| **Pochtar v City of New York** |
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| 2022 NY Slip Op 30919(U) |
| March 21, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 504373/2018 |
| Judge: Debra Silber |
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of March, 2022.

P R E S E N T:
HON. DEBRA SILBER
Justice.

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NATALIYA POCHTAR,
Plaintiff,

- against -

THE CITY OF NEW YORK
AND OCEANGATE, L.P.,
Defendants.

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**DECISION/ORDER**
Index No. 504373/2018
Mot. Seq. # 6

The following papers read on this motion:

| | NYSCEF Numbered |
|---|---|
| Notice of Motion and Affidavits (Affirmations) Annexed | 119-140 |
| Opposing Affidavits (Affirmations) | 144-146 |
| Reply Affidavits (Affirmations) | 147-148 |

Upon the foregoing papers, defendant Oceangate, L.P. (Oceangate) moves, in Motion Sequence #6, pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff Pochtar's complaint. The City of New York was previously dismissed from this action by order dated March 29, 2019 on Motion Sequence #1. The motion was

made timely, on the 60th day after the Note of Issue was filed. For the reasons which follow, the motion is granted, and the complaint is dismissed.

***Factual Background***

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff on December 10, 2016, when she tripped and fell while walking across the floor inside of her boyfriend's apartment at 2730 West 33rd Street, Brooklyn New York. Defendant owns the building. It is a large apartment building.

Plaintiff's counsel initially thought the City of New York owned the building, but then did not oppose the City's motion to dismiss. In her Notice of Claim, Doc 123, the earliest written description of this claim, this is the description of the hazardous condition which plaintiff claims caused her to trip and fall:

> the claimant, NATALIYA POCHTAR, . . . slipped/tripped and fell on a parquet or wooden floor within apartment No. "16H" located inside 2730 West 33rd Street, Brooklyn New York, as a result of presence of sticky, gooey, waxy, paste-like substance which substance was applied to the floor/used by NEW YORK CITY HOUSING AUTHORITY, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION, CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and CITY OF NEW YORK (collectively 'Respondents'), their agents, servants, employees, contractors, subcontractors and/or licensees, in repairing said parquet or wooden floor at the request or on behalf of the Respondents and/or under the respondents direction, control and supervision. It is further claimed that the aforementioned gooey, waxy, sticky, paste-like substance used in said floor repairs, was inadequate, dangerous, defective, improperly applied, improper for the type of flooring then and there existing, improper for flooring that is located over heating pipes which may cause the floor and said waxy, gooey, sticky, paste-like substance to expand and become sticky and slippery when heated, creating dangerous/defective/trap-like condition."

The defendant's negligence was alleged to be:

> Respondents, their agents, servants, employees, contractors, subcontractors and/or licensees, in owning, operating, managing, controlling, maintaining, inspecting, and repairing, failing to properly repair, failing to hire qualified staff and/or contractors to perform repairs, failing to use proper and safe materials for repairs, using materials meant for temporary patching of floor cracks/holes/defects as a permanent repair and/or failing to return to complete the floor repair, allowing inadequate repairs to be performed in such a manner as to create defects/dangers giving rise to plaintiff's injuries, failing to warn the plaintiff of dangers/defects caused by improper repairs performed by Respondents their employees, agents, contractors, subcontractors and/or licensees within the premises located at 2730 West 33rd Street, Apt 16 H, Brooklyn NY 11224, and more specifically the parquet floor within said premises without any contributory negligence on the part of the claimant."

The complaint in this action was filed on July 25, 2019, more than two years after the above-described notice of claim was served. The complaint asserts that the defendant property owner (and the City) and its "agents, servants, employees and/or licensees in the design, ownership, operation, management, maintenance, inspection, repair, and control of the aforesaid playground [sic]" were negligent.

At virtual oral argument on the record, plaintiff's counsel averred that the plaintiff is not complaining that the repair to the parquet floor caused a mis-leveled floor with adjacent tiles of different heights[1], but that she was caused to fall by the sticky substance which was used to glue the tile down some four years earlier. Counsel stated that this substance was so sticky that it stopped her shoe from moving, and that was what caused her to fall.

[1] Her earliest testimony, at a 50-h hearing, Doc 124, indicated that the height differential was "maybe a quarter of a centimeter." That would be *de minimis*, at 0.0984252 (almost one-tenth) of an inch.

Defendant argued that any excess glue from the repair, if there was any, would be gone after four years, and the property owner could not be responsible for plaintiff's accident.

Defendant supports its motion with copies of the pleadings, transcripts from plaintiff's 50-h hearing and EBT, transcripts of the EBT of Gary Lebedinsky, plaintiff's boyfriend, and of defendant's witness, Christopher Broadus, the building superintendent. The exhibits marked at the depositions are also provided. Defendant also provides an expert's affidavit.

Plaintiff testified at her 50-h hearing that this apartment was on the top floor. Apparently, there had been a leak from the roof, and there was a "general renovation" some three or four years before this accident and that is when the floor was repaired [Doc 124 Pages 20 and 24]. She said the floor had been damaged by the leak, and there were a few places in the apartment where the floor was repaired. She said they also "changed windows, fixed the roof." Asked to describe the accident, she said her "foot got stuck." Asked [Page 35] what her foot got stuck on, she said "Imagine there is chewing gum on the asphalt, so this is the feeling I had." She was then asked, "Had your foot ever gotten stuck on that same part of the floor at any time in the three to four years before the accident?" and she said "No." Then, "Had you ever seen anybody's foot get stuck there before?" and she answered "No."

Mr. Broadus testified that he had been the super at this building for about ten years. He looked in the records for this apartment and could not find any records with regard to the floor. He testified that annual inspections were done in each apartment, and the tenant, Gary

Lebedinsky, had signed the inspection forms for the three years before the plaintiff's accident, which indicated that he agreed that there were no problems in his apartment. Shown photos of the floor at issue, he said "that could have been the tenant that did that themselves. That's not work that we would have done." He said he knew this because if a 12 inch by 12 inch tile were replaced, it would fill the entire space, not leave a gap as indicated in the photo [Doc 130 Page 47]. Mr. Broadus testified that the "general renovation" which plaintiff described as having taken place three of four years prior to her 50-h (in 2017) had taken place in 2008-2010 [Doc 130 Page 38].

Defendant's expert, Tamara Cohen, PhD, provides an affidavit [Doc 133]. She holds a PhD in biomechanical engineering. She did a "site inspection" on May 5, 2021, five years after the plaintiff's accident. She notes "I also touched the glue and tactilely observed that it was dry, clean any foreign dirt or debris, and exhibited no adhesive or binding quality." Because of this delay, her report is of little value.

***Discussion***

Oceangate seeks summary judgment dismissing plaintiff's complaint. It is well settled that "the proponent of a summary judgment motion 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735

[2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendant argues that they did not have any actual or constructive notice of any hazardous condition, and that there was no hazardous condition. Defendant also argues that the fact that the tenant of record signed off on the annual inspection reports in March 2016 and February 2015 is proof that there was no hazardous or defective condition with regard to the floor. These are at Doc 137 Pages 5-14.

In opposition, the plaintiff's attorney states that plaintiff has lived in this apartment for many years. He then proceeds to testify about facts he has no personal knowledge of. He says her "slipper" got stuck, but she testified she was wearing sneakers [Doc 124, Page 17]. Counsel also provides a memo of law. He points out that plaintiff is entitled to every favorable inference and that there are "material issues of fact" here. He states, "the floor defect was not trivial because a sticky substance leaked out and enhanced the danger." He also argues that there was a height differential between the floor tiles, which is belied by her testimony and not a claim at all as stated at oral argument.

