SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM

Justice

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INDEX NO. 158258/2017

JENNY CHEN,

Plaintiff,

MOTION DATE 09/08/2020, 09/08/2020

- v -

MOTION SEQ. NO. 001 002

JAMES LEE, SANG LEE, CHARLES RUTENBERG REALTY, INC., YUNJI HAHN,

DECISION + ORDER ON MOTION

Defendants.

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JAMES LEE, SANG LEE

Third-Party
Index No. 595966/2017

Plaintiffs,

-against-

YUNJI HAHN

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 84, 91, 92

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 85, 86, 87, 88, 89, 90

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

Upon the forgoing documents, per motion sequence 001, defendants James Kyongsop Lee and Sang Hee Lee (together, the Lee's) move pursuant to CPLR 3212 seeking an order for summary judgment dismissing all claims and cross claims against them with prejudice and compelling plaintiff and/or counsel to reimburse no-show fees incurred for an Independent Medical Examination (IME) that plaintiff failed to appear for, or alternatively, a conditional order precluding plaintiff from entering any evidence or testimony regarding her injuries at trial

until the IME is reimbursed. Additionally, per motion sequence 002, defendant Charles Rutenberg Realty, Inc. (Rutenberg) moves pursuant to CPLR 3212 seeking an order for summary judgment dismissing all claims and cross claims against Rutenberg with prejudice.

On July 8, 2017, Yunji Hahn (Hahn), an independent realtor for the broker Rutenberg, was providing plaintiff a viewing of the Lee's residence located at 127 Celia Drive, Jericho, New York (premises), when at approximately 11:40 am the plaintiff slipped and fell on the first stair leading down from the Lee's living room level.[1] On September 14, 2017, plaintiff commenced this action against the Lee's alleging negligence for the stairs being maintained in a dangerous or defective condition. Thereafter, on November 22, 2017, the Lees filed a third-party action against Rutenberg and Hahn alleging vicarious liability, negligence, indemnification, and contribution. Finally, on January 22, 2018, plaintiff amended her complaint to add the third-party defendants as direct defendants, further alleging Rutenberg and Hahn were negligent in requiring plaintiff to remove her shoes before proceeding through the premises.[2]

DISCUSSION

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]

[1] The Lee's home is a split-level house. Parties' papers and depositions also refer to the location of the staircase as being on the kitchen and dining room level. These facts are not material for the purposes of the Court's decision.

[2] Plaintiff's bill of particulars alleges Rutenberg and their agents had actual and constructive notice of the dangerous and defective condition and that they allowed this condition to remain (*see* plaintiff's "Third Supplemental Verified Bill of Particulars" [NYSCEF Doc. No. 56]).

[internal quotation marks and citation omitted]). "[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["mere conclusions, expression of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment]).

LEE'S MOTION SEQUENCE 001:

In support of their motion, the Lee's proffer deposition transcripts from plaintiff, the Lee's (individually), Hahn, and Joseph Moshe (principal for Rutenberg); plaintiff's (amended) bills of particulars; photos of the stairs; exhibits from the depositions; and discovery responses with a recorded interview transcript between Hahn and an insurance adjuster. The Lee's argue they are entitled to summary judgment because they did not possess actual or constructive notice that a dangerous condition existed. In addition, the Lee's aver that there should not be any liability as the steps were not inherently dangerous or defective in any way and just because stairs are merely smooth, without more, is not considered defective or actionable.[3]

In opposition, plaintiff argues the Lee's have not met their prima facie burden and failed to proffer any evidence that the use of baby wipes (which are used for topical purposes), as opposed to water, did not create the slippery condition causing the accident. Moreover, plaintiff contends no evidence has been proffered from defendants that wood stairs are inherently

[3] The Lee's further argue that the stairs are in the same condition since the house was purchased in 2006, but for non-slip tape that was added to the stairs 5-6 years prior to the accident. In addition, defendants maintain plaintiff testified to not noticing anything on the stairs when she ascended them prior to the fall. Moreover, plaintiff never spoke to the Lee's and the Lee's never spoke to Hahn about the need to remove shoes before viewing the Lee's house. Finally, defendants argue that plaintiff admitted in her deposition she removes her own shoes at home; therefore, the removal of shoes did not contribute to the accident.

slippery. Finally, plaintiff asserts that whether or not she was told to remove her shoes before entering the Lee's house is irrelevant to the Lee's liability.[4]

