| **Duverge v Washfield Mgt.** |
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| 2013 NY Slip Op 33727(U) |
| October 17, 2013 |
| Supreme Court, Bronx County |
| Docket Number: 308427/2010 |
| Judge: Alison Y. Tuitt |
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NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 05**

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

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

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**DUVERGE,CANDIDIA** Index №. **0308427/2010**

-against- Hon. **ALISON Y. TUITT** ,

**WASHFIELD MANAGEMENT** Justice.

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The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **March 01 2013** and duly submitted as No. ____ on the Motion Calendar of 5/29/13

| | 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 | | |

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision

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

Dated: 10/17/2013

Hon. A. Y. Tuitt
**ALISON Y. TUITT, J.S.C.**

 

**NEW YORK SUPREME COURT----------COUNTY OF BRONX**

**PART IA - 5**

**CANDIDA DUVERGE,**

Plaintiff,

-against-

**WASHFIELD MANAGEMENT, ALLERVILLE ARMS OWNERS CORPORATION and ALLERVILLE ARMS, LLC,**

Defendants.

INDEX NUMBER: **308427/2010**

Present:
HON. **ALISON Y. TUITT**
***Justice***

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **5/29/13**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is denied for the reasons set forth herein.

The within action arises from an accident on May 9, 2010 in which plaintiff claims to have sustained serious injuries. Plaintiff alleges that while visiting her son and daughter's apartment for a birthday party for her grandson she was caused to trip and fall as a result of defective tiles on the floor. The accident occurred at 2550 Olinville Avenue, Apt. 9F, Bronx, New York. Defendants move for summary judgment on the grounds that they did not create the dangerous condition and had no notice of such condition.

Plaintiff testified at her deposition that the accident happened as she was walking from one side of the living room to the other when it "felt like something stopped [her]". Plaintiff testified that she never

noticed broken floor tiles before her fall but, after the accident, she saw "chipped broken tiles that appeared to be at the area where [she] fell".

Rebecca Albrino, the tenant of the subject apartment, testified at a deposition that she had lived in the apartment for 29 years which was originally rented by her grandparents, then her mother until April 2010, one month before plaintiff's accident, when she took over the lease. On the date of the accident, Ms. Albrino was hosting a birthday party for her son and plaintiff attended. Although Ms. Albrino did not witness plaintiff's fall, she observed plaintiff on the floor immediately afterwards and noted that plaintiff had tripped on cracked floor tiles. Ms. Albrino further testified that three to four years before plaintiff's fall, her uncle, Waldo Nunez, placed new stick-on-type floor tiles over the exiting floor tiles. Thereafter, her mother removed the carpeting and put down a layer of floor tiles before Ms. Albrino's uncle, six years later, put the new white floor tiles over these second layer of tiles. Ms. Albrino testified that she does not believe anyone asked the landlord to put in new floors prior to her uncle putting down the tiles. The under floor that existed prior to her uncle putting in the tiles were not ripped or dangerous. Later in her testimony, Ms. Albrino stated that at some point before plaintiff's fall, Alex, the superintendent of the building, had seen the tiles her uncle put down and had seen that it was ripped and that the landlord refused to fix it.

Ms. Albrino also submits an affidavit wherein she states that the tiles that cause plaintiff's fall had been broken for about six months prior to the accident. She further states that her mother had tried to get the building to repair the broken tiles before she left the building but the landlord would not do so. She also states that the floor tiles over which plaintiff tripped were originally installed by her uncle in or around 2007. Over the years, she would have to apply tape to the tiles to get them to lay flat. She states that Alex, the super, would come to the apartment periodically over the years and he observed the condition of the tiles with the tape on them on more than one occasion prior to plaintiff's accident, but, again, since the landlord deemed the floors to be a "cosmetic" repair, he refused to repair them. Moreover, Ms. Albrino attests that the super's testimony that neither she nor anyone affiliated with her apartment did not complain about the condition of the living room floor is not true. She states that not only did she complain, but there were complaints made by her mother and grandmother.

Plaintiff further argues that defendant here were on notice of the defective nature of the floor because the parties appeared in Housing Court five days before plaintiff's accident, and entered into a So-Ordered Stipulation dated May 4, 2010 wherein defendant agreed to inspect and repair the floors throughout the

apartment.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

In the case at bar, plaintiff does not assert that the defendant created the allegedly defective condition because her uncle installed the tiles years prior. However, with respect to notice, defendants have not

met its burden of establishing as a matter of law that it did not have either actual or constructive notice of the allegedly defective condition which harmed the plaintiff. See, Nelson v. Cunningham Associates, L.P., 908 N.Y.S.2d 713 (2d Dept. 2010)(On its motion for summary judgment, the defendant bore the initial burden of demonstrating that it did not receive any prior complaints concerning the alleged dangerous condition). In the instant matter, Ms. Albrino disputes the super's testimony that he never received complaints regarding the floor in the apartment. Ms. Albrino states that she did complain to the super. Thus, this creates an issue of fact that precludes summary judgment. Michalowitz v. Friedman, 842 N.Y.S.2d 509 (2d Dept. 2007)(Affidavit of tenant's wife, indicating that she personally showed landlord hole in linoleum-covered kitchen floor caused by water leak, created genuine issue of material fact regarding whether landlord had notice of hole and duty to repair it, precluding summary judgment in negligence action brought by tenant's guest who tripped and fell on hole. Under the circumstances of this case, the plaintiff raised a triable issue of fact as to whether the landlords had actual notice of the hole in the linoleum and a duty to repair it).

Defendants argue that the action on Ms. Albrino's uncle installing the tiles was a superceding cause of the accident. It is well settled that a plaintiff's actions which are extraordinary and unforeseeable will be deemed a superseding cause which severs the causal connection between the defendant's negligence and the plaintiff's injuries. Dumbadze v. Schwatt, 739 N.Y.S2d 399 (2d Dept. 2002)(citations omitted). Whether a plaintiff's act is a superseding cause or whether it is a normal consequence of the situation created by a defendant are typically questions to be determined by the trier of fact. Id. (citations omitted).

In the instant matter, defendants failed to make a prima facie showing that the tenant's act in attempting to repair the tile floor by installing new tiles or taping the tiles was a superseding cause absolving them from liability. A triable issue of fact exists as to whether it was foreseeable that the tenant would attempt to correct the defect. Thus, defendants' motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: 10/17/2013

**Hon. Alison Y. Tuitt**