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

PRESENT: HON. PAUL WOOTEN Justice PART 7

SVETLANA BELIK,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendants.

INDEX NO. 115589/2005

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion for summary judgment by defendant New York City Housing Authority.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

Defendant New York City Housing Authority (NYCHA) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff Svetlana Belik's complaint that she sustained personal injuries as a result of a slip-and-fall accident in the lobby of a NYCHA-owned building.

BACKGROUND

Plaintiff is a resident of an apartment building owned by NYCHA located at 870 Columbus Avenue, New York, NY. Around 9:00 P.M. on August 11, 2004, plaintiff had returned to her apartment after being away on a trip. It was raining when she returned home, and it had been raining on and off since 2:00 P.M. that day. NYCHA attaches a weather report which shows that most of the rain fell between 2:00 P.M. to 3:00 P.M. but that the rain "continued unabated" from 6:00 P.M. to 10:00 P.M. that night (Bass Affirmation ¶ 7). Plaintiff claims that she returned home and a young couple held the door open for her so that she could enter her lobby. As she entered the lobby, plaintiff testified that she "walked one step and at [her] second

step [she] slipped and fell badly" (NYCHA's Exhibit D, Plaintiff TR at 12). Plaintiff landed on her right leg, right knee and head. As a result of her fall, plaintiff allegedly sustained serious injuries and required surgery.

Plaintiff believes there had always been a problem with tracked-in water in the lobby area. She describes the floor as "ceramic tile, which gets excessively slippery when wet" (Plaintiff Affidavit ¶ 3). Plaintiff did not see the water on the floor before she fell but describes the accident area as being "wet with a ten-foot area of tracked-in rainwater" (*id.* ¶ 9). Plaintiff saw that there were wet footprints from people who walked from the lobby to the elevator. She claims to have seen the footprints only after she fell since the lighting was low in the lobby.

Plaintiff alleges that the dangerous condition of tracked-in rainwater after 4:00 P.M. and on weekends was a recurring condition. She continues that there were never any rain mats placed down during rain or snow. Plaintiff further maintains that there were even some volunteers who called themselves the "tenant patrol," who complained to NYCHA about the lack of mats and attempted to mop up the wet floor with rags during rainy conditions. She describes the lobby as being a "mess" when people would be arriving home from work in the rain.

According to NYCHA, the last time any custodian inspects the lobby area for rain is at 4:00 P.M. Custodians are only in the building between 8:00 A.M. and 4:00 P.M. NYCHA contends that, on the day of plaintiff's accident, someone mopped the floor and inspected it prior to 4:00 P.M. for any unsafe conditions. The janitor employed on the date of plaintiff's accident, Luz Giraldo (Giraldo) claims that it was customary for her to mop and inspect the floors between 9:00 A.M. and 10:00 A.M. and then again before she left at 4:00 P.M. Giraldo has no "independent" recollection of any water being tracked into the lobby on that day before 4:00 P.M. NYCHA maintains that no one had ever complained to them about the allegedly dangerous condition of tracked-in rain water.

In plaintiff's complaint, she alleges her slip-and-fall and resulting injuries are due to

NYCHA's negligence in not properly supervising and maintaining the premises (NYCHA's Exhibit B, Complaint ¶ 16). Plaintiff maintains that NYCHA was also negligent in that it did not provide mats in the lobby area and that it had actual and constructive notice of the dangerous condition (NYCHA's Exhibit C, Bill of Particulars at 1-3).

NYCHA contends that it did not have any actual or constructive notice of the dangerous wet condition.

STANDARD

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion" (*Grasso,* 50 AD3d at 544, citing *Marine Midland Bank v Dino and Artie's Automatic Transmission Co.*,168 AD2d 610 [2d Dept 1990]). The function of the court is one of issue finding, not issue determination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]).

To establish, prima facie, a cause of action for injuries resulting from a slip-and-fall accident, the plaintiff must prove that the defendant either created the condition which caused the accident, or that it had actual or constructive notice of the condition and failed to remedy it (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [1st Dept 2006]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient

length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

DISCUSSION

Plaintiff argues that NYCHA can be charged with constructive notice of the condition because it was raining intermittently on the day and evening of plaintiff's accident and that the lobby was completely unsupervised after 4:00 P.M. Moreover, a recurring dangerous condition allegedly existed, since NYCHA failed to place mats down during rainy conditions and did not have any custodians on staff after 4:00 P.M. Plaintiff also provides an expert opinion which concludes that NYCHA deviated from good and accepted building maintenance practice by not placing rain mats in the lobby during rainy or slushy weather.

NYCHA argues that plaintiff cannot prove that it had constructive notice of the water since plaintiff had been away from the building and "did not know how long the water was present on the lobby floor before she fell" (Bass Reply Affirmation ¶ 3). However, NYCHA is not able to meet its burden to establish that it lacked constructive notice of the hazardous condition. The Appellate Division, First Department has held that 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" (*Smith v Costco Wholesale Corporation*, 50 AD3d 499, 500 [1st Dept 2008]). As the Court held in *Giuffrida v Metro North Commuter R.R. Co.* (279 AD2d 403, 404 [1st Dept 2001]), "[w]here the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed."

The only evidence presented by NYCHA is that a custodian mopped the floor in the morning and then probably again before 4:00 P.M. if a hazardous condition was noticed. It is

undisputed that it had been raining for almost seven hours prior to plaintiff's accident. It is also undisputed that the latest the floor could have been inspected on that day was 4:00 P.M., which was five hours prior to plaintiff's accident. Evidently, no NYCHA staff mopped up the tracked-in water on a rainy night for at least five hours prior to plaintiff's accident.

Accordingly, even though plaintiff had not been at the building prior to arriving home at 9:00 P.M., NYCHA has not met its burden to demonstrate plaintiff's lack of evidence of "how long a period of time prior to the accident the condition existed" (*Giuffrida v Metro North Commuter R.R. Co.*, 279 AD2d at 404). As such, NYCHA has not been able to meet its burden, as a "matter of law," to demonstrate lack of notice (*id.*). As the Court held in *Lebron v Napa Realty Corp.* (65 AD3d 436, 437 [1st Dept 2009]), the defendant could not prove lack of notice since its manager had no "personal knowledge of the condition of the sidewalk at the time of the accident or in the hours immediately preceding it," nor could the manager establish that the defendant's employees could not have noticed the ice in time to clean it.

NYCHA further alleges that plaintiff's testimony, that she saw "dirty water with footprints," is self-serving and contradicts other testimony that she did not see the water until after she fell. As such, according to NYCHA, this testimony cannot raise a factual issue about notice. However, NYCHA's arguments are without merit. Plaintiff always testified that she saw the footprints after she fell down in the water. Moreover, the Appellate Division, First Department has recently held the following with respect to a plaintiff's testimony in a slip-and-fall:

> Plaintiff's statement that the floor was wet and slippery due to a constant rain is evidence sufficient to raise a factual question as to whether defendant knew or should have known of the existence of a hazardous condition. His testimony constitutes evidence from someone with personal knowledge of the facts and, whether or not it is regarded as self-serving, it is sufficient to present an issue for trial. Plaintiff identified the wet and slippery floor as the reason for his fall, thus, his testimony cannot be dismissed as mere speculation regarding causation (*Signorelli v The Great*

Atlantic & Pacific Tea Company, Inc., 70 AD3d 439, 439-440 [1st Dept 2010] [internal citations omitted]).

NYCHA further alleges that failure to place mats down does not raise an issue of fact with respect to constructive notice. However, as plaintiff properly argues, if the jury finds that there was notice, then there may be an issue of fact as to whether or not NYCHA was negligent for failing to take safety precautions. As set forth in *Hewett v Conway Stores* (266 AD2d 137, 137 [1st Dept 1999]),

> If a jury determines that defendants had adequate notice of the hazard, there is also a triable issue as to whether they took sufficient precautions to minimize the danger to pedestrians in the area by placing rugs, mats or warning signs either on the store entrance or on the steps where plaintiff fell.

The Court in *Hewett v Conway Stores, supra*, similarly to the present case, held that there was a triable issue as to whether defendants should have known about a hazardous condition in their store created by tracked-in water on a rainy day, thereby precluding summary judgment.

Accordingly, a question of fact remains for a jury to decide whether constructive notice can be found, based on the circumstances of the case, which precludes summary judgment at this time.

The Court has considered NYCHA's other contentions and finds them without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the New York City Housing Authority's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated:

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**