

<b>Rivera v 401 Hotel, L.P.</b>
2022 NY Slip Op 33939(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 153611/2019
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. James E. d'Auguste PART 55**

*Justice*

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DENISE RIVERA,

Plaintiff,

- v -

401 HOTEL, L.P., 401 HOTEL GENERAL PARTNER, L.L.C,  
HOTEL REIT, LLC, VORNADO REALTY TRUST,  
VORNADO REALTY TRUST D/B/A HOTEL  
PENNSYLVANIA,

Defendants.

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INDEX NO.	153611/2019
MOTION DATE	05/25/2022
MOTION SEQ. NO.	002
<b>DECISION + ORDER ON MOTION</b>	

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT

Defendants 401 Hotel LP, 401 Hotel General Partner LLC, 401 Hotel REIT LLC, Vornado Realty Trust and Vornado Realty Trust d/b/a Hotel Pennsylvania (“defendants”), the subject property’s owners and managers, move for summary judgment and dismissal of plaintiff Denise Rivera’s (“Rivera”) negligence complaint against defendants. For the reasons set forth below, defendants’ motion is denied.

On April 12, 2016, Rivera asserts that she suffered an accident while in the lower-level bathroom of the Hotel Pennsylvania. Rivera, a bus operator for the MTA-New York City Transit Authority, entered one of the stalls in the bathroom while taking a break from her bus route. She alleges that she slipped on a wet substance, fell backwards, hit her head, and lost consciousness for a short time. Rivera claims that her pant legs were wet, but she could not determine what the wet substance was. Incident reports, including an MTA Supervisor report, an “On the Job Injury Form,” a Hotel Pennsylvania aided report, and a C-3—the employee claim for worker’s

for worker's compensation—made in the regular course of business, all quote Rivera as stating she slipped and fell on a wet floor as she entered one of the stalls in the women's bathroom (NYSCEF Doc. Nos. 46, 52, 53, 56, 57). Also, Rivera's deposition states there were no signs in the bathroom indicating a wet floor, noting if she had seen any she "would have been vigilant" (NYSCEF Doc. Nos. 39, 51).

Defendants state that Rivera's own testimony confirms that she is unable to identify the cause of her alleged fall, and any finding by a jury that defendants' alleged negligence caused Rivera's injuries would be based on pure conjecture - thus entitling them to summary judgment (NYSCEF Doc. Nos. 34, 43). As such, defendants, relying on *Wilson v. New York City Tr. Auth.*, 66 A.D. 3d 602 (1st Dep't 2009), argue New York courts have held that the failure to identify the cause of a fall beyond speculation is fatal to Rivera's claim of negligence against a property owner; a finding that defendants' negligence, if any, proximately caused a plaintiff's injuries would be based on speculation. Additionally, defendants argue they did not create the condition that caused Rivera's fall, nor had actual or constructive notice of it. Defendants state that they did not receive any complaints regarding the unknown substance in the restroom, nor was the hazard sufficiently visible that a maintenance worker should have discovered it - as required to establish a *prima facie* case of negligence in a slip and fall case. See *Hollinger v. Chestnut Ridge Racquet Corp.*, 227 A.D. 2d 380 (2d Dep't 1996).

While it may be well settled that a "defendant is entitled to summary judgment...when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury," (see *Siegel v. City of New York*, 86 A.D. 3d 452 [1st Dep't 2011]), "[a] plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence." *Patrikis v. Arniotis*,

129 A.D. 3d 928 (2d Dep't 2015); *see also Canzoneri v. City of New York*, 193 A.D. 3d 637, 638 (1st Dep't 2021). Here, Rivera's testimony is that she fell because of a wet substance on the bathroom floor, which is corroborated by the C-3 workers' compensation claim form that she completed shortly after the accident, as well as defendants' incident reports. A supervisor, along with a superintendent, on the scene shortly after the incident, investigated the restroom stall where Rivera fell, and "found an unknown substance," and tried to "figure out what the sticky substance was" (NYSCEF Doc. No. 45). Thus, it is not "just as likely" herein that Rivera's accident was "caused by some other factor, such as a misstep or loss of balance," nor would any potential verdict in her favor on causation be based "upon sheer speculation." *Scivoletti v. New York Mercantile Exch. Inc.*, 38 A.D. 3d 326 (1st Dep't 2007).

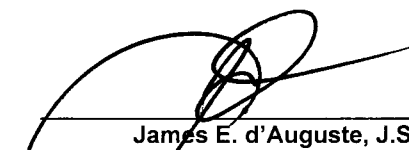
William Alleva, employed by defendants as Director of Security, Risk Management, appeared as defendants' representative for a deposition. He testified that housekeeping was responsible for cleaning the subject bathroom, and he observed the bathrooms cleaned constantly (NYSCEF Doc. No. 34). Alleva further stated he never received complaints of any similar condition before Rivera's alleged slip and fall, nor could he recall any previous accidents in the subject bathroom (NYSCEF Doc. No. 43). Alleva alleged there were no housekeepers employed by the hotel when he appeared for the deposition, as it was closed to guests since April 2020. Therefore, he was unable to identify any employees who may have had direct knowledge of the bathroom's condition on the day of Rivera's accident.

Furthermore, Rivera states that Alleva's testimony indicates he did not know many relevant details of the bathroom's maintenance. Specifically, he did not know the cleaning schedule for the bathrooms; how, or how often they were cleaned or inspected; if cleaning differed on a weekday or weekend; or when the subject bathroom was previously cleaned on the

day in question. In addition, Alleva’s testimony reveals he was not certain if he was even in the hotel on the date of Rivera’s accident (NYSCEF Doc. Nos. 45, 55). Thus, defendants failed to produce evidence of maintenance activities, including when the subject bathroom was last cleaned or inspected before Rivera’s fall, to show their asserted lack of notice - either actual or constructive.

Accordingly, after considering the parties’ respective submissions, defendants’ motion for summary judgment is denied.

This constitutes the decision and order of the Court.

<u>11/22/2022</u> DATE					 James E. d'Auguste, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE