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

PRESENT : DONNA M. MILLS **PART 58**

Justice

CARMEN ZAPATA,

Plaintiff,

-v-

173 BROADWAY ASSOCIATES, LLC, et al.,

Defendants.

INDEX NO. 100491/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 4/2/13

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

CARMEN ZAPATA,

Plaintiff,

- against -

173 BROADWAY ASSOCIATES, LLC and SDG MANAGEMENT CORP.,

Defendants.

INDEX NO.
100491/11

DECISION/ORDER

DONNA M. MILLS, J.:

This is a personal injury claim by plaintiff Carmen Zapata against the defendants 173 Broadway Associates, LLC and SDG Management Corp. Defendants bring this motion for summary judgment dismissing plaintiff's complaint on the grounds that she cannot demonstrate that the defendants created or had actual or constructive notice of the condition that allegedly caused her accident.

Plaintiff alleges that around 10:30 a.m., on February 2, 2010, she slipped and fell on a wet condition on the interior staircase of the premises where she resides, and which is owned and managed by the defendants. Plaintiff appeared for a deposition on March 1, 2012. Plaintiff testified that she was walking from the third floor to the second floor at the time of the accident when she slipped on a puddle of water with her right foot and felt her ankle break. She further stated in her deposition testimony that she noticed the water after she fell and described the water as dark which appeared dirty. She also described the puddle as about a foot long. According to the plaintiff, the superintendent's helper would clean the stairs and hallway floors almost every day. Plaintiff did not know where the water came from and did not see anyone cleaning the stairs as she descended from the third

floor to the second floor that morning.

Domingo Garcia appeared for a deposition on June 14, 2012. Mr. Garcia, the resident superintendent of the building, testified that during the sixteen years he had worked at the building, either he or his helper, Bernardo Ortiz, had always swept the building staircases and hallways every weekday, beginning at 6:00 a.m. On Mondays, Wednesdays and Fridays, either he or Ortiz also mop all of the hallways and staircases. He further testified that he had never observed any leaks or other recurrent condition that would cause water to be deposited on the stairs.

"In a slip-and-fall case, the defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged hazardous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (Zerilli v Western Beef Retail, Inc., 72 AD3d 681, 681 [2010]).

Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (see Raghu v New York City Hous. Auth., 72 AD3d 480 [2010]).

Given defendants' superintendent's testimony that he never received any complaints about water in the stairwell, his testimony regarding the daily cleaning of the subject stairs and plaintiff's testimony that she did not know where the water came from and only saw it after falling, this Court finds that the defendants made a prima facie showing that they

did not create or have actual or constructive notice of the puddle of water on which plaintiff allegedly slipped, and established its entitlement to judgment as a matter of law (see generally Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572).

In opposition, the plaintiff failed to raise a triable issue of fact (see generally Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718). Plaintiff's testimony at her deposition that the water she fell on was "dirty" does not provide evidence that the water existed for a sufficient period of time to establish constructive notice. Plaintiff also relies on an affidavit from her daughter, Imaculada Zapata, who also resides in the building. Imaculada states that on the morning in question, at approximately 6:30 a.m., she took the stairs to leave the building for work and noticed a wet condition on the stairs where her mother fell a few hours later. She further states in her affidavit that there is always water and dog urine on the stairs and hallways in the building, and finally she claims to have not seen anyone cleaning the stairs during the week, only on weekends. This affidavit not only directly contradicts plaintiff's sworn testimony one year earlier, but failed to mention any complaints made by her to defendants concerning such alleged conditions. Such self-serving affidavit denotes an effort to avoid the consequences of plaintiff's earlier testimony and are insufficient to defeat defendants' motion for summary judgment (see Amaya v Denihan Ownership Co., LLC, 30 AD3d 327, 327-328 [2006]). Moreover, despite the defendants' prior demands for witness information and a preliminary conference order requiring plaintiff to disclose any notice witnesses, only in opposition to this motion for summary judgment, did plaintiff finally disclose that her daughter was her notice witness. It strains credibility for plaintiff to now suggest that her own daughter, who

lives just one floor above her in the same building, did not mention seeing water on the steps that day at any time between the date of the accident and plaintiff's deposition more than one year later. As such, plaintiff failed to offer any evidence rebutting defendant's showing that its staff had no actual or constructive notice of the presence of the puddle prior to the subject accident (see e.g. Hendricks v. 691 Eighth Ave. Corp., 226 A.D.2d 192, 640 N.Y.S.2d 525 [1996]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants 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: 4/2/13

ENTER:

FILED

APR 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

DONNA M. MILLS, J.S.C.