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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Index Number : 104424/2010
RIEKEY, DAVID
vs.
CORNERSTONE CONTINUOUS CARE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 6/26/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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DAVID RICKEY,

Plaintiff,

Index No.: 104424/2010

- against-

CORNERSTONE CONTINUOUS CARE CORP. AND CORNERSTONE OF MEDICAL ARTS CENTER HOSPITAL,

DECISION AND ORDER

Defendants.

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For Plaintiff:
Law Offices of Todd A. Restivo, P.C.
100 Quentin Roosevelt Blvd, Suite 106
Garden City, NY 15130

For Defendants:
Lewis Brisbois Bisgaard & Smith LLP
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Papers considered in review of this motion for summary judgment:

Notice of Motion. 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Cornerstone Continuous Care Corp. and Cornerstone of Medical Arts Center Hospital (collectively referred to as "Medical Arts") move for summary judgment dismissing the complaint.

On August 16, 2007, plaintiff David Rickey ("Rickey") allegedly slipped and fell on a piece of cardboard on top of a videotape on the floor of a 9th floor storage closet at Medical Arts' premises located at 57 West 57th Street. Rickey commenced this action seeking to recover damages for the injuries he sustained to his ankle and knee.

At an examination before trial, Rickey testified that at the time of the accident, he was employed by Sodexo as general manager working on an account at Medical Arts,

which was an in-patient rehabilitation detox center. He had office space on the fourth floor at Medical Arts, and oversaw the dietary, housekeeping, central supply and linen departments. His accident occurred in a 10 feet by 10 feet storage closet, which was for his use to store items for the patients at Medical Arts. He stored pajama pants, T-shirts, slippers, mattresses and pillows in the closet. At the time of his accident, videotapes and two feet by three feet torn up and "ratty" boxes of videotapes were in the closet as well, even though, according to Rickey, they should not have been stored in the closet. According to Rickey, Medical Arts administrator Robert Morrison ("Morrison") made the decision to store the boxes in that closet approximately two months prior to Rickey's accident. Other than Rickey, the manager for housekeeping, hospital administrators and engineers had access to the closet.

The storage closet generally remained locked. Rickey had not been in the closet on the day of the accident prior to his fall. He had been in the closet the day before or two days before, and at those times, the boxes with videotapes were in the closet as well. His accident occurred when he slipped and fell on a piece of cardboard that Rickey claims had fallen onto the floor from the boxes in which the videotapes were stored. As he stepped on the piece of cardboard, he did not realize that there was a videotape underneath, and his ankle twisted to the right and his whole body fell to the floor. He believed that the cardboard was the flap from the top of one of the boxes. He did not see the cardboard before he stepped on it. He did not know how long that piece of cardboard

was on the floor before his accident. He had seen cardboard on the floor in the closet three or four times prior to his accident.

In the months prior to his accident, Rickey had complained to Director of the Medical Arts facility John Schlingheyde ("Schlingheyde") at least three times about the boxes being stored in the closet because they were in poor condition and created a danger. He complained during conversations with Schlingheyde and in safety meetings. According to Rickey, Schlingheyde said he would look into the issue. Rickey's housekeeping staff was responsible for making sure that the closet was neat.

Schlingheyde testified at an examination before trial that he did not recall having any conversations with Rickey about videotapes in the 9th floor storage closet. He recalled that Rickey told him that the accident occurred when he twisted his ankle while lifting a box.

Medical Arts now moves for summary judgment dismissing the complaint, arguing that it did not create or have notice of the alleged condition that caused Rickey's fall. Specifically, Medical Arts first contends that it never received any complaints about cardboard flaps on the floor of the subject closet. Medical Arts next contends that because the closet was under Rickey's purview and he did not see the cardboard on the floor prior to the incident and was not aware of how long the cardboard had been on the floor prior to the incident, Medical Arts could not have had notice of the cardboard.

In opposition, Rickey argues that issues of fact exist as to whether Medical Arts had notice of the recurring dangerous tripping hazard condition created by its placement of old boxes of videotapes in the subject closet. He submits an affidavit in which he indicates that the subject boxes were placed in the closet approximately two months before his accident. He provides that during those two months, videotapes would constantly fall out of the boxes as people would walk by them and he saw videotapes that had fallen on the floor more than a dozen times. Rickey further explains that pieces of the boxes would also fall on to the floor. He was not authorized to move the boxes or videotapes because they were Medical Arts' property.

He also submits the affidavit of former director of medical records for Medical Arts Rosanne Gully ("Gully") who indicates that she attended monthly safety meetings coordinated by Schlingheyde and attended by several department heads, including Rickey. She recalled that Rickey complained to Schlingheyde on at least three separate occasions prior to his accident about the unsafe condition of the subject storage room due to placement of old boxes of videotapes, which were cluttering the room and causing a tripping hazard.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853

(1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

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 hazardous condition, nor had actual or constructive notice of its existence. *Pfeuffer v New York City Hous. Auth.*, 93 A.D.3d 470 (1st Dept. 2012); *Hartley v. Waldbaum, Inc.*, 69 A.D.3d 902 (2nd Dept. 2010). A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition. *Early v Hilton Hotels Corp.*, 73 A.D.3d 559 (1st Dept. 2010).

A defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition. *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444 (2nd Dept. 2001). A plaintiff is not required to prove that the defendants knew or should have known of the existence of the exact item of debris which caused his fall. *Fundaro v. City of New York*, 272 A.D.2d 516 (2nd Dept. 2000). However, general awareness of a dangerous condition cannot create an inference of constructive notice of the particular condition that caused the plaintiff's injury. *See Chianese v. Meier*, 98 N.Y.2d 270 (2002); *DeJesus v. New York City Hous. Auth.*, 53 A.D.3d 410 (1st Dept. 2008).

Here, Rickey claims that prior to his accident, he saw videotapes that had fallen on the floor in the closet more than a dozen times and also saw cardboard from the boxes on the floor in the closet many times in the two months prior to his accident. While Schlingheyde claims that Rickey never told him about the dangerous condition of the boxes and videotapes in the closet, both Rickey and Gully maintain that Rickey informed Schlingheyde, on several occasions within the two months prior to the accident, of the unsafe condition in the storage closet due to the placement of the old torn boxes in the storage closet. Based on the evidence presented, the court finds that issues of fact exist as to whether Medical Arts had notice of an ongoing and recurring dangerous condition sufficient to be charged with constructive notice of the specific reoccurrence of the condition that allegedly caused Rickey's fall.

In accordance with the foregoing, it is hereby

ORDERED that the defendants Cornerstone Continuous Care Corp. and Cornerstone of Medical Arts Center Hospital's motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 26, 2012

ENTER:

Saliann Scarpulla, J.S.C.