[* 1]

SHORT FORM ORDER

INDEX No. 08-20459
CAL. No. 12-00339OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-28-12 (#004)
MOTION DATE 6-29-12 (#005)
ADJ. DATE 8-23-12
Mot. Seq. # 004 - MG
005 - MG; CASEDISP

SEAN O'NEILL and DIANNE O'NEILL, Plaintiffs, - against - DONNA WEBER and JOHN WEBER, Defendants.	DAVID S. KLAUSNER, PLLC Attorney for Plaintiffs 150 Grand Street, 5th Floor White Plains, New York 10601 BAXTER SMITH & SHAPIRO, P.C. Attorney for Defendant Donna Weber 99 North Broadway Hicksville, New York 11801 KELLY, RODE & KELLY, LLP Attorney for Defendant John Weber 330 Old Country Road, Suite 305 Mineola, New York 11501

Upon the following papers numbered 1 to 47 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 37; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 38 - 39; Replying Affidavits and supporting papers 40 - 45; 46 - 47; Other ___ (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Donna Weber and the motion (#002) by defendant John Weber are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Donna Weber for summary judgment dismissing the complaint against her is granted; and it is

ORDERED that the motion by defendant John Weber for summary judgment dismissing the complaint against him is granted.

Plaintiff Sean O'Neill commenced this action to recover damages for injuries he allegedly sustained on the evening of January 11, 2009, when he slipped and fell while walking through the screened-in area of a second-story porch at a two-family residence owned by defendant Donna Weber. Defendant John Weber lived in the second-story apartment at the residence at the time of plaintiff's accident; Donna Weber, John Weber's sister, occupied the main floor of the residence. The complaint, which includes a derivative claim for loss of services brought by plaintiff's wife, Dianne O'Neill, alleges defendants were negligent in allowing a "dangerous slipping hazard" to exist on the premises. More particularly, by his bill of particulars, plaintiff alleges, among other things, that the wood floor of the second-story porch became slippery when wet, and that defendants were negligent in failing to provide a safe means of ingress to and egress from the residence, and in failing to correct or warn of the slippery condition of the surface of the porch.

Defendant Donna Weber now moves for an order granting summary judgment in her favor on the grounds that the surface of the porch did not constitute a dangerous condition on the premises and, alternatively, that she lacked notice of the existence of the alleged dangerous condition. Donna Weber's submissions in support of the motion include copies of the complaint and her answer, the bills of particulars, transcripts of the parties' deposition testimony, and the deposition testimony of a nonparty witness, Adam Field. Defendant John Weber also moves for an order awarding summary judgment in his favor, arguing that there is no evidence he created or had notice of the alleged dangerous condition. He further asserts that plaintiff's injury was caused not by a dangerous condition on the premises, but by plaintiff's impaired mental state at the time of the accident. In support of his motion, John Weber submits, among other things, copies of the pleadings, the transcripts of the parties' deposition testimony, and the transcript of Adam Field's deposition testimony. Also submitted with the moving papers is an affidavit of Dr. Elkin Simson, who was retained by John Weber as an expert in the field of toxicology to render an opinion as to whether plaintiff's functional capacity was impaired at the time of his fall.

Plaintiff testified at an examination before trial that he arrived at the Weber residence at approximately 7:00 p.m. on January 11, 2009, and that he had been invited to the property by John Weber, who was hosting a card game for a small group of people. Plaintiff testified, in relevant part, that he accessed John Weber's apartment by using an exterior wooden staircase at the back of the residence, which leads from the ground level to a second-story wooden deck and a bi-level, screened-in porch area. He explained that to access the apartment from the second-story deck, a person must walk a short distance across the deck to a door that opens into the screened-in porch. According to plaintiff's testimony, upon entering the porch, a person walks a short distance through the porch area and then down a step to a lower level, which is separated from the kitchen by a sliding glass door. He testified that he had visited John Weber's apartment on a prior occasion, and that he did not have any trouble accessing the apartment at that time or when he first arrived on the day of the subject accident. Plaintiff also testified there was a mat on the deck at the entrance of the porch, but no mats or carpeting in the porch area, and that the mat was wet on the date of his accident.

Plaintiff further testified that, approximately 20 to 25 minutes after his arrival at the Weber residence, he and Adam Field left the apartment using the exterior staircase and went to his car to smoke marijuana. He testified that John Weber's girlfriend joined them as they were smoking when she returned home from the food store. Plaintiff testified that after being outside approximately 15 to 20 minutes, he, Field and John Weber's girlfriend ascended the exterior staircase to the second-story deck to go into the apartment. He

testified that after taking a few steps in the porch area, his right foot slipped on one of the steps leading to the lower level, causing him to fall to the ground. Plaintiff, who was carrying a case of bottled water when he slipped, testified that the surface of the porch was wet, and that it was wet outside when his accident occurred. He also testified that he did not know whether the floor of the porch was wet when he left the apartment to go outside to smoke.

John Weber testified at an examination before trial that it was drizzling on the day of plaintiff's accident. He testified that plaintiff and Adam Field left his apartment for approximately 15 minutes to go outside to smoke, and that plaintiff's accident occurred as he was walking through the porch towards the sliding glass door of the apartment. He testified that he was looking at plaintiff at the time of the accident, and that plaintiff was carrying a case of water bottles on his shoulder when the fall occurred. John Weber testified he did not see plaintiff slip on the floor before the fall. Rather, he testified that he observed plaintiff's right knee "buckle" as plaintiff was stepping down with his right foot to the lower level of the porch. John Weber also testified that he did not notice whether the floor was wet at the time of the accident, that there were mats on the outside deck and on the porch near the glass door, and that he did not know of any other instances in which someone was injured on the porch. Similarly, Adam Field testified that he was walking behind plaintiff immediately prior to the accident, that he did not notice whether the steps on the porch were slippery, and that plaintiff's accident occurred because he missed the step on the porch as he was walking towards the apartment door.

Property owners, as well as tenants in possession, have a duty to maintain their property in a reasonably safe condition (*see* ***Gronski v County of Monroe***, 18 NY3d 374, 940 NYS2d 518 [2011]; ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Boudreau-Grillo v Ramirez***, 74 AD3d 1265, 904 NYS2d 485 [2d Dept 2010]; ***Farrar v Teicholz***, 173 AD2d 674, 570 NYS2d 329 [2d Dept 1991]). However, they are not insurers of the safety of people on their premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). To establish liability in a slip-and-fall action, a plaintiff must show that his or her injuries were caused by a dangerous or defective condition on the property, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Lawrence v Norberto***, 94 AD3d 822, 941 NYS2d 875 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To establish constructive notice, the dangerous or defective condition must haven been visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Britto v Great Atl. & Pac. Tea Co., Inc.***, 21 AD3d 436, 799 NYS2d 828 [2d Dept 2005]).

A defendant seeking judgment in his or her favor in a slip-and-fall action has the burden of submitting sufficient evidence to make a prima facie showing that he or she neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient period of time to discover and remedy it (*see* ***Baratta v Eden Roc NY, LLC***, 95 AD3d 802, 943 NYS2d 230 [2d Dept 2012];

Zerilli v Western Beef Retail, Inc., 72 AD3d 681, 898 NYS2d 614 [2d Dept 2010]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]; ***Braudy v Best Buy Co., Inc.***, 63 AD3d 1092, 833 NYS2d 90 [2d Dept 2009]). A defendant claiming a lack of constructive notice of the dangerous condition must offer proof showing when the area in question was last cleaned or inspected relative to the time of the subject accident to meet his or her burden on the motion (***Santos v 786 Flatbush Food Corp.***, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]; *see* ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172; ***Goodyear v Putnam/Northern Westchester Bd. of Coop. Educ. Servs.***, 86 AD3d 551, 927 NYS2d 323 [2d Dept 2011]; ***Mei Xiao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d 155 [2d Dept 2011]). A prima facie case for summary judgment in a defendant's favor also may be established with proof that the plaintiff's fall was not due to a dangerous or defective condition on the property (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Grinberg v Luna Park Hous. Corp.***, 69 AD3d 793, 891 NYS2d 910 [2d Dept 2010]; ***Medina v Sears, Roebuck & Co.***, 41 AD3d 798, 839 NYS2d 162 [2d Dept 2007]).

