SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **21**

Justice

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ADRIANA ESCOBAR,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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INDEX NO. 153360/2017

MOTION SEQ. NO. 004

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

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

Upon reading the above listed documents and after hearing oral arguments, for the reasons that follow, Defendant, New York City Transit Authority's motion for summary judgment is granted.

Background

This personal injury matter arises out of a slip and fall incident on January 7, 2017, at 7.p.m., the Canal Street subway station in New York County. Specifically, Plaintiff, Adriana Escobar, alleges that she slipped and fell on a wet step while descending a staircase inside the station. Plaintiff admits that it snowed the day of her accident, but nonetheless alleges that Transit was negligent in either creating a wet and slippery condition, allowing the subject staircase to remain in a wet and slippery condition without remedying it, and further alleges that the wet and slippery condition was caused by water and moisture coming from the walls of the stairway.

Transit now moves post note of issue for summary judgment pursuant to CPLR §3212. (Transit previously moved for summary judgment, which was denied due to a procedural defect by Order dated June 2, 2022, with leave to refile). Plaintiff opposes.

Discussion

Any party in any action, including in a negligence action, may move for summary judgment pursuant to CPLR §3212 (CPLR §3212 [a]; *Andre* v. *Pomeroy,* 35 NY2d 361 [1974]). The moving party has the high burden of establishing entitlement to judgment as a matter of law by submitting proof in admissible form that "show[s] that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212 [b]; *see also Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *Zuckerman* v *City of New York,* 49 NY2d 557 [1980]).

Only when the moving party meets this burden, may courts consider the opposing parties' papers and decide whether the opposing side raises a material question of fact requiring a trial (*see Alvarez,* 68 NY2d 320). Material issues of fact must be established with evidence that does not require speculation (*see id*; *Castore v. Tutto Bene Rest. Inc.*, 77 AD3d 599 [1st Dept 2010]).

In general, regarding slip and fall accidents that happen during and reasonably after falling precipitation, property owners (including Transit as a leaseholder of the subways) may not be liable (*see Valentine v. City of New York*, 86 AD2d 381 [1st Dept 1982] aff'd, 57 NY2d 932 [1982]). The law reasons that property owners are not required to remedy and remove snow, water or ice during a storm in progress or for a reasonable time after the storm has ended (*see Valentine,* 86 AD2d 381).

This *storm in progress* doctrine applies to both exterior and interior walkways, including wet and slippery station platforms, subway station floors, and subway station stairways (*see Abraham v. Port Auth. of New York & New Jersey*, 29 AD3d 345 [1st Dept 2006]; *see also Solazzo v. New York City Transit Auth.*, 21 AD3d 735 [1st Dept 2005], aff'd, 6 NY3d 734, [2005]; *see also Kinberg v. New York City Transit Auth.*, 99 AD3d 583 [1st Dept 2012]). Further, the First Department has found that "it is unreasonable to require the Transit Authority to keep the floors

of subway cars clean and dry during ongoing storms, when the subway cars are continuously filled with wet commuters... similarly, a station floor cannot be effectively kept dry in such circumstances" (*Hussein v. New York City Transit Auth.*, 266 AD2d 146, 146–47 [1st Dept 1999]).

Here, in support of the motion, Transit submits Plaintiff's 50-h transcript, her deposition transcript, and a weather report (NYSCEF Doc. #114, 116, 117, 118, 119, 120, 121, 122). At Plaintiff's January 24, 2018, deposition (NYSCEF Doc. #120), she testified that on the day of her accident it was snowing, and the snow stopped at approximately an hour before she was walking to the subway. According to her testimony, when she was transferring trains at the Canal Street subway station and walked down the crowded PL8 staircase to reach the platform for the N train. Four steps from the platform, Plaintiff's right foot slipped on a wet step. Plaintiff also testified that she did not know why the stairs were wet and did not recall seeing any leaks or dampness on the date of the accident. Moreover, she did not observe any snow, water or wetness on the staircase prior to her accident. Nor did her clothes get wet as a result of her fall. Transit also submits a weather report showing that on January 7, 2017 there was an accumulation of over five (5) inches of snow and the average temperature was 23°F (NYSCEF Doc. #121). Thus since Transit has met its burden of establishing entitlement to judgment as a matter of law under the storm in progress defense, opposing papers will not be considered.

In opposition, Plaintiff argues that a material question of fact exists as to whether the condition that caused her to slip and fall was the result of a recurring water leak.

Plaintiff relies on the deposition testimony of a Transit employee, Vincent Moschello, and service call reports, to allege a history of prior leaks at the Canal Street subway station and to show that Transit knew of a recurring dangerous condition. Yet, Plaintiff's evidence does not establish any water leak conditions at the PL8 staircase. Plaintiff's reliance on a June 16, 2016 reported

leak, service call # 430897, is unavailing as per the deposition testimony of Moschello, who testified that the location for the June 16, 2016 leak did not concern the subject staircase and upon an inspection the area was found to be in a dry condition. Further, Plaintiff's reliance on a December 13, 2016, reported leak, service call #482155, is also unavailing as per Moschello's testimony it occurred in a trash room at the station and not in or near the PL8 staircase.

In further support, Plaintiff also submits the affidavit of an expert, with a three (3) page report, and thirteen (13) photographs. As per Fein's Affidavit, he inspected the staircase on January 18, 2017, eleven (11) days after Plaintiff's accident and several weeks prior to the service of Plaintiff's notice of claim upon Defendant. Fein alleges relying on photographs taken two (2) days after the accident by Plaintiff's friend to identify the staircase and concludes that the staircase he observed is in the same condition as the day of the accident.

Fein further alleges that although he inspected the location on a "dry day", "there was water penetrating from the right-side wall" which he asserts can be seen in the photographs taken. Yet, the photos submitted do not show leaks, drips, or moisture nor any puddles, pooling or any other accumulation of any wet condition.

Fein also alleges that there was "calcification" on the wall tiles in the staircase indicating "a near constant penetration of water through the tiles for months or years" and that same can be viewed in the photographs. Yet Plaintiff's opposing papers do address or explain how the calcification, allegedly visible to Fein on January 18, 2017, establishes that water leaked from the wall accumulated on the stairs on January 7, 2017 causing Plaintiff's fall.

Fein's January 19, 2017 report also concludes that the third step was "extremely slippery when wet" based upon his testing on January 18, 2017. However, as per Plaintiff's deposition testimony, she slipped on the fourth step and the report and affidavit are silent as to the other steps.

Upon review, Plaintiff's evidence does not raise a material question of fact that her slip and fall accident on January 7, 2017 was created or caused by Transit's negligence to remedy water leaking from the walls of the PL8 staircase in the Canal Street subway station. To accept Plaintiff's theory that on the day of her accident a recurring water leak existed based on serve call reports for other areas of the station and Fein's conclusions who visited the staircase 11 days after the accident unaccompanied Plaintiff would require much speculation (see *Castore,* 77 AD3d 599; *see* e.g, *Piacquadio v. Recine Realty Corp.*, 84 NY2d 967 [1994]; *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106 [1st Dept 1996]; *Thomas v. Our Lady of Mercy Med. Ctr.*, 289 AD2d 37 [1st Dept 2001]).

Accordingly, Transit has established entitlement to judgment as a matter of law and Plaintiff has not raise a material question of fact warranting a trial. Thus, it is hereby

ORDERED that the motion for summary judgment of Defendant NEW YORK CITY TRANSIT AUTHORITY is granted and the complaint is dismissed against the Defendant; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendant NEW YORK CITY TRANSIT AUTHORITY dismissing the claims made against them in this action.

3/28/2023
DATE

DENISE M. DOMINGUEZ
HON. DENISE M. DOMINGUEZ 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	