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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 102657/2009
KALISH,MICHAEL
vs.
HEI HOSPITALITY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
JUL 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 15, 2012

_____, 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

Index No. 102657/09

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MICHAEL KALISH,

Plaintiffs

- against -

HEI HOSPITALITY, LLC a/k/a HEI HOTELS & RESORTS, LE MERIDIEN SAN FRANCISCO HOTEL, MERRITT HOSPITALITY, and STARWOOD HOTELS AND RESORTS WORLDWIDE, INC.,

Defendants.

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JOAN A. MADDEN, J

In this action arising out of a slip and fall on a bathmat, defendants HEI Hospitality, LLC ("HEI) a/k/a HEI Hotels & Resorts, Le Meridien San Francisco Hotel ("Le Meridien"), Merritt Hospitality ("Merritt"), and Starwood Hotels and Resorts Worldwide, Inc. ("Starwood") move for summary judgment dismissing the complaint and any and all cross claims. Plaintiff Michael Kalish ("Kalish") opposes the motion, which for the reasons stated below, is granted.

Background

Kalish alleges that he sustained personal injuries on the morning of April 26, 2007, when he slipped and fell in the bathroom of his hotel room at Le Meridien Hotel in San Francisco. Kalish testified at his deposition that he was in San Francisco for a business trip and checked into Le Meridien Hotel the evening before the accident. (Kalish Dep. at 14). According to Kalish, on the evening he check in he noticed a towel laid over the side of the combination tub and shower, "which seemed to be for the purpose of a bathmat." (Id. at 25). He described the towel as composed of terry material, which was not of the same thickness as the bath towels and had no rubber siding. (Id. at 27). He stated that he did not lay the towel down that evening and was barefoot on the floor of the

bathroom. According to Kalish, the floor of the bathroom was tiled and composed a polished stone that was cold and smooth. (Id. at 28-29).

Kalish testified that the in the morning he took the bathmat off the side of the bathtub and laid it out to take a shower. (Id. at 35). After showering, he wrapped himself in a towel to dry off, got out of the shower and then exited the bathroom. Kalish testified that when he went back into the bathroom, he stepped onto the bathmat, at which point the bathmat slipped forward and he heard a "sickening crack" as he lost his balance and hit the floor. (Id. at 44-45). Kalish called hotel security from the telephone in the bathroom and an ambulance took him to the emergency room.

Tyrus Joubert ("Joubert"), who has worked as the executive director of housekeeping at HEI Hospitality since April 27, 2006, also testified. According to Joubert, the bathroom floor is composed of granite. (Joubert Dep. at 23). He testified that each of the 360 rooms at the hotel had thick bath rugs in front of the sink, rubber bath mats for inside the tub and shower and bath mats rolled up next to the tubs for guests to use when exiting the shower . (Id. at 38). The bath mats were one hundred percent cotton and did not have rubber backing or non-skid surfaces. (Id. at 25, 29).

Joubert testified that he initially became aware of the incident through the manager's daily log, called the MOD log, which he believes he first looked at on the day of the accident. (Id. at 16, 18). Joubert stated that upon reading two entries about Kalish, he went to check the room and observed towels spread on the bathroom floor, but nothing else out of the ordinary, and he did not take photos or measurements of the room. (Id. at 22). He also did not observe any water on the bathroom floor (Id. at 16). Joubert did not examine the bath mat or retain it and instead followed regular procedure and had the bath mat changed when the room was cleaned (Id. at 25, 26).

With respect to maintenance of the bathroom floor, Joubert testified that the cleaning procedure in place for cleaning the granite floors consisted of spraying the floors with Ecolab floor 99 HDD disinfectant and then wiping them clean with rags. (Id. at 43). According to Joubert, no other chemicals or agents were used on the granite floors in the hotel. Joubert stated that he is unaware of the hotel receiving any complaints about the bathroom bathmats and he is also unaware of any incidents similar to Kalish's fall. (Id. at 46-47).

Troy Gauthreaux ("Gauthreaux"), who has worked as the front office desk manager of Le Meridien since April of 2006, also provided deposition testimony. Gauthreaux stated that he learned of the accident from the hotel's paging system and responded by entering Kalish's hotel room with another hotel staffer. Upon entering the room, Gauthreaux recalls observing Kalish on the bathroom floor. He stated that Kalish told him that he had recently had knee surgery and stepped out of the tub and the knee must have given out, so he slipped. (Gauthreaux dep. at 14). According to Gauthreaux, other individuals also responded, but he could not recall their positions. Gauthreaux testified that he exited the room when the paramedics arrived. He did not photograph the bathroom or instruct that the bathmat or rugs be retained.

Gauthreaux testified that in April of 2007, the hotel bathrooms had bathmats, which were composed of terry. (Id. at 21-22). He explained that there is a distinction at the hotel between bathmats and bath rugs; bath rugs are woven rugs, which are placed in front of the sink, whereas bathmats are rolled and stood upright at the corner of the bathtubs. (Id. at 21-22). He testified that he does not know if the bathroom floors were mopped or waxed that month. He does not recall receiving complaints about the

condition of the room, bathmats or bath rugs prior to Kalish's accident. (Id. at 20-21). Gauthreaux stated that the bathroom floor was made of marble. (Id. at 37).

Kalish commenced this action which seeks to recovery damages for defendants' alleged negligence by service of a summons and complaint on or about February 25, 2009. Following the completion of discovery, defendants made this motion for summary judgment. Defendants argue that summary judgment is warranted, as Kalish was uncertain as to the exact cause of the accident, and that they did not have actual or constructive notice of any defective condition or cause or create a condition causing Kalish to fall. Defendants also argue that there is no common law, statutory or relevant industry standard that imposes on hotel owners the duty to equip hotel bathrooms with non-skid surfacing, nor is there competent evidence of any defect in either the bathroom flooring or the subject bathmat.

Kalish opposes the motion, arguing that summary judgment should be denied as the record sufficient shows that Kalish fell due to the bathmat and slippery floor. He also argues that defendants have failed to meet their burden of showing that the bathmat was not defective since did not provide an expert affidavit to support this defense. Kalish further argues that defendants have not provided evidence showing that they did not create the dangerous condition that caused him to fall or that they lacked actual or constructive notice of such condition since they failed to produce any logs to confirm that there were no complaints regarding the bathmats used at the hotel, and that Joubert's deposition testimony that there were no complaints about the bathmats is insufficient to establish the lack of notice, since he was only employed at the hotel for a year prior to the accident. Kalish also argues that as defendants discarded the bathmat after the accident,

defendants cannot argue that it was not defective or, at the very least, Kalish should be entitled to an adverse inference charge at trial.

Kalish alternatively argues that even if defendants met their burden of establishing a prima facie basis for granting summary judgment, the affidavit of his expert raises triable issues of fact sufficient to defeat defendants' motion. The expert affidavit submitted by Kalish is of floor traction expert, Russell J. Kendzior, who is the founder and chairman of the board of the National Floor Safety Institute, a trade organization that promotes the use of high-traction materials and President of Traction Expert, Inc., which specializes in floor safety technology. Kendzior inspected a bathmat provided by the defendants as an exemplar of the mat provided to Kalish and also reviewed Kalish's bill of particulars, the deposition transcripts, and the defendants' various discovery responses, which included the incident report with photographs. Kendzior opines that, "[t]he subject bathmat provided by the defendants to the plaintiff, while the plaintiff was a patron at the defendants' Hotel on April 26, 2007, was in fact not a mat, rug, or bathmat at all, but rather just a cotton towel." (Kendzior affidavit at 2). He further opines, "...the failure of the defendants to provide a non-slip bathmat with traction and/or rubber backing or any other means of preventing it from slipping on the tile floor upon which it was placed, was the cause of the plaintiff's slip and fall accident of April 26, 2007." (Id. at 3-4).

He further states that the bathmat violates Section 5.4.5 of the American Society of Testing and Materials Standard F-1637-09, which requires that "[m]ats, runners, and area rugs shall be provided with safe transition from adjacent surfaces and shall be fixed in place or provided with slip resistant backing." (Id. at 3). Kendzior hypothesizes that the bathmat would fall into the low traction slip resistant category based on the test

method published by the National Floor Safety Institute 101-C Standard, but he did not actually conduct such a test.

In reply, defendants argue that Kalish has not identified a common law or statutory requirement imposing a duty on the landowner to equip the bathroom with a non-skid surface. Defendants further argue that Kendzior's affidavit should be rejected since Kalish did not identify the expert in pretrial disclosure, and they were unaware of such an expert until Kalish served his opposition to the motion for summary judgment. Defendants also argue that Kendzior's affidavit is incomplete since it is undated, does not include a curriculum vitae as required by CPLR 301, does not indicate whether the expert inspected the incident site or performed a coefficient of friction test, and the expert does not annex any well accepted industry standards. Lastly, defendants argue that Kalish's claims of discovery violations and spoliation are baseless, since he filed a note of issue certifying that discovery was complete on July 11, 2011.

In sur-reply, Kalish states that the defendants had notice of the existence of his expert as early as February 3, 2011 and that he served a CPLR 3101(d) Expert Disclosure upon the defendants on July 7, 2011, before the defendants served their note of issue on July 11, 2011.[1]

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

[1]In his sur-reply, Kalish also argues that the defendants' reply should not be considered as defendants did not serve it until two months after the date of their motion for summary judgment and only one day prior to oral argument, and that the reply contained new arguments in support of defendants' motion. These arguments are without merit as since Kalish was permitted to submit a sur-reply, he cannot not show any prejudice resulting from defendants' late service of their reply and or by any new arguments raise in their reply.

eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

To demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant either created the dangerous or defective condition or had actual or constructive notice of the condition, which caused the accident. Piacquiadio v. Recine Realty Corp., 84 N.Y.2d 967 (1994); Acquino v. Kuczinski, Villa & Assoc., P.C., 39 A.D.3d 216 (1st Dep't 2007). To constitute constructive notice, a defect must be visible and apparent and it must have existed for a sufficient length of time prior to the accident to allow the defendants to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986).

