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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Index Number : 110188/2010
FRUCHTMAN, RUBIE
vs
TISHMAN SPEYER PROPERTIES
Sequence Number : 001
DISMISS

INDEX NO. 110188/10
MOTION DATE 11/14/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 12, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-8
Answering Affidavits — Exhibits | No(s). 9-11
Replying Affidavits | No(s). 12

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Feb. 7, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Rubie Fruchtman,

Plaintiff,

-against-

Tishman Speyer Properties,

Defendant.

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DECISION AND ORDER
Index Number: 110188/10
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits	1-8
Affirmation in Opposition, Exhibits	9-11
Reply Papers	12

In this personal injury action, defendant, Tishman Speyer Properties, moves for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On December 11, 2008, plaintiff, on her way to the subway station, slipped and fell on a puddle of water (the accident) while she was walking down the lower level corridor of 405 Lexington Ave. (the corridor). As a result of the accident, plaintiff claims that she sustained a fracture to her right wrist. Plaintiff alleges that she was unaware that the floor was wet until she ended upon the ground in the middle of the puddle after the accident.

Defendant claims that if there was water on the floor of the corridor, it was caused by rain water tracked in by commuters during rush hour.

There is no dispute that the accident occurred in plain view of a guard podium situated in the middle of the corridor area. (Eric Marte Deposition Transcript Pg. 32, L. 2-Pg. 33, L. 4).

There is also no dispute that there had been a security guard on duty for a number of hours prior to the fall.

Defendant did not produce any records to demonstrate that the area where the accident took place was inspected on the day of the accident. Defendant's security personnel, Eric Marte, testified at this deposition on 6/24/11 that the security company at the premises did not have a record of who the guard on duty was at the time of the accident. (Eric Marte Deposition Transcript Pg. 21, L.21-25 and Pg. 22, L. 2). Although it was testified that there were cameras in place overlooking the premises on the date of the accident, defendant has not reviewed said video (*Id.* at 34, L. 11-14), nor can defendant recall directing any employees to inspect the area on the date of the accident. (*Id.* at 47, L. 12-15; Pg. 110, L. 24-25; Pg. 111, L. 2). Marte also testifies that there is no record to prove whether or not there were floor mats placed in the corridor on the date of the accident. (*Id.* at 57, L. 8-58, L. 13).

Arguments

Defendant contends that dismissal of this action is warranted as plaintiff failed to present a prima facie case of negligence, because plaintiff did not establish that defendant created the dangerous condition that caused the fall.

Plaintiff argues that defendants have failed to make a prima facie showing of entitlement to summary judgment as a matter of law because defendants did not prove when the corridor was last inspected prior to plaintiff's accident.

Discussion

Pursuant to CPLR 3212(b), "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 of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition. (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery

and hazardous condition."

Here, as stated above, defendant cannot show that it did not have actual or constructive notice of the condition of the corridor. Defendant does not recall sending a security guard on an inspection of the area, did not review the video recordings, and admits that the accident area was in plain view of the security personnel. From this last statement alone, the court can conclude that defendant may have, at minimum, had constructive notice that the floors were wet prior to the accident.

While, generally, "property owners cannot be held liable for a fall caused by a storm while the storm is in progress" (see, *Solazzo v. NYC Trans. Auth.*, 21 A.D.3d 375, 800 N.Y.S.2d 698 [1st Dept. 2005]), defendant has not made a prima facie showing that there was a storm in progress by submitting certified weather records for the day and time of the accident (see, *Pipero v. NYC Trans. Auth.*, 69 A.D.3d 493, 894 N.Y.S.2d 39 [1st Dept. 2010]). Even if it were accepted that it were raining, the severity of the rain is contested by the parties in this action. Plaintiff claims that the rain was a drizzle, and defendant is contending there was a "storm" in progress. Furthermore, by defendant's own account, it is standard procedure to put mats down when it rains (Eric Marte Deposition Transcript Pg. 108, L. 16-23), and as stated above, there is no record of mats being placed on the date of the accident.

As plaintiff has not made out a prima facie showing of entitlement to summary judgment as a matter of law, defendant is under no obligation to come forward with evidentiary proof creating a triable issue of fact (see *Marie Christiana v. Joyce International Inc.*, 198 AD2d 690, 691 [3rd Dept, 1993]). A movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the

opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851; *Zuckerman v City of New York*, 49 NY2d 557; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065; *Lurie v Child's Hosp.*, 70 AD2d 1032).*Cugini v. System Lumber Co.*, 111 A.D.2d 114 *Anthony Cugini v. System Lumber Co., Inc., et al.*, [1st Dept, 1985]).

Accordingly, it is

ORDERED that defendant's summary judgment motion, is denied, in its entirety; and it is further

ORDERED that the parties proceed to mediation forthwith.

Dated: February 28, 2012

ENTER:

Joan M. Kenney, J.S.C.