SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BONNIE BIBULA,

Plaintiff,

- against -

32-42 BROADWAY OWNER, LLC, CAMMEBY'S MANAGEMENT COMPANY, LLC, and FIRST RATE MAINTENANCE, LLC,

Defendants.

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Index No. 157115/14

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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By notice of motion, defendants, owner and managing agent of a Manhattan office building and its maintenance company, move pursuant to CPLR 3212 for an order summarily dismissing the action on the grounds that they did not create the alleged dangerous condition causing plaintiff's fall, nor did they have actual or constructive notice of it. Plaintiff opposes.

I. UNDISPUTED FACTS

On November 7, 2013, sometime between approximately 1:15 pm and 2 pm, plaintiff was returning from her lunch break when she slipped and fell in the lower lobby level of the building, thereby sustaining injuries. The site of her accident is approximately 75 to 100 feet from the building's entrance. (NYSCEF 25). Contemporaneous weather records reflect that there were trace amounts of accumulated rainfall at 11 am, 0.04 inches by 12 pm, trace amounts at 1 pm, and 0.05 inches by 2 pm. (NYSCEF 27).

Surveillance video footage of the subject area at the time of the accident shows plaintiff

entering the lobby carrying a bag and umbrella. As she walks, her right foot apparently buckles and rolls to the right. She immediately falls forward. The floor in and around the area of her fall is glossy and reflective, but there are no conspicuous signs of water. (NYSCEF 17).

On or about July 21, 2014, plaintiff commenced this action, alleging that she slipped on a "slippery substance" in the lobby. She asserts a claim of negligence against defendants, directly and vicariously. (NYSCEF 1, 9, 32).

At her March 17, 2015 deposition, plaintiff testified that she entered the lower lobby and was approaching the escalator when she slipped and fell, and that when she stood up, the left side of her body was wet. She also observed "water trickling" from people's feet and umbrellas as they entered the lobby behind her, and a "little amount . . . like a small, small little puddle" of water on the floor. She testified that it was raining on the day of the accident. (NYSCEF 24).

At his July 22, 2015 deposition, Stephen Kane, chief engineer employed by defendant Cammeby's Management Company, LLC, testified that although he did not witness the accident, he inspected the area 20 to 30 minutes thereafter and determined that the floor was dry, that no "rain mat" had been placed in the area, that he could neither recall if it was raining earlier in the day nor at the time of his inspection, and that he was unaware if the area had been inspected before plaintiff's accident. Kane also testified that it was defendant First Rate Maintenance, LLC's responsibility to monitor the lobby for accumulated rain water, to inspect the area during inclement weather, to clean it, and to replace the rain mats at the entrance. He also claimed that he was unaware of any similar incidents on or prior to the day of the accident. (NYSCEF 25).

Richard Fernandes, a cleaning supervisor employed by First Rate, also testified that it was the company's responsibility to clean, maintain, place rain mats covering the lobby entrance to the escalator in the lower lobby, and to make "spot checks . . . . [e]very couple hours, or every

half hour, . . . depend[ing] on the condition." He was aware that water would be tracked inside the lobby during rainy weather, but was unaware of anyone ever slipping there. (NYSCEF 26).

II. CONTENTIONS

In support of their motion, defendants deny any obligation to remedy the alleged slippery condition of the lobby floor, as the weather records reveal only trace amounts of rain that day, and that the trace amounts fell shortly before plaintiff's accident. They rely on plaintiff's deposition, wherein she testified that she did not observe any dangerous conditions in the lobby before leaving to pick up her lunch, described only trace amounts of water in the area after she slipped, and had made no prior complaints about slippery conditions in the lobby. Defendants also note that Kane inspected the area within 20 minutes of the accident and observed no wet conditions, was unaware of the weather conditions at the time, and testified that there was no indication that maintenance personnel had inspected, cleaned, and placed rain mats in the area following the accident, as was protocol in the event of inclement weather. They contend that the foregoing is consistent with the surveillance footage, which depicts no water on the floor, that no one coming to plaintiff's aid slipped or fell, and that plaintiff merely tripped. (NYSCEF 16).

Defendants offer the expert affidavit of a professional engineer who, after inspecting the lobby on December 17, 2015, opined that in both wet and dry conditions, the lobby floor recorded a coefficient of friction value greater than 0.5, indicating a slip-resistant floor. In order to simulate both leather- and rubber-soled shoes, data were collected using both materials. Thus, in his view, there were no slippery conditions causing plaintiff to slip and fall. (NYSCEF 28).

In opposition, plaintiff contends that the heaviest rain fell at 12 pm, and then only trace amounts by 1 pm, and thus as the accident occurred over an hour after the heaviest rain, enough time elapsed for defendants to have constructive notice of the wet conditions in the lobby. She

relies on Fernandes's testimony that First Rate would inspect the lobby more frequently in the event of rain, and that if it rained, water would infiltrate the lobby and the floor would become slippery. (NYSCEF 30).

Plaintiff argues that her observation that the floor was wet and slippery following the accident raises an issue of fact as to whether defendants had constructive notice of the condition, and that defendants fail to establish when the floor was last cleaned or inspected. She also disputes the probative value of defendants' expert opinion absent any indication that the expert replicated the conditions on the day of the accident, observing that his inspection occurred over two years later. (*Id.*).

In reply, defendants contend that the two-year lapse in the expert's inspection, absent evidence that the floor was altered, should not preclude summary judgment, and notes that plaintiff does not allege that she observed water on the floor, but merely that her clothes were wet. (NYSCEF 35).

III. ANALYSIS

To prevail on a motion for summary judgment dismissing a cause of action, the defendant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action." (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To prevail on a motion for summary judgment in a slip-and-fall case, the defendant must

establish, *prima facie*, that it did not create the condition that caused the plaintiff's fall, and that it had no actual or constructive notice of that condition. (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012], *lv dismissed* 20 NY3d 965; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]). A defendant has constructive notice of a dangerous condition where it is "visible and apparent and . . . exist[s] for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (*Arcabascio v We're Assoc., Inc.*, 125 AD3d 904, 904 [2d Dept 2015]).

A defendant is not obligated to provide a constant remedy to slippery conditions resulting from rain water tracked inside the premises during inclement weather (*Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 749 [2d Dept 2007]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [1st Dept 2000]), and evidence of the defendant's generalized awareness that an area may become wet during inclement weather is insufficient to demonstrate constructive notice of the condition (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *Mitchell v Uniforms USA, Inc.*, 82 AD3d 1474, 1474 [3d Dept 2011]; *Rodriguez v 520 Audubon Assoc.*, 71 AD3d 417, 417 [1st Dept 2010]). Nevertheless, to satisfy its initial burden, the defendant must offer evidence showing when the subject area "was last inspected or cleaned." (*Pineda v 1741 Hone Realty Corp.*, 135 AD3d 567, 567 [1st Dept 2016]; *Kravets v New York City Hous. Auth.*, 134 AD3d 678, 679 [2d Dept 2015]).

The gravamen of defendants' motion is that there was no dangerous condition, in the first instance, for which they could be charged with creating or having notice. To the extent that defendants rely on the weather records as evidence of de minimis rain at the time of accident, the contention is belied by the same weather records, which reflect consistent rainfall from 11 am until 2 pm. While the foregoing may constitute evidence of a storm in progress, defendants do

not raise the defense. Moreover, to the extent that they rely on the surveillance video to establish it, the poor quality of the video and the glare on the floor preclude a finding that the floor of the lobby was not wet enough to cause plaintiff's accident. (*See Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010] [upon review of surveillance footage, court found that "angle, distance and quality of the DVD (were) insufficient to establish indisputably" absence of dangerous condition]).

Kane's and Fernandes's description of First Rate's schedule and procedure for cleaning and/or inspecting the lobby in the event of inclement weather does not constitute proof that the area was, in fact, cleaned or inspected some time before plaintiff's fall. (*See Pineda*, 135 AD3d at 567 [defendants failed to adduce evidence of measures taken to address possibility of tracked-in rain water accumulating on stairs during storm or when they were last cleaned or inspected]; *Milorava v Lord & Taylor Holdings, LLC*, 133 AD3d 724, 725-726 [2d Dept 2015] [defendant did not establish when subject area where plaintiff slipped on tracked-in rain water was last inspected, but rather set forth general policies for cleaning and inspection]; *see also Nelson v Metro. Transp. Auth.*, 122 AD3d 532, 532 [1st Dept 2014] [evidence as to general cleaning and inspection procedures does not constitute probative evidence of procedures actually performed day of accident]). Any reliance on the absence of rain mats in the lobby as evidence that no water was present is misplaced absent any evidence that a determination was made, following an inspection, that rain mats were not needed that day. Moreover, Kane's unawareness of any prior accidents that day does not prove that defendants were neither advised of nor received complaints that the floor was wet. (*Cf. Parietti v Wal-Mart Stores, Inc.*, 140 AD3d 1039, 1040 [2d Dept 2016] [defendant established lack of actual notice by submitting evidence demonstrating that it was not advised of condition nor received oral or written complaints

concerning condition]). Thus, defendants fail to establish, *prima facie*, that they neither created nor had actual or constructive notice of the alleged slippery condition.

The opinion of defendants' expert also lacks probative value, absent "a basis for the 0.5 coefficient-of-friction value he utilized as a standard." (*Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [1st Dept 2004]; *see also Rivera v Bilynn Realty Corp.*, 85 AD3d 518, 518 [1st Dept 2011] [opinion of plaintiff's expert unsupported by "evidence of a published industry or professional standard upon which it was based"]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] ["Where the expert's ultimate assertion are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force . . . ."). In any event, the expert's opinion is based on an inspection of the premises conducted over two years after the accident. (*See Kruimer v Natl. Cleaning Contrs., Inc.*, 256 AD2d 1, 1 [1st Dept 1998] [expert opinion disregarded where based on observation of alleged slippery floor over two years following accident]).

Given defendants' failure to satisfy their initial burden, I need not reach the sufficiency of plaintiff's proof.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order summarily dismissing the complaint is denied.

ENTER:

Barbara Jaffe, JSC

DATED: December 14, 2016
New York, New York