NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 17

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

BRUME,ROLF

-against-

RIVERBAY CORP.

----------X

Index №. **0022900/2005**

Hon. H. Sherman ~~DIANE A. LEBEDEFF~~, Justice.

The following papers numbered 1 to 3 Read on this motion, **DISMISSAL**
Noticed on **July 12 2011** and duly submitted as No. ____ on the Motion Calendar of 10/31/12

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	MAR 20 2012	

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING DECISION FILED HEREWITH

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 3/22/12

Hon. _____
~~DIANE A. LEBEDEFF~~, J.S.C.
H. Sherman

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

----------x

Rolf Brumme

Index No.: 22900 /2005

Plaintiff,

DECISION/ORDER

-against-

Riverbay Corporation

Howard H. Sherman
Justice

Defendant.

----------x

Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on November 28, 2003, when he slipped and fell on water on the vestibule floor of a residential building owned and operated by defendant, and located at 4220 Hutchinson River Parkway East Bronx, New York.

This action was commenced in October 2005, and issue was joined with the service of defendant's answer in January 2006.

It is alleged that defendant was negligent in the inspection and maintenance of the entrance floor , and specifically , in allowing the floor to become wet, and in failing to warn of the condition. It is also alleged "that the highly polished stone (or stone like substance) which comprises and or flooring of the entranceway . . . constituted a nuisance, trap, menace , dangerous or defective condition under the wet and rainy weather conditions existing at the time of plaintiff's injury." [Verified Bill of Particulars ¶¶ 17-18].

Plaintiff further alleges that defendant had both actual and constructive notice of the wet condition before the accident [Id.].

The Note of Issue was filed on February 10, 2011.

Motion

Defendant now moves for an order awarding summary judgment dismissing the complaint on the grounds that the evidence demonstrates as a matter of law that it neither caused the transitory wet condition to be on the floor of the vestibule, , nor, before the accident, possessed either actual or constructive knowledge that water, and /or wax had accumulated there .

Defendant submits the transcripts of plaintiff's testimony , as well as that of Riverbay's lobby attendant , and porter [Exhibits G, J, L], and the affidavits of these employees [Exhibits M, N] , as well as that of an employee affiliated with Riverbay's Insurance & Risk Management Department attesting to a search for records of complaints for the period 10/28/03 - 11/28/03 [Exhibit O], and certified copies of the records of the National Climatic Data Center [Exhibit I].

In **opposition,** plaintiff contends that applicable appellate authority prevents defendant from relying on the "storm- in- progress" defense, and argues that defendant has failed to sustain its initial burden to prove as a matter of law the lack of prior notice of the condition of the floor. In addition, it is maintained that defendant had notice of a

chronic recurring condition of rain water being tracked into the marble floor, "yet they failed to have in place any remedial measures (porters, mops, rugs, warning signs, etc) that secured the safety of those who walked upon the marble floor within the vestibule area within the hour before the accident, notwithstanding that a jury could reasonably find that the vestibule was entered by dozens of people within the hour prior to plaintiff's accident." [Affirmation in Opposition p. 27]. Video footage of the vestibule area for the period commencing at 4:30 PM on the date of the accident is tendered.

In **reply,** defendant argues that the "storm in progress" defense is still viable, and is here, applicable. In addition, it is maintained that defendant's employees have demonstrated that on the day of the accident, there was compliance with the normal protocol for inclement weather, including the placement of a mat, and that there was an inspection of the area in the morning, and again, approximately one hour before the incident. It is also argued that defendant has demonstrated that its employees were not in receipt of any pre-accident complaints concerning the condition of the vestibule floor.

With respect to the "recurring condition" argument set forth above, defendant argues that this theory was never before alleged, and plaintiff is precluded from so doing in opposition to a dispositive motion. It is also maintained that there is no evidence to raise an issue of fact of any recurring defective condition of rain water on the vestibule floor. Finally, concerning the video, defendant contends that what is depicted does not

contradict either the sworn testimony or the attestations of Riverbay's employees, or the documentary evidence, including the log book entries maintained by the lobby attendant.

