Clarke v 1710, LLC
2021 NY Slip Op 30870(U)
March 18, 2021
Supreme Court, Kings County
Docket Number: 508760/2018
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
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GERMIMAH CLARKE,

Plaintiff,

-against-

1710, LLC,

Defendant.
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Index No.: 508760/2018
Motion Date: 3/17/21
Motion Seq.: 02

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 02) 27-35, 41-51, 55-61 were read on this motion for summary judgment.

In this action the plaintiff alleges she sustained personal injuries when she slipped and fell on the premises owned by defendant 1710, LLC. The defendant moves for summary judgment on the issue of liability, pursuant to CPLR § 3212, seeking dismissal of the plaintiff's complaint. For the reasons set forth below, the defendant's motion is granted.

The complaint alleges one cause of action sounding in negligence. The plaintiff's verified bill of particulars alleges that "plaintiff was caused to slip and fall on a wet, liquid accumulation, and/or a slippery substance on the floor thereat," and further alleges that the defendant created the condition, and that it had both actual and constructive notice of it. The defendant seeks summary judgment, arguing that it did not cause or create or have actual or constructive notice of the alleged condition.

In support of its motion the defendant submits the pleadings, the deposition transcripts of the plaintiff, Archie Czarkowski (hereinafter Czarkowski), the individual responsible for maintaining the building, and Jay Loffer (hereinafter Loffer), the owner of the building. The defendant also submits photographs depicting the hallway and the elevator where the plaintiff claims to have fallen.

According to the plaintiff's testimony, on December 19, 2017 at 8:30 a.m., the plaintiff was exiting the elevator onto the first-floor lobby when she slipped and fell on a wet/slippery substance located by the elevator. The plaintiff is a resident of the building located at 1710 Newkirk Avenue, in the County of Kings, City and State of New York. The plaintiff claims there was water "all over. The ground was dirty. There were footsteps." As she was on the ground, the plaintiff observed that her clothing was wet, and that the water was one inch deep and "dirty," but was "clear" in color and had no smell to it. She testified that the floor in front of the elevator was concrete, and that the water she slipped on did not extend down the hall beyond the area in front of the elevator. The plaintiff stated that prior to the accident she had never seen water accumulate in the area of her accident, and that she was not aware of any complaints about

water accumulating outside the elevator. The plaintiff further testified that she did not know what caused the water accumulation where she allegedly slipped, and that she was unaware of how long the water was in front of the elevator. The day before the accident the plaintiff did not see water in the hallway or notice any footprints in the hallway. The plaintiff also did not recall whether it was raining that day or the day prior to the accident.

According to the deposition testimony of Czarkowski, he has lived at the premises for 10 years. He is responsible for general maintenance of the premises, which includes mopping the floors. He is required to be physically present within the building from 9:00 a.m. to 5:00 p.m., Monday through Friday. His duties also include walking around the building every day to ensure everything is running properly. In connection with his other duties, each morning Czarkowski shuts off the outside lights, which requires him to walk past the elevator where the accident occurred, to the stairway down to the basement, seven days a week. Prior to the plaintiff's fall on the day of the accident, he had already been to the basement to turn off the lights and had returned to his apartment. He testified that when he walked past the area that morning he did not observe any wet substance on the floor near the elevator. He estimated that about 20-30 minutes had elapsed between the time that he returned to his apartment and the plaintiff knocked on his door to inform him that she had fallen. Czarkowski testified that he accompanied the plaintiff to the elevator area, and that the plaintiff told him she fell while leaving the elevator, but she did not tell him what caused her to fall. Czarkowski looked at the general area of plaintiff's fall, which was comprised of vinyl floor tiles, and did not observe any liquid on the floor or any footsteps, and that the floor looked "normal" and "clean." He testified that he had not mopped the hallway just before the accident, and that generally he mopped on Thursday afternoons. The accident occurred on a Tuesday.

The building owner, Loffer, testified that he has owned the building for nine years, and during that time there have never been any water leak issues, burst pipes, or any overflowing sinks or toilet bowls. He stated that it was not raining on the day of the accident, and that he arrived there at approximately 11:00 a.m. that morning. After being informed of the incident by Czarkowski, he inspected the elevator area and did not observe any footsteps or tracks or any type of water marks. He testified that there had not been any water leaks or water accumulation in the elevator area prior to the plaintiff's accident.

The defendant argues that it is entitled to summary judgment based on the deposition testimony of the plaintiff, Czarkowski and Loffer which demonstrates that it did not create the defective condition or have actual or constructive notice of it. According to the defendant, the plaintiff testified that she did not see water or footprints in the elevator area the day before the accident, and that she did not know what caused the water accumulation she claims to have slipped on. The plaintiff also testified that she had not obtained additional information since the accident explaining why the water was allegedly at the location. The defendant points to the plaintiff's testimony that she was unaware of how long the water or wetness was in front of the elevator before her fall; she had never seen water accumulate in the first-floor elevator area prior

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to the day of the accident; and that she was not aware of any complaints from anyone about water accumulating outside the elevator before her accident.

Moreover, the defendant relies on Czarkowski's testimony that he had walked past the elevator area twice approximately 20 to 30 minutes before the plaintiff's fall and did not observe water or a wet condition near the elevator. The defendant also highlights Czarkowski's testimony that when the plaintiff informed him of the fall Czarkowski inspected the area and did not observe any wet substance on the floor where the plaintiff claimed to have fallen. The defendant also relies on Loffer's testimony that it was not raining on the day of the accident, and that the building had not experienced any water accumulation in the elevator area, burst pipes or overflowing sinks or toilets in the nine years since it had been built. The defendant asserts that even assuming arguendo that it was aware of the water, there is no evidence that it had a reasonable opportunity to clean the area and failed to do so.

