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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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NANCY LOPEZ,

Plaintiff,

DECISION/ORDER
Index No. 153968/2013

-against-

ROYAL CHARTER PROPERTIES, INC.,
CUSHMAN & WAKEFIELD, INC.

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Nancy Lopez commenced the instant action seeking to recover for injuries she allegedly sustained when she slipped and fell as she was exiting her apartment. Defendants Royal Charter Properties, Inc. ("Royal") and Cushman & Wakefield, Inc. ("C&W") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. On or about March 4, 2013, plaintiff, a resident of 602 West 165th Street, New York, New York (the "building"), allegedly slipped and fell as she was exiting her apartment, which is located just off the lobby of the building (the "accident"). Specifically, plaintiff alleges that she slipped and fell on the two interior steps in the lobby located outside her apartment because the floor was slippery as it had recently been waxed and because the lobby was inadequately lit at the time of her accident. Plaintiff testified that there was no debris of any kind on the floor at the time of her accident and she did not think that the floor was wet with water.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320,

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324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk." *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 322 (1st Dept 2006). However, "[i]n order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence." *Lezama v. 34-15 Parsons Blvd., LLC*, 16 A.D.3d 560, 560 (2d Dept 2005).

It is well-settled that "a claim that [] stairs were slippery due to wax does not give rise to a cause of action or an inference of negligence in the absence of evidence that the wax was negligently applied." *Marku v. 33 S & P Realty Corp.*, 251 A.D.2d 633, 634 (2d Dept 1998).

In the present case, the court finds that defendants' motion for summary judgment dismissing the complaint must be granted as they have established that they did not negligently apply wax to the lobby stairs on which plaintiff slipped and fell. Crescencio Santana, the building's superintendent and an employee of C&W, testified that he was responsible for cleaning the building and that he waxed the floor of the lobby twice a year, once during the summer and again in December around Christmastime. Mr. Santana further testified that the last time he waxed the floor of the lobby prior to the accident was in December of 2012, approximately three months before plaintiff's accident. Mr. Santana also testified that there were no outside contractors hired to provide cleaning or waxing services in or around the time of plaintiff's accident. Further, Mr. Santana testified that he has been the building's superintendent for twenty years, that he lives in the building, that he has never received any complaints about the lobby floor being slippery and that he never noticed that the lobby floor was slippery. Additionally, Mr. Santana testified that he waxed the lobby

each time the same way, by ensuring the floor was completely clean, removing the old wax and then applying the new wax. Defendants have also provided the affidavit of Steven Hoveke, C&W's Enterprise Operations Manager, in which Mr. Hoveke affirms that he "conducted a search to identify any reported accidents occurring in the lobby [of the building]...for the time period from October 1, 2012, up to and including March 4, 2013" and that "no other person reported falling in the lobby...other than [the plaintiff]...."

In response, plaintiff has failed to raise an issue of fact sufficient to defeat defendants' motion for summary judgment as she has offered no evidence to support the proposition that defendants negligently applied wax to the stairs on which she slipped and fell. To the extent plaintiff asserts that there is an issue of fact as to whether defendants were negligent in failing to comply with section 27-375(h) of the Administrative Code of the City of New York (the "Admin. Code"), which provides that "[i]nterior stairs shall have solid treads" and that "[t]reads and landings shall be built of or surfaced with nonskid materials," such assertion is without merit. It is well-settled that the court cannot consider any alleged violation of such provision because it was improperly raised for the first time in opposition to defendants' motion. *See Kociecki v. EOP-Midtown Props., LLC*, 66 A.D.3d 967, 968 (2d Dept 2009)("The plaintiff's contention that the staircase was in violation of Administrative Code of the City of New York § 27-375(h) was improperly raised for the first time in opposition to the motion"); *see also Atkins v. Beth Abraham Health Servs.*, 133 A.D.3d 491, 492 (1st Dept 2015)("A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers.") Plaintiff failed to specifically plead a violation of Admin. Code § 27-375(h) in her complaint or her bill of particulars. Thus, she cannot rely on a violation of said provision as proof of negligence in opposition to defendants' motion for summary judgment.

To the extent plaintiff asserts that there is an issue of fact as to whether defendants were negligent in applying wax to the stairs, such assertion is without merit as plaintiff has failed to cite any case law for such proposition. Moreover, the law is clear that the application of wax on stairs in an apartment building is not in and of itself evidence of negligence. *See Marku*, 251 A.D.2d at 634.

Additionally, the court finds that defendants' motion for summary judgment dismissing the complaint must be granted as they have established that the lighting in the lobby at the time of the accident was adequate. It is undisputed that on the day of plaintiff's accident, some of the lights in the lobby were turned off so that testing could be performed in the basement of the building. Specifically, Mr. Santana testified that four out of the six lobby light fixtures were shut off at around 11:00 a.m. and that they were off for "ten minutes, more or less." Further, Mr. Santana testified that after plaintiff's accident, he immediately inspected the area and found the lighting to be "as good as it always is." He further testified that it was sunny on the day of plaintiff's accident so that there was natural light in the lobby streaming in from the front windows of the building. Further, defendants have provided the affidavit of Michael Kravitz, a licensed professional engineer, in which Mr. Kravitz affirms that the lighting in the lobby on the date of the accident was adequate. Specifically, after inspecting the lobby of the subject premises under conditions he asserts are similar to those that existed at the time plaintiff's accident occurred, Mr. Kravtiz concluded that "[g]ood and accepted engineering and maintenance practice was adhered to by the owners of [the subject premises] with respect to the lighting of the lobby or [the subject premises]" and that "[b]ased on the measurements and analysis, the lighting condition alleged by the plaintiff was not hazardous or dangerous to pedestrians using the lobby, and are not in violation of any codes, rules or regulations."

In response, plaintiff has failed to raise an issue of fact sufficient to defeat defendants' motion for summary judgment. Plaintiff relies solely on her testimony that the lighting in the lobby of the building was inadequate at the time of her accident. However, the First Department has held that a "plaintiff's testimony alone is insufficient as a matter of law to raise a triable issue of fact on her claim of inadequate lighting." *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 325 (1st Dept 2006).

However, even if there was an issue of fact as to whether the lighting in the lobby was inadequate at the time of plaintiff's accident, defendants are still entitled to summary judgment as they have established that inadequate lighting was not a proximate cause of plaintiff's accident. Defendants have submitted plaintiff's deposition transcript which demonstrates that despite the lack of full lighting in the lobby, plaintiff was still able to see in front of her. Specifically, although plaintiff testified that the lobby was

"dark" at the time of her accident, she testified that she could see the floor as she walked, that from her apartment door she could see both lobby steps and that she could see all the way to the front door of the building. It is well-settled that a defendant "satisfies its burden of establishing that the allegedly inadequate lighting was not a proximate cause of the plaintiff's injuries" where "[w]hatever the level of light, the plaintiff's own testimony establishe[s] that [the plaintiff] saw the [alleged defect]." *Funk v. United Parcel Service, Inc.*, 73 A.D.3d 851, 852 (2d Dept 2010). Moreover, plaintiff does not claim that she slipped or tripped on any visible substance or debris but rather that she slipped because the stairs were slick with wax and she has failed to provide any evidence she would have seen any defect had the lighting been adequate.

Accordingly, defendants' motion for summary judgment is granted and the complaint is hereby dismissed. This constitutes the decision and order of the court.

DATE : 10/21/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.