SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 154473/2017

NETE BRAENDGAARD,

MOTION SEQ. NO. 004

Plaintiff,

- v -

KSSNY INC., ACCOR NORTH AMERICA INC., ACCOR BUSINESS AND LEISURE NORTH AMERICA, LLC, ACCOR BUSINESS AND LEISURE MANAGMENT LLC, and XYZ CORP(S) #1 - #5 AS FICTITIOUS ENTITIES TRUE ENTITIES BEING UNKNOWN,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

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

In this personal injury action, defendants Kssny Inc., Accor North America, Inc., Accor Business and Leisure North America, LLC and Accor Business and Leisure Management, LLC (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (Docs. 54-62, 72-74). Plaintiff Nete Braendgaard ("plaintiff") opposes the motion (Docs. 64-71). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 3, 2015, plaintiff was allegedly injured when she fell in the lobby of the Sofitel New York Hotel located at 45 West 44th Street in Manhattan ("the hotel") (Doc. 1). In May 2017, plaintiff commenced this action as against defendants, the alleged owners of the hotel, by filing a

summons and complaint (Doc. 1). In her amended complaint, plaintiff asserted, *inter alia*, that defendants failed to place adequate absorbent carpeting at the hotel's entrance or, alternatively, failed to remove the snow, ice and water that had accumulated on the uncarpeted, smooth polished marble floors (Doc. 2 ¶ 14). In July 2017, defendants interposed an answer denying liability and raising several affirmative defenses (Doc. 3).

On October 3, 2019, plaintiff filed a note of issue, representing that all discovery in this action was complete (Doc. 53).

Defendants now move for summary judgment on the grounds that plaintiff only speculates as to the hazardous condition that caused her fall and that there is no proof that a dangerous condition even existed since "[n]o one – plaintiff included – was able to identify the presence of any substance whatsoever on the floor in the area where plaintiff" fell (Doc. 55 ¶ 15-16). In support of their motion, defendants submit, *inter alia*, plaintiff's deposition testimony (Doc. 60); the deposition testimony of Carlomar Rios ("Rios"), the hotel's concierge (Doc. 61); and the deposition testimony of Acheampong Dei ("Dei"), a security officer for the hotel (Doc. 62).

Plaintiff testified, *inter alia*, that she was returning to the hotel after dinner when she slipped and fell in the lobby (Doc. 60 at 21). There was snow and water on the ground outside of the hotel from a blizzard the prior day (*id*. at 18, 20, 22). However, plaintiff conceded that she did not observe any water or snow on the lobby floor before or after her fall (*id*. at 26, 33, 91). When asked about the cause of her fall, plaintiff responded, "to me, it is pretty clear that either there was snow [or] water under my boots due to insufficient mats or there was water or snow on the floor" (*id*. at 90).

Rios testified, in relevant part, that the lobby was cleaned twice every eight hours; that he was responsible for cleaning small areas, such as small wet spots on the lobby's floor; and that the

lobby was inspected at least every hour (Doc. 61 at 25-26, 28, 30-31). Although mats were generally placed on the floor of the lobby during inclement weather until it was safe to remove them (*id*. at 33-34), Rios affirmed that the ground outside was not wet when plaintiff fell and there was thus no need to place mats on the lobby's floor on the date of plaintiff's accident (*id*. at 57, 71). Additionally, Rios' testimony revealed that people had slipped in the lobby on prior occasions when no mats were present (*id*. at 45). Rios inspected the floor after plaintiff fell but claimed that the floor was not wet (*id*. at 63).

Dei testified that his duties included, *inter alia*, inspecting the lobby's floor for any liquids that would render it unsafe (Doc. 62 at 35-36). Like Rios, Dei testified that mats were required in the lobby when the ground outside was wet to prevent slips and falls, but that they were removed when the floor or the ground outside was not wet (*id*. at 21-22). Dei also inspected the floor in the lobby after the incident and claimed that it was dry (*id*. at 55-56). He also testified that the ground outside was not wet (*id*. at 56).

