SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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GAVIN IACCARINO,

Plaintiff,

- v -

BRUNHILDE KOENIG, 222 EAST 13TH STREET CORP.

Defendant.

INDEX NO. 162121/2018

MOTION DATE 01/04/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff commenced this personal injury action asserting negligence and seeking damages for injuries allegedly sustained during a fall on Defendants' property, a home located at 71 Parkway Drive in Syosset, New York ("the property"). Defendants Koenig and 222 East 13th Street Corporation, a real estate corporation of which Koenig is the sole owner and president, move for an order pursuant to CPLR 3212 granting summary judgment and dismissing Plaintiff's complaint. Plaintiff opposes the motion.

The property is a single-family home with a basement apartment. That apartment is accessible from the rear of the home by traversing a painted concrete patio and descending five painted concrete steps leading down to the apartment's front door. Plaintiff resided in the basement apartment at the time of the incident and for approximately three years prior to the incident. Plaintiff testified that during the period he lived in the apartment, he used the steps 10-15 times per day. He stated that prior to the incident he had previously slipped on the steps but did not require medical attention.

On the evening of September 13, 2018, while returning to the apartment, Plaintiff slipped on the third step leading to his apartment door. Plaintiff testified that it was "wet and misty" at the time that he slipped, that it had been misting all day but had never rained hard, and that there was "some standing water" (NYSCEF Doc No. 37, at 77, 81). However, he did not see any defects on the stairs on the night of the incident (*id.* at 81). Plaintiff's bill of particulars asserts that Defendants created a dangerous condition by using improper paint on the exterior patio, causing Plaintiff to slip and fall (NYSCEF Doc No. 36, at ¶ 8[3]).

Both Plaintiff and Defendant Koenig testified that the steps were made of concrete and were painted annually each spring. Koenig testified, "I paint it every year myself. Nonslip paint from Home Depot" (NYSCEF Doc No. 38, at 30). When asked "Did you mix any sand or any other material in with the paint prior to using it?" Koenig answered, "No, it was a finished product. It's safe, nonslip paint." (*id.* at 32). Plaintiff testified he did not know what paint was used to paint the steps (NYSCEF Doc No. 37, at 30). He stated that he believed Defendants hired a handyman to paint the stairs and saw him doing so "a few times" (*id.*). Plaintiff testified that he told Koenig that the steps were slippery and asked about putting down sandpaper strips (*id.* at 31). Koenig denied that Plaintiff had complained to her about the steps (NYSCEF Doc No. 38, at 33).

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). A plaintiff seeking to impose liability based on a dangerous condition must demonstrate that the property owner created or had actual or constructive notice of the dangerous condition that precipitated the injury (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015], *citing Mercer v City of New York*, 88 NY2d 955, 956 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). "A defendant who

moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence" (*Ceron*, 126 AD3d, at 632, *citing Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]). Having done so, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Ceron*, 126 AD3d, at 632, *citing Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]).

The Court has held that "[m]ere wetness on a walking surface due to rain does not constitute a dangerous condition" (*Ceron*, 126 AD3d, at 632, *citing McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010]). Furthermore, "[a]bsent competent evidence of a defect in the surface or some deviation from an applicable industry standard, liability is not imposed for a slippery floor" (*Arias v Stonhard, Inc.*, 188 AD3d 590, 591 [1st Dept 2020], *citing Murphy v Connor*, 84 NY2d 969, 971-972 [1994]; *Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445 [1st Dept 2014]).

Defendants have made a *prima facie* showing that, as a matter of law, no dangerous condition existed that would subject Defendants to liability for Plaintiff's claimed injuries. It is undisputed that Plaintiff, who testified to using the steps between 10 and 15 times per day, fell on exterior stairs that were wet from mist. The party depositions annexed to Defendants' moving papers establish that Defendant Koenig specifically testified that she used a non-slip exterior paint. Plaintiff conceded that he did not know what paint was used. He further testified that he observed no defect in the steps at the time he fell.

In opposition, Plaintiff fails to establish the existence of a material issue of fact. Indeed, Plaintiff provides no other support for the allegation that Defendants used improper paint. Plaintiff's expert affidavit does not mention paint or the texture of the steps' surface, nor does it

reference any applicable industry standard, and the attached photographs do not raise any triable issues of fact. Plaintiff's contention that Defendants created a dangerous condition by using the wrong paint appears to be purely speculative, and "mere speculation about causation is inadequate to sustain a cause of action" (*Silber v Sullivan Props., LP*, 182 AD3d 512, 513 [1st Dept 2020]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a successful *prima facie* showing of entitlement to summary judgment]).

Plaintiff's argument that the steps violated building code is a new theory of liability improperly raised for the first time in opposition to Defendants' summary judgment motion. Plaintiff's expert report focuses on inconsistencies in the risers and treads of the steps and concludes that the steps violated four code provisions, however these alleged violations were not plead in the complaint or bill of particulars (*Silber*, 182 AD3d 512). In light of Plaintiff's failure to raise an issue of fact as to the existence of a dangerous condition, any claims about prior notice to Defendants need not be considered.

Accordingly for the reasons set forth herein it is hereby,

ORDERED that Defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/16/2022
DATE

LORI SATTLER, 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