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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C.
Justice

PART 44

Index Number : 116491/2008
ADLERSTEIN, SYLVIA
vs.
ADA CLINICAL MGMT SERVICES,
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/21/12
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 annexed decision.

FILED
SEP 27 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/17/12

MTF, 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
NEW YORK COUNTY

HON. MILTON A. TINGLING
PART 24

ADLERSTEIN, SYLVIA,
PLAINTIFF,
-V-
ADA CLINICAL MANAGEMENT SERVICES, INC., DELTA MANAGEMENT LLC, 73-12 COMPANY, LLC, GR 73-12, LLC, MEDHAT F. SAMI, M.D., P.C. and KAT RESTORATION, INC.
DEFENDANT

INDEX NO. 116491/2008
MOTION DATE 3/26/12

PRESENT: HON. MILTON A. TINGLING

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

Defendants, DELTA MANAGEMENT LLC, 73-12 COMPANY, LLC and GR 73-12 moves this court for summary judgment and seeks dismissal of plaintiff's complaint and any and all cross-claims on the ground that plaintiff will not be able to establish a prima facie case. Plaintiff opposes this motion for summary judgment.

Plaintiff alleges that on September 5, 2007 around 9:15pm at her son's office, she tripped and fell in the office of defendant ADA CLINICAL MGMT SERVICES. Plaintiff was lawfully on the premises of 73-12 35th Avenue, Suite# AA. Plaintiff testified she went to ADA CLINICAL MGMT SERVICES to meet her son, Dr. Andrew D. Adlerstein, who is owner, president and chief chiropractor of ADA CLINICAL MGMT SERVICES. Plaintiff testified that she walked to her son's private office to retrieve her shoes, which had just been repaired. Carrying her repaired shoes in her hand and wearing slip on shoes with elevated heels she began to exit the office when she felt something holding her back and she tripped and fell straight forward hitting the cement floor. Plaintiff alleges severe and permanent injuries occurred. Plaintiff testified that when exiting Dr. Adlerstein's office her foot got tangled on a "green rug

that looked like grass" (T23)[1], causing her to fall. Plaintiff also testified that there were papers around the rug (T23).

Plaintiff's son, Dr. Adlerstein also testified to the conditions of the office at the time of the accident. Dr. Adlerstein testified that he is owner of ADA CLINICAL MGMT SERVICES and that he rents sublevel commercial space for ADA CLINICAL MGMT SERVICES from 73-12 COMPANY, LLC and GR 73-12 and has rented this space since 1992 (P9-13)[2]. Dr. Adlerstein also testified that DELTA MANAGEMENT LLC manages the building at 73-12 35th Avenue (P12). Dr. Adlerstein testified that in 1995 he expanded his business from one apartment to two apartments, known as Suite# AA and Suite #BB (P14-16). Dr. Adlerstein testified that after taking over Suite# BB in 1995 he began to notice flooding in his office space. He recalled this occurring two to three times per year (P22). Dr. Adlerstein described that when it rained heavily water would accumulate in the outside entrances and then travel under the doors into his hallways and then into his office. This left puddles all around the office. Dr. Adlerstein alleges that the water accumulation could reach over two inches. Dr. Adlerstein also testified that at first the office would be submerged in water and when the water subsided it would leave puddles around the office (P25). Dr. Adlerstein explained the super and porters would assist with clean up using dry vacuums, brooms and mops (P26). Dr. Adlerstein explained that after a flood in 2002 the carpeting had to be replaced, walls had to be cleared of mold and sheetrock had to be replaced, at a cost of $14,000 (P27-29). Dr. Adlerstein testified DELTA MANAGEMENT came to his office to observe the conditions around four to five times from 1992 to the date of plaintiff's accident, September 5, 2007. Dr. Adlerstein testified that a member of DELTA MANAGAMENT, Mr. Schubeck told him the flooding issue would be corrected (P31). DELTA MANAGEMENT allegedly put in a higher saddle in the entrance of Suite# BB, raising it between an inch to an inch

[1] T shall represent the Transcript of Sylvia Adlerstein's deposition and will be followed by the page number.
[2] P shall represent the Transcript of Dr. Andrew D. Adlerstein's deposition and will be followed by the page number.

and a half. However, Dr. Adlerstein testified that this did not correct the flooding issue and it continued to occur two to three times per year (P33-34). Dr. Adlerstein testified that the flooding occurred at least twenty-four times from 1995 to the date of the accident.

A flooding incident occurred in 2006, according to Dr. Adlerstein's testimony. This flood caused severe damage to the office and required over $100,000 in restoration (P39-41). All of the renovations were not completed including putting down carpeting in the hallway where the accident took place. Dr. Adlerstein testified that he then complained to John Busch. Mr. Busch came to Dr. Adlerstein's office three to four times. Mr. Busch informed Dr. Adlerstein that the flooding was due to a city sewer backing up (P35). Dr. Adlerstein testified he would see water fill up the entrance ways by the drains and it would bubble and that this occurred at both the entrance to Suite# AA and Suite #BB (P43-46). Dr. Adlerstein testified that after seeing this occur he would notify the super of the building, Mr. Robinson.

In August of 2007 another flood occurred. A large rainstorm occurred causing the storm drains to back up because they could not collect all of the water. Dr. Adlerstein also testified that the DEP came to his office in August 2007. The DEP informed him that a clogged drain, which had never been cleaned, caused the sewer to back up; Mr. Busch was present at this encounter (P37). Due to the flooding in August 2007, Dr. Adlerstein's carpet was completely saturated forcing him to remove all the carpeting again. Dr. Adlerstein testified that when the August 2007 flood occurred there was construction paper placed on the floor, taped down, by his office staff. However after the flood this paper was removed because it was all wet. After removing the paper Dr. Adlerstein had to put down new paper and he also placed an Astroturf runner, which was about thirty-six inches wide and five or six feet long (P73-76). Dr. Adlerstein testified that he placed this Astroturf down instead of carpeting because, "I was afraid that we are going to be flooded out again."(P77). Dr. Adlerstein stated that the runner was in place for about two to two and a half weeks before the incident occurred. When asked about the Astroturf runner Dr. Adlerstein admitted that after his mother's fall he saw some black strings

along the width side of the runner. Dr. Adlerstein also testified that at the time of plaintiff's fall he did not see any water on the floor (P95-97).

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra.* In this case, defendant alleges entitlement to summary judgment on the grounds that plaintiff will not be able to establish a prima facie case of negligence. Defendants, DELTA MANAGEMENT LLC, 73-12 COMPANY, LLC, GR 73-12, LLC, believe that by granting summary judgment on behalf of defendants, MEDHAT F. SAMI, M.D., P.C. and KAT RESTORATION, INC., they are likewise entitled to summary judgment. In the courts decision to grant summary judgment to defendants, MEDHAT F. SAMI, M.D., P.C. and KAT RESTORATION, INC., the court held "the plaintiff's testimony, as well as that of Dr. Adlerstein, establishes that the rug upon which plaintiff tripped and fell was there as a result of Dr. Adlerstein's actions..." 73-12 defendants claim that since this is now the law of the case they cannot be held liable for plaintiff's alleged injuries resulting from her trip and fall.

However, the Court of Appeals of New York has held a defect that is visible and apparent and has existed for a sufficient length of time prior to the accident is enough to constitute constructive notice. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986). The courts have also held that a party who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition. Kohout v. Molloy College, 61 A.D.3d 640, 642 (2nd Dep't, 2009). The court maintains that negligence can be established when it is "within the control of the owner and that the recurring condition was one of longstanding with respect to which the owner

took no steps to prevent. Nevoso v. Putter-Fine Bldg. Corp., 18 A.D.2d 317, 320 (1st Dep't 1963). In the present case there is a triable issue, which can be submitted to a jury. Defendants DELTA MANAGEMENT LLC, 73-12 COMPANY, LLC, GR 73-12, LLC, knew of the reoccurring water coming into ADA CLINICAL MANAGEMENT SERVICE's space and did not take steps to rectify the situation.

Although the runner, placed by Dr. Adlerstein was found to be the cause of the plaintiff's fall, it was foreseeable by defendants that Dr. Adlerstein could place down some sort of temporary flooring in his office, instead of permanent flooring that would have to be replaced when another flood occurred. The Court of Appeals of New York held even if a defendant could not anticipate the precise manner of the accident or the exact extent of injuries, it does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable. Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 316-17(1980). The Court of Appeals also held where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. Liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. Derdiarian, 51 N.Y.2d @ 315. In this case the defendant could foresee that constant flooding of a doctors office, where people are walking around could lead to a fall. The placement of the runner does not constitute an intervening cause and does not relieve defendants of their liability. Even if the placement of the runner could be seen as an intervening act, that very act could very well be attributable to the defendant's lack of action in dealing with an ongoing often occurring series of floods.

Once the movant has established a prima facie case that it is entitled to summary judgment, the burden shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Here the movant has not established a prima facie case for summary judgment. Therefore, the court need not address the sufficiency of the opposition's papers.

Accordingly defendant's motion for summary judgment is denied.

DATED: September 17, 2012

HON. MILTON A. TINGLING
J.S.C.