SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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LAURA MANDEL,

Plaintiff,

- v -

340 OWNERS CORP., MAXWELL-KATES, INC., MAXWELL-KATES HOLDING, INC.,

Defendants.

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INDEX NO. 155169/2017

MOTION DATE 05/09/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendants 340 Owners Corp., Maxwell-Kates, Inc., and Maxwell Kates Holding, Inc. (collectively, "Defendants"), move, pursuant to CPLR 3212, for an order granting summary judgment in favor of Defendants and dismissing the Complaint of plaintiff Laura Mandel ("Plaintiff") on the grounds that Defendants did not create or have actual or constructive notice of the alleged defect in the inclement weather carpet that caused Plaintiff's injuries. Plaintiff opposes the motion on the grounds that the carpet, placed by Defendants, was inherently dangerous and Defendants had notice of the carpet's tendency to develop the type of bumps and folds over which Plaintiff alleges she tripped.

FACTUAL BACKGROUND

Defendant 340 Owners Corp. is the owner of the premises located at 340 West 55th Street, New York, New York (the "Premises"). Defendants Maxwell-Kates, Inc., and Maxwell-Kates Holding, Inc., are the managing agents for the Premises.

Plaintiff alleges that she was injured on November 20, 2016, at approximately 7:30 pm, when she tripped and fell on a raised "hump" located at the edge of a safety runner used during inclement weather in the lobby of the Premises. Plaintiff was leaving the building to walk her dog. Plaintiff testified that she was looking straight ahead while exiting the elevator into the lobby when she felt her right forefoot get caught on a "hump" in the edge of the safety runner, which caused her to fall on her right shoulder onto the stone floor. Plaintiff, who has been a resident in the Premises for approximately thirty-six years, testified that she did not see the "hump" before or after she fell, that she had never seen a "hump" in the safety runner in the lobby on any prior occasion, and that she had no knowledge of anyone ever complaining about or tripping over the safety runner in the lobby before the date of her accident (*see* Mandel Deposition, pp. 67-73).

The first person that arrived to assist Plaintiff was one of the Premises' evening doormen, Kevin Harris (the "Doorman"). The Doorman was seated in a high chair against the wall in between the entrance doors in the vestibule of the Premises, with the elevators to his left, at the time of Plaintiff's accident. While the Doorman could see the safety runner and the exterior frame of the two elevators from where he was seated, he did not see Plaintiff fall (*see* Harris Deposition, pp. 38, 40).

The Doorman had arrived at the Premises at 4:00 pm for his 4:00 pm to 12:00 am shift. When he arrived, the runner, which weighs more than fifty pounds and must be moved using a hand truck, was already placed. The Doorman testified that he did not notice any hump in the carpet when he arrived, or on any occasion prior to Plaintiff's accident, or after Plaintiff fell. The Doorman further stated that he had never had any difficulty getting the safety runner to lay flat. (*see* Harris Deposition, pp. 28-29, 36-37, 50).

When the Doorman attempted to assist Plaintiff, Plaintiff asked not to be touched, prompting the Doorman to alert the Premises' superintendent, Frank Balecga (the "Super"), of Plaintiff's accident. Plaintiff did not make any complaints to the Doorman about any defects in the runner or the condition of the runner generally at the time of her accident. When the Super arrived, the Doorman made an entry in the Premises' log book stating that Plaintiff tripped and fell on the safety runner and returned to his post. The Doorman did not have any further conversations with Plaintiff about her accident. (*see* Harris Deposition, pp. 38, 51-52).

When the Super arrived, Plaintiff was sitting in a chair in the lobby, holding her arm. Plaintiff stated that she could not extend her arm, so the Super returned to his apartment to fetch materials to make her a sling. Plaintiff did not make any statements to the Super regarding the safety runner or discuss the circumstances of her accident. (*see* Balecha Deposition, pp. 56, 60).

Ultimately, two of Plaintiff's friends arrived at the Premises and took Plaintiff to the hospital. After Plaintiff left the Premises, the Super observed the condition of the safety runner in front of the elevator where Plaintiff fell. The Super testified that the safety runner was in its usual condition, it was "straight, flat, [and] parallel to the lobby floor." (Balecha Deposition, p. 63). The Super testified that he was not aware of any complaints regarding the safety runner prior to the date of Plaintiff's accident. At the time of Plaintiff's accident, the safety runner had been in use for approximately ten years. (*see* Balecha Deposition, pp. 36, 28).

Other than her conversations with the Doorman and the Super on the date of her accident, Plaintiff identified only two instances in which she allegedly engaged in conversations with Defendants and Defendants' employees regarding the safety runner and her accident. Plaintiff testified that, after her accident, Juan Taveras, a former doorman employed by Defendants, told Plaintiff that "[e]verybody on the staff knew you had to be really careful about

how you laid those things [the safety runner] out to avoid having humps." (Mandel Deposition, p. 75). In addition, Plaintiff testified that, in a conversation subsequent to her accident, the Super stated to Plaintiff that he had informed the board on more than one occasion that the runners were getting old and needed to be replaced. (*see* Mandel Deposition, p. 73). The Super testified that no such conversation occurred. (*see* Balecha Deposition, pp. 71-72).

The safety runner remained in use at the Premises from the date of Plaintiff's accident on November 20, 2016 through April of 2018, when it was retrieved from the Premises by one of the parties' attorneys. (*see* Balecha Deposition, p. 77).

On June 6, 2018, Adam Cassel, Plaintiff's expert, performed an inspection of the safety runner at the law office of Margaret G. Klein & Associates, located at 200 Madison Avenue, New York, NY 10016. Mr. Cassel found the subject safety runner to be 33 and ¼ inches wide, 32 feet and 9 inches long, and comprised of a low pile carpet over a rubber underlayment. In addition, the safety runner had ribs that ran parallel to the length of the runner. The safety runner measured .25 inches thick at the ribs and .19 inches thick between the ribs (*see* Cassel Affidavit, ¶¶ 4-5).

At the time of his inspection, Mr. Cassel found that the safety runner did not lay flat and contained numerous locations where the edges remained rippled, curled and raised above the surface of the underlying floor. Mr. Cassel measured the various raised edges to be as much as 1 and ¼ inches high. Mr. Cassel also opined that the safety runner would have been safer if it had been equipped with a beveled edge strip to prevent movement, bunching and "humps" along the edges, or if it had been affixed to the floor with tape. In sum, Mr. Cassel concluded that the raised and curled edges he observed when the safety runner was un-rolled during his inspection created a dangerous condition that caused Plaintiff's accident (*see* Cassel Affidavit, ¶¶ 10-11).

PROCEDURAL HISTORY

Plaintiff commenced this action by filing a Summons and Complaint on June 6, 2017. Issue was joined by Defendants by their filing of an Answer on July 14, 2017. After discovery was completed, Plaintiff filed the Note of Issue on September 11, 2018. On January 4, 2019, Defendants moved, pursuant to CPLR 3212, for an order granting Defendants summary judgment and dismissing the Complaint. Thus, Defendants' motion is timely.

DISCUSSION

Defendants move for summary judgment dismissing Plaintiff's sole cause of action for negligence on the grounds that they did not create, or have actual or constructive notice of, the alleged defect in the safety runner that purportedly caused Plaintiff's injuries.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"[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 hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and

remedy it" (*Dhu v New York City Hous. Auth.*, 119 AD3d 728, 729 [2d Dept 2014]). For there to be 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 defendant's employees to discover and remedy it" (*Gordon v. American Mus. of Nat. Hist.*, 67 N.Y.2d 836, 837 [1986]; *Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625 [1985]). "The mere happening of the accident does not establish liability on the part of the defendant" (*Lewis v. Metropolitan Transp. Auth.*, 99 A.D.2d 246, 251 [2d Dept 1984], *aff'd* 64 N.Y.2d 670 [1984]); rather, it must be shown that "the owner ha[d] a sufficient opportunity, within the exercise of reasonable care, to remedy the situation," and failed to do so (*see Mercer v. City of New York*, 223 A.D.2d 688, 689 [2d Dept 1996], *aff'd* 88 N.Y.2d 955 [1996]). "A defendant demonstrates lack of constructive notice 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" (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]).

The court finds that Defendants have satisfied the initial burden of making a prima facie showing that Defendants did not create the allegedly hazardous condition that purportedly caused Plaintiff's fall and that they lacked actual and/or constructive notice of any such condition. Thus, the burden shifts to Plaintiff to come forward with evidentiary proof, in admissible form, to demonstrate the existence of a triable issue of fact.

In opposition, Plaintiff fails to rebut Defendants' prima facie showing that the safety runner over which Plaintiff fell did not constitute a dangerous or defective condition and that Defendants did not have actual or constructive notice of the alleged defective condition. Such prima facie showing was made by Plaintiff's own testimony that she never previously observed a hump in the safety runner either prior to or at the time of her accident. Moreover, the Doorman

and the Super each testified that they had never observed a "hump" in the safety runner either before, at the time of, or after Plaintiff's accident. Significantly, the Doorman observed the safety runner when he arrived at the Premises at 4:00 pm and he had an unobstructed view of the safety runner from his high seat in the vestibule from 4:00 pm through the time that Plaintiff fell at around 7:30 pm. (*see Jacobsohn v New York Hosp.*, 250 AD2d 553, 553 [1st Dept 1998] [finding plaintiff failed to rebut defendants' prima facie showing that the runner that caused her fall did not constitute a dangerous or defective condition where it was observed shortly before her fall and was flush with the floor]). The Doorman also testified that he had never had any difficulty getting the safety runner to lay flat, as evidenced by the safety runner laying flush with the floor in the color photographs submitted in support of the motion (NYSCEF Doc. No. 25), which were authenticated by the Doorman at his deposition (*see* Harris Deposition, pp. 59-60). Furthermore, the Super testified there had been no prior accidents in the lobby caused by any defects in the safety runner during the ten years that the safety runner was in service (*see Burke v. Canyon Rd. Rest.*, 60 A.D.3d 558, 876 N.Y.S.2d 25 [2009] [defendants granted summary judgment because deposition testimony established that the general manager of the restaurant for the last several years was not aware of any complaints or accidents]).

The expert's affidavit regarding his inspection of the safety runner eighteen months after Plaintiff's accident is insufficient to raise an issue of fact. Significantly, the expert's affidavit does not state where or how the safety runner was stored between the date that it was removed from the Premises in April of 2018 and the date of the inspection. Moreover, the expert's affidavit does not contain any details regarding how the safety runner was un-rolled, the surface on which the safety runner was inspected, the amount of time the safety runner was left to rest before it was inspected, or any other details that establish that the safety runner, which remained

in use for more than a year following Plaintiff's accident, was in the same condition on November 20, 2016, the date of Plaintiff's accident, as on June 6, 2018, the date the safety runner was inspected. (*see Budd v Gotham House Owners Corp.*, 17 AD3d 122 [1st Dept 2005] [holding defendants, owner and manager of building where plaintiff slipped and fell on carpet, were entitled to summary judgment dismissing complaint since plaintiff failed to raise issue of fact as to notice of hazard in that she admitted at her deposition that, prior to her fall, she did not see any wrinkles in rug and expert affidavit was prepared more than a year after accident and was devoid of any evidence that rug was in same condition when examined as it was on night plaintiff was injured]).[1] Finally, to the extent the expert identified certain defects or raised edges in the safety runner at the time of the inspection, the expert's affidavit does not state where the raised edges were located or that the raised edges were observed on the same portion of the safety runner of which Plaintiff alleges she tripped and fell.

Plaintiff's post-accident observations of the safety runner are also insufficient to create a triable issue of fact as to whether a dangerous condition existed before her fall (*see Vazquez v Genovese Drug Stores, Inc.*, 88 AD3d 467, 468 [1st Dept 2011] [holding plaintiff's husband's observations of the condition of the rug and its placement after plaintiff's accident were insufficient to raise an issue of fact as to the condition of the rug before plaintiff fell]).

In sum, nothing submitted in opposition to the motion demonstrates that Defendants created the hazard or that the alleged hazardous condition was "visible and apparent and [existed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Penn v Fleet Bank*, 12 AD3d 584 [2d Dept 2004]). Significantly, "a

[1] The expert's conclusion that the safety runner could have been safer if it was equipped with a beveled edge trim or taped to the lobby floor in the Premises is not relevant to a determination of whether placing the subject safety runner in the lobby constituted the creation of a dangerous condition or whether Defendants had actual or constructive notice of "humps" in the safety runner and an opportunity to correct them (*see* Cassel Affidavit, ¶¶ 7-8, 11).

general awareness that [] floor mats occasionally bunch is insufficient by itself to constitute notice of a dangerous condition" (*Hughes v. Carrols Corp.*, 248 A.D.2d 923, 924 [3d Dept 1998]; *see also Piaquadio v. Recine Rlty.*, 84 N.Y.2d 967, 979 [2d Dept 1984]). The Court concludes, therefore, that Plaintiff fails to establish that Defendants created or had actual or constructive notice of any alleged defective or dangerous condition.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/18/19
DATE

W. FRANC PERRY, J.S.C.
HON. W. FRANC PERRY, III
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE