Hart v 210 W. 77 St. LLC
2023 NY Slip Op 34063(U)
November 17, 2023
Supreme Court, New York County
Docket Number: Index No. 160578/2021
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

BETSY HART, Plaintiff,	INDEX NO.	160578/2021
- v -	MOTION DATE	05/11/2023
210 WEST 77 STREET LLC,TWO TEN WEST 77 CONDOMINIUM AND, MIDBORO MANAGEMENT LLC Defendant.	MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56
were read on this motion to/for JUDGMENT - SUMMARY.

In this slip-and-fall action, Defendants Two Ten West 77 Condominium ("Condominium") and Midboro Management LLC ("Midboro") move for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing plaintiff Besty Hart's ("Plaintiff") Complaint in its entirety. Plaintiff opposes the motion.

Plaintiff alleges that she was injured when she fell in the lobby of the condominium located at 210 West 77th Street ("the building") in Manhattan on February 1, 2021. The Condominium operates common areas of the building and Midboro is the condominium's managing agent. Plaintiff was a tenant of the owner of a condominium unit in the building at the time of her injury.

It is undisputed that it had been snowing the day of the accident and that 14 inches of snow fell in Central Park that day. Plaintiff had been out and returned to the building around 12:30 p.m. She entered the building's lobby from the street without incident and proceeded to walk through the lobbies to the elevators. While walking through the sliding doors that separated

the elevator bank from the lobby, she slipped on the exposed marble floor underneath the doorway and fell, breaking her right ankle in three places.

The building's elevator bank is located farther inside the building than the main lobby area. The lobby is separated from the elevator bank by a sliding door. The floor of both areas is comprised of an inlaid carpet in the center surrounded by a marble perimeter. The floor underneath the sliding doorway is all marble. At the time of the accident, the lobby floor was covered by a runner mat – a large rubber mat covered with heavy-duty carpeting – which had been placed over the inlaid carpet and exposed marble due to the inclement weather. Smaller mats had also been placed outside of the elevator doors. The marble floor underneath and immediately adjacent to the sliding doorway was not covered by a mat or other carpeting, which left about two feet of marble floor exposed between the lobby's runner mat and the elevator bank's inlaid carpet.

Luis Alba, the doorman on duty at the time of Plaintiff's accident, attested that the Condominium's protocol for inclement weather involved the placement of mats in the lobby and in front of the elevators and mopping the floor when it became slick (NYSCEF Doc. No. 40, Alba EBT at 30-32, 44). When asked whether any Condominium employees were empowered or had a duty to mop the lobby during inclement weather, he stated "We all did" referring to himself, the other doormen, the porter, and the super (*id*. at 44). Although he acknowledged that it had been snowing the entire day, Alba could not recall if he or anyone else had mopped the area where Plaintiff fell in the hours before the accident, testifying "That area, I don't recall if I actually did or didn't [mop]. If it was wet, I'm sure I would have" (*id.* at 49, 56). He testified that there were no logs or other documents that detailed maintenance of the lobby (*id*. 19)

Alba detailed the Condominium's inclement protocol as to the placement of mats in the lobby:

> We have a runner that leads from the front door to the sliding doors. There's two mats that are placed outside the elevator entrances. And carpeting inside the elevator that's placed when the weather needs it. And there's also a mat that is placed outside the doors to the building.

(*id.* at 31). He stated that the mats outside of the elevators had been placed there because the floor had been "slick" on a few past occasions: "I wouldn't say five times, it would be less . . . . maybe less than two" (*id*. at 43-44). Alba confirmed that no mat had ever been placed underneath the sliding doors and that he never saw a mat or other coverage on the marble floor where plaintiff fell prior to or on February 1, 2021, despite prior instances of a slick condition on the same floor material near the elevators farther inside the building (*id.* at 40). Asked why this area had been left bare, he stated "I'm not sure what the reason would have been" (*id.*) For her part, Plaintiff testified that at some unspecified time before her accident she had seen the building's porter, Douglas Wiggins, cleaning the area in the doorway: "I was told by the porter that he cleaned the area. He referred to it as a bowling alley" (NYSCEF Doc. No. 39, Plaintiff EBT, at 57). After Plaintiff's accident, a mat was placed over the marble floor in the doorway, bridging the runner mat and carpet near the elevators (NYSCEF Doc. No. 51).