***Conclusions of Law***

A property owner may be liable for a trip and fall on its property if it "'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010], quoting *Ortega v*

*Puccia*, 57 AD3d 54, 61 [2008]; *see Banscher v Actus Lend Lease, LLC,* 132 AD3d 707, 709 [2015]). However, there must be a dangerous or hazardous condition. Here, defendant has made a prima facie case that there was none (See *Bartholomew v Sears Roebuck & Co.*, 159 AD3d 786, 787 [2d Dept 2018], citing *Gerner v Shop-Rite of Uniondale, Inc.*, 148 AD3d 1122, 50 NYS3d 459 [2017]; *Lew v Manhasset Pub. Lib.*, 123 AD3d 1096, 1097, 999 NYS2d 527 [2014]; *Koepke v Deer Hills Hardware, Inc*, 118 AD3d 957, 987 NYS2d 854 [2014]; *Casamassa v Waldbaum's Inc.*, 276 AD2d 659, 660, 714 NYS2d 352 [2000]).

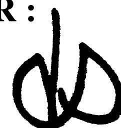
As the Appellate Division states in *Zamor v Dirtbusters Laundromat, Inc.*, 138 AD3d 1114, 1114-1115 [2d Dept 2016]:

> "A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Cupo v Karfunkel*, 1 AD3d 48, 51, 767 NYS2d 40 [2003] [internal quotation marks omitted]; *see Witkowski v Island Trees Pub. Lib.*, 125 AD3d 768, 769, 4 NYS3d 65 [2015]). In order for a landowner or a lessee 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 defendant landowner or lessee affirmatively created the condition or had actual or constructive notice of its existence (*see Witkowski v Island Trees Pub. Lib.*, 125 AD3d at 769; *Ingram v Costco Wholesale Corp.*, 117 AD3d 685, 985 NYS2d 272 [2014]; *Fontana v R.H.C. Dev., LLC*, 69 AD3d 561, 562, 892 NYS2d 504 [2010]; *Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 792 NYS2d 123 [2005]).
>
> Here, the defendants made a prima facie showing that they maintained the laundromat premises in a reasonably safe condition, and that the plaintiff's accident was not caused by any defective condition (*see Witkowski v Island Trees Pub. Lib.*, 125 AD3d at 769-770; *Ingram v Costco Wholesale Corp.*, 117 AD3d at 685; *Fontana v R.H.C. Dev., LLC*, 69 AD3d at 562; *Maldonado v Su Jong Lee*, 278 AD2d 206, 207, 717 NYS2d 258 [2000]).

Similarly, here, plaintiff alleges that her injuries were the result of a dangerous condition, specifically, the glue that had been used to adhere the wood floor tiles to the cement floor some years prior to her accident. However, her EBT testimony and photos do not establish that there was in fact a dangerous condition on the floor. Nor does she establish that defendant's agents did the repair work. She relies on defendant to provide the proof for her case, but it does not. Defendant denies receiving any complaints about the floor after the repair but prior to plaintiff's accident, denies repairing the floor within the three years prior to her accident, denies that the photos indicate work done by an employee of defendant or a contractor hired by defendant, and denies that any type of flooring glue would be sticky three to four years after it was applied. Defendant provides copies of the annual inspection reports signed by the named tenant in February 2015 and March 2016, which indicate there were no problems in the apartment. Plaintiff did not provide any evidence, expert or otherwise, to overcome the motion. To be clear, even if this "sticky" condition existed on the date of plaintiff's accident, plaintiff has not established that the "condition" she complains of was hazardous, or that it was caused or created by the defendant, nor does she establish that defendant had actual or constructive notice of it.

Based upon the foregoing, it is hereby **ORDERED** that the defendant's motion seeking summary judgment dismissing plaintiff's complaint is granted, and the complaint is dismissed. The foregoing constitutes the decision and order of the court.

**E N T E R :**



**Debra Silber, J.S.C.**