Testimony

As pertinent here, plaintiff testified that he has resided in the subject building since 1984 [BRUMME EBT: 4], and on the day of the incident he left his apartment at around 3:00 PM to walk to the store [EBT: 13-14]. He was not sure, but he believed that he exited the building through the front entrance because he was walking, and not driving [Id. 14]. It had been raining "all day that day off an on " [Id. 16:8-9], and at that time it was "drizzling." [Id. 19: 29]. He was not carrying an umbrella [Id. 19]. He testified that he could not remember seeing any building employees as he left [Id. 18]. Whether he exited through the front or the rear of the building, he testified that he did not see any water on the floor while he was leaving [Id. 17].

The weather was the same as he walked home from the store an hour later [Id. 23-24]. He went to the front entrance of the building, and after opening the first of the two entry doors, he stepped on a mat, and then took a few steps and slipped and fell [Id. 26-30].

> A. There is a mat in the center of that like vestibule and that mat doesn't go all the way from the front to the rear, it's only in the center. After you step on that mat, then you step on that - - I don't know floor stuff, that shiny stuff, then that's where I

slipped .

29:19-25

He described the floor material as a "stone-like substance." [Id. 30]. He did not look at the floor before he fell. He was looking towards the door and preparing to put his key in the lock [Id. 33]. He testified as follows concerning what caused him to slip .

A. Well, because it was slippery, either because they waxed the floor and the combination waxing the floor and the water

Id. 33: 17-19

Q Did you observe water on the floor at some point before you fell ?

A. Well, it was raining all day so there was water on the floor.

Q. Did you see water on the floor before you fell?

A. I would say, yes.

Q. Where did you see water ?

A. All over the place, people coming in with umbrellas and all that stuff.

• • • •

Q. Before you fell , where did you see water on the floor ?

A. Not where the carpet part is, on the stones.

Q. Did you see water on the floor in the area where you slipped before you fell ?

A. Don't remember.

• • • •

Q. After you fell, did you see water on the floor ?

A. Yes.

Q. Where did you see water on the floor after you fell ?

A. Right where I was laying there.

Id. 33:20- 35:7

Plaintiff testified that there were no cautions signs in the vestibule area [Id. 43]. The building's "door person" was present, and at plaintiff's request she called an ambulance [Id. 44;54].

Plaintiff also testified that he never made any complaints to Riverbay concerning a slippery condition in the vestibule area before his accident, and had no specific information about other such incidents at that location [Id. 40-42].

Luis Fernando Nunez[1] testified that he had been employed by Riverbay as a porter for a period between twenty- four to twenty -six years [NUNEZ EBT: 7]. In November 2003, he was one of five porters assigned to Riverbay's Building 29B, one of whom was the "lobby man" assigned to clean the lobbies [EBT: 11-12;50-52].[2] Nunez would work with the porter assigned to the lobby duty. His work week was Monday - Friday [EBT: 15], and his duties were the cleaning of the building from the 26th floor to the lobby [Id. 13].[3] As part of these duties he was required to report to his supervisor after finishing a task, so that the supervisor could complete a handwritten daily report [Id. 13-14].

Nunez testified that the area between the two entry doors, as in all buildings in the development , was partially covered by a carpet, but the "sides" were not [Id. 27-30].

When it rained he was required to lay down carpets in the lobby "all around the hall in front of the elevators" [Id. 36:19-21], as well as " in the back side ", near another door [Id. 39: 6-7]. Concerning the mopping of the floor by the entrance on a rainy day, Nunez testified that he was unable to say how often he would do so , as "it depends", because "[w]henever it's wet we have to dry." [Id. 49:10-11]. To his knowledge there were no written records kept concerning how often he would mop a particular area [Id. 49;54].

---

[1] Exhibit L

[2] In his affidavit Nunez attests that in October /November 2003 he "was assigned to Building 29B, 4220 Hutchinson River Parkway East..." [Affidavit of Luis Fernando Nunez ¶ 2].

[3] There are approximately 150 apartments in the building [Id. 30].

In his affidavit,[4] Nunez attests that in November 2003, upon the start of his workday at 7:00 AM, he would inspect the vestibule/lobby area for debris, and/or spills, and the mopping of the floors would be done during the morning hours [Affidavit of Luis Nunez ¶¶ 5-6]. In October and November 2003 , the lobby and vestibule "were never waxed." [Id. ¶ 5]. In addition, he attests that he "would immediately rectify" any spill observed during the workday, or any condition reported [Id. ¶ 7]. Finally, he attests that he was not notified of any condition on the vestibule floor prior to the accident .

Priscilla Caballero[5] testified that she was employed as a lobby attendant for Riverbay and her duties included checking that the doors and elevators were working, and identifying guests as they enter the building [CABALLERO EBT: 7]. In addition, when observed, the lobby attendant is required to advise Public Safety of water spills or debris in the lobby/vestibule area [EBT: 8]. She was working in Building 29B on the date of the accident, and her work hours were from 4:00 PM to 12:00 AM [Id. 11] Caballero testified that she knew "Louie" to be the building's porter, and she believed that work hours were from 7:30 to 4:00 [Id. 13].

On rainy days, the porter would put rugs down in the hallway leading from the back door to the front of the entrance door where she sat [Id. 14]. Nothing was put down

---

[4] Exhibit M

[5] Exhibit J

in the vestibule area, i.e., on the "two or three feet of marble area that goes from where the carpet is - - the inlaid carpet is to where the door is ." [Id. 15: 14-19]. Caballero testified that she had never seen water accumulate there when it was raining [Id. 15], and the only thing she observed to accumulate there was snow, which the porter would clean up. [Id. 15-16:6]. If the snow was observed after 4:00 PM, Caballero would call Public Safety [Id. 16].

In the approximate half hour before the incident , Caballero observed about five people enter the building, some of whom were carrying umbrellas, however, she did not observe anyone to "shake out" their umbrella in the vestibule [Id. 20]. She observed plaintiff enter the building, and "then [she] blinked [her] eye ", and she observed him lying on the floor in front of the locked door [Id. 18-19]. Caballaro called Public Safety and EMS arrived about twenty to twenty-five minutes later [Id. 24] She observed that the carpet was "damp", but she did not see any wetness on the remainder of the floor [Id. 21]

A copy of Ms. Caballero's log book entry for the date is submitted [6]. The entry notes that plaintiff fell at 5:13 PM, and that it was raining , and that officers responded

In her supporting affidavit, [7]Caballero attests that she arrived at 4:00 PM on the date of the accident to start her shift , and that she "did not see any water on the vestibule floor

---

[6] Exhibit K

[7] Exhibit N

at anytime prior to the incident involving ..." , and "no one made any complaints or notified [her] that there was water on the vestibule floor prior to the incident involving [plaintiff]." [Affidavit of Priscilla Caballero ¶ ¶ 5-6].

Affidavit

Defendant submits the affidavit of Sita Suleman[8] , employed as the Insurance Coordinator in Riverbay's Insurance & Risk Management Department who attests that she conducted a search for records of complaints received by defendant with respect to water in or around the vestibule area of the building for the period 10/28/03 through 11/28/03, and that no records were found for the subject location and period.

Discussion

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E. 2d 718 , 427 N.Y.S. 2d 595 [1980]). Upon consideration of the motion , "the evidence must be construed in a light most favorable to the party opposing the motion (Weiss v Garfield, 21 AD2d 156)." Matter of Benincasa v. Garrubbo , 141 A.D.2d 636, 637-638 ; 529 N.Y.S.2d 797 [2d Dept. 1988]; see also, Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 850 NE2d

[8] Exhibit O

653, 817 NYS2d 606 [2006]).

