SHORT FORM ORDER

INDEX No. 16-616330
CAL. No. 18-01783OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 2-28-19
ADJ. DATE 5-2-19
Mot. Seq. # 001 - MD

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PATRICIA GRANT,

Plaintiff,

- against -

CARILLON NURSING & REHABILITATION CENTER, LLC,

Defendant.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated January 23, 2019; Notice of Motion/ Order to Show Cause and supporting papers___; Answering Affidavits and supporting papers by plaintiff, dated April 4, 2019; Replying Affidavits and supporting papers by defendant, dated May 1, 2019; Other __; it is,

ORDERED that the motion by defendant Carillon Nursing & Rehabilitation Center, LLC, for summary judgment dismissing the complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Patricia Grant on April 26, 2016, when she tripped and fell after her left foot became entangled in a telephone wire on the premises owned by defendant Carillon Nursing & Rehabilitation Center, LLC ("Carillon"). The accident occurred in the room occupied by her mother, Patricia McKee.

Plaintiff testified that her mother was admitted to Carillon in approximately 2006 and had been residing in the same room for at least five years prior to the accident. She stated that she visited her mother four times a week during the five month period before the accident. Plaintiff testified that Ms. McKee's telephone was provided by her children and moved around by the nursing aide. She explained that the telephone would be kept on the night stand at night and on the bed near the chair where Ms. McKee sat during the day. When the telephone was on the bed, the wire was sometimes behind the headboard and sometimes on the floor and draped across the bed. Plaintiff stated that she would usually push the wire under the bed to "make sure it was not out." She also stated that when aides were in the room, she would say "what's going on, this is not right," because the telephone wire was "supposed to be draped around the back of the headboard so it does not land on the floor."

Plaintiff testified that while the telephone wire was on the floor, it laid on top of longer, stiffer wires that the facility placed there for an alarm system approximately five months prior to the accident. Although the alarm system was used for only one or two weeks and then disengaged, the alarm wires were left on the floor. Plaintiff stated that she complained to aides that the alarm wires were dangerous, but that they "didn't pay any attention" to her complaints. Plaintiff could not remember the names or appearances of such aides. Plaintiff also stated that she did not provide a written complaint about the wires before the accident. Plaintiff testified that on the day of the accident, she arrived at her mother's room and began organizing items on the bed that she brought Ms. McKee. Within one or two minutes of arriving, plaintiff took two or three steps towards the sink and fell when she felt a tightness around her left ankle, as if someone had grabbed her. Plaintiff stated that the telephone wire was around her ankle after she fell.

Sandria Brown, a nurse's aide at Carillon, testified that Ms. McKee usually slept with the phone in bed, requiring her to move it in the morning to make the bed after moving Ms. McKee to the chair. Each day, Ms. Brown would then place the telephone on the bed within Ms. McKee's reach from the chair with the wire over the headboard "out of reach of everybody." Ms. Brown testified that prior to the date of the accident, she never saw phone wires on the floor on the side of the bed and never had to step over Ms. McKee's telephone wire. She also stated that she never had any conversations with plaintiff or other family members regarding the telephone wires, never received complaints regarding the telephone wires, was never asked to change the location of the telephone wires, was not aware of any accidents involving the telephone wire, and never saw plaintiff move the telephone wires. In addition, Ms. Brown testified that Carillon did not have a policy regarding where to place wires within a resident's room.

As to the day of the accident, Ms. Brown testified that she did not recall moving the telephone wire. She testified that during each of the six times she was in the room that day, the telephone was on the bed, that none of the telephone wires were ever located on the floor, that none of its wires were protruding from underneath the bed, and that no wires other than the telephone wires and call bell wires were located within the vicinity of Ms. McKee's bed. Ms. Brown stated that the telephone was on the bed and the wire that connects into the wall was over the headboard when she made her final round between 2:30 and 3:00 p.m. Also during her final round, none of the telephone wires were on the floor on the side of the bed. Finally, Ms. Brown testified that she did not look at the floor on the day of the accident and that she did not know whether any nursing aide entered the room after her shift ended, but before the accident occurred.

Carillon now moves for summary judgment dismissing the complaint on the grounds that it lacked actual or constructive notice of the alleged dangerous condition. Carillon submits, among other things, copies of the pleadings, the bills of particulars, and the transcripts of the deposition testimony of plaintiff and Sandria Brown. In opposition, plaintiff argues that Carillon created and had notice of the hazardous telephone wire. Plaintiff submits, in opposition, an accident report and the transcript of the deposition testimony of Vickie Voss.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility,

evidence must be viewed in the light most favorable to the nonmoving party (***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Covelli v Silver Fist, Ltd.***, 167 AD3d 980, 91 NYS3d 181 [2d Dept 2018]). To establish liability in a premises liability action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; ***Hoffman v Mucci***, 124 AD3d 723, 2 NYS3d 531 [2d Dept 2015]; ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]).

A defendant moving for summary judgment must show, prima facie, that he or she did not create the defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discovery and remedy it (***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]; ***Ariza v Number One Star Mgt. Corp.***, 170 AD3d 639, 93 NYS3d 603 [2d Dept 2019]; ***Witkowski v Island Trees Pub. Lib.***, *supra*). In order to constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to discovery and remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]; ***McDermott v Santos***, 171 AD3d 1158, 98 NYS3d 646 [2d Dept 2019]; ***Radosta v Schechter***, 171 AD3d 1112, 97 NYS3d 664 [2d Dept 2019]). A defendant cannot satisfy its burden by merely pointing to gaps in the plaintiff's case (***Ariza v Number One Mgt. Corp.***, *supra*). A defendant who has actual notice of an ongoing and recurring dangerous condition may be charged with constructive notice of each reoccurrence of such condition (***Pagan v New York City Hous. Auth.***, 172 AD3d 888, 101 NYS3d 168 [2d Dept 2019]; ***Toussaint v Ocean Ave. Apt. Assoc., LLC***, 144 AD3d 664, 40 NYS3d 508 [2d Dept 2016]; ***Mauge v Barrow St. Ale House***, 70 AD3d 1016, 895 NYS2d 499 [2d Dept 2010]; ***Kohout v Molloy Coll.***, 61 AD3d 640, 876 NYS2d 505 [2d Dept 2009]). However, general awareness of a condition is insufficient to constitute notice of the particular condition (***Mauge v Barrow St. Ale House***, *supra*).

Carillon failed to establish a prima facie case of entitlement to summary judgment dismissing the complaint, as it failed to demonstrate that it did not have actual notice of the alleged hazardous condition (*see* ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]; ***Bradley v DiPaterio Mgt. Corp.***, 78 AD3d 1096, 913 NYS2d 244 [2d Dept 2010]; ***Kohout v Molloy Coll.***, *supra*; *cf.* ***Pagan v New York City Hous. Auth.***, *supra*; ***Mauge v Barrow St. Ale House***, *supra*). In viewing the evidence in the light most favorable to plaintiff, a triable issue of fact remains as to whether Carillon had actual notice of a recurring condition involving the telephone wire. While Ms. Brown testified that she never received complaints regarding the telephone wires, plaintiff testified that prior to her accident, she would say "what's going on, this is not right," to aides present in her mother's room in regards to the presence of the telephone wire on the floor. As Carillon did not meet its prima facie burden, the motion for

summary judgment must be denied regardless of the sufficiency of plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by Carillon Nursing & Rehabilitation, LLC, for summary judgment dismissing the complaint is denied.

Dated: Riverhead, New York
October 18, 2019

VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION