PRESENT:

HON. ODESSA KENNEDY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 2

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LESLIE OGLETREE, Index No.: 500118/19

Plaintiff(s),

-against- **ORDER**

LONG ISLAND UNIVERSITY a/k/a LIU BROOKLYN and HARRIET ROTHKOPF HEILBRUNN SCHOOL OF NURSING,

Defendant(s).

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

Papers	**NYSCEF Document No.**
Motion Sequence No.	001
Notice of Motion, Affirmation in Support	21-22
Opposition	36
Reply	47

Upon oral argument and review of the foregoing papers, the Defendants' motion for summary judgment, under Motion Sequence 001, is hereby **GRANTED**, and the complaint herein is dismissed.

This case concerns an accident that occurred on July 9, 2017. Plaintiff alleges that on that date, she was caused to become injured by a metal door at the entrance to the Health Sciences Building/Heilbrunn School of Nursing, located on Defendants' Brooklyn campus.

Defendants argue that they had no notice of any defect concerning the subject metal door, they did not create any defect therein, and that Plaintiff fails to identify exactly what about the door was defective.

In their motion, Defendants include, among other exhibits, the affidavit of Michael Ng, the Environmental Health and Safety Manager for Defendants' Brooklyn campus as well as a Construction Project Manager.

In her opposition, Plaintiff argues, in part, that the Defendants had actual or constructive notice of a defect with the subject door and were negligent in their maintenance of same. Plaintiff also argues that on the date of loss, the door swung "abruptly," causing her to "fall forward," and claims that an Incident Report prepared by a non-party security officer shows that an inspection took place, and the door was found to be "faulty."

Based upon the papers submitted and the oral argument conducted on September 14, 2022, this Court finds that summary judgment is warranted, for the reasons enumerated below.

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b).

It is well settled that CPLR §3212 provides that a party is entitled to summary judgment when it demonstrates that the causes of action asserted against it have no merit and that there exists no triable issue of material fact with respect to it. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 413 N.Y.S.2d 141, 385 N.E.2d 1068 (1978).

"In a premises liability case, the defendant moving for summary judgment has the initial burden of establishing 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." See Alexander v. New York City Housing Authority, 89 AD 3d 969 - NY: Appellate Div., 2nd Dept. 2011, citing Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986); Birnbaum v New York Racing Assn., Inc., 57 AD3d 598 (2008); Gerbi v Tri-Mac Enters. Of Stony Brook, Inc., 34 AD3d 732 (2006).

Where liability is premised upon an alleged dangerous condition, to establish a prima facie case, a plaintiff must show that the defendant either created the dangerous condition or had actual or constructive knowledge of the condition. Segretti v. Shorenstein Company, 256 AD2d 234, 235 [1st Dept. 1998]; Gell-Tejada v. Macy's Retail Holding, Inc., 116 AD3d 594 [1st Dept. 2014]; Gordon v. American Museum of Natural History, 67 NY2d 836, 837 [Ct. App. 1986]

Here, Plaintiff has not established that the Defendants created any defect regarding the subject door, nor has Plaintiff proven that Defendants had actual or constructive notice of a defect. Further, Plaintiff has not identified any specific defect that existed with respect to the subject door on July 9, 2017.

As a result, Plaintiff has failed to meet her prima facie burden, and her complaint must be dismissed.

The Plaintiff has not proven that Defendants had actual or constructive notice of a defect. The Defendants conducted a search for work orders concerning the location where the Plaintiff claims that her accident occurred. This search included computerized records, based upon location and type of work order, from December 2012 through July 9, 2017, through Workorderama, the computer software previously used by the Defendants for facilities-related

work order requests.

The results of that search revealed no work orders concerning the doors at the entrance to the Health Sciences Building (which contains the School of Nursing), including the door that Plaintiff claims caused her accident. There is also no evidence before this Court of any complaints concerning the subject door.

In opposition, Plaintiff's counsel cites Plaintiff's testimony that on the date of the accident, the subject door "abruptly" closed on her, causing her to "fall forward." Yet, counsel conceded that Plaintiff did not testify regarding any specific defect with respect to the subject door.

Plaintiff's arguments concerning the door closing "abruptly" does not constitute a dangerous and defective condition, and Plaintiff has failed to prove that Defendants created any such condition concerning the subject door.

In their papers, Defendants cite to a case, Lezama v. 34-15 Parsons Blvd, LLC. There, Plaintiff, Natalia Lezama, testified that a door closed "abruptly," causing injury, but the Court determined that alone did not constitute a dangerous and defective condition, and the Appellate Division affirmed the Supreme Court's dismissal of Lezama's complaint.

