

Yakubova v Methodist Hosp. Physicians Org., Inc.
2022 NY Slip Op 32159(U)
June 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 520521/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of June, 2022.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X

KHASIDA YAKUBOVA,

Index No.: 520521/2017

Plaintiff,

-against-

DECISION AND ORDER

METHODIST HOSPITAL PHYSICIANS ORGANIZATION,
INC. D/B/A NEW YORK METHODIST HOSPITAL A/K/A
NEW YORK-PRESBYTERIAN BROOKLYN METHODIST
HOSPITAL and M.E. HOSPITAL,

Motions Sequence #3

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	37, 38, 40-48,
Opposing Affidavits (Affirmations).....	49-52,
Reply Affidavits (Affirmations)	54,
Memorandum of Law.....	39

After a review of the papers and oral argument, the Court finds as follows:

The instant action results from an alleged slip and fall accident that occurred on February 10, 2016. Plaintiff Khasida Yakubova (hereinafter the "Plaintiff") allegedly injured herself after slipping while walking down one of the hallways located within Defendant Methodist Hospital (hereinafter the "Defendant").

The Defendant now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Defendant contends that summary judgment should

be granted as the Plaintiff cannot identify the alleged defect at issue. The Defendant argues that as a result, it could not have actual or constructive notice of the alleged defective condition.

The Plaintiff opposes the motion. Specifically, the Plaintiff contends that the Defendant has failed to meet its *prima facie* burden in as much as the Defendant has failed to submit admissible evidence in that the deposition that the Defendant relies upon is inadmissible.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98, 101 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See

Demshick v. Cmty. Hous. Mgmt. Corp., 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–59, 610 N.Y.S.2d 50 [2d Dept 1994].

Generally, "a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Castillo v. Silvercrest*, 134 AD3d 977, 977, 24 N.Y.S.3d 86 [2d Dept 2015] [emphasis added]; see *Parietti v. Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137, 61 N.Y.S.3d 523 [2017]; *Williams v. Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 937, 114 N.Y.S.3d 118 [2d Dept 2019]. However, "a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation." *Rivera v. J. Nazzaro Partnership, L.P.*, 122 AD3d 826, 827, 995 N.Y.S.2d 747 [2d Dept 2104]; see *Madden v. 3240 Henry Hudson Parkway, LLC*, 192 AD3d 1095, 1096, 141 N.Y.S.3d 369 [2d Dept 2021].

Turning to the merits of the instant motion, the Court finds that the Defendant has met its *prima facie* burden. In support of its application, the Defendant primarily relies on the deposition of the Plaintiff, the Defendant's Director of Environmental Services, Lino Machado, and Marshall Sornik, the Defendant's prior Director of Environmental Services. As part of her deposition, when asked if she saw the defect or condition that might have caused her to slip, the Plaintiff stated "I don't know. A slippery floor." (See Defendant's Motion, Exhibit "B" Page 24). When asked if there was any defect other than her shoe marks on the floor that she could see after the accident, the Plaintiff stated "No. There was nothing there. The floor was glistening." She further stated that she did not see water on the floor and did not touch the floor. After saying the floor was shiny, the Plaintiff was asked if she knew why it was shiny. The plaintiff responded, "[n]o, I don't know. Maybe it was buffed or washed. When they use something to buff it with,

it becomes slippery. Maybe that's the reason." "That my supposition." (See Defendant's Motion, Exhibit "B" Page 39-40). Plaintiff's own testimony does not indicate that there was evidence of wax or wax build up on the floor or that there was a dangerous or defective condition.

"A defendant may not be held liable for the application of wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge that the product could render the floor dangerously slippery. In the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence." *Union v. Excel Commercial Maintenance*, 185 AD3d 869, 869-870, 125 N.Y.S.3d 305, 306 [2d Dept 2020], quoting *Faiella v. Oradell Constr. Co., Inc.*, 171 AD3d 1013, 1014, 98 N.Y.S.3d 270 [2d Dept 2019] and *Walsh v. Super Value, Inc.*, 76 AD3d 371, 372, 904 N.Y.S.2d 121 [2d Dept 2010] [internal quotations omitted]; see *Khaimova v. Osnat Corp.*, 21 AD3d 401, 402, 799 N.Y.S.2d 779 [2d Dept 2005]; see also *Kapoor v. Randlett*, 144 AD3d 984, 985, 42 N.Y.S.3d 232 [2d Dept 2016].

As part of his affidavit, Marshall Sornik states that on the date of the alleged incident he was the Defendant's Director of Environmental Services. Mr. Sornik states that as it relates to the alleged incident "the incident report references the location of the incident, and indicates that 'no hazardous conditions' were found."¹ Mr. Sornik also states that "I never received any complaints, either prior to February 10, 2016 or on February 10, 2016 regarding the condition of the floor in the hallway between Miner Pavilion or Carrington Lobby." (See Defendant's Motion, Exhibit "G" Paragraphs 5 and 6). This testimony is sufficient for the Defendant to meet its *prima facie* burden.

In opposition, the Plaintiff has failed to raise an issue of material fact. Plaintiff argues that the Defendant failed to provide *prima facie* evidence that it did not have actual or constructive notice of the

¹ The Plaintiff does not challenge the admissibility of this representation.

dangerous or defective condition. Plaintiff also argues that Mr. Machado's deposition transcript is inadmissible because it was not signed by the deponent nor notarized. Plaintiff also argues that Mr. Sornik's affidavit is inadmissible as it was not made under oath. However, both documents are admissible as Mr. Machado's transcript was signed and notarized, and Mr. Sornik's affidavit was sworn to under the penalties of perjury, signed and notarized.

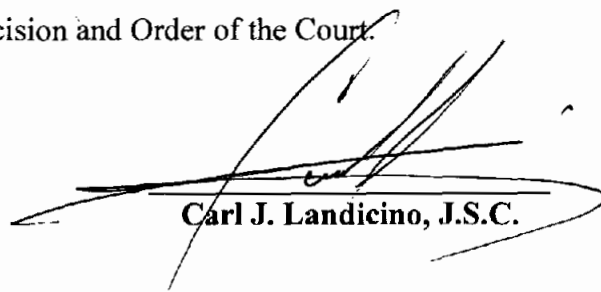
Although dangerous residue of wax on the floor may establish *prima facie* evidence of a negligent application of wax, *see Galler v. Prudential Ins. Co.*, 63 NY2d 637, 479 N.Y.S.2d 509 [1984], the Plaintiff in opposition has failed to provide evidence that Plaintiff slipped on wax residue. Even assuming *arguendo* that the Defendant had applied wax, the Plaintiff did not allege any evidence of negligence on the part of the Defendant and did not allege any other defective condition. Plaintiff's allegations are speculative. *See Khaimova v. Osnat Corp.*, 21 AD3d 401, 402, 799 N.Y.S.2d 779; *Cribbs v. ISS Intl. Serv. Sys.*, 300 AD2d 339, 751 N.Y.S.2d 534 [2d Dept 2002]. Accordingly, the Defendant's motion for summary judgment is granted as the Defendant has made a *prima facie* showing based upon Plaintiff's own testimony, and the Plaintiff has failed to raise an issue of material fact on the issue of whether there was a defective or dangerous condition.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion for Summary Judgment (motion sequence #3) is granted and the Plaintiff's complaint is accordingly dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

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