SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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ROXANNE FRASER,

Plaintiff,

- v -

40 WALL STREET HOLDINGS CORP, 40 WALL STREET COMMERCIAL LLC,40 WALL STREET LLC,40 WALL STREET MEMBER CORP, 40 WALL STREET N.V

Defendants.

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INDEX NO. 156458/2018

MOTION DATE 01/28/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 86, 87, 88

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendants for summary judgment dismissing this case is granted.

Background

This slip and fall action occurred when plaintiff entered defendants' building located at 40 Wall Street on August 3, 2017. Plaintiff maintains she slipped as she stepped into the lobby of the building around 5:45 a.m. Defendants seek summary judgment on the ground that plaintiff failed to identify the defective condition that caused her fall; they point out there was no precipitation that day and that plaintiff testified she didn't see any water on the sidewalk in front of the building.

Defendants also argue that the employee assigned to clean the sidewalk did not "punch in" until 6:03 a.m. that morning, meaning that the alleged liquid in the lobby could not have come from cleaning the sidewalk. Defendants also attach the affidavit of Bernard Lorenz, an

engineer, who claims that the door and door saddle of the subject building would have prevented water from entering the lobby while workers cleaned the sidewalk (NYSCEF Doc. No. 81, ¶ 10). Defendants emphasize that they had neither actual nor constructive notice of the liquid, and therefore this case should be dismissed.

In opposition, plaintiff contends that she walked over a freshly cleaned sidewalk outside the building and then slipped and fell on the polished lobby floor once entering the building. She argues that whether or not water could have entered the building over the door saddle (as discussed in defendants' expert affidavit) is irrelevant because her shoes got wet from the sidewalk and then she walked into the building.

Plaintiff asks the Court to ignore the timecard of the person (Mr. Figueroa) who allegedly cleaned the sidewalk that morning and arrived after the accident (he punched in at 6:03 am and plaintiff fell at 5:45 am). She maintains that this was disclosed for the first time after the note of issue was filed and that there has been no testimony relating to this exhibit. Plaintiff also argues that there was testimony that many people had cleaning responsibilities so this individual timecard is not dispositive.

In reply, defendants complain about plaintiff's effort to modify plaintiff's deposition testimony and ask the Court to ignore those efforts. They also point out that prior to the filing of the note of issue, they sent plaintiff a post-deposition response that identified Mr. Figueroa as a former employee for defendants and contained his home address. Defendants maintain that plaintiff simply decided not to try to depose Mr. Figueroa.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages for a breach of this duty, a party must establish that the landlord created, or had actual or constructive notice of the hazardous condition which precipitated the injury. Moreover, in order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it" (*Zuk v Great Atl. & Pac. Tea Co.*,

Inc., 21 AD3d 275, 275-76, 799 NYS2d 504 [1st Dept 2005] [internal quotations and citations omitted]).

At plaintiff's deposition, she testified that it was not raining at the time of her accident and she was wearing open toe flats (NYSCEF Doc. No. 69 at 21). She testified that as soon as she entered the building, she immediately fell (*id*. at 35). She explained that she took a step in the building with her left foot "[a]nd then I took a step with my right foot and that's when I fell" (*id*. at 36).

Plaintiff was then asked if she "made any observations about the condition of the sidewalk on 40 Wall Street as you approached the building at 40 Wall Street?" and plaintiff responded, "As far as I can remember, no" (*id*. at 37). She was also asked if she looked at that the sidewalk before she pushed open the entrance door and plaintiff testified that "As far as I can remember, no" (*id*. at 38). Plaintiff also noted that she had not observed any building employees on the sidewalk outside of the building on the date of the incident nor did she see anything on the sidewalk (*id*.). Upon further questioning, plaintiff testified that she did not see anyone cleaning the lobby when she entered the building (*id*. at 45).

When asked to describe the incident, again, plaintiff said "I proceeded to the building, I opened the door, I stepped in with my left foot and then when I stepped in with my right foot, I went down" (*id*.) She added that after she fell, she noticed a clear liquid in the palm of her right hand (*id*. at 48-49). Plaintiff testified that she didn't check to see if there was water on her feet and that "I just saw the water that was on my hand" and didn't see any water on the lobby floor following her fall (*id*. at 49).

The Court grants the motion based on the foregoing deposition testimony. Plaintiff failed to articulate a cognizable defective condition that caused her fall sufficient to impose liability on

defendants. "To impose liability upon the defendant, there must be evidence tending to show the existence of a dangerous or defective condition" (*King v New York City Tr. Auth.*, 266 AD2d 354, 354, 698 NYS2d 328 [2d Dept 1999]). As best this Court can tell, plaintiff slipped and fell on some type of liquid although it is unclear whether that liquid was from the lobby floor, the sidewalk or some other location. In other words, plaintiff cannot raise an issue of fact by simply falling after taking two steps on the lobby floor and not identifying what caused her to slip.

The Court also finds that plaintiff's affidavit submitted in opposition (NYSCEF Doc. No. 85) is really an attempt to rewrite her deposition testimony. In other words, plaintiff's assertions are feigned issues of fact that do not compel the Court to deny the instant motion (*Bamberg-Taylor v Strauch*, 192 AD3d 401, 402, 142 NYS3d 537 [1st Dept 2021] [finding a belated theory of liability not discussed in plaintiff's deposition did not raise an issue of fact]). The affidavit in question makes all manner of statements plaintiff could have raised at her deposition. Contrary to her contentions in opposition, the Court does not find that the questioning by counsel for defendants was improper. Counsel merely asked plaintiff about the incident in many different ways because it was manifestly unclear how plaintiff's accident happened.

Suddenly, in her opposition to this motion, plaintiff says that the sidewalk in front of the building is washed every day at 5:00 a.m. although at her deposition she said she didn't see anything on the sidewalk on the day of her accident (such as liquid). Moreover, plaintiff did not say (even in her affidavit) that she saw workers washing the sidewalk that morning or that it was still visibly wet. Instead, the affidavit states she "must walk over the washed/wet sidewalk before entering the premises" (NYSCEF Doc. No. 85, ¶ 5) as if this was a routine or habit. But there is no evidence of this routine submitted by plaintiff in opposition nor did she discuss it at her deposition despite ample opportunity to describe her observations on the day of her accident.

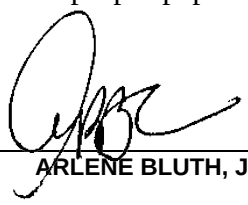
Nevertheless, plaintiff now claims her shoes were wet from a just-washed sidewalk. That feigned issue of fact must be disregarded.

Summary

The Court recognizes that it can be difficult sometimes to articulate how an accident occurs. An injured individual is understandably not always thinking about a potential legal case. But, here, plaintiff did not provide the Court with sufficient detail to assess whether defendants could face any liability. Simply because plaintiff fell does not mean defendants are liable. Plaintiff's deposition testimony only supports a theory that she fell without any discernable cause related to defendants. She did not mention anything about observing the sidewalk being cleaned on the morning of her accident or that the lobby floor was wet. That she now pursues a theory that the sidewalk was wet and caused her to slip and fall is too late; she cannot add details to help her case only after defendants brought the instant motion.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing this case is granted and the Clerk is directed to enter judgment in favor of defendants and against plaintiff accordingly along with costs and disbursements upon presentation of proper papers therefor.



1/31/2022
DATE

ARLENE BLUTH, J.S.C.

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