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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

FILED
JAN 20 2011
NEW YORK
COUNTY CLERK'S OFFICE

JENICE McGINLEY and JAMES McGINLEY,
Plaintiffs,

-against-

Index No. 111278/09

MYSTIC WEST REALTY CORP. d/b/a ROSIE O'GRADY'S, TREL RESTAURANT INC. d/b/a ROSIE O'GRADY'S, APPLE CORE HOTELS, INC. d/b/a COMFORT INN and THE CHURCH OF ST. MARY THE VIRGIN EPISCOPAL CHURCH,
Defendants.

SEQ. #002

RECEIVED
JAN 20 2011

The following papers, numbered 1 to 2 were read on this motion by defendant(s) motion to dismiss the complaint for failure to state a claim, pursuant to CPLR § 3211 and 3212.

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

Cross-Motion: ☐ Yes ☐ No

The defendant Apple Core Hotels, Inc. d/b/a Comfort Inn (the hotel) moves, pursuant to CPLR §§ 3211 and 3212, for an order dismissing the complaint and all cross claims. This is an action to recover damages for personal injuries suffered by the plaintiff Jenice McGinley, and for loss of consortium by her husband James McGinley (jointly the plaintiffs), as the result of a slip and fall accident on the sidewalk on West 46th Street, Manhattan.

The moving defendant hotel is the record owner of the premises located at 129 West 46th Street. In support of its motion to dismiss the complaint, the hotel points to the plaintiffs' bill

of particulars, and alleges that the accident occurred down the block, in front of the property at 145 West 46th Street, owned by the codefendant The Church of St. Mary the Virgin Episcopal Church (the Church). The Church's building at 145 West 46th Street, and the hotel's building at 129 West 46th Street, do not adjoin. It is also argued that the hotel does not use the sidewalk in front of the Church.

In opposition to the motion, the recently impleaded Church, and the plaintiffs, both argue that summary judgment is premature as discovery is outstanding, and that the hotel's leaking trash bags could have caused the accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.* 10 NY3d 733, 735, *rearg denied* 10 NY3d 885 [2008]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action even where the facts are uncontradicted (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]).

> 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. 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 v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]).

The defendant hotel satisfies its initial burden of establishing, *prima facie*, the absence of any triable questions of fact so as to entitle it to judgment as a matter of law (*Smalls v AJI Indus. Inc.*, 10 NY3d at 735). In support of its motion, the hotel submits plaintiffs' bill of particulars, plaintiff's photographs of the Church's pile of trash bags placed in front of the Church, and an affidavit from the hotel's director of operations, establishing that the subject slip and fall did not occur either in front of the hotel's premise, or as a result of a leak from the hotel's garbage. The hotel's proffer of the plaintiffs' bill of particulars, indicating that the slip and fall occurred in front of the Church, and the plaintiffs' photographs of the Church's pile of garbage bags, together with the affidavit from hotel's Director of Operations, are sufficient to shift the burden to the plaintiffs, and the codefendant Church, of demonstrating the existence of questions of fact (*Raghu v The New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010]).

The summary judgment motion is not premature (*see Gonzalez v Vincent James Mgt. Co.*, 306 AD2d 226 [1st Dept 2003]). The hotel's affiant has personal knowledge of the hotel's plastic garbage bags, and avers that the hotel's garbage bags are not placed down the block in front of the Church. The hotel's averments as to its routine practices, suffice to make a prima facie showing that the hotel's placement of it's plastic garbage bags could not have caused any unsafe condition related to the trip and fall in issue. The plaintiffs, and the codefendant Church, on the other hand, have no acceptable excuse for not showing any countervailing facts (*see Zuckerman v City of New York*, 49 NY2d at 562), namely, their inability to procure affidavits from Church representatives likely to have knowledge of the Church's placement of its plastic garbage bags.

Accordingly, it is

ORDERED that the defendant Apple Core Hotels, Inc. d/b/a Comfort Inn's motion for summary judgment is granted and the complaint and cross claims are dismissed with costs and

disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 27, 2010

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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