The Court in Lezama stated the following on the issue:

> "The Supreme Court properly determined that the door which abruptly closed on the plaintiff Natalia Lezama, causing her to lose control of the stroller in which the infant plaintiff was strapped, did not constitute a defective or dangerous condition. The deposition testimony of the building superintendent established that he inspected the door in question upon its installation a year before the accident and found it operable, was familiar with the door check mechanism that controlled the speed of the door, and found no need to adjust it. The superintendent never observed any problem with the door in question and never received any complaints concerning the speed with which the door closed. This evidence was sufficient to establish a prima facie case that the door was not defective." Lezama v. 34-15 Parsons Blvd, LLC, 16 A.D.3d 560, 792 N.Y.S.2d 123 (N.Y. App. Div. 2005), citing Hunter v. Riverview Towers, 5 AD3d 249; Aquila v. Nathan's Famous, 284 AD2d 287; Walsh v. City School Distr. of Albany, 237 AD2d 811, 812).

Much like the Plaintiff in Lezama, this Plaintiff's only information as to what caused her accident is that the subject door closed on her "abruptly," which does not alone constitute a defective condition.

Defendants also cite Hunt v. Meyers, in which "the defendants established their entitlement to judgment as a matter of law by submitting, inter alia, the deposition testimony of the injured plaintiff, in which he stated that he did not know what had caused him to fall." Hunt v. Meyers, 63 AD 3d 685 - NY: Appellate Div., 2nd Dept. 2009, citing Reiff v Beechwood Browns Rd. Bldg. Corp., 54 AD3d 1015 (2008); Kletke v GOS Corp., 51 AD3d 875 (2008);

DeSantis v Lessing's, Inc., 46 AD3d 742 (2007); Manning v 6638 18th Ave. Realty Corp., 28 AD3d 434 (2006); Curran v Esposito, 308 AD2d 428 (2003); Visconti v 110 Huntington Assoc., 272 AD2d 320 (2000).

When the Plaintiff in Hunt tried to defeat summary judgment via affidavit, the Court in that matter found as follows: "The injured plaintiff's affidavit, in which he identified the causes of his accident as the presence of ice and inadequate lighting conditions in the area where he fell, presented feigned issues of fact designed to avoid the consequences of his earlier deposition testimony, and thus was insufficient to defeat the defendants' motion." Id., citing Hughes-Berg v Mueller, 50 AD3d 856, 858 (2008); Karwowski v New York City Tr. Auth., 44 AD3d 826 (2007); Denicola v Costello, 44 AD3d 990 (2007); Manning v 6638 18th Ave. Realty Corp., 28 AD3d 434 (2006); Tejada v Jonas, 17 AD3d 448 (2005); Califano v Campaniello, 243 AD2d 528 (1997); Garvin v Rosenberg, 204 AD2d 388 (1994).

There is no specific defect, mechanical or otherwise, identified by the Plaintiff as it pertains to the subject door. Further, there is no proof submitted herein that a defect even existed on July 9, 2017.

In the Fontana matter, the Second Department held that a door was not defective because of a lack of complaints, and also because that Plaintiff used the door for two years without incident.

The Fontana court stated that "the evidence showed that the door that closed on the plaintiff's foot did not constitute a defective or dangerous condition. The plaintiff acknowledged in her deposition testimony that she had worked at Card Corner II for about two years, and during that time had used the door every day without incident, and had never taken any special precautions while holding it. Further, she had never complained about the door before the accident, nor, to her knowledge, had anyone else ever complained about it. This evidence was sufficient to establish a prima facie case that the door was not defective" Fontana v. R.H.C Development, LLC, 69 A.D.3d 561, 2010 N.Y. Slip Op. 96, 892 N.Y.S.2d 504 (N.Y. App. Div. 2010), citing Maldonado v Su Jong Lee, 278 AD2d 206, 207 (2000); see also DeCarlo v Village of Dobbs Ferry, 36 AD3d 749, 750 (2007); Aquila v Nathan's Famous, 284 AD2d 287, 288 (2001).

Here, Plaintiff testified that she used the subject door once weekly for a period of approximately two years, from 2015 (when third-party Allied Universal took over security operations at Defendants' Brooklyn campus) up to the July 9, 2017 accident date. Plaintiff used the door somewhere in the area of 100 times without incident prior to July 9, 2017. The computerized search conducted by Defendants revealed no complaints concerning the subject door preceding the accident.