This "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522), as such, 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 , [1957]).

Failure to demonstrate the absence of any material issues of fact requires the denial of the motion , regardless of the sufficiency of the papers in opposition. Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industries, Inc., 10 NY3d 733, 735 [2008]; Vega v. Restani Constr.Corp., ___ N.Y.3d ____ , 2012 NY Slip Op 01148 ,2012 N.Y. LEXIS 262 [02/16/12]).

Moreover, " [a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense" (Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992])" Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 N.Y.S. 2d 594 [2d Dept. 2003]; Torres v. Indus. Container, 305 A.D.2d 136 , 760 N.Y.S.2d 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 A.D.3d 578, 876 N.Y.S.2d 38 [1st Dept. 2009]).

Once a prima facie showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

In the context of a slip-and-fall, the appellate court has recently restated the burden of a defendant moving for summary judgment dismissal of the complaint .

> 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" (*Rodriquez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519, 913 N.Y.S.2d 189 [2010][internal quotation marks omitted]).
>
> Pfeuffer v. New York City Housing Authority, 2012 N.Y. App. Div. LEXIS 1768; 2012 NY Slip Op 1755 [1st Dept. 03/12/12]

It is by now well settled that "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit defendant's employees to discover and remedy it(*Negri v Stop & Shop*, 65 NY2d 625, 626; *Lewis v Metropolitan Transp. Auth.*, 64 NY2d 670, affg on opn at 99 AD2d 246, 249)." Gordon v American Museum of Natural History, 67 N.Y.2d 836, 837-838 , 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986]; see also, Reynolds v. Knibbs, 15 N.Y.3d 879, 938 N.E.2d 996 [2010]

A defendant's "general awareness that it was raining and that water was being tracked into the building is insufficient to raise a triable issue of fact with respect to notice of a dangerous condition (*Garcia v Delgado Travel Agency*, 4 AD3d 204, 771 NYS2d 646

[2004]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 106-107, 718 NYS2d 42 [2000]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234, 634 NYS2d 1 [1995])." (Wise-Love v 60 Broad Street LLC 75 A.D.3d 487, 906 N.Y.S.2d 35 [1st Dept. 2010] ; see also, O'Rourkev Williamson , Pickett Gross, 260 A.D.2d 260, 688 N.Y.S, 2d 528 [1999]; Asante v. JPMorgan Chase Co., 2012 N.Y.App. Div. LEXIS 1520 [1st Dept. 03/01/12]).

It is also settled that a defendant may be charged with constructive notice where the record contains " 'evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord' (*O'Connor-Miele v Barhite & Holzinger*, 234 A.D.2d 106, 106-107, 650 N.Y.S.2d 717 [1996]; accord *David v New York City Hous. Auth.*, 284 A.D.2d 169, 171, 727 N.Y.S.2d 404 [2001]; cf. *Endres v Mingles Rest.*, 271 A.D.2d 207, 706 N.Y.S.2d 32 [2000], *lv dismissed* 95 N.Y.2d 845, 735 N.E.2d 1283, 713 N.Y.S.2d 518 [2000])." Uhlich v. Canada Dry Bottling Co. Of N.Y., 305 A.D.2d 107, 758 N.Y.S. 2d 650 [1st Dept. 2003]; see also, Bido v 876-882 Realty , LLC, 41 A.D.3d 311; 839 N.Y.S.2d 54 [1st Dept. 2007]; Cabrera v New York City Department of Education, ____ A.D.3d ____, 937 N.Y.S.2d 848 [1st Dept. 2012]

Conclusion

Upon review of the record here and upon consideration of the applicable law, it is the finding of this court that defendant has demonstrated as a matter of law that it neither caused the rain water, or any "waxy" condition to be on the vestibule floor at the time of

the accident, nor prior to the occurrence, had any actual or constructive knowledge that it had accumulated there. In addition, there is no evidence that defendant was aware of any ongoing and/or recurring condition of either a waxy substance and/or of a water accumulation in the vestibule area which regularly went "unaddressed." (Compare, Stryker v. D'Agostino Supermarkerts, 88 A.D.3d 584 , 931 N.Y.S.2d 293 [1st Dept. 2011] [issue of fact as to constructive notice due to evidence that patron made multiple complaints to manager prior to accident])