In reply, the Lee's aver plaintiff's attorney's affirmation has no evidentiary value and is insufficient to defeat the summary judgment motion. Moreover, the Lee's maintain plaintiff failed to proffer evidence that the Lee's were negligent in causing a slippery condition and plaintiff failed to provide an expert affidavit that the use of baby wipes made the condition exceedingly slippery; nevertheless, an expert affidavit would be insufficient to raise a triable issue of fact per caselaw. Finally, the Lee's reiterate that Hahn admitted to telling plaintiff to remove her shoes; the Lee's never spoke to Hahn or plaintiff about this arrangement; and caselaw shows having a guest remove their shoes is insufficient to defeat a summary judgment motion.[5]

"It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances" (*Waiters v N. Tr. Co. of New York*, 29 AD3d 325, 326 [1st Dept 2006], citing *Basso v Miller*, 40 NY2d 233, 241 [1976]). In a slip-and-fall case such as this, defendants bear "the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice

[4] Plaintiff further agues, to the extent that these issues are material or relevant at trial, that a jury should decide whether plaintiff was asked to remove her shoes before entering the premises; and whether there was non-stick tape on the stairs (as plaintiff testified the photos showing the tape on the stairs are dissimilar from the stairs at the time of the accident). Likewise, Ms. Lee testified that she added the nonstick tape after learning someone had fallen; therefore, there is a triable issue as to whether there was nonstick tape at the time of the accident. Lastly, on a summary judgment motion, it is the movant's responsibility to refute each allegation in the bill of particulars, which plaintiff maintains the Lee's have failed to do.

[5] The Lee's also argue Hahn took photographs immediately after the accident depicting that the stair in question had the nonslip tape on it at the time of the accident, which would refute plaintiff's claims that this is a triable issue for a jury to decide. In addition, the Lee's do not believe they need to refute everything in the bill of particulars.

of that condition for a sufficient length of time to discover and remedy it" (*Ash v City of New York*, 109 AD3d 854, 855–56 [2d Dept 2013]). "However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*id.*). Further,"[i]t is well settled that the fact that a floor is slippery by reason of its smoothness or polish, in the absence of any proof of the negligent application of wax or polish, does not give rise to a cause of action, or an inference of negligence" (*Pagan v Local 23-25 Intern. Ladies Garment Workers Union*, 234 AD2d 37, 38 [1st Dept 1996]).

Here, the Court finds that the Lee's have met their prima facie burden by submitting evidence that there was nothing wrong with the steps, except for plaintiff's testimony that they were "shiny" and felt "slippery" (NYSCEF Doc. No. 58 [plaintiff's EBT tr at 32, 34, 36]). In opposition, plaintiff alleged that the use of baby wipes to clean the steps may have made the steps more slippery; however, such assertion is speculative and unsupported by any evidence (*see Murphy v Conner*, 84 NY2d 969, 971 [1994] ["[p]laintiff offers no evidence of the reason for her fall other than the [steps] being smooth"); *Pagan*, 234 AD2d at 38 [plaintiff's "theory of negligence" that defendant "may have swept the floor where plaintiff fell, that if [defendant] did sweep the floor, it did so with a mop treated with an unknown chemical, which chemical might have been dangerous by creating a slippery condition on the newly installed tile" was "conclusory, self-serving and highly speculative" and "insufficient to defeat [defendant's] motion for summary judgment"]; *see also Caran v Hilton Hotels Corp.*, 299 AD2d 252 [1st Dept 2002] ["Since neither smoothness nor slipperiness, without more, permits an inference of negligent waxing or polishing, the action was properly dismissed"]). "Absent proof of a reason for a fall other than the 'inherently slippery' condition of the floor, no cause of action sounding

in negligence can be sustained" (*Lindeman v Vecchione Const. Corp.*, 275 AD2d 392 [2d Dept 2000]), particularly where "there was no evidence of any negligent conduct on the part of defendant" (*Kruimer v Natl. Cleaning Contractors, Inc.*, 256 AD2d 1 [1st Dept 1998]).[6]

The Court declines to grant that branch of the motion directing plaintiff to reimburse Dr. Montalbano for an $850.00 no-show fee. Plaintiff had already appeared for an IME, missed one appointment based on an undisputed law office failure from plaintiff's counsel's office, and promptly appeared when re-scheduled thereafter.

RUTENBERG REALTY'S MOTION SEQUENCE 002:

In support of its summary judgment motion, Rutenberg argues the agreements between Rutenberg and co-defendant Hahn places all responsibility on Hahn, including showing the premises.[7] In addition, Rutenberg avers there has been no duty element established. Likewise, Rutenberg believes plaintiff has failed to show that there were any complaints of a slippery or dangerous condition on the stairs. Further, even if plaintiff alleges the cause of her accident was the result of her being told to remove her shoes, Rutenberg is not liable for such. Finally, Rutenberg contends its indemnification clause with Hahn absolves Rutenberg of liability and/or duty in this case.

Rutenberg proffers deposition transcripts from plaintiff, the Lee's (individually), the principal for Rutenberg Realty Joseph Moshe (Moshe), Hahn, an affidavit from Moshe, and two contracts between Rutenberg and Hahn: (1) the "Independent Contractor Relationship

[6] Evidence was also submitted by the Lee's sufficiently demonstrating that the steps in question had nonslip tape on them at the time of the accident (*see* NYSCEF Doc. No. 62 [Hahn's July 8, 2017 text message]). In arguendo, plaintiff has not presented any evidence why the nonslip tape forms the basis for denying the motion.

[7] Rutenberg further argues that it did not control or provide any direction regarding the real estate transaction with the Lee's; they did not know the Lee's; and they have never been to the house where the accident occurred.

Agreement (ICR Agreement); and (2) the "Commissions and Fees Agreement for Independent Contractors Associated with Charles Rutenberg Realty, Inc." (C&F Agreement).

In opposition, plaintiff argues the affidavit of Moshe is conclusory, irregular and should not be considered as it is defective. In addition, plaintiff avers that a real estate agency may be responsible for negligence of its agents. Plaintiff also contests Rutenberg's belief that it cannot be held liable for the inherent nature of the flooring. Moreover, plaintiff maintains that the question of whether or not Hahn directed plaintiff to remove her shoes is a material issue of fact for the jury to resolve. Finally, plaintiff argues that being instructed to walk on the floor without shoes with the floor having been polished by baby wipes is indicia of Hahn unleashing an instrument of harm, whereby Rutenberg as principal owes a duty to plaintiff.

In reply, moving defendant argues the document in question was received via photograph since Moshe was unable to scan or fax the document due to the Covid-19 pandemic and although the document is not aesthetically pleasing, it is fully admissible and must be considered. In addition, the indemnity agreements hold Rutenberg harmless, placing all responsibility on Hahn. Moreover, no duty has been established for defendant. Further, there is no evidence presented that the baby wipes, let alone any evidence, was the cause of plaintiff's fall. Likewise, there has been no actual or constructive notice of the stairs being of a dangerous or slippery condition or of any falls prior to the accident. Finally, there is no evidence that Hahn unleased an instrument of harm or any evidence of negligence on the part of defendants.

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for

determination by the courts" (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002] citing *Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). "[L]iability for a dangerous condition on property is predicated upon ownership, occupancy, control, or special use" (*Bruhns v Antonelli*, 255 AD2d 478, 478 [2d Dept 1998]).

Here, Rutenberg presented Moshe's affidavit[8] and evidence sufficiently showing that Rutenberg did not own, occupy, control, or have special use of the premises where the accident occurred. Therefore, Rutenberg has met their initial burden that they did not owe a duty of care to plaintiff (*see Eichelbaum v Douglas Elliman, LLC*, 52 AD3d 210 [1st Dept 2008] [defendant real estate brokers met their prima facie burden by "showing that their only connection to the house in which plaintiff fell was to show it to prospective buyers, such as plaintiff, and that they therefore owed plaintiff no duty to make the house safe"]). Plaintiff's argument, inter alia, that Rutenberg is liable for Hahn's negligence as an agent or that Hahn launched an instrument of harm by allowing plaintiff to walk on floors polished by baby wipes is unavailing. Her reliance on *Stimmel v Osherow* (133 AD3d 483, 486 [1st Dept 2015]) is misplaced as it ignores the fact that there is an independent contractor agreement, to which plaintiff failed to address in general. The Court has considered plaintiff's other arguments and finds them without foundation.

CONCLUSION

Accordingly, that the branch of the motion by defendants James Kyongsop Lee and Sang Hee Lee (motion sequence no. 001) for summary judgment dismissing the complaint and any cross claims asserted against them is granted; and it is further

ORDERED that the branch of the Lee's motion seeking reimbursement for an IME no-show fee or, alternatively, a conditional order of preclusion is denied; and it is further

[8] The Court presumes the affidavit was notarized pursuant to Executive Order 202.7 [March 31, 2020] accessible at: https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf

ORDERED that defendant Charles Rutenberg Realty, Inc.'s motion (motion sequence no. 002) for summary judgment dismissing the complaint and any cross claims asserted against it is granted; and it is further

ORDERED that the claim(s) against the remaining defendant Hahn is severed and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of moving defendants James Kyongsop Lee and Sang Hee Lee and Charles Rutenberg Realty Inc., together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the Court.

3/31/2021
DATE

ALEXANDER M. TISCH, J.S.C.

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