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

PRESENT: DEBRA A. JAMES PART 59
*Justice*

TIFFANY LLOYD,

Plaintiff,

- v -

MARRANO DEVELOPMENT AFFILIATES, L.P. and BROADWAY MANAGEMENT CORP.,

Defendants.

Index No.: 103320/2009
Motion Date: 12/23/2011
Motion Seq. No.: 001
Motion Cal. No.:



The following papers, numbered 1 to 3 were read on this motion for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | 1 |
| Answering Affidavits - Exhibits | 2 |
| Replying Affidavits - Exhibits | 3 |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that the motion for summary judgment of the defendants shall be denied.

In this trip and fall action concerning an accident which occurred on September 26, 2006 at the defendants' apartment building located at 310 West 143rd Street, New York, New York, the defendants move for summary judgment.

Plaintiff testified at her deposition testimony that on that date at approximately 7 AM, she, at the time an expectant mother (delivery due on December 12, 2006), began waiting in the intercom room of the building where she was a tenant in order to take her child outside and put him on a school bus. During that

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

time she observed through the glass walls of the intercom room a porter mopping the area near the security office and storage room. She waited about 45 minutes because the school bus was late that day. After placing her child on the bus, she reentered the lobby of the building, took three steps and fell suffering a back injury and the onset of labor.

Defendants move for summary judgment on the grounds that there is no negligence since their porter's mopping of the floor was not inherently dangerous and because plaintiff observed the porter mopping the floor establishing that any failure to warn was not a substantial factor in bringing about her injuries. Defendants argue that as the condition of the floor was open and obvious, plaintiff admitting that she observed the porter in the process of mopping the floor, defendants had no duty to warn her of the hazard and may not be cast in damages as a matter of law. They cite McPherson v Grant Advertising, Inc, 281 AD 579 (1st Dept 1953) in support of their contentions.

Plaintiff counters that she only observed the porter mopping in the security office and storage area but not in the lobby, saw the mop bucket in the lobby at the time of her fall, and saw no wet signs. She disputes the recollection of the porter that he had only reached the entrance doors adjacent to the lobby at the time of her accident, that the area where plaintiff fell was not wet, and that before he began mopping, he

placed wet signs two or three feet from where plaintiff fell. Plaintiff argues that such evidence raises an issue of fact whether defendants breached their duty of care to plaintiff in failing to post warning signs in the lobby to alert plaintiff of the wet condition.

Based on the evidence submitted on this motion, the court finds that there are issues of fact to be determined at trial and therefore summary judgment shall be denied. The cases cited by defendants are distinguishable from the present action.

In McPherson, supra, the Court reversed the jury verdict in favor of a plaintiff who "admitted that she knew that the floors were being cleaned, and testified that during the evening, prior to the time when she fell, she 'had to pass the corridor that led into the cloak room and that was being waxed.' Inasmuch as it thus appears she knew that the floors were being waxed, close by where she slipped and fell, she possessed whatever information a warning would have given." 281 AD at 582-583. In setting aside the verdict and dismissing the complaint, the McPherson Court reasoned that

> The floors had to be cleaned and waxed at some time, and, although a jury question might have been presented if the floor had been left in an unsafe condition after the work had been completed, defendants would be subjected to a greater burden than the law imposes if they were required to insure that the floors of these offices would be in their normal condition at each stage of the process of washing and waxing them, at least as regards plaintiff who already knew that the work was in progress in the immediate vicinity.

281 AD2d at 583.

The facts at bar are more similar to those in the lower court opinion in Coggin v Clinton Trust, 52 NYS2d 827 (NY City Court 1944), n.o.r. where the court trial court denied defendant's motion for a directed verdict and entered judgment in favor of the plaintiff. In Coggin, the trial judge found that the infant plaintiff fell in an accumulation of water and soap in the vestibule of defendant's multiple dwelling where she lived with her family who were tenants, which puddle the janitress's daughter left when she abandoned that area to wash the hall on the floor immediately above the ground floor.[1]

Likewise, the evidence, here in the form of the plaintiff's and the porter's conflicting deposition testimony, raises a question that must be determined by the fact finder, i.e. whether there was negligence on the part of defendants, specifically whether the porter put or spilled water on the lobby before he commenced mopping there, and whether he placed caution signs in the vicinity of plaintiff's fall.

In this regard, the court agrees with plaintiff that on the facts of this case, the question of whether a condition is open and obvious is one for the jury. "Nor is the mere that a defect

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[1]Compare Samuels v Terry Holding Co, 253 NY 593 (1930), which as McPherson and Coggin, was decided before the abrogation of the common law rule of contributory negligence and the adoption of comparative fault laws in New York State.

or hazard is capable of being discerned by a careful observer the end of the analysis. The nature or location of some hazards, while they are technically visible, make them more likely to be overlooked." Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 72 (1st Dept 2004). Clearly such is the case here, given the nature of water and the conflicting evidence in the record as to the precise location that water was being applied during the period in question. Contrast Melendez v City of New York, 76 AD3d 442 (1st Dept 2010) (city had no duty to protect park visitors from park waterfall, a natural geographic phenomenon whose wet, slippery ledge, was open and obvious, rather than latent, natural feature of the landscape).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is DENIED.

This is the decision and order of the court.



**Dated:** August 2, 2012

ENTER:

DEBRA A. JAMES J.S.C.