

Flowers v Cora Realty Co, L.L.C.
2023 NY Slip Op 35189(U)
April 21, 2023
Supreme Court, Bronx County
Docket Number: Index No. 24076/2017E
Judge: Alison Y. Tuitt
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5**

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ERIC FLOWERS,

Index No. 24076/2017E

Plaintiff,

-against-

Hon. Alison Y. Tuitt

Justice Supreme Court.

CORA REALTY CO, L.L.C. and CHESTNUT
HOLDINGS OF NEW YORK, INC.,

Defendants.

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The following papers were read on this motion (Seq No. 3) for **summary judgment** submitted on January 26, 2023.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 35 – 48
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 49 – 58
Notice of Cross-Motion – Affirmation and Exhibits	NYSCEF Doc. # 61 – 71
Affirmation in Opposition to Cross-Motion	NYSCEF Doc. # 73 – 76
Affirmation in Opposition to Cross-Motion	NYSCEF Doc. # 73 – 76
Affirmation in Opposition to Cross-Motion	NYSCEF Doc. # 77 – 80
Affirmation in Reply	NYSCEF Doc. # 81 – 82
Affirmation in Reply to Cross-Motion	NYSCEF Doc. # 83

Upon the foregoing papers, it is ordered that this motion (Mot. Seq. 3) by defendants CORA REALTY CO., L.L.C. (“Cora”) and CHESTNUT HOLDINGS OF NEW YORK, INC. (“Chestnut”; collectively “Defendants”) for an order pursuant to CPLR 3212 granting Defendants summary judgment dismissing Plaintiff’s Complaint, and Plaintiff’s cross-motion pursuant to CPLR 3212, for an order granting summary judgment to the plaintiff on the issue of liability against the Defendants, are decided in accordance herewith.

Plaintiff’s Complaint seeks damages for personal injuries arising out of an alleged slip and fall which occurred when Plaintiff was walking down the stairs in between the third and second-floor landings on the premises located at 3345 Reservoir Oval West, Bronx, New York (“the Premises”). The incident is alleged to have occurred on May 2, 2017, at approximately 11:00 a.m. Plaintiff’s Bill of Particulars alleges that Defendants were negligent in, inter alia, failing to maintain the Premises in a safe and proper condition, permitting the Premises to become and remain in a wet, waxed, slippery and dangerous, defective condition, failing to have proper mopping procedures and protocols, and negligently failing to place warning signs. Plaintiff’s bill of particulars alleges that Defendants had actual and constructive notice of the condition, in that Defendants created said condition or should have known of said condition that was caused to remain on the Premises for an unreasonably long time.

Defendants' Motion

In support of the motion, Defendants submit, inter alia, Plaintiff's deposition testimony, the deposition testimony of Ramon Berroa and Zohar Yaish on behalf of Defendants, and the affidavits of James Miller, Andrea Miller, and Ben Rieder.

Plaintiff's Testimony

Plaintiff testified that he was descending the interior marble stairwell from the third to second floors and did not see anything on the stairs or landing. Plaintiff stepped from the intermediate landing to the first step with his left foot, with his right hand on metal piece above the banister post, when his left foot slipped on the step. Plaintiff's left foot went forward, and his right leg was behind him as he fell toward the second-floor landing. Plaintiff testified that after his body came to rest at the bottom of the stairs, his hands, hair, and clothes were covered in a clear slick waxy substance. Plaintiff testified that the steps behind him were wet and shiny as far as he could see, as was the second-floor landing in front of him. Plaintiff testified that Andrea Miller found him on the stairs approximately 25 minutes later and got her husband, Jim Miller. Plaintiff testified that there had been prior occasions when the super mopped the floor without using warning signs, although Plaintiff had not made any complaints.

