Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Cirila Urbina DeEscobar,

Plaintiff,

-against-

Westland South Shore Mall, L.P., South Shore Mall LLC, Westfield, LLC and Westfield South Shore Mall Company,

Defendants.

Motion Sequence No.: 001; MOTD; CD
Motion Date: 4/25/18
Submitted: 5/23/18

Index No.: 610678/2017E

Attorney for Plaintiff:

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Clerk of the Court

Upon the **E-file document list** numbered 15 to 21 read on this application by defendants Westland South Shore Mall, L.P., South Shore Mall LLC, Westfield, LLC, and Westfield South Shore Mall Company for an order granting them summary judgment dismissing the complaint pursuant to CPLR 3212; it is

ORDERED that the motion by defendants Westland South Shore Mall, L.P., South Shore Mall LLC, Westfield, LLC, and Westfield South Shore Mall Company for summary judgment dismissing the complaint is granted pursuant to CPLR 3212.

This is a personal injury action arising from an alleged slip and fall which occurred on October 21, 2016 in front of Aeropostale and Foot Locker within the Westfield South Shore Mall, 1701 Sunrise Highway, Bay Shore, New York. The action was commenced by the filing of a summons and verified complaint on June 7, 2017. Issue was joined by all defendants on June 19, 2017. Plaintiff served her verified bill of particulars on August 14, 2017. Plaintiff was deposed on February 1, 2018. Defendants now move for summary judgment and submit in support thereof an affirmation of counsel, an affidavit of Orville Brown, the security officer for the Westfield South

Shore Mall who was on-duty at the time of the alleged fall, an affidavit of Jack Barbera, the director of security for the Westfield South Shore Mall who was on-duty at the time of the accident, a copy of the pleadings and verified bill of particulars, copies of photographs of the location of the fall at or near the time of the alleged accident, and a copy of plaintiff's unsigned deposition transcript along with correspondence from counsel for defendants dated February 16, 2018 requesting plaintiff to execute and return same within sixty (60) days pursuant to CPLR 3116 (a). The Court notes that defendants may rely upon the certified yet unsigned deposition testimony of plaintiff to sustain their prima facie burden on this motion for summary judgment, as the transcript was forwarded to plaintiff's counsel pursuant to CPLR 3116 (a), the testimony is undisputed by plaintiff, and the testimony has been adopted by plaintiff (*see* ***Pavane v. Marte,*** 109 AD3d 970, 971 NYS2d 562 [2d Dept. 2013]; ***David v. Chong Sun Lee,*** 106 AD3d 1044, 1045, 967 NYS2d 80, 82 [2d Dept. 2013]); ***Martin v City of New York,*** 82 AD3d 653 [2011]); ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]; ***Rodriguez v Ryder Truck, Inc., supra***; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572). Further, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). Where a feigned factual issue is designed to avoid the consequences of an earlier admission (*see* ***McGuire v. Quinnonez***, 280 A.D.2d 587, 720 N.Y.S.2d 812 [2001]), it is insufficient to defeat summary judgment (*see* ***Israel v. Fairharbor Owners, Inc.***, 20 A.D.3d 392, 798 N.Y.S.2d 139 [2005]).

[* 2] To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her

injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). .

However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v. City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]) and to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Hayden v. Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v. Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]; *see also* ***Barretta v. Glen Cove Prop., LLC***, 148 AD3d 1100, 50 NYS3d 520 [2d Dept 2017]; ***Scoppettone v. ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2d Dept 2007]; ***Bradish v. Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v. City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v. American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]; ***Marchese v. St. Martha's R.C. Church, Inc.,*** 106 AD3d 881, 881-882, 965 NYS2d 557 [2d Dept 2013], *quoting* ***Arzola v. Boston Props. Ltd. Partnership,*** 63 AD3d 655, 656, 880 NYS2d 352 [2009]); ***Perez v. New York City Housing, Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]; ***Bolloli v. Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010] [internal quotation marks omitted]; ***Villano v. Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]; ***Valdez v. Aramark Serv.***, 23 AD3d 639, 804 NYS2d 811 [2d Dept 2005]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [2d Dept 1986]; ***Bykofsky v. Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994])). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v. Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). This burden, however, cannot be satisfied by merely pointing to gaps in the plaintiff's case (*see* ***Valdez v. Aramark Serv.***, *supra* 23 AD3d 639).