Alba could not explain the reason why the marble floor beneath doorway was uncovered on February 1. Asked whether it was physically possible to place a mat or other coverage in the doorway, he responded "Not entirely because the [sliding] doors were working for a while" (Alba EBT at 37). However, he then testified that the sliding doors had been inoperable on February 1 and had been left open as a result; when asked for how long they had been inoperable, he could not recall but estimated it had been at least a month (*id.* at 39). Alba could

not recall if the building had or used "wet floor" signs in the 60 days before Plaintiff's accident (*id.* at 41).

Plaintiff commenced this action on November 23, 2021 asserting negligence. The Condominium and Midboro now move for summary judgment dismissing the Complaint as against them. They argue that they took reasonable precautions to keep the premises safe during an ongoing snowstorm, that they did not have actual or constructive notice that the floor was wet where Plaintiff fell, and that Midboro is a disclosed agent of the Condominium that did not have exclusive control over the building and therefore cannot be held liable for a nonfeasance.

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). The Court must view the evidence "in a light most favorable" to the nonmoving party and accord the nonmovant "the benefit of every reasonable inference" (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). A plaintiff seeking to impose liability based on a dangerous condition must demonstrate that the property owner created or had

actual or constructive notice of the dangerous condition that precipitated the injury (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015], *citing Mercer v City of New York*, 88 NY2d 955, 956 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition . . . nor had actual or constructive notice of its existence" (*Ceron*, 126 AD3d, at 632, *citing Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]).

Under the "storm-in-progress" doctrine, a defendant property owner is "not required to provide a constant, ongoing remedy for an alleged slippery condition caused by moisture tracked indoors during a storm" (*O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658 [1st Dept 2017]). To prevail on summary judgment under the doctrine, a defendant must show that it took "reasonable measures to remedy a hazardous condition" (*Toner v National R.R. Passenger Corp.*, 71 AD3d 454 [1st Dept 2010]) and "all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in" its remedial actions (*Rijos v Riverbay Corp.*, 105 AD3d 423 [1st Dept 2013], quoting *Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 465-466 [1st Dept 2009]).

The Condominium and Midboro fail to meet their prima facie burden. Although it is undisputed that it was snowing the entire day of Plaintiff's accident and that the Condominium and Midboro had set out a runner mat on the lobby floor, the movants fail to show an absence of a factual dispute as to whether all of the circumstances of their maintenance efforts in the lobby constituted reasonable care in the conditions surrounding Plaintiff's accident (*see Rijos*, 105 AD3d at 423). For instance, Alba testified he and other Condominium employees would mop up liquid on the lobby floor after it was observed but could not recall whether he had actually

mopped the area where plaintiff fell. He was also unable to recall whether any other Condominium employees had mopped the area in the hours before the accident or the last time that the area had been inspected for wetness on that day. Furthermore, he testified that rubber mats had been placed further inside the building next to the elevators after slick conditions were previously observed there, but that the area in the doorway had never been covered before Plaintiff's accident and was unable to explain why the area had not been covered with a mat despite that area having the same marble floor as the elevator area and being located closer to the building entrance (*cf. Rodriguez v Kwik Realty, LLC*, 216 AD3d 477, 478-479 [1st Dept 2023] [summary judgment denied where plaintiff demonstrated issue of fact as to whether anti-slip floor mat was unreasonably short]). The Condominium and Midboro also fail to present any evidence of when the area where Plaintiff fell was last cleaned and inspected before her accident (*see Dakers v BFP Tower C Co., LLC*, 208 AD3d 1128 [1st Dept 2022]). The Court therefore denies this branch of the motion seeking dismissal of the Complaint.

However, the Court finds that the Complaint must be dismissed as against Midboro as the record establishes that it was a managing agent that did not exercise "complete control of the management and operation" of the building (*German v Bronx United in Leveraging Dollars, Inc.*, 258 AD2d 251, 252 [1st Dept 1999]). The Management Agreement specifies that employees at the building are those of the Condominium, not Midboro, and that repairs over $2,500 are only to be made with approval of the Condominium (NYSCEF Doc. No. 33, Management Agreement §§ 2[a], 2[b]). A managing agent may not be held liable for a nonfeasance of the sort alleged in the Complaint where it did not exercise complete control of the premises (*Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [1st Dept 2007]; *German*, 258 AD2d at 252-253).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that the Complaint is dismissed as against defendant Midboro Management LLC only; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

11/17/2023
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE