To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MARY LEWIS,

Plaintiff,

-against-

DECISION & ORDER
Index No. 54019/2017
Motion Sequence 2

STANLEY STEEMER INTERNATIONAL, INC.,

Defendant.

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The following papers were read and considered in connection with the above-captioned matter:

Notice of Motion/Affirmation/Exhibits A-J	1-12
Affirmation in Opposition/Exhibits A-C	13-16
Reply Affirmation/Exhibits K-N	17-21
Affirmation in Further Opposition to Defendants New Submission	22

Factual and Procedural Background

The plaintiff commenced this action seeking damages for personal injuries and loss wages allegedly sustained on November 18, 2016, by the plaintiff, Mary Lewis ("Lewis"), a seventy five year old woman, when she fell on her kitchen floor.

Lewis testified that she hired Stanley Steemer International, Inc. ("Stanley Steemer") to clean the kitchen floor at her residence. On the day of the incident, two Stanley Steemer employees, Delvauna Brown a/k/a Ricky Bobby ("Brown") and Johnny Evans ("Evans") came to Lewis' residence. They began setting up the equipment to clean the floor. Brown and Evans testified that they placed safety cones near the truck, a slip and fall stand up

sign outside Lewis' residence, and slip and fall sticky post-it signs at the entrances to the kitchen and at the bottom and top of all stairways near the area that was to be cleaned.

As part of the process, the employees had to spray an alkaline solution on the kitchen floor and Brown sprayed the entire kitchen floor with the solution. Lewis testified that they needed water from the garden hose to clean the floor, but the water had been turned off and someone had to go to the basement to turn on the valve from the inside. Brown testified that he went to the basement to attempt to locate the valve, but was unable to find it and came back upstairs to let Lewis know. According to the testimony, Lewis said that she would show them where the valve was and proceeded to walk on the kitchen floor. Lewis testified that she took a couple steps into the kitchen and opened the door to the basement, turned, took a step down the stairs and her other foot just shot out from under her. She testified that she heard "be careful and then landed on her butt on either the first step or the second step down. Brown and Evans testified that they warned Lewis not to come into the kitchen because Brown had sprayed the solution on the floor. Lewis testified that no one told her not to go into the kitchen.

Lewis testified that she slid herself on her behind to the living room, where she asked for her telephone and called her daughter. Brown and Evans testified that they assisted her to the living room. Brown and Evans finished cleaning the floor and requested payment from Lewis.

As a result of falling, Lewis suffered a severely comminuted irreducible left trimalleolar ankle fracture dislocation, which required surgical intervention. Lewis also

claims that on March 29, 2017, she fell because her ankle just gave way and suffered a left subcapital hip fracture, impacted.

Issue was joined, discovery completed and the defendant, Stanley Steemer now moves for summary judgment pursuant to CPLR 3212, dismissing the complaint against it. Stanley Steemer, by its attorney, argues that Lewis cannot make out a prima facie case of negligence, even if she slipped on the wet floor, since it was an open and obvious condition which she was aware of at the time of her slip and therefore, Stanley Steemer employees had no duty to warn. Stanley Steemer also argues that Lewis' claim is barred by contractual waiver signed by the plaintiff prior to its employees commencing the work which Lewis ordered. Stanley Steemer further contends that Lewis cannot make out a prima facie case of negligence regarding her hip injury as there is no proximate cause of that accident attributable to Stanley Steemer and the timing of the hip injury occurred after Lewis' doctor cleared her of all restrictions and confirmed that her ankle injury had fully healed.

In opposition, Lewis, by her attorney argues that the slippery condition of the kitchen floor was not an open and obvious condition as a matter of law; that Lewis is not barred by a purported contractual waiver, which she allegedly signed prior to Stanley Steemer employees commencing the work; that Stanley Steemer is not entitled to summary judgment based on proximate cause; and that Stanley Steemer's negligence was a proximate cause of Lewis' subsequent hip injury.

In reply, Stanley Steemer's attorney reiterated the defendant's arguments, contending that Lewis knew that the work had commenced and sat in the living room

watching the employees work. Also with regard to Lewis' hip injury, Stanley Steemer further argues that there is overwhelming medical evidence to show that Lewis' ankle was fully healed and unrelated to her hip injury. The defendant submitted additional documents in support of its arguments. Lewis' attorney filed an affirmation in further opposition to Stanley Steemer's new documents and arguments made in reply, contending that they must be disregarded because evidence cannot be submitted for the first time in a reply.

In support of the motion, Stanley Steemer relies upon, among other things, witness deposition transcripts, an expert affirmation from Howard J. Luks, M.D., medical records, a supporting affidavit, an attorney's affirmation and copies of the pleadings. In opposition, Lewis relies upon her affidavit, an attorney's affirmation, a copy of a signed check to Stanley Steemer and an affirmation from Samuel A. Hoisington, M.D.

Discussion

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. (*Andre v Pomeroy*, 35 NY2d 361, 362 [1974]). "It is nevertheless an appropriate tool to weed out meritless claims." (*Hamawi Deli, Inc. v Psaras*, 2006 WL 3734554, 2NYSup 2006], *citing*, *Lewis v. Desmond,* 187 AD2d 797 [3d Dept 1992]; *Gray v Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 [3d Dept 1981]).

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Failure of a moving party to tender sufficient evidence to demonstrate as a matter

of law the absence of a material issue of fact results in a failure to tender a prima facie entitlement to summary judgment and requires denial of the motion, regardless of the sufficiency of the opposing papers. (*McDonald v Mauss,* 38 AD3d 727 [2d Dept 2007]).

If a sufficient prima facie showing is made, however, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

Bestowing the benefit of every reasonable inference to the party opposing the motion (*see Boyce v. Vasquez*, 249 AD2d 724, 726 [3d Dept., 1998]), the record reveals that material issues of fact exist.

In this case, Stanley Steemer does not argue that it did not create the condition of which Lewis complains, but asserts that it was an open and obvious condition and its employees warned Lewis of the dangerous condition. However, proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition, but does not preclude a finding of liability(*see Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 [2d Dept 2010]). It only raises an issue of fact as to the plaintiff's comparative negligence (*see Devlin v Ikram*, 103 AD3d 682 [2d Dept 2013]). Also, "[t]he issue of whether a dangerous condition is open and obvious is fact specific, and usually a question of fact for a jury to resolve" (*Id.*).

There are discrepancies in the testimony of the people who were present at the scene of the fall and the Court cannot determine on this record, as a matter of law, that the wet floor upon which Lewis slipped and fell, was open and obvious and not inherently dangerous, so as to relieve Stanley Steemer of its duty to warn of the hazard. Additionally, there are issues of fact as to whether warning signs were placed and whether Brown and Evans verbally warned Lewis and tried to prevent her from entering the kitchen.

With regard to signing a waiver and release of liability. Lewis claims that while waiting for her daughter to arrive after she fell, Brown handed Lewis her checkbook, she wrote a check and he had her sign the iPad and that was the only time that she signed the iPad. Further, Lewis specifically testified that she did not sign the iPad when the workers first arrived or at any time before they started working. Lewis also contends that the signature that is being put forth by Stanley Steemer for the waiver is completely different than the signature on the check signed by Lewis. Therefore, there are issues of fact as to whether Lewis signed a waiver absolving Stanley Steemer of liability.

Lewis also submitted the affirmation of Dr. Hoisington, who opines to a reasonable degree of medical certainty, with regard to Lewis' ankle and hip injury, that the left ankle fracture suffered by Lewis on November 18, 2016, and the resulting weakness of the joint was a substantial factor in causing Lewis' left ankle to give way on March 29, 2017, which in turn caused her to fall and fracture her hip. While Dr. Hoisington fails to state the precise language that the statements contained therein were true under penalties of perjury, by referring to the governing statute in the affirmation, which contains the phrase, under penalties of perjury, the affirmation was properly set forth (*Jones v Schmitt*, 7 Misc3d 47

[App. Term 2005]). This creates an issue of fact as to whether Lewis' weakened ankle caused her to fall and injure her hip. There is also an issue as to whether Lewis was still undergoing physical therapy or had completed physical therapy on her ankle. The defendant's attorney's affirmation also states that Dr. Hoisington's affirmation creates more issues than it resolves, thereby seemingly conceding that there are issues of fact to be resolved. Therefore, the Court finds that there are issues of fact as to proximate cause of Lewis' hip injury.

Accordingly, based on the foregoing, the defendant's motion for summary judgment is denied. The parties are directed to appear before the settlement conference part, on November 13, 2018 at 9:15 a.m. in Courtroom 1600.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2018

HON. SAM D. WALKER, J.S.C.