicated that he cleaned the theater at the conclusion of the last show prior to the movie showing plaintiff intended to see.

The deposition testimony of Defendants' employee, Ms. Phillips-Ferguson, merely sets forth the Kips Bay Theaters' general inspection practice of conducting auditorium checks after each movie showing by "walking around by management insuring everything is safe and operational." Absent from the record are Defendants' activities on the date of the accident: who, if anyone, actually inspected the specific area in the question, and whether and the extent to which an auditorium check was performed near the area in question.

Also, while Ms. Phillips-Ferguson testified that Defendants' auditorium check protocol was part of a written safety policy promulgated by AMC, a copy of such policy has not been made part of

the record on this motion (*id.* at 13-15). In this regard, there is no testimony or proof in the form of a logbook or cleaning card showing that the specific area in question was part of an auditorium check on the day of the accident (Ferguson Deposition pp. 17-20) and while Ms. Phillips-Ferguson explained that the Defendants used an outside cleaning service, there is no testimony or invoice report showing when and/or how often the carpet in question was attended to (Ferguson Deposition p. 34):

Q. Who would take care of that carpet in April of 2011?
A. Carpet cleaning company.
Q. Do you know the name of the carpet cleaning company?
A. Accuchem.
Q. And they would be hired by Loews?
A. Loews AMC, correct. That's the only carpet company
Q. That they use?
A. I believe at this time.
Q. And what do they do, would they come and clean it?
A. Oh, I'm never there. I'm not there when they come.

It is apparent that all that Defendants have been able to provide through this witness is information on what should have been done, but no information at all on what was done.

Given the lack of specifics regarding the Kips Bay Theater's inspection and cleaning activities immediately proceeding Plaintiff's accident, Defendants' contention that the fiber in question could have come loose only minutes or seconds before Plaintiff's fall, while possible, is not determinative of this motion. For summary judgment purposes, what is important is that Defendants have not *prima facie* demonstrated their lack of constructive notice, requiring the denial of their motion. *See Hawthorne-King,* 128 AD3d at 540; *Mahoney*, 103 AD3d 855 at 856; *Johnson*, 95 AD3d at 1079; *Birnbaum*, 57 AD3d at 598-599.

Accordingly, it is hereby

ORDERED that the motion by defendants Kips Bay Development Limited Partnership and AMC Loews Kips Bay 15 for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: 4-11-16

SHERRY KLEIN HEITLER, J.S.C.