Nevertheless, a landowner does not have a duty to warn or protect against a condition that is open and obvious, or that is not inherently dangerous (*see* ***Losciuto v. City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v. Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v. Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v. Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]; ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]). An owner or general contractor has no duty to protect workers against a condition that may be readily observed (*see* ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000];***Bombero v. NAB Construction Corp.,*** 10 AD3d 170, 780 NYS2d 333 [1st Dept. 2004]; ***McGrath v. Lake Tree Vill. Assocs.***, 216 AD 2d 877, 877, 629 N.Y.S.2d 358, 359 [4th Dept.1995]) *citing* ***Gasper v. Ford Motor***

Co., 13 N.Y.2d 104, 110, 242 N.Y.S.2d 205, 192 N.E.2d 163 [1963]; *cf* ***Grasso v. New York State Thruway Authority,*** 159 AD3d 674, 679, 71 NYS3d 604 [2d Dept. 2018]); ***McAdam v. Sadler***, 170 A.D.2d 960, 566 N.Y.S.2d 130 [4th Dept. 1991], *lv. denied* 77 N.Y.2d 810, 571 N.Y.S.2d 913, 575 N.E.2d 399 [1991]). Moreover, a property owner will not be held liable for trivial defects, not constituting a trap or nuisance, over which one might merely stumble, stub his or her toes, or trip (*see* ***Miller v. Costco Wholesale Corp.,*** 125 AD3d 828, 4 NYS3d 281 [2d Dept. 2015]; ***Ambriose v New York City Tr. Auth.***, 33 AD3d 573, 826 NYS2d 261 [2d Dept 2006]; ***Fairchild v J. Crew Group, Inc.***, 21 AD3d 523, 800 NYS2d 735 [2d Dept 2005]; ***Hagood v. City of New York***, 13 AD3d 413, 785 NYS2d 924 [2d Dept 2004]; ***Germain v. Hegedus,*** 289 AD2d 443, 735 NYS2d 426 [2d Dept. 2001]). The court, in determining if the defect is trivial, is required to examine all the facts presented, including the "width, depth, elevation and irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (***Trincere v. County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997]; *see* ***Wasserman v. Genovese Drug Stores***, 282 AD2d 447, 723 NYS2d 191 [2d Dept 2001]; ***Sanna v. Wal-Mart Stores***, 271 AD2d 595, 706 NYS2d 156 [2d Dept 2000]).

A plaintiff's inability to identify the cause of the fall is fatal to a negligence action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation *(see* ***Trapani v Yonkers Racing Corp.***, 124 AD3d 628, 1 NYS3d 299 [2d Dept 2015]; ***DiLorenzo v S.I.J. Realty Co., LLC***, 115 AD3d 701, 981 NYS2d 590 [2d Dept 2014]; ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]). Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture (*see* ***Alabre v Kings Flatland Car Care Ctr.,*** 84 AD3d 1286, 924 NYS2d 174 [2d Dept 2011]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; ***Lissauer v Shaarei Halacha, Inc.***, 37 AD3d 427, 829 NYS2d 229 [2d Dept 2007]; ***Oettinger v Amerada Hess Corp.***, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; ***Garvin v Rosenberg***, 204 AD2d 388, 614 NYS2d 190 [2d Dept 1994]).

Here, plaintiff testified repeatedly that there was no dangerous condition on the floor where she fell and she had no knowledge as to what caused her to fall. Specifically, plaintiff testified "I was walking and then I slipped and I didn't notice anything else." When asked what caused her to slip, plaintiff responded "I didn't notice. I didn't see. I was just walking....[u]p to today I do not know how I slipped." Plaintiff further testified that she did not see any water or liquid on the floor prior to her fall, she did not see her foot step into anything that could have caused her to slip, and when she was on the ground she did not see any type of liquid or water on the floor. Plaintiff testified she "didn't find anything." Plaintiff further testified that her daughter-in-law was with her at the shopping mall when she fell but that "she did not see me fall...she was a few steps ahead of me....she saw me when I was already down on the floor." Plaintiff further testified that after the accident her daughter-in-law did not show her anything that was on the floor that would cause her to slip. She said her daughter-in-law "didn't see any[thing] [like] that." Moreover, the affidavits of security officers Brown and Barbera confirm that there was no substance on the floor that could cause plaintiff to slip and fall. Security Officer Brown alleges in his affidavit that the plaintiff had fallen near Foot Locker, that he inspected the area around where the plaintiff was laying and "found it to be dry and free of debris." He stated he did "not observe any condition which could have caused the [plaintiff] to fall." Officer Brown further averred that he was unaware of any prior complaints or accidents involving any wet or dangerous condition in the area where the plaintiff fell. The affidavit

of Jack Barbera provides the same information and further indicates that he took photographs depicting the condition of the floor, which he observed was "dry and free of debris." The photographs taken of the accident scene, which were identified by plaintiff at her deposition, do not show any evidence of liquid or water or any debris on the floor where plaintiff fell.

Through the above evidence presented by defendants, they have established their prima facie entitlement to summary judgment in that they did not create the alleged condition that caused plaintiff to fall, as there is no evidence that any such dangerous or unsafe condition existed (*see* ***Gershfeld v. Marine Park Funeral Home,*** 62 AD3d 833, 870 NYS2d 549 [2d Dept. 2009]; ***Christal v. Ramapo Cirque Homeowners Assoc.,*** 51 AD3d 730, 858 NYS2d 304 [2d Dept. 2008]; ***Makaron v. Luna Park Housing Corp.,*** 25 AD3d 770, 809 NYS2d 520 [2d Dept. 2006]; ***Zabbia v. Westwood, LLC,*** 18 AD3d 542, 795 NYS2d 319 [2d Dept. 2005]; ***Murphy v. 136 N. Blvd. Assoc.,*** 304 AD2d540, 747 NYS2d 582 [2d Dept. 2003]; ***Carricato v. Jefferson Valley Mall. Ltd. Partnership,*** 299 AD2d 444, 749 NYS2d 575 [2d Dept. 2002]; ***Lissauer v Shaarei Halacha, Inc.,*** 37 AD3d 427, 829 NYS2d 229 [2d Dept. 2007]; ***Oettinger v Amerada Hess Corp.***, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; ***Rizzi v Y.S.G.F. Realty, LLC.***, 15 Misc.3d 1113, 839 NYS2d 436 [Richmond Cty. 2007]). Any cause of plaintiff's fall is speculative, inasmuch as plaintiff testified that she did not know the cause of her slip and fall (*see* ***Plowden v Stevens Partners, LLC***, 45 AD3d 659, 846 NYS2d 238 [2d Dept 2007]; ***Kane v Hestia Greek Rest. Inc***., 4 AD3d 189, 772 NYS2d 59 [1st Dept 2004]; ***Bitterman v Grotyoham***, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]; ***Rizzi v Y.S.G.F. Realty, LLC***., supra).

The burden then shifted to plaintiff to produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. Plaintiff was required to lay bare her proof in evidentiary form; conclusory allegations being insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v. City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]).

The affidavit submitted by plaintiff's daughter-in-law in opposition to summary judgment contains allegations that are inconsistent with plaintiff's deposition testimony, and to that extent, it must be rejected by this Court (***Irizarry v. The Rose Bloch 107 Univ. Place Partnership***, 12 Misc. 3d 733, 736, 819 N.Y.S.2d 398, 402 [Kings CTY. 2006]). Plaintiff's reliance upon speculation, conjecture, contradictions, and inconsistencies is merely an attempt to create feigned issues of fact, which are insufficient to defeat defendant's motion for summary judgment (*see* ***Soussi v. Gobin***, 87 A.D.3d 580, 581–582, 928 N.Y.S.2d 80 [2d Dept. 2001]; ***Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School Dist.,*** 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.,*** 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Makaron v. Luna Park Housing Corporation***, 25 A.D.3d 770, 809 N.Y.S.2d 520 [2006]; ***Abramov v Miral Corp.,*** 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]).

Ultimately, the plaintiff's failure to sufficiently describe a dangerous or unsafe condition is fatal to her claims. Plaintiff's failure to identify the cause of the accident or raise an issue of fact in opposition to the motion for summary judgment requires dismissal of plaintiff's complaint, as a jury would be forced to speculate the cause of her accident, which could have been caused by a sudden

misstep or loss of balance (*see* ***Penn v Fleet Bank***, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004], *lv denied* 5 NY3d 704, 801 NYS2d2 [2005]; ***Bitterman v Grotyoham***, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]; ***Plowden v Stevens Partners, LLC***, 45 AD2d 659, 846 NYS2d 238 [2d Dept. 2007]; *see also* ***Rizzi v Y.S.G.F. Realty, LLC.***, 15 Misc.3d 1113, 839 NYS2d 436 [Richmond Cty. 2007]). Viewing the evidence in a light most favorable to the plaintiff, as this Court must on defendant's motion for summary judgment, the Court nevertheless finds that defendants have demonstrated their entitlement to summary judgment dismissing the complaint (*see* ***Branham v. Loews Orpheum Cinemas, Inc.***, 8 N.Y.3d 931, 834 N.Y.S.2d 503 [2007]).

Plaintiff's argument that summary judgment is premature is unfounded, as plaintiff fails to adequately demonstrate how discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge or control of plaintiff (*see* ***Williams v. Spencer-Hall***, 113 AD3d 759, 979 NYS2d 157 [2d Dept. 2014]; ***Cajas-Romero v. Ward***, 106 AD3d 850, 965 NYS2d 559 [2d Dept. 2013]; ***Romero v. Greve***, 100 AD3d 617, 953NYS2d 296 [2d Dept. 2012]). Indeed, "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (***Cajas-Romero v. Ward***, *supra*, 106 AD3d at 852). The Court has considered plaintiff's remaining contentions and finds them to be without merit.

Accordingly, summary judgment in favor of defendants Westland South Shore Mall, L.P., South Shore Mall LLC, Westfield, LLC, and Westfield South Shore Mall Company is granted. Defendants' motion for attorneys' fees and costs against plaintiff is denied, as defendants have not presented a sufficient basis upon which to grant such relief (*see* 22 NYCRR §130-1.1).

Dated: August 21, 2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

____X____ FINAL DISPOSITION_____ NON-FINAL DISPOSITION