Following the holdings in Lezama and Hunt, Plaintiff has failed to specifically identify the cause of her accident. There is no evidence before this Court of any mechanical defect with the

door in question prior to the date of loss, and certainly none involving the so-called "hinge mechanism," other than an offhand reference in an Incident Report that Plaintiff did not prepare.

Applying Fontana, Plaintiff's complaint should be dismissed, as there were no complaints about the subject door and indeed, Plaintiff herself used the door without incident approximately 100 times by her own estimate before the accident.

Plaintiff's counsel cites to an Incident Report as evidence that the subject door was defective. Plaintiff argues that a non-party, Sergeant Piltie, inspected the door and noted that the hinge mechanism was "faulty." Notably, the Incident Report was not prepared by the Defendants herein.

Upon review, the Court notes that the Incident Report does not raise a material issue of fact that would prevent summary judgment, as there is no proof that anyone (including Sergeant Piltie) inspected the subject door on behalf of the Defendants on the date of the accident and found it to be "faulty," and in addition, the Incident Report itself is not in admissible form.

Furthermore, the Court finds that the statement contained within the Incident Report – "At approximately 1315 s/p Ogletree entered the base and stated the left Health Science exit door struck her back and left shoulder as the hinge mechanism on top of the door was faulty to Sgt. Piltie" – is an observation made by the Plaintiff to the non-party, Sergeant Piltie. Plaintiff's counsel concedes that Sergeant Piltie was not deposed, and there is no affidavit from her before this Court for consideration. Further, Sergeant Piltie is not an expert, and has not been qualified or proffered as such by any party.

Plaintiff's counsel further argues, in paragraph 4 of his Response to Defendants' Statement of Uncontested Facts in Support of Motion for Summary Judgment, as follows: "Sergeant Piltie told plaintiff during their conversation that the door had been 'written in for maintenance' and was 'under repair' [Plaintiff's Deposition, 44-45]."

The Court finds this argument to also be without merit. The statement referenced by Plaintiff's counsel and attributed to Sergeant Piltie is inherently vague and double hearsay. There is no further explanation as to exactly what is meant by the terms "written in" or "under repair," and there are no repair records before this Court providing context to this statement.

In paragraphs 8 and 9 of Plaintiff's counsel's Affirmation in Opposition, he argues that the door was "written in for maintenance" and placed "under repair" by Allied, and that this fact establishes notice to the Defendants. Notably, Allied is not the same entity as the Defendants, and there is no evidence that Allied ever discussed any defect of any kind concerning the subject door with the Defendants.

In paragraphs 25 and 26 of his Affirmation in Opposition, Plaintiff's counsel argues that because the Defendants were planning to perform door upgrades prior to Plaintiff's accident, that a defect existed with the subject door, citing some "urgency" in performing the upgrades.

The Court finds this argument lacking in merit, as the mere fact that upgrades were planned do not prove that a defect existed prior to July 9, 2017. The Court notes that just because an "upgrade" is being sought, that does not mean that what exists currently is deficient. Further, there is no admissible evidence before the Court of any "urgency" concerning any of the Defendants' door upgrades.

While Plaintiff argues it is the Defendants' obligation to show that the door was inspected and/or show that there was nothing wrong with the door, the Court disagrees. The Court finds that the Plaintiff has failed to prove the existence of a defect, thus failing to meet her prima facie burden.

Merely because the Plaintiff describes the subject door as closing "abruptly" or "slamming" on her does not mean that the door was defective in the first place. There is nothing before the Court in admissible form to indicate that the subject door was defective, and that that defect caused Plaintiff's incident.

In conclusion, even when viewing the evidence in the light most favorable to the opposing party (Toure v. Avis Rent A Car Systems, Inc., 284 A.D.2d 271, 728 N.Y.S.2d 140 (N.Y. App. Div. 2001), Plaintiff has failed to prove that the Defendants created a dangerous or defective condition, that Defendants had actual or constructive notice of a dangerous or defective condition, or that a defect concerning the subject door existed at all on July 9, 2017.

Based upon the foregoing, the Court finds that the Plaintiff has not raised a triable issue of fact in opposition to Defendants' application, and accordingly, the Defendants' motion is granted, and the Plaintiff's complaint is dismissed.

This constitutes the Order of the Court.

Dated: September 22, 2022

ENTER:

HON. ODESSA KENNEDY