As a preliminary matter, contrary to defendants' position, Kalish sufficiently identified the cause of his fall based on his testimony that he fell after he slipped on the bathmat. That being said, however, for the reasons below, defendants are entitled to summary judgment. It is well established that "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action or inference of negligence." Thomas v. Caldor's, 224 A.D.2d 171 (1st Dep't 1996).

Here, the record indicates that the floor was cleaned with a spray disinfectant and rag wipe, but was never waxed, diamonized, or buffed. In addition, defendants have presented sufficient evidence to make a prima facie showing that the bathmat was not

defective, but was a standard 100% cotton bathmat, which had been used widely at the hotel, and that defendants had not received any complaints about the mat.

Moreover, in opposition to the motion, Kalish has failed to identify a common law, statutory, or relevant industry standard imposing a duty on hotel owners to supply a no-skid surface in the bathroom area. See Azzaro v. Super 8 Motels, Inc., 62 A.D.3d 525, 526 (1st Dep't 2009)(affirming trial court grant of summary judgment in action alleging that bathroom area and cotton floor mat were unreasonably dangerous where plaintiff failed to meet her burden of identifying any common law, statutory or relevant industry standard imposing on hotel owners the duty to supply non-skid surfacing in the bathtub area); Lunan v. Mormille, 290 A.D.2d 249 (1st Dep't 2002), (holding that lessors of apartment owed no duty to supply non-skid surfaces in bathtub); Portanova v. Trump Taj Mahal Assocs., 270 A.D.2d 757 (3rd Dep't 2000), lv denied, 95 N.Y.2d 765 (2000)(complaint in action arising out of fall on cotton bathmat used on marble floor in bathroom should have been dismissed in absence of evidence of a defect in the surface or some deviation from relevant industry standards).

In addition, the statements in plaintiff's expert affidavit are insufficient to raise a triable issue of fact in this regard.[2] "It is well settled that an expert's opinion must be based on facts in the record or personally known to the witness, and that the expert may not assume facts not supported by evidence in order to reach his or her conclusion." Brogdan v. Sheridan Avenue, LLC, 5 Misc 3d 1012(A) (N.Y. Sup. Ct. 2004); see also Hambsch v. New York City Transit Authority, 63 N.Y.2d 723, 236 (1984). Here, the expert neither measured the co-efficient of friction of the bathroom floor, nor examined

[2] Even assuming arguendo that Kalish failed to timely identify his expert witness, the court may consider the affidavit as there is no indication that any such failure was intentional or willful or prejudicial to defendants. See Busse v. Clark Equipment Co., 182 A.D.2d 525 (1st Dep't 1992).

the bathroom floor in question, or tested the exemplar bathmat. Moreover, the safety standards cited by the expert are inapplicable. In particular, Section 5.4.5 of the American Society of Testing and Materials, on which Kalish's expert relies, is part of F-1637-09, which is entitled "Standard Practice for Safe Walking Surfaces." This standard covers walking surfaces for pedestrians wearing "ordinary footwear," and expressly excludes "swimming pools, bathtubs, and showers" from its scope. In addition, while Kalish's expert states that the National Floor Safety standard would place the mat in the "low traction category," he does not state that he tested the exemplar bathmat or that the use of a low traction mat violated any applicable standard.

Finally, the defendants' failure to preserve the bathmat does not provide a basis for denying summary judgment. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them." See Kirkland v. New York City Housing Authority, 236 A.D.2d 170, 173 (1st Dep't 1997). Moreover, spoliation sanctions are not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case. See Cameron v. Nissan 112 Sales Corp., 10 A.D.3d 591 (2nd Dep't 2004), Tawedros v. St. Vincent's Hospital of New York, 281 A.D.2d 184 (1st Dep't 2001).

Here, while the bathmat at issue was either discarded or at least not set aside by defendants, it appears that defendants did so in the normal course of business prior to the commencement of this action. Balaskonis v. HRH Constr. Corp., 1 A.D.3d 120 (1st Dep't 2005). In any event, even if the defendants' failure to preserve the bathmat was arguably

negligent, there has been no showing that it is crucial to Kalish's case since the bathmat was standard and its loss did not prevent Kalish from proving his case.

In view of the above, it is

ORDERED that the motion for summary judgment by defendants is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: June 5, 2012 ~~May~~, 2012

J.S.C.

FILED

JUL 02 2012

~~NEW YORK~~ COUNTY CLERK'S OFFICE