Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

LOUISE DEJARNETTE,

Plaintiff,

-against-

MACEDONIA SENIOR RESIDENCE, L.P., MACEDONIA SENIOR HOUSING DEVELOPMENT FUND COMPANY, INC., THE D&F DEVELOPMENT GROUP LLC,

Defendants.

IAS Part - 42

Index No.: 713507/2018

Motion Date: 10/29/20

Motion Cal. No.

Motion Seq. No. 2

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR § 3212 granting summary judgment to Macedonia Senior Residence, L.P., Macedonia Senior Housing Development Fund Company, Inc., and the D&F Development Group LLC (collectively, the "defendants"), dismissing the plaintiff's complaint, in its entirety.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits.....	EF 23 - 32
Affirmation in Opposition-Exhibits.....	EF 35 - 38
Reply Affirmation- Exhibits	EF 40 - 41

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by Louise Dejarnette ("Ms. Dejarnette" or "plaintiff"). Ms. Dejarnette alleges that on May 14, 2017, she was caused to fall by water on the floor in the hallway outside her apartment on the third floor of 333 Beach 67th Street, Queens County, city and state of New York. As a result, on August 31,

2018, she commenced the instant action; and on October 9, 2018, issue was joined, wherein the defendants interposed a verified answer. After some litigation, on January 21, 2020, plaintiff filed a Notice of Trial and Certificate of Readiness ("NOI"), with the clerk of the court, requesting this action be placed on the court's trial calendar.

Now, defendants move for summary judgment, pursuant to CPLR § 3212. In particular, the defendants argue that the plaintiff claims she slipped and fell in a stream of water in the hallway of her apartment complex. However, the water was caused by the intentional acts of Raymond Baltazar, Jr. ("Mr. Baltazar"), when he purposely stuffed clothes into a drain of a sink and left the water running. The defendants argue that the intentional actions of Mr. Baltazar were an intervening act that constituted a superseding cause sufficient to relieve the defendants of liability because intentionally stuffing clothes into a drain and leaving the water running is extraordinary under the circumstances, not foreseeable and far removed from any alleged negligence of the defendants. Moreover, the defendants argue that plaintiff admittedly observed the water in the hallway before the accident and still decided to walk through the stream of water without taking any action to avoid stepping into the water. Accordingly, the water was open and obvious and not inherently dangerous. Lastly, the defendants content that they did not have either actual or constructive notice of water in the hallway and did not create the condition.

In opposition, the plaintiff argues that a property owner has a duty to minimize the foreseeable dangerous acts of third parties on their property. Further, the defendants failed to demonstrate that they did not have either actual or constructive notice of the condition prior to the incident involving plaintiff. Moreover, defendants' affidavit of witness Sharon Johnson ("Ms. Johnson") should be disregarded by the Court because she was not disclosed as a witness by defendants before the Note of Issue was filed. Additionally, plaintiff argues that defendants should be precluded from arguing "Culpable Conduct of Others" and "Lack of Notice" because their Bill of Particulars was totally deficient with respect to those defenses. Moreover, plaintiff contends that whether the condition that caused plaintiff's fall was open and obvious goes to her comparative negligence, if any, and is for the jury. Lastly, plaintiff raises an issue of fact with respect to whether she could have even avoided the condition that caused her to fall. The defendants did submit reply papers. However, the defendants failed to address all the points outlined in plaintiff's opposition papers.

"Summary judgment is a drastic remedy made in lieu of a trial which resolves the case

as a matter of law" (*Reyes v. Arco Wenworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011], citing *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; *see also Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show *prima facie* entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR § 3212(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1984]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Furthermore, considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v. Griffin*, 71 AD2d 1112, 1115 [2d Dept 2010] [internal quotations marks omitted]).

It is well settled that a landowner has a duty to maintain its premises in a reasonably safe manner. (*Basso v. Miller*, 40 NY2d 233, 241 [1976]; *Nannariello v. Kohl's Dept. Stores, Inc.*, 161 AD3d 1089 [2d Dept 2018].) However, a landowner has no duty to warn against an open or obvious condition which, as a matter of law, is not inherently dangerous. (*Gerner v. Shop-Rite of Uniondale, Inc.*, 148 AD3d 1122, 1122 [2d Dept 2017]; *Nesbitt v. Town of Poughkeepsie*, 88 AD3d 774, 774 [2d Dept 2011]; *see Tagle v. Jakob*, 97 NY2d 165, 169 [2001]; *Ruiz v. Hart Elm Corp.*, 44 AD3d 842, 843 [2d Dept 2007].) The condition must be of such a nature that it could not reasonably be overlooked by anyone in the area whose eyes were open. (*Tagle v. Jakob*, 97 NY2d at 170.) Whether a condition is open and obvious is generally a question of fact for the jury, and a court should only determine that such a risk is open and obvious as a matter of law when the facts compel such a conclusion. (*Tagle v. Jakob*, 97 NY2d at 169.) The fact that a condition is open and obvious, however, does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of plaintiff's comparative negligence. (*Cupo v. Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003].)

Furthermore, the court finds that the defendants ailed to make a prima facie showing of its entitlement to judgment as a matter of law on the ground that it did not have constructive notice of the alleged dangerous condition. A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected (*see Butts v. SJF, LLC*, 171 AD3d 688 [2d Dept 2019]; *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Walsh v. Super Value, Inc.*, 76 AD3d 371 [2d Dept 2010]). To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident (*see Sartori v. JP Morgan Chase Bank, N.A.*, 127 AD3d 1157 [2d Dept 2015]; *Campbell v. New York City Tr. Auth.*, 109 AD3d 455 [2d Dept 2013]; *Levine v. Amverserve Assn., Inc.*, 92 AD3d 728 [2d Dept 2012]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*Herman v. Lifeplex, LLC*, 106 AD3d 1050 [2d Dept 2013]; *see Rodriguez v. Shoprite Supermarkets, Inc.*, 119 AD3d 923 [2d Dept 2014]; *Rogers v. Bloomingdale's, Inc.*, 117 AD3d 933 [2d Dept 2014]). Defendants' submissions in support of its motion failed to demonstrate, prima facie, a lack of constructive notice. In fact, the deposition testimony of Gary Brenner ("Mr. Brenner") merely referenced his general inspection practices and failed to indicate when the area of the hallway where the alleged slip and fall occurred was last inspected or cleaned relative to the accident (*see Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 AD3d 880-881, 951 [2d Dept 2012]; *Klerman v. Fine Fare Supermarket*, 96 AD3d 907 [2d Dept 2011]).

Additionally, the court agrees with the plaintiff that the defendants failed to particularize its affirmative defense based upon the "culpable conduct of others." On November 27, 2018, the defendants served their response to the plaintiff's Demand for a Bill of Particulars relating to Culpable Conduct of Others, wherein the defendants stated the following:

> The Defendants object to this demand to the extent it seeks information which is evidentiary in nature and is improper subject matter for bill of particulars. The Defendants further object to this demand to the extent that discovery is on-going and the Defendants intend to explore this issue through discovery.

Clearly, the defendant failed to particularize its affirmative defense based upon the "culpable conduct of others." (*see, McLean v. Huntington Hospital*, 227 AD2d 533 [2d Dept 1996]; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3041:6, at

482; *Forney v. Huntington Hosp.*, 134 AD2d 405 [2d Dept 1987]). It is well settled that summary judgment should not be granted where the facts are in dispute, where conflicting inference may be drawn from the evidence, or where there are issues of credibility. (*Collado v. Jiacono*, 126 AD3d 927 [2d Dept 2014] citing *Scott v. Long Island Power Authority*, 294 AD2d 348 [2d Dept 2002]; *see also Fobbs v. Shore*, 171 AD3d 874 [2d Dept 2019]).

Accordingly, it is hereby

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

ORDERED that plaintiff shall serve, via NYSCEF, a copy of this decision and order with notice of entry upon the defendant and the clerk of this court on or before April 30, 2021.

The foregoing constitutes the decision and order of the court.

Dated: March 30, 2021
Long Island City, NY

MAURICE E. MUIR, J.S.C.

FILED
3/31/2021
COUNTY CLERK
QUEENS COUNTY