Ramon Berroa Testimony

Ramon Berroa, building superintendent of the Premises at the time of the incident, testified that his duties included cleaning, maintaining, and performing inspections of the Premises. Berroa testified that he would mop the building between once and twice per week, usually on Tuesdays and Wednesdays after 10:00 a.m., depending on how dirty the building was. Berroa would mop the stairs on different days from the floors and the landings. He would begin mopping on the sixth floor, leaving the mop bucket in the elevator, and he would work his way down to the basement. Berroa could not recall if he put yellow signs down when he mopped in May of 2017. Berroa could not recall if anyone ever complained about the way he mopped the floor and stairways and was unable to testify as to where he was on the day of the incident, or the last time the area was cleaned or inspected prior to the incident.

Zohar Yaish Testimony

Zohar Yaish, senior field manager for the building at the time of the incident, testified that no records of cleaning, inspections, or maintenance were kept for the building in 2016 or 2017. Yaish testified that written complaints were not kept "unless it is something big" (Zohar Yaish deposition tr at 65).

James Miller and Andrea Miller Affidavits

The Millers aver that, after hearing a sound in the hallway, they opened their apartment door and saw Plaintiff had fallen on the steps and needed assistance. The Millers contend that they did not notice any substance or debris on the steps or floor of the hallway, nor did they observe any evidence that the area had been just cleaned or mopped.

Ben Rieder Affidavit

Rieder, Chief Operating Officer of defendant Chestnut Holdings of New York Inc., avers that defendant Chestnut Holdings of New York Inc. is not in possession of accident reports, inspection/maintenance/cleaning records, logbook entries, complaints relating to the interior stairwell, training materials, employee handbooks or documents relating to the interior stairwell, or violations issued relating to the interior stairwell between the second and third floors for the period of January 1 2017 through May 2, 2017.

Plaintiff's Cross-Motion

In support of the cross-motion, Plaintiff submits the affidavit and report of engineer Scott M. Silberman, P.E., the affidavits of James Miller and Charee Bowman, Plaintiff's affidavit, a video, the signed statement of James Miller, and photographs.

Plaintiff's Affidavit and Video

Plaintiff avers that, as he was falling down the stairway, he was reaching for the handrail. After his fall, he noticed the stairs looked like they usually do after being mopped. Plaintiff concludes that it was clear that the steps were freshly mopped and there were no warning signs placed down. Plaintiff avers that, "shortly after the accident"¹, he videotaped his building "on a Tuesday, a little after 10:00 a.m., right after the super mopped," with no warning signs, cones or markers present (Eric Flowers affidavit ¶ 17). A videotape is appended to Plaintiff's submission, depicting a mop bucket in an elevator with water on the floor of the elevator and no visible warning signs.

Charee Bowman

Bowman avers that she arrived at the Premises approximately thirty minutes after receiving a call from the Plaintiff and observed Plaintiff's clothes and shoes to be wet. Bowman contends that she has observed the floors, steps and stairways in the Premises to be freshly mopped by the super, on at least three occasions, and there were never any warning signs or cones put down.

¹No further detail is provided as to when or where the videotape was recorded.

Statement of James Miller dated September 28, 2017

Miller avers there were no warning signs, cones or markers put out in the area at the time of the incident. Miller avers that in the prior year, he has seen the super mop or wax the building floors and has never seen him put out or display warning signs for a wet floor. Miller avers that when he mopped the floors and steps, they become very slippery.

Report of Engineer Scott Silberman

Silberman performed an inspection of the Premises on July 23, 2020, more than three years after the incident. Silberman contends that the front portion of the marble tread is very worn and severely sloped downward creating a slipping hazard even in a dry condition. Silberman further contends that the treads of the subject staircase are too narrow, improperly maintained, and the handrail does not have enough finger clearance. Silberman opines that these defects constituted violations of various regulatory, statutory and code provisions, and do not conform to good and accepted practice for stairway construction.

