Molina v Loft 124 Condominium
2022 NY Slip Op 32678(U)
August 8, 2022
Supreme Court, New York County
Docket Number: Index No. 150937/2017
Judge: Shlomo Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO HAGLER** **PART** **17**

Justice

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MARGARITA MOLINA,

Plaintiff,

- v -

THE LOFT 124 CONDOMINIUM, LENOX CONDOS, LLC,ROMO CONSTRUCTION CORP.

Defendant.

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INDEX NO. 150937/2017

MOTION DATE 08/05/2020, 08/05/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 76, 77, 78, 79, 81

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 80, 82

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Nos. 002 and 003 are consolidated for disposition.

In Motion Sequence No. 002, defendant Romo Construction Corp. ("Romo") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it. In Motion Sequence No. 003, defendant The Loft 124 Condominium ("The Loft") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it. Romo and The Loft discontinued without prejudice any and all cross-claims asserted by The Loft as against Romo, and cross-claims asserted by Romo as against The Loft, by stipulation, dated December 14, 2021 (NYSCEF Doc. No. 84).[1]

[1] Consequently, to the extent either movant moves for summary judgment on their cross-claims, those branches of the motions are moot. In addition, by Stipulation filed on June 1, 2020, the parties discontinued with prejudice the action and any cross-claims and/or counterclaims asserted against defendant Lenox Condos, LLC (NYSCEF Doc. No. 75).

BACKGROUND

This personal injury action arises out of an incident that occurred on April 15, 2016 at 5:00 p.m. when plaintiff Margarita Molina tripped and fell "over a hazardous/misplaced obstruction" at 138-140 West 124th Street, New York, New York, known as The Loft 124 Condominium (the "Building"). Romo was a contractor doing façade work on the roof of the Building at the time of the accident (the "Project").

Plaintiff's deposition

Plaintiff testified that at the time of the accident, she was working as a housekeeper for the Pineda family who owned one of the condominium units located in the Building (tr plaintiff deposition, dated 12/14/18 at 11-12, 16 [NYSCEF Doc. Nos. 58, 68]). Plaintiff worked from 9:00 a.m. until 5:00 p.m. on the day of the accident.

The accident occurred at the end of plaintiff's workday at 5:00 p.m. when plaintiff took the elevator down to the first floor prior to exiting the Building. When asked at her first deposition to state how the accident occurred in her own words, plaintiff testified as follows:

> "I took the elevator as always. When I got to the lobby, the elevator door opened. When I exited I tripped on something, and I didn't see on what. I hit against the wall, hit myself against the wall and when I fell to the ground against the floor I saw there was plywood around and the edges of the corner they were like bent" (*id.* at 33).

Plaintiff testified further:

> Q. Immediately after the accident when you saw the plywood, did you notice anything about the plywood that would have made you fall?
> A. They were bent, yes.
> Q. Can you describe with more specificity how they were bent?
> A. (Indicating)
> Q. It looks like from what you are showing me that the lip of the plywood was bent upwards.
> A. Yeah. The edges of the plywood were raised up.
> Q. Approximately how high up were the edges raised? One inch, two inches or something else?
> A. (indicating)

Q. So is that about an inch, an inch and-a-half?
A. Perhaps. Like this. That is the way I can describe it to you (indicating)" (*id.* at 46).

Plaintiff stated that she took two steps outside of the elevator prior to starting to fall (tr plaintiff deposition, November 20, 2019 at 32 [NYSCEF Doc. Nos. 59, 69]). Plaintiff claims that on the day of the accident, there was no tape on the plywood (tr plaintiff deposition, dated 12/14/18 at 49 [NYSCEF Doc. Nos. 58, 68]). Plaintiff stated that the plywood created a path from the lobby hallway to the elevator (*id.* at 42). Plaintiff observed the plywood on the floor for the first time after the accident occurred (*id.* at 44).[2]

Plaintiff testified that on the day of the accident, she used the elevator to go to the lobby approximately four times for reasons such as leaving the Building to pick up the Pineda's son at the bus stop and helping the Pinedas bring up groceries from the lobby (*id.* at 85-86; *see also* 34). When asked at her deposition whether during the four or five times she used the elevator on the day of the accident but prior to her fall she noticed the plywood, plaintiff stated "[t]here was no plywood during the whole day there" (*id.* at 44).

Deposition of Romo

Javier Gutierrez ("Gutierrez"), the foreman of the Project on the day of the accident, testified on behalf of Romo. Romo was engaged in a project involving work on the façade of the Building (tr Gutierrez deposition at 9-11 [NYSCEF Doc. Nos. 57, 71]). On the day of the accident, the work was primarily conducted on the roof and Romo's workers moved materials onto the roof using the one elevator in the Building (*id.* at 13). Gutierrez testified about the material Romo placed on the floor outside the elevator as follows:

[2] Plaintiff refers to the material on the floor as "plywood" while other witnesses or other documents in the record alternatively refer to the material as messoline, masonite, sheets, pieces or cardboard. This Court will use all such terms in the instant decision. How the material covering the lobby floor is described is immaterial to this Court's determination.

Q. Did Romo place any type of protective – anything on the floors to bring the equipment in?
A. We use messoline to cover the – starting at the front door main entrance all the way to the elevator.
Q. What is messoline?
A. It's a board used to protect the floor.
Q. Is it plastic or does it look like plywood?
A. No, it's like cardboard and it's eight feet by four feet and an eight[h] in thickness (*id.* at 14-15).

Q. When did Romo first put these messoline planks down?
A. They get put down before work starts so about 7:50.
Q. They're put down every day and removed at the end of every day?
A. Every day (*id.* at 15).

Q. Who actually physically put down the messoline pieces every morning?
A. Every morning it was different people, usually laborers (*id.* at 20-21).

Q. So, do you know which one of these four individuals [the laborers working on the day of the accident] placed the pieces down on the morning of the accident?
A. Argel (*id.* at 25).

Gutierrez stated that five pieces of the messoline were used to cover the lobby floor from the front door to the elevator (*id.* at 18). When Gutierrez arrived at work on the day of the accident, he went straight to the roof, ate breakfast and then came downstairs to the lobby (*id.* at 27, 32). At that point, he inspected the messoline pieces that were laid down outside the elevator. Gutierrez testified that he "make[s] sure nothing is lifted off the ground and everything is nice, taped so no accidents can happen … [and] make sure nothing is lifting on the corners" (*id.* at 33). Gutierrez stated that he and the laborers made many trips in the elevator to the lobby during the course of the day of the accident and often travelled over the messoline boards on their way to the street (*id.* at 34-36). Gutierrez made four to five such trips (*id.* at 35). Gutierrez testified further that "every time I come down out of that elevator I always check to see if anything is lifted off the floor, tape is not sticking" (*Id.* at 37).

Most significantly, Gutierrez testified that on the date of the accident, he conducted his last inspection of the messoline pieces at 4:20 p.m. when he observed that the condition of the pieces was good and none of the boards needed to be retaped or replaced (*id.* at 37-39). Gutierrez testified that his inspections involved making sure the boards were properly taped (*id.* at 36). Gutierrez also stated that prior to or on the date of the accident nobody told him that the sheets were damaged, that they were "coming up" or that the tape was coming off (*id.* at 70). In addition, Gutierrez was not aware that anyone informed Romo prior to the accident that the messoline sheets were damaged (*id.*).

Gutierrez was speaking with the superintendent of the Building when he heard yells and saw plaintiff make contact with the wall outside of the elevator (*id.* at 40).

Deposition of The Loft

Jameel Hosein ("Hosein"), the superintendent of the Building and employee of the entity that manages the Building, testified on behalf of The Loft (tr Hosein deposition at 7, 11 [NYSCEF Doc. Nos. 60, 70]). Hosein confirmed that work was being done by Romo on the day of the accident (*id.* at 15-16). Hosein observed plaintiff after the accident sitting down outside the elevator in the lobby area (*id.* at 17). Hosein testified that "there was a covering in the lobby which was masonite, no plywood, masonite protection for the floor" (*id.*). When asked at his deposition whether that floor covering was raised or uneven, Hosein replied "[l]evel, not uneven" (*id.*). In addition, Hosein testified that he had never received complaints from any Building tenants or guests regarding slipping on the Masonite that was placed in the lobby (*id.* at 49). When asked at his deposition whether he "ever [saw] anyone slip on that Masonite?", he answered "no" (*id.* at 62-63).

The Photographs

During plaintiff's deposition on December 14, 2018, counsel for The Loft introduced four photographs of the area where the accident occurred, identified as Exhibit 2 and Exhibit 3, which he represented were taken two months after the accident (tr plaintiff deposition, 12/14/18 at 46-48 [NYSCEF Doc. Nos. 58, 68]). During oral argument, plaintiff's counsel argued that the photos demonstrate that at the time of the accident the planks of plywood or cardboard were "bent up" (tr oral argument at 8-9). Plaintiff's counsel conceded, however, that plaintiff herself never properly authenticated the photos in Exhibit 2 and consequently, plaintiff must rely on Gutierrez to properly authenticate said photos (*id.* at 14). Although plaintiff's counsel argued that Gutierrez properly did so, the deposition testimony of Gutierrez suggests otherwise as follows:

> Q. Do you recognize what's depicted in these photographs?
> A. Yes, that's the elevator
> Q. First of all, when you say elevator, is that the elevator at 140 West 124th Street address?
> A. Yes.
> Q. Is that inside the elevator or outside the elevator what we're looking at in those two photographs?
> A. That's inside the elevator.
> Q. Does that refresh your recollection as to whether cardboard was placed within the elevator?
> A. Yes.
> Q. Is Defendant's Exhibit 2 a fair and accurate description of the condition of those cardboard pieces on the date of the accident?
> A. Yeah (*id.* at 57-58).

> Q. Does Exhibit 2 refresh your recollection as to whether or not you had laid cardboard down within the elevator?
> A. Yes
> Q. And, the way it's taped in Defendant's Exhibit 2 is that the same way it would be taped on a daily basis every morning?
> A. Yes.
> Q. Is this the same piece of cardboard that would be placed within the elevator each morning?
> A. Inside the elevator, yes (*id.* at 61-62).

It is evident therefore that to the extent Gutierrez authenticated the photographs in Exhibit 2, he identified the photos as depicting boards located within the elevator rather than outside the elevator where plaintiff unequivocally testified that she fell.

Moreover, Gutierrez was unable to authenticate Exhibit 3. When asked whether those photos depict the cardboard within the elevator at the Building, Gutierrez answered "I can't say if this is the one. This elevator looks different" (*id.* at 60). Gutierrez testified further:

> Q Do you recall seeing the cardboard in the condition as the cardboard depicted in Defendant's Exhibit 3?
> A No.
> Q At any point before or after the accident?
> A No (*id.* at 61).

SUMMARY JUDGMENT

In a summary judgment motion, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails this showing, the motion should be denied (*id.*). However, where this showing is made, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action (*id.*).

In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Where different conclusions may reasonably be drawn from the evidence, the motion should also be denied (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995]). On the other hand, bare allegations or conclusory assertions are

insufficient to create genuine issues of fact to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

DISCUSSION

It is well settled that "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Actual notice of a dangerous condition exists where the defendant created the condition or was aware of it before the accident (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011]). A defendant demonstrates its lack of actual notice by producing "a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). As to constructive notice, a defendant is charged with constructive notice of a dangerous condition when the condition is "visible and apparent and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d at 421). A defendant demonstrates its lack of constructive notice by producing evidence that the condition did not exist when the area was last inspected and cleaned prior to the accident (*id.*).

Motion by Romo for Summary Judgment (Motion Sequence No. 002)

At the outset, it is settled that the mere presence of masonite boards on the floor is not considered an inherently dangerous condition (*Tresgallo v Danica*, 286 AD2d 326 [2d Dept 2001]; *see Kuhn v American Intl. Realty Corp.*, 17 Misc3d 1120(A) [Sup Ct NY County 2007]).

Romo sustained its burden of showing that it did not create the alleged condition or have actual knowledge of any issue with the subject boards prior to the accident. Gutierrez testified

that he was unaware of any problems with the messoline boards as a result of his inspections of the boards in the morning and throughout the day (tr Gutierrez deposition at 33, 37) [NYSCEF Doc. Nos. 57, 71

Romo also sustained its burden of showing that it lacked constructive knowledge that the subject board was untapped or bent. Gutierrez testified that soon after the subject messoline was put down by a co-worker, Gutierrez came down from the roof to "make sure everything is nice" and that the boards are taped "so no accidents can happen" (*id.* at 33). In addition, on the day of the accident, Gutierrez made four to five trips in the elevator to the lobby and that every time he was in the lobby he "check[ed] to see if anything is lifted off the floor, tape is not sticking" (*id.* at 37-39). Most significantly, Gutierrez testified that his last inspection of the subject boards occurred at 4:20 p.m. (forty minutes before plaintiff's 5:00 p.m. accident) when he observed the boards to be in good condition and not in need of retaping or replacement (*id.*) (*Mareneck v Bohemian Brethern Presbyt. Church*, 201 AD3d, 471, 472 [1st Dept 2022] [location of accident inspected twenty minutes before plaintiff fell]; *Velocci v Stop & Shop*, 188 AD3d at 440 [the accident location was inspected about an hour and a half before plaintiff fell]; *cf Abraham v Dutch Broadway Assoc. L.L.C.*, 192 AD3d 550, 550-551 [1st Dept 2021] [defendant failed to offer specific information as to when accident site was last inspected]). Gutierrez testified that all his inspections involved determining whether a board required retaping (*id.* at 36). In addition, prior to and on the date of the accident, nobody told Gutierrez that the boards were damaged and Gutierrez was not aware of any complaints made to Romo prior to the accident (tr Gutierrez deposition at 70) [NYSCEF Doc Nos 57, 71]).

Plaintiff failed to raise an issue of fact as to whether Romo created or had actual or constructive notice of a dangerous condition with respect to the subject boards. Plaintiff testified

that she only observed the plywood on the floor in the lobby for the first time after the accident occurred (tr plaintiff deposition, 12/14/18 at 44 [NYSCEF Doc. Nos. 58, 68]).[3] Moreover, when asked at her deposition whether she noticed plywood in front of the elevator during the four or five times she used the elevator and went to the lobby on the day of the accident but prior to her fall, plaintiff stated "[t]here was no plywood during the whole day there" (*id.*) As such, "plaintiff failed to establish the existence of any defect or that defendant had actual or constructive notice of it and sufficient time to remedy it" (*D'Ambra v New York City Tr. Auth.*, 16 AD3d 101, 101 [1st Dept 2005]; *see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). Given that plaintiff did not even identify that there were boards on the lobby floor until after she fell, it is mere speculation to assert that Romo could have had either actual or constructive knowledge of the alleged defective condition of the subject boards.

Motion by The Loft for Summary Judgment (Motion Sequence No. 003)

It is uncontroverted that Romo installed the messoline boards. Gutierrez testified that a Romo employee named "Argel" placed the messoline boards on the floor on the day of the accident (tr deposition testimony of Gutierrez at 25 [NYSCEF Doc Nos 57, 71]). Gutierrez also testified that it was his responsibility to make sure that the boards were put down and taped to the floor (*id.* at 26). In fact, Romo kept spare pieces of the messoline sheets in case one of the pieces

[3] At plaintiff's second deposition conducted on November 20, 2019, when viewing a video of the accident, plaintiff answered "yes" to the following question posed over objection "[s]o had this plywood been in place on any occasions before your accident?" Plaintiff clarified "[l]ike I said, the time before that I came to testify, sometimes there was wood on the floor, but sometimes they would stick it to the floor. This time it wasn't done" (tr plaintiff deposition, 11/20/19 at 29-30 [NYSCEF Doc. Nos. 59, 69]). Plaintiff's testimony that the plywood was in place prior to the accident contradicts plaintiff's prior testimony that she observed the plywood for the first time after she fell. However, even if her later testimony reflects that she saw the plywood on other occasions prior to her accident, she failed to testify in a non-conclusory manner as to the condition of the plywood boards on those prior occasions in order to charge either defendant with constructive notice of a dangerous condition.

in use on the lobby floor became damaged (*id.* at 18). As such, it is clear that The Loft satisfied its burden that it did not cause or create the alleged defective condition of the boards.

The Loft further sustained it burden of showing that it lacked actual or constructive knowledge that the subject board was untapped or bent. As discussed above, plaintiff herself testified that she did not see any problem with the condition of the boards prior to the accident. In fact, plaintiff testified at her first deposition that she never even saw plywood boards on the lobby floor prior to after she fell, including during the day of the accident when she traversed the lobby four to five times. The record also reflects the testimony of Gutierrez that he inspected the subject boards forty minutes before the accident in addition to multiple times during that day, and found no defect.

Even if the subject board became damaged between the time Gutierrez inspected the boards at 4:20 p.m. and when plaintiff fell on the alleged defective board at 5:00 p.m., any defective condition would have existed for an insufficient amount of time for either defendant to have remedied the condition (*see Samon v Roosevelt Is. Operating Corp.*, 202 AD3d 607, 608 [1st Dept 2022] ["the dangerous condition was present for no more than 24 hours prior to the accident, an insufficient amount of time … for defendant to have obtained notice of and to have remedied the condition"]).

CONCLUSION

Based on the foregoing, it is

ORDERED that the motion of defendant Romo Construction Corp. for summary judgment dismissing the complaint asserted against it (Motion Sequence No. 002) is granted; and it is further

ORDERED that the motion of defendant The Loft 124 Condominium for summary judgment dismissing the complaint asserted against it (Motion Sequence No. 003) is granted. Accordingly, the complaint is dismissed. The Clerk shall enter judgment accordingly.

8/8/2022
DATE

SHLOMO HAGLER, 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