SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM
Justice

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HELEN WILLEBOORDSE, and MICHAEL TOPP

Plaintiffs,

- v -

ASPHALT GREEN, INC.,

Defendant.

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INDEX NO. 154380/2017

MOTION DATE 05/04/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84

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

Motion by defendant Asphalt Green, Inc., ("Defendant") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the action by plaintiffs HELEN WILLEBOORDSE ("Plaintiff"), and MICHAEL TOPP ("Topp") (collectively "Plaintiffs") is denied for the reasons stated herein.

BACKGROUND

A. Overview

This is a slip-and-fall negligence action arising from an accident ("accident") that allegedly took place on Monday, August 1, 2016, at about 11:30 AM, at premises maintained by defendant Asphalt Green ("Defendant") at 555 East 90th Street New York, New York, 10128 ("subject premises"). (Memo in Opp, Plaintiff EBT dated June 06, 2018 [Plaintiff EBT] at 67:12-68:02; 68:11-13; Complaint ¶ 3.) The accident allegedly took place when Plaintiff slipped and fell at the subject premises outside the women's guest locker room in a small hallway/vestibule area/corridor that was on the same floor as the pool and the pool deck. (Plaintiff EBT at 68:03-10; 90:23-91:05; *see also* Memo in Opp, Ex 03 [Photos Submitted by Plaintiff].)

Plaintiffs commenced the instant action on May 11, 2017, against Defendant asserting, *inter alia*, asserting that Defendant failed to provide a reasonably safe pool area and breached its duties to Plaintiffs. Topp alleged that by reason of Defendant's negligence, he lost the services of Plaintiff since the alleged accident. (Memo in Supp, Ex A [Summons & Complaint] ¶¶ 7-17; *see also* Memo in Supp, Ex B [Supp Summons & Complaint].) Plaintiff subsequently served a

Verified Bill of Particulars. (Memo in Supp, Ex D [Bill of Particulars].)

Defendant now moves for summary judgment dismissing Plaintiff's Amended Verified Complaint against it. Defendant argues that it did not breach any duty of care owed to Plaintiff, and a dangerous condition did not exist at the alleged accident location at the time of the accident, which caused the accident, and even if a dangerous condition existed, Defendant did not have notice. Defendant further argues that Plaintiff created the condition that caused herself to slip and fall. (Memo in Supp, NYSCEF Doc No 66.)

In opposition, Plaintiff argues that there are clear issues of fact that preclude the granting of Defendant's motion. According to Plaintiff's opposition papers, Plaintiff's safety consultant witness William Marletta disputes the report of Defendant's engineering witness Anthony M. Dolhon and concludes that the subject premises were not reasonably safe and proximately caused Plaintiff's fall—establishing Defendant's breach. (Memo in Opp, NYSCEF Doc No 70.)

In his reply affirmation, Defendant's counsel states that "[b]ased upon the documentary evidence in this case, including the deposition testimony, photographs and affidavit of Anthony M. Dolhon, P.E., Plaintiff cannot maintain an action against defendant." (Reply Affirm ¶ 3, NYSCEF Doc No 84.) Defendant's counsel states that Defendant's alleged failure to comply with regulations promulgated by the American Standards Institute or other safety standards is not evidence of negligence. (*Id.* ¶¶ 9, 10, 11, 12.) Defendant's counsel states that based on the record, there are no triable issues of fact. (*Id.* ¶¶ 15-33.)

At the time of the accident, Plaintiff was fifty (50) years old and worked part-time for Defendant at the subject premises as a coach and a private instructor for swimming and for the masters/adult competitive swim team. (*Id.* at 27:03-13; *see also* Memo in Opp at 2; Memo in Supp, Defendant's Aquatics Director Craig Charlson EBT at 15:08-10.) Plaintiff has also been a part of Asphalt Green's masters competitive swim team since sometime in 2000. (Plaintiff EBT at 44:22-45:11.) She also regularly engaged in other physical activities such as weightlifting, calisthenics, jump-roping, sprinting, and running the stairs. (*Id.* at 82:03-17; 82:23-84:16; Plaintiff EBT dated June 25, 2018 [Plaintiff 2d EBT] at 216:10-12; 232:12-19.)

B. Deposition Testimonies

1. Plaintiff's EBT

a. The Day of the Alleged Accident between 7:15 AM - 11 AM

According to Plaintiff, on the date of the alleged accident, Plaintiff arrived at the subject premises at around 7:15 AM. (Plaintiff EBT at 72:08-13; 74:16-18.) She went to her designated locker at a locker room that is located one floor below the ground floor where the pool is located to change into a training bathing suit and rubber-soled flip-flops and swam for an hour. (*Id.* at 72:22-73:03; 74:22-75:04; 75:05-14; 76:25-77:04; 78:04-05.)

b. The Day of the Alleged Accident between 11 AM - 11:40 AM

Between 11:20 AM and 11:30 AM, having left the premises for a short time, Plaintiff returned to the subject premises to pick up her bag from her designated locker room. (*Id.* at 87:04-88:24; 89:13-25; 90:07-19.)

At approximately 11:30 AM, preparing to exit the subject premises, Plaintiff "went up to the pool deck to the lifeguard station to get ice for [her] shoulder." (*Id.* at 90:14-22.) The lifeguard scooped the ice into a plastic bag, filling the bag halfway with ice, and knotted the bag. (*Id.* at 91:11-15; 91:15-16; 92:24-93:11; 93:12-18.)

According to Plaintiff, with her ice bag in hand, Plaintiff intended to then "exit the pool [premises] by going through the [women's] guest locker room." The women's guest locker room was on the same floor as the pool, as opposed to the locker room where her designated locker was located. (*Id.* at 93:19-25.)

From the pool area into the women's guest locker room, there was a small hallway off the pool deck which went to the right and to a door on the left at the end of the hallway, which opened to the women's guest locker room. (*Id.* at 94:19-95:14; 98:19-23; *see also* Memo in Opp, Ex 03 [Photos Submitted by Plaintiff].) As Plaintiff was approaching the locker room door, and as she was "about to open the door on the left," she saw through the window on the door that someone was coming out of the locker room. (*Id.* at 95:18-24; 96:12-18.) The person coming out of the locker room pushed opened the door about six to ten inches. (*Id.* at 94:15-18; 95:21-24.) "[T]here [was] not much space in the hallway[.]" (*Id.* at 94:15-18.) To leave space for the person to come out of the door, Plaintiff stopped briefly and as her right foot "pivoted," to the left, she "fell on [her] right." (*Id.* at 94:07-18; 96:24-97:16; 100:21-22; 103:24-104:02.)

Plaintiff stated that as she fell, she did not remember where the ice bag in her hands fell. (*Id.* at 101:14-19; 101:23-102:02.)

Plaintiff stated that no one was in the hallway when she fell to witness her fall and that, after she fell, she did not see the person who had come out of the locker room. (*Id.* at 113:08-14.)

According to Plaintiff, at some point after her fall, a lifeguard went to where Plaintiff fell and asked her if he could help her. (*Id.* at 113:20-25.) Aquatics Manager Kristen Pinkerton ("Pinkerton") also went to Plaintiff's side at some time after her fall and asked her if she needed an ambulance. (*Id.* at 114:03-07.) Plaintiff testified that she told Pinkerton that "she slipped in water." (*Id.* at 9-10.)

Plaintiff stated that she called her trainer Ian Cervone ("Cervone") and he came to the accident location to check up on her after her fall. (*Id.* at 117:11-14.)

The floor where the accident occurred was tiled. (*Id.* at 101:07-08.) There were no mats at the alleged accident location, which is undisputed by Defendant. (*Id.* at 105:02-08.)

Plaintiff stated that she did not see water on the hallway floor before the accident. (*Id.* at 102:07-09.) She stated that, right after the accident, she noticed that "[t]here was a lot of water that was standing in the hallway." (*Id.* at 101:04-06.)

Plaintiff stated that after the accident, she heard from the former triathlon coach Michael Galvan ("Galvan") who worked there at the time of the accident—but did not work there at the time of this EBT—who said to her "that standing water was an issue" and, as a staff member, he had "asked . . . to put mats in that area . . . repeatedly. And the response each time was that it wasn't part of the capital expense budget." (*Id.* at 107:24-108:24.)

Plaintiff further stated that Galvan also told her that he "reported . . . to the director of aquatics," Craig Charlson ("Charlson"), to put mats in the accident location over a period of two years. (*Id.* at 109:23-25; 110: 08-14.)

2. Michael Galvan's EBT

Galvan, the triathlon coach who worked at the subject premises at the time of the accident, stated that he ran into Plaintiff coincidentally in the fall of 2016 where they talked about Plaintiff's accident. Galvan in his EBT stated that standing water was an issue on the pool deck; but, he did not personally observe this issue in the accident location. (Memo in Supp, Galvan EBT dated Jan 17, 2019, at 25:13-27:08; 27:08-15; 31:11-24.)

3. Craig Charlson's EBT

Charlson, the aquatics director who worked at the subject premises at the time of the accident, stated that he never discussed mats in the pool deck area with Galvan. (Charlson EBT dated Oct 2, 2018, at 68:09-16.) Charlson stated that Galvan verbally insulted him at one time and, as a possible reason for the insult, Charlson stated that Galvan did not get a position at Asphalt Green that he wanted. (*Id*. at 69:04-70:21.)

Charlson stated that "[t]he mats are much more stable than the pool tile[,]" and mats are "placed into the pool deck area at Asphalt Green to prevent people from falling." (*Id.* at 51:22-23; 52:14-16.) He stated that the tiles around the pool were the same tiles as the ones that were at the accident location. (*Id.* at 60:04-08.) He further stated that there were no mats at the accident location because they "have a drain in there." (*Id.* at 55:02-05.)

At the time of the accident, Charlson served as the aquatics director and, since the accident, he also has started to serve as the head masters coach. (*Id.* at 14:16-19.) At the time of the accident, as an aquatic director, he oversaw all of the swim programs in the pool, lessons, teams, water polo; was in charge of schedules; managed the staff to adhere to all of those programs; and managed lifeguards. (*Id.* at 11:05-14.) He oversaw the pool managers, assistant pool managers, and the head guards who were in charge of supplying aid supplies. (*Id.* at 12:04-10.) He did not manage the physical facility of the pool or of the gym in general. (*Id.* at 11:16-20.)

Charlson stated that he did not personally witness Plaintiff's alleged accident. (*Id.* at 17:07-21.) He was notified of the accident by a First Aid Report. (*Id.* at 18:04-07.) He also stated that regarding the First Aid Report, he spoke with Zachary Terzano ("Terzano"), who was the facility manager at the time of the accident and was also in charge of the placement of the mats, who informed him that Plaintiff "fell on her ice." (*Id.* at 13:25-14:09; 19:12-20:13). Charlson stated that on the day of the accident, he did not inquire as to the accident, but his concern was "how [Plaintiff] was doing." (*Id.* at 20:23-21:03.) Within the week of the accident, Charlson spoke with Terzano for a second time. Terzano relayed the same information that Plaintiff had fallen on her ice. (*Id.* at 26:13-23.)

Charlson did not inquire about what the lifeguards on duty at the time of the accident observed or heard. (*Id.* at 34:05-15.)

4. Kristin Pinkerton's EBT

Pinkerton, the aquatics manager who worked at the subject premises at the time of the accident, stated that her responsibilities included ensuring that the pool deck was safe at all times. (Pinkerton EBT dated Dec 2, 2018, at 20:06-08; 34:10-13; 38:16-18.) Pinkerton's responsibilities also included the vestibule area of the women's guest locker room where Plaintiff's accident allegedly occurred. (*Id.* at 37:05-08.) She acknowledged that at times the floor where the accident occurred would be wet. (*Id.* at 75:17-25.) However, according to Pinkerton, the floor of the vestibule area of the women's guest locker room where the accident occurred would not become slippery when it was wet. (*Id.* at 76:02-14.)

According to Pinkerton, when she initially arrived in the area of the accident, Plaintiff was on the floor, with the ice bag next to here and ice all over the floor outside of a bag. (*Id.* at 44:13-45:12.) Pinkerton states that the bag for the ice was in the same area of Plaintiff. Pinkerton further states that Plaintiff then told her that she slipped on her ice. (*Id.* at 45:06-07; 48:18-49:15.)

5. Victor Rodriguez's EBT

Victor Rodriguez ("Rodriguez"), the head lifeguard on duty at the subject premises at the time of the accident, stated that he filled out the First Aid Report on the day of the accident. (Memo in Supp, Ex K, Rodriguez EBT dated Oct 5 2018 [Rodriguez EBT] at 21:09-14; Memo in Supp, Ex L, Rodriguez EBT dated May 14, 2019 [Rodriguez 2d EBT] at 10:06-08.) Two days after the accident, he added a four-sentence statement, as directed by facility manager Terzano, "in case of a lawsuit." (Rodriguez EBT dated Oct 5, 2018, at 20:18-24:18.)

Rodriguez also stated that he gave Plaintiff the ice bag. Rodriguez stated that he filled up the bag with ice less than halfway, made sure that the knot was tight, and looked to ensure that there were no holes in the bag. (*Id.* at 42:13-25.) He testified that he had given Plaintiff ice around five times previously. (*Id.* at 46:10-17.) He stated that Plaintiff was carrying two bags on her shoulders. (*Id.* at 48:20-22.) He stated that he was "alerted to the fact that Miss Willeboordse had slipped and fell" when "[o]ne of the women counselors came up to the desk and told [him] that a woman had slipped and fell" "[b]y the women's locker room." (*Id.* at 52:11-23.) He then

"grabbed the first aid bag, an incident report, and … ran over to the women's locker room." (*Id.* at 54:13-15.) He was accompanied by fellow lifeguard Anthony Lopez ("Lopez"). (*Id.* at 57:02-05.) He stated, "When I got there, I told her who I was, and I offered my assistance. She accepted it, and then I asked her what had happened, and she said she slipped on her ice." (*Id.* at 57:09-13.) He stated that, Plaintiff spoke to him "clearly." (*Id.* at 62:03.) He stated that the ice was "on the floor around the drain." (*Id.* at 62:04-15.) He stated that he asked Plaintiff how she fell and "[s]he said she slipped on her ice that came from her bag." (*Id.* at 62:16-22.)

Rodriguez stated that "when people get out of the pool and go into the women's guest locker room area . . . they drip water." (*Id.* at 74:22-25.) Consequently, the tile in the accident location "gets wet." (*Id.* at 75:02-04.)

6. Anthony Lopez's EBT

Anthony Lopez ("Lopez"), also a lifeguard on duty at the subject premises at the time of the accident, stated that when he went to where Plaintiff had her accident, Rodriguez and Pinkerton were already there. (Memo in Supp, Lopez EBT dated Dec 20, 2018, at 31:09-12.) Lopez stated that he saw a hole in the ice bag and that "most of the ice that was in the bag had fallen out." (*Id.* at 39:04-17.)

Lopez stated that he did not remember what, if anything, Plaintiff told him when he saw her after she fell. (*Id.* at 45:20-22.) He stated that he did not recall Plaintiff saying anything to him personally. (*Id.* at 46:05-10.) Lopez stated that Pinkerton told him that Plaintiff "slipped and fell on ice." (*Id.* at 46:11-14.) Further, Rodriguez told him that "she fell on her own ice." (*Id.* at 49:24-50:12.) Further, Lopez stated that when Plaintiff's trainer Cervone asked Plaintiff how she fell, Lopez heard Plaintiff respond to Cervone that "she slipped on her own ice." (*Id.* at 58:13-22.) He stated that Plaintiff remained in the hallway for 45 to 50 minutes. (*Id.* at 68:07-11.)

Lopez stated that he made a statement that was attached to the First Aid Report stating Plaintiff slipped on an ice cube that fell out of her bag of ice. According to Lopez, this statement would have been written on the second page of the First Aid Report. (Lopez EBT at 53:05-09; 80:14-20.) However, Lopez stated that he did not recall if Plaintiff actually stated that "she slipped on an ice cube that fell out of her bag of ice." (*Id.* at 76:24-81:25; 83:16-18.)

Lopez stated that he had a talk with Rodriguez after the ambulance left during which Rodriguez told him that "after he gave her the ice bag while she was walking away, he saw [Plaintiff] fidgeting with the knot." (*Id.* at 41:16-42:10.)

7. Ian Cervone's EBT

Cervone, Plaintiff's personal trainer who worked at the subject premises at the time of the accident, stated that he was called up to check up on Plaintiff at some time after the accident. (Cervone EBT dated Nov 20, 2018, at 22:02-07; 27:07-31:05.) Cervone stated in his EBT that Plaintiff told him that "she slipped on ice[,] but he did not recall her specifically saying that she slipped on "her own ice." (*Id.* at 31:24-15.)

8. Tom O'Connor's EBT

Tom O'Connor, the facility manager who worked at the subject premises at the time of the accident, testified that the tiles in the pool deck area were unglazed and did not get slippery when wet. (O'Connor EBT dated Feb 21, 2019, at 17:19-20:14.) O'Connor stated that mats around the pool deck were not needed "to prevent individuals from slipping." (*Id.* at 59:22-25.) Similarly, since the tiles in the accident location at the time of the accident were the same tiles as the ones around the pool, according to O'Connor, a mat was not needed to prevent people from slipping at the accident location. (*Id.* at 60:02-13.)

9. Zachary Terzano's EBT

Terzano, the facility manager at the time of the accident who was also in charge of the placement of the mats, stated that the mats were put on the pool deck to prevent people from slipping. (Terzano EBT dated March 18, 2019, at 23:03-10; 43:19-25.)

He stated in his EBT that he did not recall reviewing any First Aid Reports recording slip and falls in the vestibule area/hallway of the woman's guest locker room where the accident allegedly happened. (*Id.* at 38:23-39:10.)

10. Retained Witnesses' EBTs

Both Defendant and Plaintiffs submitted reports by retained witnesses who gave different opinions. Defendant's engineering witness conducted an on-site inspection, which was performed on March 19, 2019, together with his review and analysis of the record. (Memo in Supp, Ex V [Defendant's Engineering Witness Aff]; *see also* Ex U [Defendant's Engineering Witness Disclosure]) Plaintiff's safety consultant witness also conducted an on-site inspection, which was performed on September 26, 2018, together with his review of the record. (Memo in Opp, Ex 2 [Plaintiff's Safety Consultant Witness Report]; *see also* Plaintiff's Safety Consultant Witness Aff.)

Defendant's witness stated in part, within a reasonable degree of engineering certainty, that the floor of the vestibule area of the women's guest locker room where Plaintiff's accident allegedly happened was not in a dangerous condition at the time of Plaintiff's accident. Defendant's witness further stated that Plaintiff's accident is characteristic of a misstep rather than a heel slip. Defendant's witness further stated that the presence of standing water on the floor of the accident location is contrary to his observations. Defendant's witness stated that he observed that the floor within the vestibule was pitched for positive drainage toward the floor drain at the center of the corridor and, as such, the pitch of the floor anywhere within the corridor would not cause standing water. Defendant's witness further stated that there was no evidence as to the amount of water/ice that was on the floor at the time of the accident. Further, he stated that there was no evidence of puddling as a result of the standing water and/or ice. Defendant's witness also stated that the accident location was adjacent to the pool deck and one could expect water on the pool deck and in the corridor at the entrance to the women's guest locker room during normal operations. According to Defendant's witness, if there was water and/or ice on the floor, there was no evidence that it was any greater in surface area, volume or depth than would

otherwise be found under normal operations. Defendant's witness stated that there was no evidence that the water and/or ice was in excess of what would otherwise be expected under normal operations and, as such, there was no evidence that a hazardous condition was created by the water and/or ice that would not otherwise be present on a pool deck. Defendant's witness stated that the absence of a pool deck mat at the accident location allowed the splash to drain to the floor to avoid ponding and that there was no evidence that ponding water either caused or contributed to the accident. Defendant's witness stated that covering the accident location would have actually contributed to water ponding at low lying areas at the floor drain. Defendant's witness also stated that there were no code-specified requirements for the installation of mats, floor coverings, or non-slip materials at the accident location. Lastly, Defendant's witness stated that there was no evidence that Defendant failed to warn, inspect, or barricade the accident location due to a slippery condition. The witness explained that the corridor had water dripping from swimmers, which was normal and expected.

On the other hand, Plaintiff's safety consultant witness stated that Defendant's premise was not reasonably safe and that it proximately caused Plaintiff's fall. Plaintiff's witness states that his professional opinion, to a reasonable degree of certainty as a certified safety professional, is that the conditions of accident location were ripe for a slip and fall occurrence, that there was a failure to maintain a safe, clean and dry floor surface for pedestrian use in conformance with good and accepted safe practice as required, that the mosaic ceramic tile at the accident location is safe when clean and dry and is slippery and dangerous when wet or with other foreign debris, that based on slip testing conducted with an English XL tester and a BOT 3000E both support that this floor which was tested is slippery when wet, that based on the information provided, there was a failure to provide adequate mats and runners within the small hallway leading from the pool area to the guest locker room, that such furnishings would have prevented water from being tracked from the pool to the locker rooms and vice versa, that there was a lack of adequate inspection, supervision, training, and maintenance of the premises, that at a minimum, although not sufficient to remedy the hazard, adequate warning signs, cones, attendants, and or barricades should have been posted until proper cleanup and precautions could be affected, that the rationale of hard, smooth, ceramic tiles being slippery when wet has existed for a prolonged period of time sufficient that the owner knew or should have known that this was a poor choice of tile for a pool and locker room area without the use of other precautions, and that the understanding that hard, smooth, ceramic tiles are slippery when wet has existed for a prolonged period of time sufficient that the owner knew or should have known that this was a dangerous condition which needed improved remedial measures implemented.

11. The Accident First Aid Reports by Defendant

Enclosed in the record is the First Aid Report as allegedly filled out on the date of the accident. It states that Plaintiff "slipped on a piece of ice by the locker room." Then in a different color of ink, it adds, "on her own ice." (NYSCEF Doc No 54 at 65 [Accident First Aid Report].)

DISCUSSION

A. Summary Judgment Standard

"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 eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff ... the court on a summary judgment motion must indulge all available inferences[.]" (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

B. Premises Liability

Generally, a property owner "must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotations and citations omitted]; *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].) In particular, property owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of those on their premises. (*Russo v Home Goods, Inc.*, 119 AD3d 924, 924 [2d Dept 2014] [internal citations omitted].)

In order to be held liable, a property owner must be aware of the alleged defective or dangerous condition, either by having created it, or having actual knowledge of the condition, or constructive notice of it. "To constitute 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 a defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986].)

A defendant property owner moving for summary judgment in a slip-and-fall action "has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury." (*Ross v Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421 (NY App Div 1st Dept 2011); *Richardson v Brooklake Assoc., L.P.*, 131 AD3d 1153 (NY App Div 2d Dept 2015) *citing Kruger v. Donzelli Realty Corp.*, 111 AD3d 897 (NY App Div 2nd Dept 2013); *Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633 (NY App Div 2nd Dept

2011); *Bloomfield v Jericho Union Free School Dist.*, 80 AD3d 637 (NY App Div 2nd Dept 2011); *Pryzywalny v. New York City Tr. Auth.*, 69 AD3d 598 (NY App Div 2nd Dept 2010)) or that the condition was open and obvious and not inherently dangerous as a matter of law (*see Casiano v St. Mary's Church*, 135 AD3d 685 (NY App Div 2d Dept 2016); *Davarashvili v ABM Indus. Inc.*, 81 AD3d 776 (NY App Div 2d Dept 2011)).

To meet its initial burden on a summary judgment motion, a defendant property owner must tender some evidence establishing when the area in question was last cleaned or inspected prior to the plaintiff's slip and fall. (*McPhaul v Mut. of Ameria Life Ins. Co.*, 81 AD3d 609, 610 [2d Dept 2011]; *Zambri v Madison Sq. Garden, L.P.*, 73 AD3d 1035, 1036 [2d Dept 2010]; *Rodriguez v Hudson View Assoc., LLC*, 63 AD3d 1135, 1136 [2d Dept 2009]; *Gerbi v Tri-Mac Enterprises of Stony Brook, Inc.*, 34 AD3d 732, 732 [2d Dept 2006].)

C. Application

Defendant argues that it did not create a dangerous condition that caused Plaintiff's accident. Defendant points to no evidence showing when the accident location was last cleaned or inspected. Instead, Defendant argues that it cannot be held liable for Plaintiff's injuries because any water that Plaintiff slipped and fell on was "necessarily incidental" to the pool use and, therefore, is not actionable. (Memo in Supp at 12-13, citing *Dove v Manhattan Plaza Health Club*, 113 AD3d 455, 456 [1st Dept 2014]; *Jackson v State*, 51 AD3d 1251, 1253 [3d Dept 2008]; *Nespoli v Equinox Holdings, Inc.*, 2012 N.Y. Slip Op. 32420[U] [N.Y. Sup Ct, New York County 2012].)

However, as will be further explained, this Court finds that, based on the evidence presented, it cannot determine as a matter of law that the alleged slippery condition was incidental to the use of the area where the accident occurred.

In *Grossman v TCR*, the plaintiff slipped and fell on water on the tile floor in the men's locker room "in a central spot from which a patron could access the showers, sinks, sauna and steam room, as well as the pool-access corridor." (*Grossman v TCR*, 142 AD3d 854, 854 [1st Dept 2016].) The area was not covered with a mat or any other floor covering. (*Id.* at 854.) In 2016, the *Grossman* Court—distinguishing *Dove v Manhattan Plaza Health Club*—held that the defendant failed to establish that any alleged water was incidental to the subject area, as the plaintiff was not in the shower area and he had left the pool area. (*Id.* at 855.) The court added that "[n]either the presence of a drain in the floor nor the regular use of towels on parts of the floor to sop up excess water justifies concluding as a matter of law that the presence of water was 'necessarily incidental' to the use of that area of the locker room so as to preclude a finding of liability. On the contrary, the need for the towels could support a finding that there was a defective condition in the shower section of the locker room." (*Id.* at 855-56.)

Similarly, in the present case, this Court cannot make a determination as to whether any water in the accident location was "necessarily incidental" to the use of the pool so as to preclude a finding of liability against Defendant. Plaintiff was not on the pool deck area nor was she inside the locker room by showers or the like. Further, the need for the drain at the accident location and the fact that there was allegedly standing water in the area of the accident location

may reasonably be presumed, for the purposes of the instant motion, to support a finding that there was a dangerous condition in the accident location.

Further, in *Rou Dong Yee v Deluxe Meat Market, Inc.*, where the plaintiff slipped and fell on a puddle of water at the live-fish section of the defendant's Chinatown market—where there was naturally a lot of water on the floor and Plaintiff was fully aware of the water while standing in it—the First Department, citing *Grossman*, held that the record presented issues of fact as to whether defendants maintained the area in a reasonably safe condition, precluding the defendant's entitlement to summary judgment. (*Rou Dong Yee v Deluxe Meat Mkt. Inc.*, 159 AD3d 407, 408 [1st Dept 2018]; *see also Grossman*, 142 A.D.3d at 855 [rejecting that "any water on a tiled floor anywhere in a locker room must preclude a claim for negligence because water is 'necessarily incidental' to the entire locker room's intended use"].)

Similarly, here, regardless of whether any alleged water in the accident location is incidental to the use of the pool, the record presents issues of fact as to whether Defendant maintained the accident area in a reasonably safe condition. As pointed out in the depositions, there is a dispute as to whether there was standing water in the accident location. The mere fact that water may be incidental to the use of the pool does not necessarily indicate that there can be no negligence where there is notice that a dangerous condition exists. (*Grossman*, 142 A.D.3d at 855; *Yee*, 159 AD3d at 407.) There is a further issue of fact as to whether there was a need for mats in the accident location and whether Defendant's failure to place mats in this location at the time of the accident could have contributed to Plaintiff's accident.

Next, assuming *arguendo* that a dangerous condition existed, Defendant argues that it did not have notice of the dangerous condition. However, viewing the evidence in light most favorable to Plaintiffs as the non-movant party, Defendant has failed to establish that (1) it lacked notice of any standing water at the accident location or that (2) its failure to have mats at the location was not a proximate cause of the accident. (*See Van Stry v State*, 104 AD2d 553, 554 [2d Dept 1984].) The proof submitted by Defendant is not sufficient to establish its lack of any responsibility.

Initially, there is no testimony as to when the accident location was last cleaned or mopped or inspected. Pinkerton whose responsibility it was to keep the accident location acknowledged that the alleged accident area at times became wet yet offered no testimony as to when it was last cleaned before the alleged accident. (*See Zambri*, 73 AD3d at 1036.)

Moreover, there is testimony from Defendant's own witnesses Rodriguez and Charlson calling into question as to whether the subject tiles became slippery when wet, whether there was standing water at the accident location, and whether mats were needed at the accident location. Further, Defendant's own witness Lopez calls into question whether Plaintiff slipped on her own ice. These are all factual issues that have not been ruled out based upon Defendant's moving papers and are to be resolved at trial.

Further, Defendant's own witness Terzano stated that the mats were placed on the pool deck to prevent people from slipping and also at the accident location during high traffic meets to, in part, prevent someone from slipping. (Terzano EBT at 49:11-20.) Yet, no mats were placed

at the accident location, from which a jury could infer that Defendants failed to maintain the area in a reasonably safe condition.

Again, based on Defendant's submissions, although Terzano stated in his EBT that no one ever slipped in the hallway vestibule area, at least one of the First Aid Reports that is submitted by Defendant provides that a seven-month pregnant woman slipped and fell at a location that, viewing the evidence in light most favorable to Plaintiff as the non-movant party, could be interpreted to be the accident location. (Memo in Opp, Ex 6 [First Aid Report dated 01/26/2014] at 15.).

Lastly, Defendant argues that Plaintiff created the condition that caused her to slip and fall, asserting that she fell on ice from her own bag. Even assuming that Defendant makes a prima facie claim regarding this issue, Plaintiff clearly contests this. Whether Plaintiff slipped on standing water or ice that fell from her own bag requires credibility determinations that cannot be made on the instant motion for summary judgment.

The Court finds that Defendant has failed to establish that there was no foreseeable risk of an accident where there was water in the accident location and that there are no issues of fact as to whether a breach by Defendant has occurred. It will be for the jury to decide the circumstances of the accident.

CONCLUSION

Accordingly, and for the reasons so stated, it is hereby

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's action is denied; and it is further,

ORDERED that counsel serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

7/14/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	[ ]	CASE		[X]	NON-FINAL		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN	[ ]	OTHER
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