Discussion

To be entitled to the drastic remedy of summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471 [1st Dept 2012]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that a dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). "A showing of general cleaning procedures is insufficient to satisfy the burden of demonstrating the lack of constructive notice of the condition prior to the accident" (*Smith v Montefiore Med. Ctr.*, 192 AD3d 609, 610 [1st Dept 2021] [citation omitted]).

Here, Defendants failed to satisfy their initial burden of submitting evidence sufficient to refute Plaintiff's deposition testimony, which gave rise to a reasonable inference that the Defendants had created a dangerous condition on the stairwell by mopping the staircase (*Stone v KFC of Middletown, Inc.*, 5 AD3d 106 [1st Dept 2004]). Defendants also failed to demonstrate the absence of constructive notice of the dangerous condition since it failed to submit any evidence as to when the area was last inspected or mopped prior to the Plaintiff's accident (*Ross*, 86 AD3d 419, 421). Additionally, as Plaintiff identified the wet floor as the reason for his fall, his testimony cannot be dismissed as mere speculation regarding causation (*Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70

AD3d 439, 440 [1st Dept 2010]). Since the Defendants failed to eliminate all triable issues of fact as to whether it created or had notice of the condition complained of, they failed to establish prima facie entitlement to judgment as a matter of law, and Defendants' motion for summary judgment must be denied, regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]).

To establish a prima facie case on a slip and fall, a plaintiff must show that the defendants either created a dangerous condition or had actual or constructive knowledge of the condition (*Lemonada v Sutton*, 268 AD2d 383, 384 [1st Dept 2000]). Slippery conditions created by defendants in the course of cleaning a premises can give rise to liability (*DiVitri v ABM Janitorial Service, Inc.*, 119 AD3d 486, 497 [1st Dept 2014]).

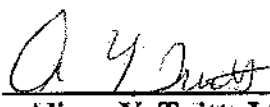
With respect to Plaintiff's cross-motion, summary judgment must be denied. As an initial matter, contrary to the opinion of Plaintiff's expert engineer based on his inspection performed over three years after the incident, there is no evidence in the record that the handrail played any role in Plaintiff's accident (*Perez v Riv. Park Bronx Apartments, Inc.*, 168 AD3d 465, 466 [1st Dept 2019]), and the defects identified in his report are not relevant, as they are not the conditions alleged by the Plaintiff to have caused his accident (*see Jackson v Michel*, 142 AD3d 535 [2d Dept 2016]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]). While Berroa's testified that he typically mopped the Premises between once and twice per week, usually on Tuesdays and Wednesdays after 10:00 a.m., depending on how dirty the building was, there is no evidence in the record that anyone saw the building superintendent or observed anyone mopping the stairs at any time prior to the incident. Further, by the time Plaintiff was discovered, the alleged wet condition no longer existed². Contrary to Plaintiff's contention, Plaintiff's surmise that the stairs were recently mopped, and circumstantial evidence submitted is insufficient under the circumstances to warrant his entitlement to judgment as a matter of law (*compare Chavez v Prana Holding Co. LLC*, 200 AD3d 449 [1st Dept 2021] [citation omitted]; *see Thomas v Our Lady of Mercy Medical Ctr.*, 289 AD2d 37, 38 [1st Dept 2001]).

Accordingly, it is hereby

ORDERED that the motion (Mot. Seq. 3) by defendants CORA REALTY CO., L.L.C. and CHESTNUT HOLDINGS OF NEW YORK, INC. for an order granting Defendants summary judgment dismissing Plaintiff's Complaint, and Plaintiff's cross-motion pursuant to CPLR 3212, for an order granting summary judgment to the plaintiff on the issue of liability against the Defendants are **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: 4/21/23

Hon. 
Alison Y. Tuitt, J.S.C.

² The Court notes that Plaintiff's undisputed testimony is that he remained on the steps for approximately 25 minutes before being discovered.

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION..... ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CROSS-MOTION..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
4. CHECK IF APPROPRIATE..... ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT