

Perez v Gonzalez y Gonzalez Rest.

2020 NY Slip Op 31097(U)

April 26, 2020

Supreme Court, New York County

Docket Number: 160799/2016

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

NELIDA PEREZ,

Plaintiff,

- v -

GONZALEZ Y GONZALEZ RESTAURANT, 625
BROADWAY VENTURE, LLC

Defendant.

-----X

INDEX NO. 160799/2016

MOTION DATE 07/16/2019,
07/16/2019

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 100, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 126, 128

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 98, 99, 101, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 129

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

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

Defendant Gonzalez Y Gonzalez Restaurant (the Restaurant) moves,¹ pursuant to CPLR 3212, for summary judgment dismissing the complaint against it (Motion Seq. No. 004). Plaintiff opposes the motion and the Restaurant replies. Defendant 625 Broadway Venture, LLC (625 Broadway) also moves, pursuant to CPLR 3212, for summary judgment (Motion Seq. No. 005). Plaintiff opposes and 625 Broadway replies.

¹ Defendant appeared as 192 Mercer Street Corporation d/b/a Gonzalez Y Gonzalez.

FACTUAL AND PROCEDURAL BACKGROUND

In this personal injury action, plaintiff Nelida Perez alleges in her verified complaint that, on May 6, 2016, while lawfully in the Restaurant, located at 192 Mercer Street in New York County (the premises), “she was caused to sustain serious and permanent injuries because of [an] unsafe condition which caused her to fall” (Doc. 1 at par. 34).² In the complaint, plaintiff alleged that each of the defendants owned, operated, utilized, managed, leased, inspected, repaired, maintained, cleaned, and/or made special use of the premises. She further alleged that the premises in the area where plaintiff was injured was “improperly and inadequately constructed, repaired, inspected and maintained such that it constituted a severe hazard, a trap for the unwary, a public and private nuisance, and was in violation of applicable code” (*id.* at par. 36), and that the defendants had “actual and constructive notice of the defective, dangerous and trap-like conditions in existence” on the premises “but failed to remedy same in a timely fashion or warn the plaintiff of the dangerous conditions prior to the happening of the occurrence as herein alleged” (*id.* at par. 38). Plaintiff also alleged that each defendant “breached [its] respective duties to maintain the aforementioned premises and floors” by “permitting, causing and allowing the aforesaid premises to remain in the aforesaid unsafe, defective, and dangerous and reoccurring condition” (*id.* at par. 39).

Plaintiff further alleged in the complaint that the defendants: failed “to properly and adequately remove, clear, clean, inspect and control an accumulation of slippery substances from said premises, and keep same free from an accumulation of slippery substances;” failed “to cure

² For purposes of this Decision and Order, this Court generally identifies a NYSCEF Document Number by the number initially assigned at that document’s first filing or in connection with papers first filed with the instant motions. This Court generally does not reference the additional NYSCEF Document numbers for other filings of the same document.

the defective condition within a reasonable time;” and failed “to effectuate repairs within a reasonable time following the receipt of notice of the defective condition as hereinbefore described” (*id.*). Additionally, she alleged that defendants’ “agents, servants and/or employees, were careless, reckless, and negligent” in that they failed to maintain the premises “in a good and safe condition, free from hazards and defects,” failed to erect warnings or barriers, failed “to comply with applicable rules, regulations, and laws,”” and were “otherwise careless, reckless, and negligent...” (*id.*).

The Restaurant and 625 Broadway thereafter joined issue by verified answers dated March 9 and June 7, 2017, respectively, in which they denied all substantive allegations of wrongdoing, asserted affirmative defenses, including contributory negligence, and asserted cross claims against one another (Docs. 8 and 9).

Bill of Particulars

In her October 27, 2017 verified bill of particulars responsive to the Restaurant’s demand, plaintiff alleged that the incident occurred on May 6, 2016 at approximately 2:00 a.m. (Docs. 92 and 95, Ex. D, at par. 2), and that as a result of her fall she sustained a fractured right wrist and other injuries (*id.* at par.7). The bill of particulars repeated the complaint’s allegations regarding defendants’ negligence and added that defendants failed “to inspect for slip hazards,” and failed “to ensure that the aforementioned area was not slippery” (*id.* at par. 5). Additionally, plaintiff claimed in the bill of particulars that defendants: failed “to abide by the terms set forth in applicable street opening permits or applications;” failed “to restore the aforementioned area pursuant to local law 14;” failed “to consider public safety above their own concern of keeping down costs;” failed “to use common sense,” and failed “to adequately research construction

endeavors” (*id.*). Additionally, plaintiff alleged in the bill of particulars that defendants failed: “to hire competent personnel”; “to properly train personnel;” and “to supervise their agents, servants, employees and/or contractors” (*id.*).

Plaintiff additionally responded that she “incorporates by reference the findings of plaintiff’s experts, if any, and alleges that each and every failure to comply with pertinent code constitutes negligence and carelessness” (*id.* at par. 5, and at 7). Plaintiff did not identify any specific code violation. Plaintiff asserted that the demand for specification of the alleged statutory violation was improper, “in that the plaintiff in the complaint did not allege violations of particular statutes, rules, and/or ordinances and therefore is not required to provide such” (*id.* at par. 23).

In her March 16, 2018 verified bill of particulars responding to the demand of 625 Broadway, plaintiff essentially reiterated the allegations set forth in her bill of particulars as to the Restaurant and further claimed that the dangerous and defective condition was “[w]etness and/or moisture and/or debris creating a slipping hazard on the floors of the aforementioned premises and/or the floors at the aforementioned location are inherently slippery and/or defective” (Docs. 92 and 95, Ex. E, at par. 4[a]). Plaintiff also alleged that the “defendants had actual and constructive notice of the dangerous and defective conditions” (*Id.* at par. 4[c]), and that the “Restaurant created and/or [was] aware of the dangerous and defective conditions prior to the occurrence” (*id.* at pars. [4][d]-[e]). Plaintiff stated that “at this time [she] is unaware of the exact identities of the defendants who it is claimed received actual notice” and “also unaware at this time as to who gave the defendants notice and when and where it occurred” (*id.*). Plaintiff alleged that defendants had constructive notice because the “aforementioned condition(s)” existed “for such a period of time that on the exercise of reasonable care, the defendants, their

servants, agents, employees and/or licensees should have discovered and repaired such dangerous condition. At this time, Plaintiff is unaware of the exact duration for which the said defect existed” (*id.* at par. 4[f]). Plaintiff did not identify any code violations and further stated that “[a]t the present time plaintiff is not alleging any violations of statutes, however, plaintiff reserves the right to supplement and/or amend this response upon further discovery” (*id.*).

By supplemental verified bill of particulars dated March 16, 2018, plaintiff alleged, in response to the Restaurant’s demand number 6: “Dangerous/Defective Condition: Wetness and/or moisture and/or debris crating a slipping hazard on the floors of the aforementioned premises and/or the floors at the aforementioned location are inherently slippery and/or defective” (Docs. 38, 92 [Ex. F]). The supplemental verified bill of particulars did not include a specification of a particular statute, rule, code, and/or ordinance that plaintiff alleges the defendant violated.

Plaintiff did not subsequently amend or supplement her bills of particular to specify defendant’s alleged violations of any particular statute, rule, code and/or ordinance. As noted *infra*, she filed her note of issue and certificate of readiness on January 8, 2019, and the first and only time plaintiff alleges specific code violations is in the expert affidavit she submits in opposition to the instant summary judgments motions.

Discovery

In her March 16, 2018 responses to defendants’ combined demands for expert information, plaintiff stated that she “has not retained an expert witness for trial. After an expert is hired, the plaintiff will notify the defendants pursuant to the applicable provisions of the CPLR” (Docs. 92 and 95, Exs. G and H, unnumbered pages). Plaintiff further responded that she

was unaware of any notice witnesses, witnesses to the occurrence or to the acts, omissions or condition which caused the occurrence, and did not possess any party statements (*id.*).

In its June 19, 2018 responses to plaintiff's notice for discovery and inspection and combined demands, the Restaurant responded "none" to plaintiff's demands for: all reports, incident reports, and statements relating to similar occurrences; all "records of inspection, maintenance and/or repair regarding the subject matter location for a period of two years prior to the within accident and one year subsequent to the within accident;" plaintiff's statements; and incident and/or accident reports. (Doc.114, at pars. 4, 5, 13 and 16).

The Lease

The lease in effect on the day of plaintiff's accident was dated April 25, 2011, and was entered into by the Restaurant, as tenant, and James D. Kuhn, as Temporary Receiver for 625 Properties Owners LP as landlord (lease agreement) (Doc. 92, at pars.19 and 20, Exhibits O and P). After the commencement of the lease term, 625 Broadway became the owner/landlord of the premises (Doc. 92, paragraph 21, Exts. P and Q). The term "premises" was defined as "a portion of the ground floor and basement as more particularly shown on Exhibit A" that was made part of the lease agreement (Doc. 92, Ex. O).

Paragraphs 4 (A) and 29 of the lease agreement provided that the Restaurant was in charge of maintenance and repairs to the premises and provided the cleaning, as follows:

"4. REPAIRS AND MAINTENANCE. A. Tenant shall, throughout the Term, take good care of the Premises, the fixtures and appurtenances therein, the sidewalks adjacent thereto and the storefront, at Tenant's sole cost and expense, make all nonstructural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear and damage"

“29. SERVICES

H. Cleaning/Provided by Tenant. Tenant, at Tenant’s expense, shall cause the Premises to be kept clean in a manner reasonably satisfactory to Landlord . . . In addition, Tenant shall, at its own cost and expense, clean and remove all garbage, waste, rubbish and refuse from the Premises and the Building in accordance with such rules and regulations Landlord deems reasonably necessary or desirable for the proper operation of the Building.”

The lease agreement additionally provided, in paragraph 41 (3), that the Restaurant maintain the premises in good repair and good condition:

41. ADDITIONAL COVENANTS

“(3). Good Order and Condition. Tenant agrees that, at its sole cost and expense, and in a manner reasonably satisfactory to Landlord, Tenant shall keep, put and maintain the Premises . . . located in the Premises and exclusively serving the Premises and every part thereof in good repair, good working order and good condition. Tenant shall be responsible, at its sole cost and expense, to perform all nonstructural repairs to the Premises without regard to cause, and to perform all structural repairs to the Premises caused or required directly or indirectly by acts or omissions of Tenant or its employees, invitees and representatives”

Paragraph 41 (4) of the lease agreement provided that “Tenant, at Tenant’s expense, shall cause the Premises to be kept clean.”

Paragraph 14 (A) permitted landlord access to the premises under the following circumstances:

“Tenant shall permit Landlord, Landlord’s agents and public utilities servicing the Building to erect, use, maintain and replace, concealed ducts, pipes and conduits in and through the Premises. Landlord, Landlords agents . . . shall each have the right to enter the Premises at all reasonable times and upon reasonable prior notice (except in an emergency in which event no such notice shall be required) . . . (iii) to make such decorations, repairs, replacements, alterations, improvements or additions as Landlord may deem necessary or desirable to the Premises or to any other portion of the Building or which Landlord may elect to perform following Tenant’s failure to make repairs or perform any work which Tenant is obligated to perform under this Lease, (iv) for the purpose of complying with laws, regulations or other requirements of government authorities and (v) to perform remedial work after the failure of Tenant to perform the

same in accordance with the terms of this Lease . . . Nothing herein contained, however, shall be deemed or construed to impose upon Landlord any obligation, responsibility or liability whatsoever, for the care, supervision or repair of the Building or any part thereof, other than as herein provided.”

Paragraph 14 (B) provides as follows:

“Other Landlord Privileges. Landlord shall have the right at any time, without the same constituting an actual or constructive eviction and without including any liability to Tenant therefor, to change the arrangement and/or location of entrances or passageways, doors and doorways, corridors, elevators, stairs, toilets and other public parts of the Building. . . Tenant acknowledges that Landlord may (but shall have no obligation to) perform repairs, improvements, alterations and/or substantial renovation work in and to the public parts of the Building and the mechanical and other systems serving the Building (which work may include improvements to the lobby and facade of the Building, which may require that scaffolding and/or a sidewalk bridge be placed in front of the Building, and the replacement of window glass, requiring access to the same from within the Premises).”

Deposition Testimony

This Court addresses at length the deposition testimony, as the moving and opposing parties rely on and interpret differently their selected portions, and plaintiff’s expert affidavit is based in part on his reading of the same. This Court notes that the testimony reflects conflicting accounts as to certain material facts but also narrows certain allegations raised in the complaint and bills of particular.

Plaintiff’s Deposition

At her deposition on July 11, 2018, plaintiff testified that she visited the Restaurant on May 5, 2016, which was Cinco de Mayo and her birthday (Pltf. Deposition Tr., attached as Ex. 1

to Docs. 92 and 95, and Docs. 111 and 121, at 77:23 to 78:4). She had been to the Restaurant before and had never tripped or fallen there (*id.* at 104:3-7).³

Around 12:00 a.m. on May 5th or 12:30 a.m. on May 6th (*id.* at 21:10; 25:9; 25:20-21), plaintiff left the bar area where she was seated to go to the bathroom (*id.* at 29:18-20). At that time, there were no dinner chairs and tables in the area and, instead, it was a “big dance area” (*id.* at 106:5-18; 22::23) and the “dance floor was all the way down to the bar” (*id.* at 122:7-8),

She walked through the hallway, which had a wood floor, and through the open door that led to the stairs which led to the bathroom (*id.* at 77:10-17; errata sheet entries for page 121, line number 22, 23; for page 112, lines 18-20). In the hallway area prior to the door she saw something “shiny and a puddle of water or wine, I didn’t know what it was so I went around it” (*id.* at 25:14-16). She saw this both on her way to and from the bathroom (*id.* at 26:7-10; 31:21 and 24). “It look[ed] like liquid, shiny” (*id.* at 31:22). She did not observe any other area of the floor that had liquid that evening (*id.* at 129:5-9), she did not have to walk around any other bodies or pools of liquid that evening (*id.*), and that was the first time she saw the liquid (*id.* at 109:21-25). When she was walking to the bathroom, the floor felt “a little bit slippery” (*id.* at 114:2-7). In response to the question “Do you know what was causing the floor to feel that way,” plaintiff answered “I really can’t tell you that” (*id.* at 114:1-10), and in response to the question of whether she knew how long the water had been on the floor when she was going to the

³ The testimony of plaintiff and the Restaurant’s co-owner Cirillo conflicted as to the frequency of plaintiff’s visits to the Restaurant. Plaintiff testified that she visited the Restaurant “not too often but once in a blue moon a friend would invite me, I would go. But I didn’t go there many times” (*id.* at 24:22-24). She also said that she had been to the Restaurant one to three times before (*id.* at 79:21-80:2). In contrast, Cirillo testified that he had seen Perez at the Restaurant countless times (*id.* at 73:23). He said that she was a “great customer” who went to the Restaurant maybe two or three times a week (*id.* at 74:2-7); the bartenders and everyone knew who she was (*id.* at 74:17-18); and she was treated as a “VIP” (*id.* at 76:7-20). She usually stood or sat at the end of the bar (*id.* at 74:8-16). The nonparty witness testified that one of the bouncers approached her and Perez and knew them “from going there, he’d always check up” (*id.* at 26:16-21).

bathroom around midnight, plaintiff testified that: “Right now, that answer, I cannot give it to you, but I know that when I went to the bathroom, I saw that water” (*id.* at 114). She spent approximately 10 minutes in the bathroom and then returned to the bar (*id.* at 25:17-18). She did not tell anyone about the water or liquid she observed on the floor (*see id.* at 25: 12 -20).

Approximately an hour later, at around 1:00 a.m., a gentleman, whose name she did not know, asked her to dance (*id.* at 25:19-21; 115:7-11). She followed him and “was looking forward” and “didn’t look to the floor” (*id.* at 111:2-4). Before she started to dance (*id.* at 33:10) or one or two seconds after when she started moving (*id.* at 118:3-5; 18:12-13), she ended up falling on her back on the floor in the corner in the hallway leading to the bathroom (*id.* at 118:18-25; 25:21-25). The gentleman who was walking ahead of her did not slip or fall (*id.* at 138:15-20). The accident occurred “around 1:00, 1:30” a.m. on May 6th, 2016 (*id.* at 21:10-15). She could not get up from the floor and after the gentleman helped her up, her “blouse was all wet at the back” and she “realize[d] they didn’t clean that water. That’s the corner I end up falling” (*id.* at 26:4-6). She identified the location in photographs marked as Exhibits A and B (the deposition photographs). She fell in the same area where she saw the liquid earlier in the night (*id.* at 26: 20-23; 32: 6-11). She ended up “slipper[ing] [sic] into that water” (*id.* at 32: 4-5); she “just end up like slipper[ing] [sic] on that water on that ground, on that slippery, waxy ground” (*id.* at 75:9-10). The gentleman helped her back to the bar, she was in pain and wanted to go home.

When questioned about lighting, she testified that there was “dim light” in the Restaurant (*id.* at 116:24; 117:4) and in the bar area where she was sitting (*id.* at 117:19-23). There were “very dim light fixtures” in the area where she slipped and fell (*id.* at 117:5-8); she did not know

the location of the closest light fixture (*id.* at 117:9-11). She did not know whether the dim lighting was similar to lighting found in other clubs that she visited (*id.* at 117: 12-18).

She did not know whether the liquid on the floor was water or alcohol and, as she also ended up cutting her wrist, she did not know whether there was glass on the floor (*id.* at 27:3-6). She felt immediate pain in her right hand, “like [she] couldn’t move [her] wrist, [her] hand and bleeding, blood coming out” (*id.* at 35:18-23). She insisted that “[b]ecause [the Restaurant was] so crowded [because it was] Cinco de Mayo, they should have people around it cleaning because it’s a lot of people dancing, a lot of people walking back and forth and I didn’t see no one with a mop before or after” (*id.* at 33:3-7). When asked whether after her fall she “actually look[ed] around to see if there was any liquid on the ground”, she testified that: “I be honest with you, when you fall, you lose your - - how you say? Your connection, your nerves. You’re hurt, you’re in pain, you’re not concentrating on what’s going on around you but your pain, I’m okay? What happened? And that’s what happened, this is my answer” (*id.* at 73:14-11). She was not looking at the floor and did not remember whether she saw any pool or body of water or liquid on the floor when she fell (*id.* at 111:14-21). In her errata sheet, sworn to September 6, 2018, for p. 11, for lines 18, 19, 21, plaintiff stated: “After the fall, I felt my blouse was wet that’s when I looked on the floor and I saw the water,” listing the reason as “I didn’t remember at the time” (Doc. 121).

When asked whether she ever saw or felt liquid after she fell onto the floor, she testified that her “blouse was completely wet” and “[t]hat’s how [she] knew that liquid was there” (*id.* at 111:5-10). She “just saw that water and shiny floor and that was all I saw, but I didn’t see anything else” (*id.* at 112:3-7), explaining that she used the word shiny “because when you look, the reflection of the lights even though they were low, shows the floor shiny. It could be wax that

they put in there and then the puddle of water like one inch, one foot” (*id.* at 112:10-14). She also explained that, when she stated the ground was waxy, she meant “when you look at the floors, especially a wooden floor, you see shiny, so in my head, you know, I said they put some kind of wax in here. And even after the fall, I thought of that, my back is wet, not only the water help me to fall but maybe the wax floor” (*id.* at 132:20 - 25). She described the liquid she saw as a “puddle of water [was] like one inch, one foot” (*id.* at 112:13-14), and also described it as one foot long and approximately half a foot wide (*id.* at 130:20;130: 23). There was no food or garbage on the floor (*id.* at 136:14 to 137:1). She did not see any buckets or mops in the area where she saw liquid (*id.* at 116:9-12).

Plaintiff further testified that: “If it’s the place crowded like that, I believe they have someone that dry [sic] that water. But when I end up falling and my blouse wet, I said, this is why I end up falling because they didn’t clean that water, they didn’t took [sic] care of whatever they supposed to take care” (*id.* at 74:9-15).

Restaurant’s Deposition

Joey Cirillo (Cirillo), a co-owner of the Restaurant, was deposed on August 7, 2018, and plaintiff waived the deposition of 625 Broadway (Doc. 92, Ex. K). Cirillo and his partner acquired the Restaurant approximately eight years before the alleged incident (Deposition Tr. Joey Cirillo, Doc. 92 [ex. J] at 7:5) and, in 2012, they renovated the space (*id.* at 7:7), including resurfacing the entire floor with reclaimed hardwood (*id.* at 8:5-10), “all done to code” (*id.* at 8:17-22). The kitchen was located downstairs, where all the cooking took place (*id.* at 20:2; 20:18-19). Floor maintenance, including buffing to get rid of scratches (*id.* at 20:22-25), generally occurred every six months to a year depending on the condition of the wood (*id.* at

20:11). Sometimes the floor got a light buff, and sometimes it got a light sanding and some polyurethane to keep it looking clean (*id.* at 20:12). Polyurethane had last been placed approximately eight months prior to May 5, 2016 (*id.* at 43:17-19). The Restaurant had a total of four restrooms, two for women and one for men downstairs in the basement, which is the lower level, and one handicap accessible restroom on the main floor [*id.* at 18:20 to 19:15).

The Restaurant employed three porters who cleaned the premises (*id.* at 47:17-20) and a security force, which consisted of seven security guards on busy days such as Cinco de Mayo (*id.* at 25:7-8; 25:22-25), which was the busiest time of the year (*id.* at 23:6). Crowd control was overseen by a security guard inside the venue, who monitored how many people entered and exited, with the number not exceeding the occupancy limit of 135 (*id.* at 24:17-18; 25:12-16; 25:22 to 26:3). One porter's "job is to walk around with a sweeper, with a picker-upper and he has a mop and he's picking up debris from the floor, any empty cups, sweeping up paper napkins, anything on the floor. He's on the floor the entire time" (*id.* at 47:20 to 48:2). Additionally, there were two bathroom attendants (*id.* at 59:18 to 60:5) and two porters "walking up and down that hallway, picking up, sweeping up paper napkins and toilet tissue, whatever you have" (*id.* at 48:5-7). In response to the question: "Do you yourself also walk around to see if there's any spills on the floor?", Cirillo answered "I do, and I literally pick it up myself" (*id.* at 56:15-18).

At about 5:00 p.m. on Cinco de Mayo, after lunch service ended, the Restaurant removed the tables and chairs from the dining room floor and staff carried them downstairs to storage (*id.* at 48: 25 to 49:8). Only bar stools and a permanent bench by the wall on the far left side of the Restaurant remained on the main floor (*id.* at 49:17-25; 50:2-6), so that the room was open for dancing (*id.*). In addition to the three porters, the Restaurant "probably had more additional, as

well” on Cinco de Mayo (*id.* at 53:21-22), “[b]ecause it’s the busiest out of the year. The place has to be kept clean” (*id.* at 53:25 to 54:2). The porters were assigned to clean up anything, such as drinks, on the floor (*id.* at 54:3-7), using the mop, bucket, sweeper and a picker-upper located on both sides of the room behind the swinging doors (*id.* at 54:8-14), one station located in the area by the accessible restroom (*id.* at 56:21-22), and one past the ATM machine and phone charging station in the corridor leading towards the basement (*id.* at 56: 23-25; 57: 11-12). If the security guards saw something on the floor that needed cleaning, “they [were to] take it upon themselves to actually grab the mop or whatever have you and clean up the floor immediately” (*id.* at 55:7-9). Cirillo testified that it was important for safety that spills on the ground were attended to as soon as possible to prevent people from slipping on the floor (*id.* at 56:7-13). The hot water in the bucket used for the wet mop included Pine-Sol or another sanitizing solution (*id.* at 58:21-25; 72:13-16).

The floor porter’s responsibility was to walk around and look for spills (*id.* at 71:25 to 72:3). The observations and spot cleanups were not recorded in a document and there is no schedule for the porters (*id.* at 59:2-13). Cirillo also instructed busboys and security guards to clean drinks spilled on the floor, whether or not it was part of their job requirements (*id.* at 61:15-19; 60:24 to 61:6). Cirillo admitted that it was “a fact of running a bar or being in a bar, [that] people spill drinks.” (*id.* at 61:1-14). During Cinco de Mayo, the floor porter was in “continuous motion,” “continuously walking through the entire top floor” (*id.* at 71:11-12; 71:15). The floor was all wood, its composition did not change, and it was level (*id.* at 73:3-12).

Plaintiff called Cirillo approximately six weeks after Cinco de Mayo, claiming she was injured at the Restaurant that day (*id.* at 77:20-21), and wanting him “to give her a cash envelope for her not to sue” (*id.* at 77:5, 9-10). Perez told him that “she fell on glass (*id.* at 79:17-18), and

Cirillo responded “that is not possible because we only use plastic cups and there were only plastic cups served” (*id.* at 79:17-20). She told him “she was very, very distressed because she fell on glass and she thought that she deserved to get some compensation because of it. And when was the earliest convenient time that [he’ll] be able to sit down with her to discuss a cash payment” (*id.* at 80:4-9). He testified that “this whole claim is totally fraudulent” (*id.* at 81: 5-6), because “the areas that she said she fell has changed three times. The element [sic] came first on glass, and after there was no glass served that night, it changed to spillage on the floor” (*id.* at 81: 8-12). Additionally, she changed the location of the fall three times, first claiming it happened by the ATM machine (*id.* at 81:22-25), then on the dance floor (*id.* at 82:2) and then “she said it happened on the way down the stairs to get the building involved” (*id.* at 82:2-4). He requested that she tell him how it happened but she would not be specific (*id.* at 77:20-25). He called her back with his lawyer on the telephone, and his attorney requested that she bring her own lawyer when she came to discuss the incident (*id.* at 78:8-17), but there were no further conversations (*id.* at 78:23 to 79:2).

Cirillo agreed “100 percent” that, if there were liquid or spillage on the floor, it should be cleaned up as it is unsafe because it is slippery (*id.* at 82:17-23). When asked whether an employee should have cleaned up liquid on the floor for an hour, Cirillo said that it was “impossible” that a liquid would have been present for so long (*id.* at 82:24 to 83:4). In response to the follow-up question of “But my question is: If it was on the floor for an hour, would that be something that would be unsafe?”, Cirillo answered “[a]nd my answer is that it would be impossible for liquid to be on the floor for even ten minutes or even five minutes” (*id.* at 83:5-10), because the Restaurant keeps a “tight, tight, tight clean shift” (*id.* at 83:12-13).

Depositions of Nonparty Witnesses

On April 30, 2019, defendants took the deposition of nonparty Liz Rosario (Rosario).⁴ Rosario has known Perez for approximately 23 years and was with her at the Restaurant on May 5 and 6, 2016 (Docs. 115, Deposition Tr. at 6:12-15;7:21-22). Rosario saw liquid on the floor downstairs in the basement on her way to the bathroom (*id.* at 14:4-15), but did not remember the time (*id.* at 13:7-10). She also saw liquid when she walked back from the bathroom and was walking back up to the main floor (*id.* at 15:21-24) and saw “plenty” of liquid on the main floor in the bar area (*id.* at 15:25 to 16:4). Rosario did not slip in any of that liquid (*id.* at 15:18-20). At approximately 10:00 or 11:00 p.m., it was very crowded and she saw a “big puddle of liquid, whatever that might’ve been” when she “walked towards the back where the stage is ‘cause I had a friend over there and there was liquid in the middle of the dance floor,” and she also saw liquid “behind where [she] was sitting“ (*id.* at 16:7-14, 18-24). “[T]here was spillage everywhere in reality” (*id.* at 16: 4-25), and she “think[s] maybe people were spilling their drinks and - - and they weren’t able to keep up with it. I don’t know. I’m speculating here, but there was liquid everywhere” (*id.* at 17:2-5). She did not recall that there was anything other than liquid on the floor, such as debris or garbage (*id.* at 17:6-12). She “slipped several times actually in - - in the puddles” (*id.* at 17:10-11), but did not fall (*id.* at 19:6). She also slipped when she “went walking towards the back to greet [her] friend and walking - -walking towards the back and returning back to the bar where the group was” (*id.* at 17:20-25). Rosario did not recall the color of the liquid (*id.* at 17:13-19). She testified that: “I can’t say I recall seeing throughout the night someone specifically out there cleaning up, picking up glasses, bottles, mopping. I can’t say I

⁴ Plaintiff, who submits the nonparty deposition transcript, does not state in the attorney affirmation that it was signed by Ms. Rosario, and the exhibit does not include the signature page. Since defendants took the deposition, this Court will assume that the transcript was signed and that it is thus admissible and may be considered on this motion.

saw that” (*id.* at 21:17-19). She stopped seeing anyone cleaning or mopping or picking up glasses once it got to the point that it had gotten more crowded, when “in [her] opinion” it was crowded “past full capacity” (*id.* at 41:3-14). The last time she observed any workers mopping or cleaning was approximately 7:00 or 8:00 p.m. (*id.* at 45:1-7).

Rosario did not tell anyone about the liquid on the floor (*id.* at 19, lines 7-9).

Rosario did not see plaintiff fall; she “didn’t actually see her go down” (*id.* at 23:20-21). She saw someone, she thinks the person plaintiff was dancing with, holding plaintiff and bringing her back to the bar (*id.* at 23:16-21]. Plaintiff was coming from the center of the dance floor (*id.* at 32: 16-19), an area that was not close to where one goes to get to the bathroom and not near an ATM machine (*id.* at 33:2-16). In response to the question of whether plaintiff showed her where the liquid was, Rosario testified that: “Well, she pointed to the back behind her from where we were” (*id.* at 37:5-7), “back there” on the dance floor (*id.* at 37:14-15), “somewhere in the - - can’t say exactly where she pointed” (*id.* at 37:17-18). When she was asked whether she looked in the area where plaintiff pointed, Rosario testified: “But see I already knew that was there because I had walked by and I knew that the floor was wet” (*id.* at 37:19-23). When asked “how long was it between when you saw that liquid until her accident,” Rosario responded: “I don’t know” (*id.* at 37:24 to 38:1).

Rosario knew plaintiff “wasn’t feeling well. She had a fall and she wanted to leave, so we left” (*id.* at 23:12-13) at approximately 1:00 a.m. (*id.* at 23:2-3). Rosario testified that plaintiff “said she fell and she showed me her clothing. She was wearing white clothing and it was all wet and icky, yuchy (*id.* at 24:7-9). Plaintiff told her “she was dancing and she slipped and went down” (*id.* at 25:22-23), but did not tell her what she slipped on, “[s]he just said there was - - the floor was wet and she fell” (*id.* at 27:14-16).

Note of Issue and Related Motion Practice

Plaintiff filed a note of issue and certificate of readiness on January 8, 2019. Defendants then filed a motion (motion sequence 003) to vacate the note of issue and to compel plaintiff to produce certain outstanding discovery (Doc. 72), and plaintiff opposed the motion and cross-moved for sanctions (Docs. 75, 78). By stipulation dated April 2, 2019, defendants withdrew their motion to vacate the note of issue and the parties agreed that the cross motion would be taken on submission (Docs. 102, 103). By order dated June 12, 2019, this Court denied the cross motion, finding that defendants set forth a reasonable basis for their motion since the depositions of nonparty witnesses with possible knowledge of the alleged incident had yet to be conducted and defendants' actions did not rise to the level of frivolous conduct as defined in 22 NYCRR 130-1.1 (Doc. 131).

LEGAL CONSIDERATIONS

The Restaurant now moves (motion sequence 004) for summary judgment dismissing the complaint against it. It is not disputed that the Restaurant is the tenant of the premises and the accident occurred inside the premises.

625 Broadway also moves (motion sequence 005) for summary judgment dismissing the complaint against it. It is not disputed that 625 Broadway is the out of possession landlord of the premises.

The “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

“Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

“Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). “On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The role of the court in determining the “drastic remedy” of summary judgment is “issue - finding,” not “issue - determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

The Restaurant’s Motion (Mot. Seq. No. 004)

Contentions

By notice of motion and supporting affirmation dated March 11, 2019, the Restaurant moved for summary judgment, contending that plaintiff cannot establish a prima face case against it, as it did not have actual or constructive notice of any allegedly defective condition which purportedly caused plaintiff to slip and sustain injuries. Relying on deposition testimony and other evidence, the Restaurant asserts that it has demonstrated its entitlement to dismissal of this slip and fall action since it did not create the allegedly defective of dangerous condition, it

did not know of the condition and fail to remedy it, and the condition did not exist for a sufficient length of time that, in the exercise of reasonable care, it should have known of and remedied the condition.

Relying on plaintiff's deposition testimony, the Restaurant argues that plaintiff did not notify anyone about the liquid she observed earlier on the floor, did not observe liquid on the floor immediately prior or subsequent to the accident, and only believed that she slipped on liquid because her blouse was wet after the accident. Additionally, while plaintiff, in her errata sheet "made a substantive correction contradicting her deposition testimony" (Doc. 95, affirmation of attorney in support, at par. 27), by stating that, when she looked down at the floor after she fell and saw water, "she did not state that this was the liquid she previously observed" (*id.*). Similarly, although plaintiff testified that "her accident occurred in the same area of the restaurant where she previously saw the liquid on the floor, she did not testify that this was the same liquid she fell on" (*id.*).

The Restaurant also asserts that Cirillo's deposition testimony demonstrated that he did not observe water or liquid in the area where plaintiff allegedly slipped and had not received any complaints of any kind concerning the area where she allegedly fell. Additionally, the Restaurant implemented procedures to ensure that the premises were maintained in a safe condition. These procedures included: the Restaurant's porters continuously walked around to look for spills, which would have made it impossible for liquid to be on the floor for even 5 or 10 minutes; there were two stations on the Restaurant's first floor that stored cleaning supplies, including a mop, bucket, sweeper and picker-upper; and while it is the porters' responsibility to clean, all employees took it upon themselves to clean spills when they spotted them. The Restaurant also relies on Cirillo's deposition testimony that plaintiff changed her story from falling on glass to

falling due to spillage on the floor, and changed the location of the accident three times, from near the ATM machine, to the dance floor, to the stairs.

In opposition, plaintiff argues that the Restaurant's motion must be denied since it failed to meet its prima facie burden, including its burden on constructive notice. Plaintiff additionally argues that "[t]here is no question that the plaintiff slipped on liquid on the dance floor", that the liquid had been observed hours prior to the accident and that, as admitted to by Cirillo, there is no question that liquid on the dance floor is unsafe (Doc. 105, Attorney Affirmation in Opposition, at par. 4).

Relying on the party and nonparty deposition testimony, as well as plaintiff's opposing affidavit, plaintiff asserts that the Restaurant had constructive notice of the liquid on the floor, as it was in the same location for several hours. Moreover, Cirillo's deposition testimony addressed only general cleaning procedures, defendant failed to demonstrate that the cleaning procedures were actually followed on the day of the accident, and the Restaurant did not maintain schedules or records of cleanings or inspections. Plaintiff also argues that Cirillo's testimony is contradicted by nonparty witness Rosario's testimony that she did not observe any Restaurant employees cleaning the floor for several hours prior to plaintiff's accident.

In her opposing affidavit (Doc. 119), plaintiff states that, on May 5, 2016, at approximately 12:00 a.m., she went to use the Restaurant's restroom located in the basement and, on her way, she "observed a puddle of liquid on the dance floor behind where [she] had been sitting" (*id.* at par. 4). She stated that "[a]lthough the lighting was dim, [she] could see a shiny reflection coming from the puddle. It was approximately one (1) foot long, six (5) inches wide and one (1) inch deep" (*id.* at par. 4). On her return from the restroom approximately ten minutes later, she "observed the same puddle of liquid in the exact same position on the dance

floor” (*id.* at par. 5). At 1:30 a.m., “about an hour and a half” after she first observed the puddle of liquid, she followed the gentleman who asked her to dance “to an area of the dance floor that was not as crowded,” which “was the same area where [she] had previously observed the puddle earlier in the night” (*id.*). “As soon as [she] stepped onto the puddle with [her] right foot, [she] slipped and [she] fell backwards landing on [her] right wrist” (*id.*). The gentleman lifted her off the floor onto her feet, and “once [she] stood up [she] realized that the back of [her] blouse was completely soaked with the liquid from the puddle,” and she “looked down to see what it was that caused [her] to slip and [she] observed the same puddle of liquid in the exact same spot where it had been an hour and a half before” (*id.* at par. 6). Plaintiff stated that she fell in the same area she circled on the photographs marked at her deposition, in which area she previously observed the liquid, and that at her deposition she “also explicitly identified the cause of [her] floor as a puddle of liquid that was left on the dance floor for at least an hour and a half” (*id.* at par. 8). She attested that “[t]here is no doubt that the puddle [she] observed at approximately 12:00 a.m. was the same puddle that caused [her] to slip and fall at approximately 1:30 a.m. [and she has] never wavered on this fact” (*id.* at par.8).

Plaintiff also submits an affidavit dated March 20, 2019 from Robert L. Schwartzberg, P.E. (Schwartzberg) (expert affidavit) (Docs. 110 and 120). The identical expert affidavit is submitted in opposition to both of the instant summary judgment motions. In the expert affidavit, Schwartzberg states that he is a licensed and registered professional engineer in New York State, he possesses over 40 years of experience as an engineer, and he has performed work related to safety, structures, buildings and the “determination of specification and code conformance with federal, state and local laws” (*id.* at par.2).

Schwartzberg maintains that he bases his opinions on a site inspection he conducted on May 29, 2018, and his review of the following documents: the deposition photographs; plaintiff's verified bill of particulars in response to 625 Broadway's demand; the deposition transcripts of plaintiff and Cirillo; and the moving affirmations of defendants' attorney. He concludes that it is his "opinion within a reasonable degree of Engineering Certainty that hazardous conditions were created and allowed to remain in place at the subject restaurant" (*id.* at par.7).

He first addresses the coefficient of friction, which he concludes resulted in a slippery floor and plaintiff's slip and fall. He states that, during his inspection, he "tested the coefficient of friction of the specific area circled by plaintiff" on the deposition photographs, and that the "readings obtained at the accident site during [his] inspection are indicative of an unsafe surface for pedestrians" (*id.* at par.7), since the "coefficient of friction of the floor surface" "varied between 0.27 to 0.41 when the floor was dry, which is below standards held to be adequate for pedestrian travel (0.5 or greater), thus the floor surface is inherently slippery and dangerous" (*id.*). He further states that "when a finished floor of the type at the accident location becomes wet, the coefficient of friction thereat will be reduced as the flooring surface becomes more slick and slippery" (*id.*), and that as "defendants' establishment is regularly used for dancing within the premises, it is imperative that the flooring be maintained dry and that all persons be advised of the inherent dangers of the flooring in place at the locations" (*id.*). He states that this "was not done and plaintiff was caused to slip and fall on liquid on the subject floor" (*id.* at par. 7). Further, he states that to "make matters worse, there were no signs, posted materials or warning[s] present to advise persons within the facility of the inherent dangers of the flooring nor any warning to be aware of any upset flooring conditions such as spilled liquid on the floor"

(*id.*). In his affidavit, Schwartzberg does not cite to any source of the standards regarding the coefficient of friction which he relies upon, such as a regulation, treatise, industry standard or other authority.

He next concludes that the floor was not level, and that this is a structural condition violative of the New York City Administrative Code which, he asserts, provides that the owner is responsible for an unsafe and inherently slippery floor. He states that his inspection “revealed that the floor where the subject accident occurred is not level” and is “pitched downward and away from the bar toward the accident site at an angle of 0.5 degrees and is also inclined downward from the area of the doorway leading to the restrooms toward the accident site at an angle of 0.3 degrees. This allows for any nearby spilled liquid to collect and pool at the exact location where the plaintiff slipped and fell” (*id.* at par. 8). He states that it is his “opinion that the pitch and the surface of the floor are a part of the structure of defendants’ building,” and, therefore 625 Broadway, as owner, violated New York City Administrative Code, Article 6, section 27-128, which “mandates that the ‘owner’ is responsible for an unsafe and inherently slippery floor” (*id.*).

Schwartzberg next asserts that the lighting inside the premises violated Administrative Code section 27-381, and thereby Administrative Code Section 27-107, as it presents an unsafe condition that was a proximate cause of plaintiff’s accident. He states that his inspection revealed that the light intensity measurement at the site of the accident varied from a minimum of 0.39 foot candles to 0.60 foot candles, and not the required measurement of 2.0 foot candles. He opines that defendants’ “failure to comply with the Code requirements was a violation of good and accepted practice and presents an unsafe condition” (*id.* at par. 9), and that “the proximate

causes of this accident was [sic] the inherently dangerous floor as well as the unsafe lighting at the subject location” (*id.* at par.10).

Additionally, he states that 625 Broadway violated NYC Administrative Code, Title 28/New York City Construction Codes, Chapter 3, Maintenance of Buildings/Article 301 General section 28-301.1 “which places the responsibility for maintaining safe conditions (i.e. the subject floors and lighting) on the ‘owner’ of the subject premises. Due to the structural nature of the mis-leveled. floor, it is [his] opinion that the floor existed in this condition for a considerable duration” (*id.* at par.10). He further states that “the area where the plaintiff’s accident occurred was a high-trafficked area that led to defendant’s only bathroom. Thus, it was foreseeable that patrons would frequently pass by and spill drinks [in that area]. Towards that end, the accident occurred during the Cinco de Mayo celebration, during which the restaurant experiences an unusually high volume of customers” (*id.* at par. 10). He also states that as “the location where plaintiff’s accident occurred was separate from the dance floor, it would have been reasonable for defendants to place a mat in the area to soak up spilled liquids” (*id.* at par.10), and that defendants were negligent in failing to do so and failing to frequently inspect the area where the plaintiff slipped and fell (*id.*). He concludes that “[t]hese findings together and/or individually served to create an extremely dangerous and hazardous condition” (*id.* at par.10), and “[t]his is precisely what occurred to the plaintiff, Ms. Perez, and is the proximate cause of her fall” (*id.*)

In reply, the Restaurant asserts that plaintiff failed to defeat its showing that it is entitled to summary judgement. The Restaurant asserts that this matter “involves an open and obvious and transient condition (liquid) on the wooden floor” (Doc. 128, reply affirmation of Restaurant’s counsel at par. 4), and reiterates its prior reliance on plaintiff’s deposition testimony

showing that she did not observe the liquid immediately before or after the accident, believed she slipped on liquid because her blouse was wet, and did not testify that she fell on the same puddle of liquid she observed before. The Restaurant additionally argues that plaintiff “simply could have fallen due to a misstep” (*id* at par.10), the nonparty witness Rosario did not observe the fall, and it is significant that the gentleman who accompanied and preceded plaintiff onto the dance floor did not fall. The Restaurant again points to Cirillo’s deposition testimony that the porters continuously walked around the Restaurant looking for spills, that it was impossible for liquid to be on the floor for 5 or 10 minutes, that there are two cleaning stations, including mops, locating on the first floor, and that its employees clean spills whenever they spot them.

Analysis

“A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013], quoting *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Where a “defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed” (*Jacques v Richal Enters. Inc.*, 300 AD2d 45 [1st Dept 2002] [internal quotations and citation omitted]). A movant “bear[s] the burden of disproving an essential element of” the plaintiff’s claim and “cannot affirmatively establish the absence of notice as a matter of law . . . merely by pointing out gaps in the plaintiff’s case” (*Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012])

[internal quotation marks and citations omitted]). The burden then shifts to the plaintiff “to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Briggs*, 103 AD3d at 526, quoting *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]).

To establish a claim for constructive notice, a plaintiff must show that the defect was “visible and apparent” and “exist[ed] for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). “Evidence of a general awareness of debris and spills in [the area] does not require a finding that defendant is deemed to have notice of the condition that caused plaintiff to fall” (*Torres v New York City Hous. Auth.*, 85 AD3d 469, 469[1st Dept 2011] [internal citation omitted]). A “general awareness” of a condition is insufficient to constitute notice of a particular condition that caused the fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 968 [1994] [internal quotation marks and citations omitted]). A defendant’s “general awareness” that bar patrons “might spill their drinks on the dance floor does not obviate the plaintiff’s obligation to establish that defendant has actual or constructive notice of the particular condition which caused her to fall” (*Gloria v MGM Emerald Enters., Inc.*, 298 AD2d 355, 356 [2d Dept 2002] [internal citations omitted]). Although “evidence of an unremedied condition that recurred and caused prior accidents because it was not addressed could constitute constructive notice” (*Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012] [internal citations omitted]), where “a reasonable cleaning routine was established and followed, liability cannot be imposed” (*id.* [internal citations omitted]).

Whether to grant or deny summary judgment where constructive notice is claimed and defendant asserts it took reasonable precautions and had a reasonable cleaning routine depends

on the particular facts and circumstances of the case and the evidence before the court. Thus, summary judgment was proper where there was “no evidence that would permit an inference that the ice or wetness on which plaintiff slipped was created by defendant’s employees or had been on the floor of defendant’s crowded restaurant for a sufficient length of time to permit defendant’s employees to discover and remedy it”, and it was the defendant bar manager’s uncontradicted deposition testimony that there were no complaints of spills and “he inspected the floor on a regular basis and had it cleaned as necessary” (*Stefan v Monkey Bar L.P.*, 273 AD2d 133 [1st Dept 2000]). Defendants also met their prima facie burden where they submitted evidence “including their cleaning inspection schedule which indicated that the cafeteria floor was inspected every 15 minutes and was inspected about two minutes prior to plaintiff’s fall, and the testimony of the cafeteria manager that no liquid was observed on the cafeteria floor” (*Gagliardo v Compass Group, USA, Inc.*, 173 AD3d 574 [1st Dept 2019]) [internal citations omitted]).

In contrast, a denial of summary judgment was proper where defendants failed to provide sufficient details regarding the staff’s actions, the cleaning routines followed and the last time or how often the area was checked prior to the fall (*Dehuna Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]; *Jacques*, 300 AD2d 45 [1st Dept 2002]).

A fall resulting from a floor’s inherently slippery condition, such as it being composed of terrazzo or marble, is insufficient to establish notice and is not actionable (*DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181 [1st Dept 2007]; *Duffy v Universal Maintenance Corp.*, 227 AD2d 238 [1st Dept 1996]). So too the “opinion of plaintiff’s expert that the coefficient of friction of the subject area of the restaurant floor was below the generally accepted minimum, causing the floor to be dangerously slippery even when it was clean and dry, fail[s] to raise a

triable issue of fact” (*Green v Gracie Mews Rest. Corp.*, 105 AD3d 578 [1st Dept 2013]).

Similarly, a “theory that the accident was proximately caused by inadequate illumination” will not defeat summary judgment where the plaintiff admitted at their deposition that they saw the liquid substance on the floor before they fell and “offered no evidence that [the] fall was precipitated by any hazard [plaintiff] failed to see due to poor lighting” (*Jenkins v New York City Housing Auth.*, 11 AD3d 358, 359 (1st Dept 2004)).

Engaging in issue finding and not determination and viewing the facts in the light most favorable to plaintiff as the non-moving party, this Court finds that the Restaurant has not demonstrated that it is entitled to dismissal of the complaint against it as a matter of law. The facts requiring a trial center on constructive notice including, but not limited to, disputed factual issues as to whether the slip and fall was a result of liquid located on the Restaurant’s floor, whether and for how long the liquid was on the floor, whether the condition was visible and present for a sufficient period of time to remedy it, and whether the Restaurant maintained a reasonable cleaning routine that was followed on May 5- 6, 2016. The extent of, and weight to be given to, the conflicting and contradictory evidence are left for determination at trial, as is the persuasiveness of plaintiff’s claim and the Restaurant’s defenses, and the issue of credibility.

In so determining, and without opining on the ultimate merits of plaintiff’s case or issues to be addressed by the trial court, this Court notes that the deposition testimony does not support the Restaurant’s contention that it is not liable as a matter of law. Rather, the depositions raise questions of fact regarding the issue of constructive notice. For example, the Restaurant’s cleaning routine, about which Cirillo testified, does not establish as a matter of law that there was no water or other liquid on the floor where and when plaintiff fell, particularly in light of the

testimony of plaintiff and nonparty Rosario that they previously observed liquid on the floor and that plaintiff's blouse was wet after she fell.

However, there is no genuine issue of fact regarding actual notice. Although plaintiff's complaint, bills of particular, and discovery responses allege actual notice, neither plaintiff nor Rosario told the Restaurant about the water or other liquid that they had allegedly seen on the floor prior to the incident. Plaintiff testified that she did not previously slip and fall in the Restaurant, that she was unaware of any notice witnesses, and that there are no incident reports or statements relating to similar occurrences within the two years prior to the accident.

Nor does a genuine issue of fact exist regarding plaintiff's initial allegations that she slipped and fell due to the acts of a Restaurant employee or debris or wax on the Restaurant's floor. Plaintiff and Rosario did not testify at their depositions that they observed a Restaurant employee spill water or other liquid on the floor or that the water or other liquid on the floor was a result of a Restaurant's employees mopping or cleaning the area, and the kitchen was located downstairs. Additionally, plaintiff's deposition testimony that she might have fallen because of wax on the floor was speculative and conclusory. Nor is plaintiff's allegation that the accident occurred due to overcrowding on Cinco de Mayo supported by the record evidence.

Having found that issues of fact remain as to constructive notice, this Court does not reach the affidavit of the expert witness within its analysis of the Restaurant's motion. Rather, this Court addresses it, particularly as to the alleged structural defects and code violations, in its discussion of 625 Broadway's motion.

For the reasons discussed above, this Court finds that issues of fact requiring a trial exist which warrant the denial of the Restaurant's motion. To be clear, this Court does not opine in

this decision on the ultimate merits of the case and leaves all issues, including those relating to the trial expert, to the trial court and the jury.

625 Broadway's Motion (Mot. Seq. No. 005)

Contentions

625 Broadway argues that it is entitled to summary judgment dismissing the complaint against it since the lease agreement did not require it to maintain and clean the premises and, as the out-of-possession landlord, it is not liable for plaintiff's alleged slip and fall on liquid on the Restaurant floor.

Plaintiff argues that 625 Broadway failed to demonstrate that it did not have a right to re-enter the premises to inspect or make repairs, failed to prove that it was not responsible for structural repairs on the premises, and failed to even address "the structural nature of the mis-levelled floor, which violates multiple provisions of the NYC Building Code" (Affirmation in Opposition of Plaintiff's Attorney, Doc. 117, at par. 4). Plaintiff relies on the deposition testimony and the affidavit of its expert Schwartzberg, and specifically asserts that the "pitch and slipperiness of defendant's floor is in violation of Administrative Code, article 6 [c26-105.1] 27-128 and 301 General section 28-301.1" (*id.* at par. 8). Plaintiff also argues that Schwartzberg's affidavit demonstrates that the lighting at the Restaurant was in violation of Building Code Section 27-381.

Additionally, plaintiff argues that 625 Broadway is liable under the right of re-entry provisions of the lease agreement, specifically Paragraphs 14 (A) and 14 (B). Plaintiff also argues that, since the lease provides that the Restaurant is responsible for all non-structural repairs, 625 Broadway is therefore responsible for all structural repairs to the premises.

625 Broadway replies that this “matter involves an open and obvious and transient condition (liquid) on the wooden floor” inside the Restaurant (Doc. 129, at par. 4). 625 Broadway did not install, and was not obligated to maintain, the floors in the Restaurant (*id.* at par. 6). Moreover, plaintiff and plaintiff’s expert point to irrelevant structural defects and code violations, which did not cause plaintiff’s accident, and plaintiff’s “arguments and supporting expert report are red herrings and are attempts to create issues of fact when there are none” (*id.* at par. 7). Plaintiff testified at her deposition that she slipped on liquid, a condition which is not a structural defect and which does not violate any statutes (*id.* at par. 8), and did not slip and fall because of an alleged mis-leveled floor, insufficient lighting, or a structural defect (*id.*). 625 Broadway contends that plaintiff’s speculative and conclusory factual and legal allegations fail to defeat its prima facie showing of entitlement to judgment dismissing the complaint against it as a matter of law.

Analysis

The lease agreement provided that the Restaurant was responsible for maintenance and cleaning, and therefore 625 Broadway “cannot be held liable for injuries caused by a defective condition in its premises absent evidence that it agreed to be responsible for maintenance or repair” (*Alonzo v McDonald’s Corp.*, 282 AD2d 395, 395 [1st Dept 2001] [internal citations omitted]). Nor can a liability issue be found due to the lease agreement’s right of reentry, as “[i]t is well settled that an out-of-possession owner who retained the right to reenter the premises for repairs and inspections cannot be held liable under a theory of constructive notice in the absence of a significant structural or design safety provision” (*McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept. 2003] [internal quotations marks and citations omitted]). A close reading of

Paragraphs 14 (A) and 14 (B) and an analysis of the undisputed facts herein do not support plaintiff's contention that the right of reentry imposes liability upon 625 Broadway. First, the defect complained of, liquid on the floor, "involves simple general maintenance of the premises, which was the sole responsibility of the tenant" (*Manning v New York Tel. Co.*, 157 AD2d 264, 270 [1st Dept 1990]). Additionally, Paragraph 14 (B) applies to public parts of the building, not to the floor inside the Restaurant. The lease's reservation of the out-of-possession landlord's right of reentry for inspection and repair does "not warrant a finding that it had consented to be responsible for making repairs" or for maintaining and cleaning the floor inside the premises, or for giving 625 Broadway the option of performing lease obligations not performed by the Restaurant (*Alonzo*, 282 AD2d at 395-396).

Contrary to plaintiff's contention, Schwartzberg's affidavit fails to demonstrate that a genuine issue of fact remains as to 625 Broadway's liability under these circumstances. Although Schwartzberg asserts that 625 Broadway violated specific code sections, plaintiff fails to specify any code violations in her responses to defendants' demands for the bills of particulars and in her supplemental bill of particulars. Although she reserved her right to supplement or amend her response upon further discovery, she did not do so and instead filed a note of issue. Therefore, this Court declines to consider the alleged code and statutory violations Schwartzberg raises in opposition to the summary judgment motion.

Moreover, Schwartzberg's expert opinion is "disregarded as conclusory inasmuch as it was based upon observations of the floor [and premises] made over two years after the accident" (*Krumier v Natl Cleaning Contrs. Inc.*, 256 AD2d 1 (1st Dept 1998) [internal citations omitted]). (See also *Duffy v Universal Maintenance Corp.*, 227 AD2d 238 [1st Dept 1996]), particularly

since he “also failed to show that the floor’s condition when he inspected it was the same as on the day of the accident” (*Green*, 105 AD3d at 579).

In any event, the expert opinion fails to raise a triable issue of fact. Schwartzberg’s expert opinion based on the coefficient of friction of the restaurant floor resulting in an inherently slippery floor fails to raise a material issue of fact (*Green*, 105 AD3d at 579).

Additionally, the expert affidavit did not raise a triable issue “since the expert did not identify the basis for the 0.5 coefficient-of-friction value he utilized as a standard” (*Jenkins*, 11 AD3d at 360).

Schwartzberg also misreads and misapplies the Administrative Code sections he cites. For example, Administrative Code Section 27-381 applies to exit lighting and corridors leading to exits. Plaintiff testified at her deposition, however, that the accident occurred within the premises in the area leading to stairs that led to the bathrooms in the basement, and there is no evidence that the accident occurred at an exit or a corridor leading to the exit. Moreover, since plaintiff testified that she previously observed the liquid on the floor and did not look down when she approached the location and began dancing, the theory of inadequate and unsafe lighting as a proximate cause of the accident is speculative and not supported by the record evidence.

Similarly, plaintiff failed to demonstrate that the liquid on the floor constituted, or resulted from, a significant structural defect or safety provision for which the out-of-possession landlord can be held liable. “The defect complained of did not involve significant structural and/or design defects or violate specific Administrative Code provisions which the landlord could have had the opportunity to discover and cure” (*Henderson v Hickory Pit Rest.*, 221 AD2d 161, 161 [1st Dept 1995]) (citing *Manning*, 157 AD 2d at 269-270, distinguishing *Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559 [1987]).

The alleged code provisions relied upon by plaintiff are either unrelated to the manner in which the accident occurred or are non-specific, and, therefore, are insufficient to impose liability upon 625 Broadway (*see McDonald*, 308 AD2d at 346). For example, and contrary to Schwartzberg's contention, Building Code Section 27-128, which provides that an owner is responsible at all times for the safe maintenance of a building and facilities, is general and non-specific, and is insufficient to impose liability under these undisputed factual circumstances (*see McDonald*, 308 AD2d at 346). Moreover, there is no evidence that the allegedly mis-leveled floor caused plaintiff to fall, it is undisputed that the Restaurant installed the floor, and there is no actual or constructive notice to 625 Broadway of the unsafe condition that allegedly caused the accident. Accordingly, 625 Broadway's motion is granted.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Gonzalez Y Gonzalez Restaurant seeking summary judgment pursuant to CPLR 3212 (Motion Seq. No. 004), is denied; and it is further

ORDERED that the motion by defendant 625 Broadway Venture, LLC seeking summary judgment pursuant to CPLR 3212 (Mot. Seq. No. 005) is granted and the complaint against this defendant is dismissed with costs and disbursements as to this defendant only, as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