LEGAL CONCLUSIONS:

"An owner or occupant of premises has a duty to remove an accumulation of snow or ice inside or outside the premises which may be dangerous to those entering the premises, or to take other measures to ensure the safety of the premises, when it has actual or constructive notice of the existence of the condition and a reasonable opportunity to act" (*George v NY City Hous. Auth.*, 2017 NY Slip Op 30098[U], 2017 NY Misc LEXIS 183, *7 [Sup Ct, NY County 2017] [citations omitted]; *accord Morris v City of NY*, 2010 NY Slip Op 32779[U], 2010 NY Misc LEXIS 4875, *7-8 [Sup Ct, NY County 2010]).

It is well-settled that a defendant moving for summary judgment in a slip and fall action bears the prima facie burden of demonstrating that it neither created the alleged hazard nor had actual or constructive notice of the dangerous condition (*see Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Giuffrda v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). A defendant may establish its prima facie entitlement to judgment as a matter of law by submitting proof that the plaintiff cannot identify the cause of his or her fall without engaging in speculation (*see Haibi v 790 Riverside Drive Owners, Inc.,* 156 AD3d 144, 147 [1st Dept 2017]; *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). However, "[a]lthough mere conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiffs show facts and conditions from which the negligence of the defendants and the causation of the accident by that negligence may be reasonably inferred" (*Seelinger v Town of Middletown*, 79 AD3d 1227, 1229 [3d Dept 2010] [internal quotation marks and citations omitted]; *see DeRosa v City of New York*, 30 AD3d 323, 325-326 [1st Dept 2006]).

Defendants fail to establish their prima facie entitlement to summary judgment. This Court rejects defendants' contention that the cause of plaintiff's injuries, given her deposition testimony that she fell due to "snow [and] water under [her] boots due to insufficient mats" or "water or snow on the floor," (Doc. 60 at 90) is speculative and fatal to her claim. Plaintiff testified that there was a blizzard the day before her accident and that water and snow remained on the ground outside the hotel, allowing for "the natural and reasonable inference" that water or snow, tracked-in from outside, was the cause of her fall (*Haramis v Mount Sinai Med. Ctr.*, 284 AD2d 150, 150 [1st Dept 2001]; *see Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]; *Pajovic v 94-06 34th Rd. Realty Co., LLC*, 152 AD3d 781, 781-782 [2d Dept 2017]; *Chase v OHM, LLC*,

75 AD3d 1031, 1033-1034 [3d Dept 2010]; *Signorelli v Great Atlantic & Pacific Tea Co., Inc.*, 70 AD3d 439, 440 [1st Dept 2010]; *O'Connor v Czerniecki*, 2013 NY Slip Op 31206[U], 2013 NY Misc LEXIS 2382, *9-10 [Sup Ct, Suffolk County 2013]; *compare Gagliardi v Compass Group, USA, Inc.*, 173 AD3d 574, 574 [1st Dept 2019]).

Further, defendants' argument that there is no proof of a dangerous condition at the premises (Doc. 55 ¶ 15) is belied by its own proof. Both Rios and Dei confirmed that mats were placed in the hotel lobby during inclement weather to prevent people from falling and that people have slipped at the premises in the past when the mats were not present. Moreover, plaintiff's testimony that there was snow and water on the ground outside of the hotel contradicts the hotel employees' testimony that the ground outside was dry. Since there is a dispute as to the condition of the ground outside the hotel at the time of the incident and, thus, whether plaintiff tracked-in water or snow into the lobby such that mats were necessary to prevent her injuries, this Court finds that the drastic remedy of summary judgment would be improper at this juncture (*see Gonzalez v Bd. of Educ. of City of NY*, 165 AD3d 1065, 1066-1067 [2d Dept 2018]; *Guerrero v Duane Reade, Inc.*, 112 AD3d 496, 496 [1st Dept 2013]; *Milano v Staten Is. Univ. Hosp.*, 73 AD3d 1141, 1142 [2d Dept 2010]; *Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d at 440; *compare Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]).

In view of defendants' failure to tender sufficient evidence to eliminate all material issues of fact from the case, this Court need not address the sufficiency of plaintiff's opposition papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Williams v NY City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is denied; and it is further

ORDERED that, within 30 days after this order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this order, with notice of entry, on plaintiff; and it is further

ORDERED that this constitutes the decision and order of this Court.

8/27/2020
DATE

KATHRYN E. FREED, J.S.C.

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