SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12**

Justice

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CLARISSA VAZQUEZ

Plaintiff,

- v -

NAMDOR INC.,

Defendant.

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INDEX NO. 150988/2020

MOTION DATE 05/18/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

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

This is a personal injury action brought by Clarissa Vazquez (plaintiff), who alleges that, on June 21, 2019, she was walking on the sidewalk of 315 South End Avenue, New York, New York (the subject premises). She sustained injuries when her foot made contact with an open door of the defendant Namdor's grocery store.[1] Defendant Namdor (defendant) is the leaseholder of the subject premises.

Defendant moves for summary judgment dismissing the complaint against it, and plaintiff opposes.

I. Analysis

To prevail in a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form

[1] As further detailed below, it is unclear exactly what precipitated the accident.

demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. Of New York and New Jersey*, 29 NY3d 27, 37 (2017).

To establish a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 (2016) (citation and internal quotation marks omitted). A landowner has a duty to maintain its property in a reasonably safe condition. *See Boderick v RY Mgt. Co., Inc.*, 71 AD3d 144, 147 (1st Dept 2009) (citations omitted). "In order to recover damages for an alleged breach of this duty, the plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury." *Id.*

A. Notice

Defendant establishes, and plaintiff seemingly concedes, that defendant did not have actual or constructive notice of an alleged door defect. Defendant submits the deposition testimony of its assistant manager, Gee Chan, who testified that he had no complaints regarding this particular door and he had never had any issues with it himself in the ten years he had worked at that store. *See* NYSCEF doc. no 57 at 122, lines 18-22; 67, lines 17-23; 126, lines 3-10. Mr. Chan also testified at his deposition that he could not recall a time when the door ever required maintenance. *Id.* at 67, lines 9-23. With respect to constructive notice, Mr. Chan testified that he used the door the day before the incident without issue and stated that he used that door almost every time he had a shift

at the store. *Id.* at 125-26, lines 17-2; 126, lines 3-10. Given Mr. Chan's almost daily use of the door, defendant cannot be held to have constructive notice of this door's alleged defect because if such a defect existed, it did not exist for a sufficient period of time for it to be remedied by defendant. Thus, defendant has demonstrated its prima facie entitlement to summary judgment by showing that they did not have actual or constructive notice of any defective door condition. *See e.g. Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 (1st Dept], lv. denied 17 NY3d 780 (2011).

Plaintiff does not oppose defendant's contention that it did not have actual or constructive notice of the alleged hazardous condition, nor does she produce any evidence of a prior problem with the door that would have provided notice of the defect.[2] The sole argument offered by plaintiff in opposition to summary judgment is the applicability of the doctrine of *res ispa loquitur* to the facts in this case, which, if applicable, obviates the need to show that defendants had notice of the defect.

B. *Res Ipsa Loquitur*

"Res ipsa loquitur is an evidentiary doctrine which 'permits the inference of negligence to be drawn from the circumstances of the occurrence' when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event was not caused by the plaintiffs actions." *Barkley v Plaza Realty lnvs., Inc.*, 149 AD3d 74, 77 (1st Dept 2017), quoting *Dermatosssian v New York City Tr. Auth.*, 67 NY2d 219, 226 (1986). By establishing these elements, plaintiff may avoid the need to show defendants had actual or

[2] By failing to offer any argument in response, plaintiff has conceded that defendant did not have actual or constructive notice of any problem. "Where a party fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists." *114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 762 (2d Dept 2019) *see also Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544 (1975) ("...in the absence of either party challenging the veracity of the alleged facts, as in true in the instant case, there is, in effect, a concession that no question of fact exists.").

constructive notice of the defect. *See Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 (1st Dept 2015) ("Notice of a defect is inferred when [res ipsa loquitur] applies and the plaintiff need not offer evidence of actual or constructive notice in order to proceed").

The first requirement of *res ipsa loquitur* can only be satisfied where the incident is the kind which ordinarily does not occur in the absence of someone's negligence. *See Berliner v Consolidated Edison, Inc.*, 171 AD3d 492, 493, 98 NYS3d 40, 41 (1st Dept 2019), *Giaccio v 179 Tenants Corp.*, 45 AD3d 454, 455 (1st Dept 2007), *Red Apple Supermarkets Inc. v Hudson Towers Housing Company, Inc.*, 58 aD3d 420, 421 (1st Dept 2009).

Plaintiff's reliance on the doctrine of *res ipsa loquitur* is misplaced under the circumstances. Plaintiff failed to establish that plaintiff's incident was the result of the door being defective or inherently dangerous, that it violated a code section, that the door latch or lock was broken, or that the door was negligently inspected or repaired. There is no evidence that the door malfunctioned or was not operating or functioning as designed at the time plaintiff encountered it. In fact, plaintiff's own deposition testimony is unclear as to whether the door was open at the time of her accident and how the accident happened. Moreover, plaintiff testified that she did not see the door until she walked into it.

Additionally, the facts in this matter are distinguishable from the cases cited by plaintiff in opposition. Although plaintiff relies on *Pavon v Rudin*, 254 AD2d 143, 143 (1st Dept 1998) and *Lukasinski v First New Amsterdam Realty*, 3 AD3d 302, 303 (1st Dept 2004), both of these cases involves doors with broken hinges, unlike the case at bar. Further, in *Hutching v Yuter*, 108 AD3d 416, 417 (1st Dept 2013), a garage door suddenly fell and struck plaintiff in the head. In the instant action, the door at issue was operating exactly as it was meant to, opening onto the sidewalk when in use.

As such, plaintiff's accident "...could have occurred in the absence of negligence and could have been caused by a misstep on [her] part." *Meza v 509 Owners LLC*, 82 AD3d 426, 427 (1st Dept 2011). Therefore, as plaintiff cannot satisfy the first prong of her *prima facie* case to establish the applicability of *res ipsa loquitur,* defendant's summary judgment motion is granted.

II. Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the order and decision of the Court.

10/13/2023
DATE

LESLIE A. STROTH, 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