With respect to the issue of the "storm-in-progress" defense, it is submitted that while the doctrine is indeed "viable" under prevailing appellate authority (see, Powell v. MLJ Hillside Associates, LP, 290 A.D.2d 345, 737 N.Y.S. 2d 27 [1st Dept. 2002]; Espinall v. Dickson, 57 A.D. 3d 252 [1st Dept. 2008]; Krinsky v. Fortunato , 82 A.D. 3d 409 [1st Dept. 2011]; Rand v. Cornell Univ., ____ A.D.3d _____, 937 N.Y.S. 2d 49 [1st Dept. 2012]), its application has been confined to those cases involving winter storms, in recognition of the futility of any efforts to remove snow during a snowstorm. [9] As such, the landowner's obligation to take remedial action to remove snow and icy conditions commences only when the storm has ceased . The evidence here demonstrates not a winter storm, but a rainstorm in non-freezing weather. As such, the owner's obligation to maintain the

[9] See, concurring opinion of McGuire, J. , Toner v. National Railroad Passenger Corp., 71 A.D.3d 454 , 455; 894 N.Y.S.2d 873 [1st Dept. 2010] citing authority of Hilsman v. Sarwil Assoc., L.P., 13 A.D.3d 692, 693-694, 786 NYS2d 225 [3d Dept. 2004]).

vestibule, and all lobby areas of the building was never suspended during the course of the storm.

Nevertheless, that obligation, or standard of care would not, under these circumstances, include either the provision of continuous mopping to remove water from the vestibule as parties enter from the rain (see, Pomahac v. TrizecHahn, 1065 Avenue of the Americas, LLC., 65 A.D.3d 462, 464, 884 N.Y.S.2d 402 [1st Dept. 2009]; see also, Rogers v. Rockefeller Group International , Inc., 38 A.D. 3d 747, 832 N.Y.S.2d 600 [2d Dept. 2007]), or to cover with mats any area not already carpeted (see, Pomahac, op.cit., see also, Negron v. St. Patrick's Nursing Home, 248 A.D.2d 687; 671 N.Y.S.2d 275 [2d Dept . 1998]). Defendant here provided porter staff for the sole purpose of cleaning the building vestibule/lobby areas of the building , as well as a lobby attendant whose desk was positioned within feet of the vestibule/entrance door. Both employees were charged with the inspection of that area, and Ms. Caballero attests that she performed this function when her shift commenced at 4:00 PM.

In opposition , plaintiff fails to come forward with any probative evidence that the inspection/maintenance duties attested to by defendant's employees were not discharged prior to the accident. Concerning plaintiff's additional allegation that the "stone" material of the vestibule floor , to the extent not carpeted, became dangerously slippery when wet, is also here unavailing absent any showing that defendant had

actual or constructive notice of a dangerous condition resulting from a combination of these factors (see, Waiters, Respondent, v Northern Trust Company of New York , 29 A.D.3d 325; 816 N.Y.S.2d 18 [1st Dept. 2006]; Wasserstrom v New York City Tr. Auth., 267 AD2d 36, 37, 699 NYS2d 378 [1st Dept. 1999], *lv denied* 94 NY2d 761, 728 NE2d 338, 707 NYS2d 142 [2000]; Hussein v New York City Tr. Auth., 266 AD2d 146, 147, 699 NYS2d 27 [1st Dept. 1999]).

For the reasons above stated, it is ORDERED that the motion of the defendant for an order awarding summary judgment be and hereby s granted ,

This constitutes the decision and order of this court.

Dated: March 22, 2012

Howard H. Sherman