Defendants' submissions are sufficient to demonstrate a prima facie case of entitlement to judgment as a matter of law that plaintiff's accident did not occur as a result of a dangerous condition on the property (*see* ***Fallon v Duffy***, 95 AD3d 1416, 943 NYS2d 289 [4th Dept 2012]; ***Grinberg v Luna Park Hous. Corp.***, 69 AD3d 793, 891 NYS2d 910; ***Sadowsky v 2175 Wantagh Ave. Corp.***, 281 AD2d 407, 721 NYS2d 665 [2d Dept 2001]). Mere wetness on a walking surface due to rain is insufficient to demonstrate the existence of a dangerous condition (*see* ***McGuire v 3901 Independence Owners, Inc.***, 74 AD3d 434, 902 NYS2d 69 [1st Dept 2010]; ***Grinberg v Luna Park Hous. Corp.***, 69 AD3d 793, 891 NYS2d 910; ***Sadowsky v 2175 Wantagh Ave. Corp.***, 281 AD2d 407, 721 NYS2d 665). Here, plaintiff testified simply that the fall occurred after his right foot slipped on the wet surface of the porch floor as he was stepping down to the lower level to get to the kitchen area of the second-story apartment.

In addition, through the parties' deposition testimony, defendants established that they did not create or have constructive notice of the alleged dangerous condition on the porch (*see* ***Costanzo v Woman's Christian Assn. of Jamestown, N.Y.***, 92 AD3d 1256, 938 NYS2d 404 [4th Dept 2012]; ***Zerilli v Western Beef Retail, Inc.***, 72 AD3d 681, 898 NYS2d 614; ***Gullo-Georgio v Dunkin' Donuts Inc.***, 38 AD3d 836, 834 NYS2d 202 [2d Dept 2007]; ***Perlongo v Park City 3 & 4 Apts., Inc.***, 31 AD3d 409, 818 NYS2d 158 [2d Dept 2006]; ***Berger v ISK Manhattan, Inc.***, 10 AD3d 510, 781 NYS2d 648 [1st Dept 2004]). An owner or possessor of property is not required "to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in" rain or snow (***Negron v St. Patrick's Nursing Home***, 248 AD2d 687, 687, 671 NYS2d 275 [2d Dept 1998]; *see* ***Naulo v New York City Bd. of Educ.***, 71 AD3d 651, 896 NYS2d 155 [2d Dept 2010]; ***Garcia v Delgado Travel Agency***, 4 AD3d 204, 771 NYS2d 646 [2d Dept 2004]; ***Kovelsky v City Univ. of N.Y.***, 221 AD2d 234, 634 NYS2d 1 [1st Dept 1995]), and a general awareness that water might be tracked into a building during rainy or snowy weather is insufficient to impute constructive notice of a dangerous condition on the floor to a defendant (*see* ***Muscante v Department of Educ. of City of N.Y.***, 97 AD3d 731, 949 NYS2d 014 [2d Dept 2012]; ***Wartski v C.W. Post Campus of Long Is. Univ.***, 63 AD3d 916, 882 NYS2d 192 [2d Dept 2009]; ***Rogers v Rockefeller Group Intl., Inc.***, 38 AD3d 747, 832 NYS2d 600 [2d Dept 2007]; ***Yearwood v Cushman & Wakefield***, 294 AD2d 568, 742 NYS2d 661 [2d Dept 2002]). As mentioned earlier, both plaintiff and John Weber testified that they did not notice any wetness on the floor of the porch prior to plaintiff's accident.

The burden, therefore, shifted to plaintiffs to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The speculative and conclusory statements by plaintiffs' counsel that the porch floor was wet from people tracking water in from the outside, and that John Weber "should have known of the dangerous condition, a wet floor due to wet conditions throughout the day," are insufficient to raise triable issues either as to whether a dangerous condition existed on the premises or as to whether defendants had notice of such a condition (*see* ***Joseph v New York City Tr. Auth.***, 66 AD3d 842, 888 NYS2d 533 [2d Dept 2009]; ***Perlongo v Park City 3 & 4 Apts., Inc.***, 31 AD3d 409, 818 NYS2d 158; ***Gwyn v 575 Fifth Ave. Assoc.***, 12 AD3d 403, 784 NYS2d 579 [2d Dept 2004]; ***Ford v Citibank, N.A.***, 11 AD3d 508, 783 NYS2d 622 [2d Dept 2004]; ***Yearwood v Cushman & Wakefield***, 294 AD2d 568, 742 NYS2d 661). Accordingly, defendants' motions for summary judgment dismissing the complaint are granted.

Dated: November 30, 2012

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION