At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 7th day of April, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

JENNIFER NUNEZ,

PLAINTIFF,

-AGAINST-

DECISION & ORDER

LORI D'AVANZO and FRANK D'AVANZO,

INDEX #EF001814/2019
Motion date: Jan 18, 2021
Motion Seq. #1

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 7 were read on the motion for summary judgment by defendants dismissing the complaint:

Notice of Motion/ Affirmation (Condello)/Exhibits A - G .. . . . 1 - 3
Affirmation in Opposition (DelDuco)/Supporting Affidavit/Exhibits 1-2. . . . . 4 - 6
Reply Affirmation (Condello) 7

This personal injury action arises out of a trip and fall that plaintiff alleges occurred on or about May 3, 2017 inside the premises located at 9A Main Street, the Hamlet of Wallkill, County of Ulster, New York. The premises is owned by the defendants and plaintiff was a month to month tenant who had been residing there for approximately three years prior to the accident. The alleged defect was raised or "bubbling" carpeting in the hallway of the apartment. Plaintiff alleges *inter alia* that defendants were negligent in creating the alleged defect by contracting to install insulation under the floor and failing to properly reinstall the carpet causing it to "bubble"

creating a "trap like" condition.

This action was commenced by the filing of a Summons and Complaint on March 7, 2019. Plaintiff testified at a deposition on January 3, 2020 and stated that the accident occurred when her foot got caught in the carpet which was bubbling. She noticed the bubbling after defendants had someone come in to install insulation. She stated that it was "bubbly at all times...everybody is walking in and out from that area. And it would come out when I would vacuum." (NYSCEF Doc. #15 at p.28) Plaintiff conceded that she never complained of this condition to the defendants and that they never came to the premises. (NYSCEF Doc. #15 at pp.18, 30)

In their motion for summary judgment, defendants argue that they had no actual or constructive notice of the defective condition alleged by the plaintiff to have caused her to fall. Plaintiff concedes that the bubbling began some time after the insulation work was completed and that she never made any complaints to the defendants prior to her accident. She also concedes that the defendants never saw the condition of the rug as they did not enter the apartment after the insulation install was completed. Plaintiff explained that the area of her fall is a very high traffic area and that vacuuming made the condition worse.

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings." (*Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214 [2d Dept 2010]) The bill of particulars alleged that the defendants improperly and negligently repaired the carpeting in the premises; failed to tack and/or secure the carpeting in the premises; causing an unreasonable danger; failed to address/repair/mark a dangerous falling hazard and failed to warn of a dangerous condition.

The familiar formulation of the law of premises liability is that "[i]n order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence." (*Lezama v. 34–15 Parsons Blvd, LLC*, 16 A.D.3d 560, 560 [2d Dept. 2005] ; *see Fontana v. R.H.C Dev., LLC*, 69 A.D.3d 561 [2d Dept 2010]; *Bodden v. Mayfair Supermarkets*, 6 A.D.3d 372, 373 [2d Dept 2004]) A landowner has constructive notice of a dangerous or defective condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford a reasonable opportunity to discover and remedy it. (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; *Davis v. Rochdale Vil., Inc.*, 63 A.D.3d 870, 870–871 [2d Dept 2009]) Thus, in cases where an owner is not alleged to have created the dangerous or defective condition, liability may nevertheless be predicated on the owner's failure to remedy the condition despite notice and sufficient time to do so. (*see Perlongo v. Park City 3 & 4 Apts., Inc.*, 31 A.D.3d 409, 410 [2d Dept 2006]; *Birthwright v. Mid–City Sec.*, 268 A.D.2d 401 [2d Dept 2000])

On the other hand, where liability is predicated on the owner's creation of a dangerous or defective condition, it has been said that " usual questions of notice of the condition are irrelevant" (*Cook v. Rezende*, 32 N.Y.2d 596, 599 [1973]; *see Ohanessian v. Chase Manhattan Realty Leasing Corp.*, 193 A.D.2d 567 [1st Dept 1993]) because an owner who creates a dangerous or defective condition usually knows about it. (*see Lewis v. Metropolitan Transp. Auth.*, 99 A.D.2d 246, 249 [1st Dept 1984], *affd. for reasons stated below* 64 N.Y.2d 670 [1984]) But not always. It is possible, even for a reasonable person acting reasonably, to create a

dangerous or defective condition without realizing it, and to remain ignorant of it for a period of time. Our system of tort law is generally predicated on fault, attaching liability for the breach of a duty owed and a departure from the expected behavior of reasonable persons. (*see generally Prosser, Law of Torts* § 75, at 492–496) Thus, except where, for policy reasons, the law imposes strict liability, an owner should be held liable for the creation of a dangerous or defective condition on property if a reasonable person in the owner's position would have known, or would have had reason to know, of the danger created, or would have had such knowledge imputed by operation of law.

Here, the defendants were responsible, either directly or vicariously, for the carpet being taken up and then reinstalled but they had no knowledge of the alleged defect which occurred subsequent to the work. Therefore, defendants have established their prima facie entitlement to judgment as a matter of law by showing that, prior to the accident, a reasonable person in their position would not have known, and would not have had reason to know, that the insulation install work would create a dangerous or defective condition. (*cf. Beyda v. Helmsley Enters.*, 261 A.D.2d 563, 564–565 [2d Dept 1999]). In opposition, plaintiff failed to raise a triable issue of fact. Her submissions did not address whether the defendants were chargeable with actionable knowledge of the allegedly dangerous condition and she made no showing as to why or how they should have been alerted to the danger.

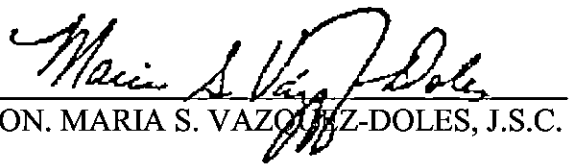
ORDERED that the motion for summary judgment by defendants is granted and it is further

ORDERED that the complaint is dismissed as against defendants, LORI D'AVANZO and FRANK D'AVANZO.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 7, 2021
Goshen, New York

ENTER:



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF