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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

MARIA F. NESPOLI,

Plaintiff,

- against-

EQUINOX HOLDINGS, INC. d/b/a EQUINOX FITNESS CLUB,

Defendant.

INDEX NO. 112619/09

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion by defendant to for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1,2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

This is a negligence "slip and fall" action brought by Maria F. Nespoli (plaintiff) to recover damages for injuries sustained when she allegedly slipped and fell on moist tiles in the sink area of the women's locker room of Equinox Holdings, Inc.'s (defendant) gym/health club, located at 2465 Broadway, New York, New York. Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint for plaintiff's failure to establish any negligent conduct on the part of the defendant. Plaintiff is in opposition to the motion.

BACKGROUND

This action arises out of an accident that occurred on July 20, 2009 at approximately 7:30 p.m. when plaintiff allegedly slipped and fell on moist tiles in the sink area of the women's locker room at the defendant's gym/health club located at 92nd Street and Broadway. Plaintiff alleges the incident resulted in physical injuries.

Plaintiff testified at her deposition that she entered defendant's health club at approximately 5:30 p.m. on July 20, 2009 to attend a spin class beginning at 6:00 p.m. (*see* Notice of Motion, exhibit D, p. 15-16). After her spin class, plaintiff took a shower (*id.*, at p. 17).

After exiting the shower area with flip-flops on, plaintiff walked down a corridor towards the locker room sinks (*id.*, at p.18). Plaintiff testified that the shower area and corridor she walked down after her shower had rubber mats on the floor, but the mats that were usually in place in the sink area had been moved (*id.*). Plaintiff claims that she did not notice that the mats in the sink area had been moved until she had already stepped on the tile floor in the sink area (*id.*). Plaintiff maintains that she immediately slipped and fell after taking her first step on the sink area floor and that prior to falling, plaintiff did not see the substance that caused her slip (*id.*, at p. 18, 25-26). After falling, plaintiff stated that she noticed moisture on the tiles upon which her left foot had left a skid mark on the tiles (*id.*). She also testified that there was no water or puddles in the area that she fell, but claimed that there was an even distribution of moisture spread on the tile floor (*id.*, at p. 26). Plaintiff identified the moist tiles as the cause of her fall (*id.*, at p. 52). Moreover, plaintiff testified that there was another woman in the sink area washing her hands at the time of the accident, but the identity of this witness is unknown (*id.*, at p. 50).

Plaintiff, in her deposition, testified that the rubber mats which were usually on the floor where she fell, in between the corridor and sinks, had been removed and placed directly under the sinks (*id.*, at p. 40). Plaintiff asserts that on previous occasions when the mats were under the sink she observed locker room attendants physically drying the floor in the sink area, but on this occasion there were no locker room attendants present when plaintiff stepped in to the sink area (*id.*, at p. 30, 48, 57-58). Additionally, plaintiff claims not to have seen any warning signs in the sink area advising patrons about a wet floor (*id.*, at p.44).

Michael Buonocore, General Manager of the Equinox gym/health club on July 20, 2009, stated he was not the manager on duty when plaintiff's accident occurred and did not find out about the accident on the morning of July 21, 2009 (*see* Notice of Motion, exhibit E, p. 20). Buonocore states he did not check with the manager on duty at the time of the accident to

determine if any club employees witnessed the accident, whether there were any club employees in the locker room at the time of the accident, or whether any members of the gym witnessed the fall (*id.,* at p. 24, 55, 57). However, Buonocore did state that one or two maintenance workers would be assigned to the women's locker room at any given time, including the evening of July 20, 2009 (*id.,* at p. 32, 48). Buonocore stated that maintenance workers assigned to the locker would remain in the locker room for their entire shift unless they were removing towels (*id.,* at p. 36). Buonocore claims that maintenance staff is instructed to dry the locker room floors when they become wet using a mop that has a towel wrapped around it (*id.,* at p. 39-40). Further, Buonocore stated that staff only put out warning signs advising patrons of a wet floor when they are mopping with cleaning solution, and this is not done when staff are drying the floor (*id.*, at p. 46). He stated that he believed the rubber mats would be moved from their normal position to dry the tile floor underneath (*id.,* at p. 41).

Testimony was also taken of Maria Chauca, maintenance manager at the Equinox location where the accident occurred. Chauca testified that she believes she was working on July 20, 2009, but had no recollection of the accident in the locker room,[1] and did not recall what maintenance workers were assigned to the locker room on the evening of July 20, 2009 (Notice of Motion, exhibit F, at p.10-11, 46). She also testified that maintenance staff assigned to the women's locker room would be in the locker room for their entire shift and are responsible for cleaning windows, lockers, towels, and mopping the floor (*id.*, at p. 11-12, 15). Chauca stated that staff does not clean the floor during business hours, but is instructed to dry the floor whenever it becomes wet (*id.,* at p. 30-31). When Chauca does a "walk through" of the women's locker room, which occurs approximately two to four times and hour, she looks for wet floors (*id.*, at p. 48-49). Additionally, if she or any other staff member see a wet floor,

[1] Chauca did not specify when she last performed a walk through prior to plaintiff's accident.

Chauca states, they would dry the floor with a mop or rag (*id.*, at p. 50). Chauca testified that on the date of the accident she did not instruct locker room attendants to move the mats in the sink area in order to dry the tile underneath (*id.*, at p. 32).

In support of its summary judgment motion defendant submits, *inter alia*, the summons and complaint, defendant's answer, plaintiff's verified bill of particulars, transcript of the Examination Before Trial (EBT) of plaintiff, transcript of the EBT of Michael Buonocore, and transcript of EBT of Maria Chauca.

Defendant proffers that it is entitled to summary judgment because plaintiff cannot establish that there was a defective condition in the locker room. Specifically, defendant claims that wet or moist tile floors near showers or sinks cannot be deemed a defective condition. Defendant further argues that even if there was a defective condition, plaintiff fails to demonstrate that defendant had actual or constructive notice of the condition. Additionally, defendant contends that all appropriate measures were taken to protect against any alleged hazards and that defendant did not have any duty to warn plaintiff about the missing mats or a "moist" tile floor.

In opposition, plaintiff argues that the motion for summary judgment should be denied because defendant fails to establish that the moisture that allegedly accumulated on the tile floor was not a dangerous condition or that defendant lacked notice of the defective condition resulting in the plaintiff's accident. Additionally, plaintiff claims that defendant fails to demonstrate that it took all appropriate measures to protect plaintiff from the alleged hazardous condition on the floor. Plaintiff further asserts that the issue of moisture on the tile floor or the removal of the rubber mats being an open and obvious condition goes towards the issue of comparative negligence and is not a reason to grant summary judgment.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of

fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Centruy-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well-established that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "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" (*id.* at 500; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well-settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

DISCUSSION

A plaintiff in a slip and fall case where negligence is alleged, must prove that a dangerous condition existed at the time of the accident, otherwise summary dismissal is appropriate (*see Delia v 1586 N. Blvd. Co., LLC*, 27 AD3d 269 [1st Dept 2006], citing *Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Courts have established that floors in locker rooms in close proximity to showers and swimming pools are "bound to become wet and that such a condition has been held to be incidental to the use of such facility and does not, in and of itself constitute a dangerous condition" (*Fox v Equinox Columbus Centre, Inc.*, Sup Ct New York County, September 20, 2010, Sherwood, J., index No. 114321/08, slip op at 4-5, citing *Conroy v Saratoga Springs Auth.*, 259 App Div 365 [3d Dept 1940], *affd* 267 NY 585 [1940]; *Sciarello v Coast Holding Co., Inc.*, 242 App Div 802 [2d Dept 1934], *affd* 267 NY 585 [1935]; *O'Neil v Holiday Health & Fitness Ctrs. of N.Y.*, 5 AD3d 1009 [4th Dept 2004]; *cf. Van Stry v State of New York*, 104 AD2d 553 [2d Dept 1984]).

Upon evaluation of the evidence, the Court finds that plaintiff has not met her burden of proving that an inherently dangerous condition or defect existed on the date of the accident.

Plaintiff's accident took place in a locker room facility that had showers, sinks, and a steam room (*id.*, at p. 21). Plaintiff testified that the tile floor in question was not wet, nor were puddles or standing water, but rather there was simply moisture on the tile floors (Notice of Motion, exhibit D, p. 26). Plaintiff cites *Van Stry v State of New York* (104 AD2d 553, 555) and proffers that slippery conditions are not incidental to the use of a locker room and therefore the conditions in the locker room at Equinox were inherently dangerous (Affirmation in Opposition, p. 27). In *Van Stry* a slip and fall occurred in a "puddle one-eighth of an inch deep and four to five feet in diameter" (259 App Div 365 [3d Dept 1940], *affd* 267 NY 585 [1940]). However, the Court in *Van Stry* readily distinguishes the facts of that case from *Conroy v Saratoga Springs Auth.* (259 App Div 365 [3d Dept 1940]), where the Court held that the moist conditions on the floor were incidental to the use of a bathhouse (*id.*). The Court finds that the facts in *Van Stry* are distinguishable from the case at bar and are instead analogous to the facts in *Conroy* as there was no puddle of water on the floor of the locker room, but rather there was only moisture on the tiles. Moreover, a "wet floor, especially in a bathroom where one can expect some water to make its way out of the shower to the floor is not enough, standing alone, to establish negligence" (*Seaman v State of New York*, 45 AD3d 1126, 1127 [3d Dept 2007], citing *Miller v Gimbel Bros.*, 262 NY 107, 108 [1933]; *Todt v Schroon Riv. Campsite*, 281 AD2d 782, 783 [3d Dept 2001]; *Miller v Easley*, 9 AD2d 978, 978-979 [3d Dept 1959]; *see also Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 759 [3d Dept 2000], *lv. denied* 95 NY2d 765 [2000]). The Court finds that in this instance the moisture on the tile floor was incidental to the use of the locker room and does not constitute a dangerous condition or defect. Thus, defendant's motion for summary judgment must be granted (*see Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1st Dept 1999]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that defendant is directed to serve a copy of this Order, with Notice of Entry, upon all parties and the Clerk of the Court who is directed to enter judgment accordingly, within 30 days.

This constitutes the Decision and Order of the Court.

Dated: 9-10-12

Enter:

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

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