The plaintiff opposes the motion, and submits the initial and supplemental bill of particulars, deposition transcripts of the plaintiff and Czarkowski, the plaintiff's affidavit of October 21, 2020, the affidavit of Loffer dated May 16, 2019, five photographs of the accident location, three photographs depicting cameras located on the premises, and the operative report dated December 18, 2019 relating to surgery performed on the plaintiff's cervical spine. The plaintiff argues that proximate cause of an accident may be inferred from the facts and circumstances surrounding the injury, despite a lack of direct evidence of causation. She further argues that it is not necessary that she identify the exact substance that caused her to slip and fall in order to maintain an action. The plaintiff's affidavit, submitted in opposition to the instant motion, contends that she slipped and fell as a result of the wet condition on the floor, possibly water, and that the wetness/water that caused her fall might have been due to a recurring condition of garbage drippage, spillage and/or matter from garbage bags carried onto the elevator by tenants while disposing of them outside of the building. The plaintiff never testified about the alleged recurring condition caused by the leaking garbage bags at her deposition.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp*., 68 NY2d 320 (1986). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212(b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman* at 562.

In order to impose liability upon the defendant for a slip and fall "there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time." *See Kudrina v 82-04 Lefferts Tenants Corp*., 110 AD3d 963, 964 (2d Dept 2013); *see also Davis v Sutton*, 136 AD3d 731, 732-733 (2d Dept 2016). A defendant can meet its initial burden by demonstrating that the plaintiff did not know what caused her to fall. *See Defino v Interlaken Owners, Inc*., 125 AD3d 717 (2d Dept 2015). A plaintiff's inability to identify the cause of the fall is fatal to the plaintiff's action because a finding of the defendant's negligence would be based on speculation. *See DiLorenzo v S.I.J. Realty Co., LLC*, 115 AD3d 701 (2d Dept 2014); *see also Louman v Town of Greenburgh*, 60 AD3d 915 (2d Dept 2009).

Further, to provide constructive notice to a defendant it must be shown that the dangerous condition was "visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *See Campbell v New York City Tr. Auth*., 109 AD3d 455, 456 (2d Dept 2013). To meet its burden on the issue of lack of constructive notice, "the defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *See Campbell*, 109 AD3d at 456. While a plaintiff can establish that the dangerous condition proximately caused the accident in the absence of direct evidence of causation, such cases require "a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred." *See Bettineschi v Healy Elec. Contr., Inc.*, 73 AD3d 1109, 1110 (2d Dept 2010).

In the instant case, the defendant has met its prima facie burden establishing its entitlement to summary judgment as a matter of law. In opposition, the plaintiff has failed to raise a triable issue of fact. The defendant has demonstrated, based on the deposition testimony of the plaintiff, Czarkowksi and Loffer, that it did not cause or create the condition. The plaintiff's deposition testimony and affidavit make clear that she was not sure what caused her fall, which is fatal to her claim. *See DiLorenzo v S.I.J. Realty Co., LLC*, 115 AD3d 701. She testified that it might have been water or other wet substance, however in her affidavit the plaintiff speculates that the wet condition could have also been caused by leaking garbage bags carried onto the elevator by the tenants. While the plaintiff avers that she had previously made general complaints to Czarkowski about the leaking garbage bags, she offers no evidence that it caused the alleged dangerous condition that led to her fall. Likewise, the plaintiff's claims concerning the recurring condition are unsupported, as she offers no evidence that complaints were made to Czarkowski or the building owner concerning the leaking garbage bags prior to the accident. A general awareness that leaking garbage bags were being carried onto the elevator to be disposed of outside of the building was insufficient to raise an issue of fact. Thus, the plaintiff has not established that the defendant had notice of a recurring dangerous condition. *See Nesterenko v Starrett City Assoc., L.P.*, 111 AD3d 806 (2d Dept 2013) (holding that the

defendants' general awareness that garbage bags were left on the floor near the garbage chute was insufficient to charge them with notice of the particular condition that caused the plaintiff's fall).

Further, through the testimony of Czarkowski and Loffer the defendant has established that it had no actual or constructive notice of the dangerous condition. Czarkowski testified that he walked past the elevator twice approximately 20 to 30 minutes before the plaintiff's accident and he did not observe a wet condition. He also testified that that he had not mopped the floor that day, and that part of his duties consisted of walking around the building daily to inspect whether everything was running properly. Loffer testified that it was not raining that day, and that the building never had any issues with leaks or water accumulation near the elevator. Moreover, the plaintiff's testimony that she had not seen water in that area prior to the day of the accident; that she had no idea how long the water had been there before she fell; and that she was unaware of any prior complaints to the defendant about water accumulation in that area demonstrates that the defendant did not have constructive notice of the condition. Thus, the plaintiff has failed to raise a triable issue of fact as to whether the dangerous condition was visible and apparent and existed for a sufficient period of time to allow the defendant to discover the condition and remedy it. *See Campbell v New York City Tr. Auth*., 109 AD3d at 456; *see also Kershner v Pathmark Stores*, 280 AD2d 583 (2d Dept 2001) (finding that "in the absence of proof as to how long a puddle of water was on the floor of the entrance to its store, there is no evidence to permit an inference that the defendant…had constructive notice of the condition").

Lastly, the plaintiff's argument that the defendant intentionally removed cameras from the building that might have captured the accident is inapposite, and based on sheer conjecture and speculation. Moreover, the plaintiff's assertions are belied by the testimony of Czarkowski and Loffer, and Loffer's affidavit, that the building did not maintain a video surveillance system at the premises, and that the cameras seen by the plaintiff in the hallway of the lobby were never functional.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendant's motion for summary judgment is GRANTED.

This constitutes the decision and order of the Court.

Dated: March 18, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.