Krampf v Sheraton N.Y. Hotel & Towers
2013 NY Slip Op 33601(U)
May 28, 2013
Supreme Court, New York County
Docket Number: 101834/2011
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 101834/2011
KRAMPF, MARIAN
vs.
SHERATON NEW YORK HOTEL
SEQUENCE NUMBER : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants Sheraton New York Hotel & Towers, Sheraton New York, LLC, The Sheraton, LLC., Manhattan Sheraton Corporation and Starwood Hotels & Resorts Worldwide, Inc., for an order, pursuant to CPLR § 3212, granting summary judgment, dismissing the complaint of plaintiff Marian Krampf, is granted, the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion to strike the Sheraton's answer, or in the alternative, for an adverse inference charge at trial for spoliation of relevant discovery is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff. This constitutes the decision and order of this Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5.28.2013

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MARIAN KRAMPF,

Plaintiff,

-against-

SHERATON NEW YORK HOTEL & TOWERS, SHERATON NEW YORK, LLC, THE SHERATON, LLC., MANHATTAN SHERATON CORPORATION and STARWOOD HOTELS &RESORTS WORLDWIDE, INC.,

Defendants.

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Index No. 101834/2011

Motion Seq. 002

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Sheraton License Operating Company, LLC i/s/h/a Sheraton New York Hotel & Towers, Sheraton New York, LLC, The Sheraton, LLC., Manhattan Sheraton Corporation and Starwood Hotels & Resorts Worldwide, Inc. (collectively the "Sheraton" or "defendant") move pursuant to CPLR § 3212 for summary judgment dismissing the complaint of plaintiff Marian Krampf ("plaintiff"). In response, plaintiff cross moves to strike the Sheraton's answer, or in the alternative, for an adverse inference charge at trial for spoliation of relevant discovery.

Factual Background

On October 24, 2009, plaintiff allegedly slipped and fell on a wet marble floor due to rainwater tracked into the main lobby of the Sheraton New York Hotel & Towers, located at 811 Seventh Avenue, New York, New York, by hotel guests and visitors during inclement weather.

Plaintiff's Deposition

Plaintiff testified that she was a guest at the Sheraton New York Hotel & Towers on

October 24, 2009 along with her husband and several friends (Zincke Aff. Ex. D, Marian Krampf EBT: 13-14). She recalled that it was "drizzly" earlier that day, when on the way back to the hotel from a matinee (14), and that by the time they reached the hotel "it was raining out then." (17).

Upon their return to the hotel, plaintiff went to her room with her husband to rest before dinner (18-19). After resting, plaintiff went down to the lobby and exited the lobby to briefly check the weather outside, passing through the interior revolving door in the vestibule (23-26). She was outside under the awning for a minute (26). After seeing "it was raining," plaintiff "came right back in" (24). She then walked to the right toward a lobby seating area to wait for her husband and friends (28), and as she was walking, slipped and fell on the lobby's marble floor (28, 30).

As she was lying on the floor, she noticed it was wet (35). According to plaintiff, the floor was wet from "people probably coming in with their wet umbrellas and wet clothing" (35). Plaintiff saw a hotel employee with a bucket and mop approximately four feet away from her "trying to dry the floors" (36-37). A security guard then assisted her to the seating area (32).

Although plaintiff could not recall the specific layout of the lobby, plaintiff recalled seeing areas of carpeting and mats in addition to the marble flooring (25-26). Plaintiff did not see any signs regarding the floors (37).

Deposition of Ricardo Carmona

Ricardo Carmona ("Carmona") is the Security Services Manager for the Sheraton New York Hotel & Towers (Zincke Aff. Ex. C, Ricardo Carmona EBT: 5-6). In this capacity, Carmona is responsible for providing the "best safe environment in the hotel" and supervises 25

security officers (9-10). He has no maintenance responsibilities (9).

Carmona testified that plaintiff fell in the lobby on the Seventh Avenue side of the hotel. He explained that there are two entrances to the Sheraton's main lobby – one on Seventh Avenue and one on 53rd Street (7). A guest entering the Seventh Avenue entrance from the sidewalk walks under an approximately 15' x 25' metal canopy leading from the sidewalk to the Sheraton's exterior sliding doors (11-13). These sliding doors open into a vestibule which leads directly to a revolving center door flanked by conventional hinged doors, all of which open into the main lobby (11-13). The lobby floor is marble, with the exception of carpeting approximately 10 feet to the left and right of the revolving door where the Library Bar and Avenue Restaurant are located, respectively (16-17; 20-21). There is also a carpeted seating area to the right of the revolving door (22).

Carmona testified that he is familiar with the maintenance performed at the Sheraton (23). In the event of rain, the Sheraton's procedures dictate that housekeeping staff place carpeted mats "in the main lobby, as you walk in from the revolving doors, as well as the 53rd Street entrance" and the elevators (23-24). At the Seventh Avenue entrance, the Sheraton puts a carpeted mat measuring approximately 15' x 20' on the lobby floor (23-24). At the far end of this carpeted mat where it meets the marble floor, housekeeping staff place a yellow A-frame "Wet Floor" sign to advise guests that the floor gets slippery when wet (39; 42). Housekeeping staff put a total of three "Wet Floor" signs in the lobby area during inclement weather (39-41). In addition, the housekeeping manager on duty stations two to three porters in the lobby with mops and rags to mop excess water from umbrellas and raincoats (25; 27). Periodically, every half hour during a rainy day, the marble floor is mopped by these porters (73; 74-75). On rainy days, in the

vestibule area between the exterior sliding doors and interior revolving door, the Sheraton also puts out stands with plastic bags attached for guests to take to store their wet umbrellas (42-43).

Carmona testified that on rainy days, guests and visitors of the hotel would track water into the lobby causing the marble floor to become "slippery" (34). Although he never observed any visitors or guests slip and fall from that condition, he has heard of such an event occurring two or three times during his employment at the Sheraton (35).

Carmona was advised of plaintiff's accident over the radio and responded to the scene within five minutes (47, 66). He did not speak to plaintiff, who, at this time, was seated in the sitting area to the right of the lobby entrance with security officer George Irizarry ("Irizarry") (45). Irizarry informed Carmona that as plaintiff entered the hotel she fell on the marble floor and he indicated the exact location where plaintiff slipped (46). Carmona did not see wetness in that area, but admitted that he did not know if it had been cleaned by a porter between the time that plaintiff slipped and his arrival (46-47). Carmona recalled that it was drizzling at the time (47).

Carmona returned to his office where he viewed the video surveillance footage of the accident (50). He testified that the video shows plaintiff entering the lobby through the revolving door, crossing over the carpeted mat, and taking two steps on the marble floor (50-51). "And then she was off camera" (52). The accident took place off camera (50). The video also shows 10 to 12 visitors congregating in the lobby who had attended a conference at the hotel (51-53). Carmona explained that the Sheraton did not complete an accident report that evening because plaintiff refused to give her name and did not want any medical treatment (46).

Deposition of George Irizarry

Irizarry is a Security Officer for the Sheraton New York Hotel & Towers (Zincke Aff. Ex. E, George Irizarry EBT: 5). On the day of plaintiff's accident, Irizarry was assigned to patrol the lobby up to floor 20 during his 4:00 p.m. to 12:00 a.m. shift (6-7). Although he has no maintenance responsibilities, Irizarry is familiar with the Sheraton's general policies and procedures during inclement weather (14-16).

Irizarry reiterated Carmona's testimony that housekeeping staff place mats at each of the hotel's two entrances and inside the elevators to prevent slips, place "Wet Floor" warning signs inside the lobby to alert guests that the floor is or is likely to become slippery, and station porters to the lobby to clean-up excess water (16; 33; 66-68). The mat put down by housekeeping during inclement weather is approximately 20 feet long and is placed directly in front of the revolving door in the lobby (17-19). Mats are not placed in front of the conventional hinged doors to the right and left of the revolving door, although permanent carpets are located at those entrances as well (21-22, 49).

On the date of plaintiff's accident, Irizarry responded immediately to plaintiff's fall (36). Although he did not see plaintiff slip, he saw a commotion and a group of seven or eight hotel visitors surrounding plaintiff who was on the floor (36-37). Plaintiff was on the marble floor in the uncovered area between the carpeted mat located in front of the revolving door and the permanent carpet in the seating area (41, 46). Irizarry testified that the floor where plaintiff fell was wet and this wet area encompassed approximately five feet of the floor (41-42). When asked if the mat was down that day, he responded "Yes . . . The one that they placed is right in the middle, the revolving door" (43). He confirmed that "if you come in the revolving door, you

would walk across the carpet, then you walk across five feet of the marble, and then you step onto this mat" and that plaintiff was in the area between the carpet and the mat, a few feet to the side of the mat (45, 49). Although he recalled seeing porters inspect the lobby during his shift, he does not specifically recall seeing anyone inspect the area where plaintiff fell (51-52). The Housekeeping department places signs in the lobby 10 feet from the entrance inside the lobby when it rains, but he did not recall observing any sign on that day (66-67). He was responsible for reporting if a sign were not there, but did not recall whether he made any such report that evening (67-68).

Prior to Irizarry's examination before trial, he viewed the surveillance video to refresh his recollection of the accident (36). As a result, he could recall that at the time of the accident 40 to 50 guests and visitors were dispersed throughout the lobby (57). During his shift, he had asked guests and visitors holding umbrellas to move away from blocking the entrance door two to three times (20-21; 58-59). Irizarry postulated they were most likely causing wetness by the front entrance (59).

Defendant's Contentions

In support of summary judgment, the Sheraton argues that it took reasonable measures to prevent and remedy slipping hazards from tracked-in rainwater. Such precautions included placing carpeted mats on the marble floor, putting up "Wet Floor" warning signs, and stationing porters in the lobby to wipe-up wet areas.

The Sheraton has a large canopy protecting its visitors and guests from inclement weather as they approach the hotel's exterior sliding doors from the sidewalk. The vestibule between the sliding doors and revolving door is permanently carpeted to absorb water from shoes and

clothing and has stands with plastic bags for visitors and guests to use to store their wet umbrellas before entering the hotel. The floor of the revolving door is permanently carpeted and a large carpeted mat is placed over the marble floor adjacent to the revolving door during inclement weather to absorb tracked-in water. "Wet Floor" signs are also placed in the lobby. While plaintiff did not walk far enough into the lobby to see the "Wet Floor" sign positioned at the end of the Seventh Avenue entrance mat, such a sign is habitually placed there by the Sheraton.

In addition, porters are stationed in the lobby to wipe away wet areas every half hour, and plaintiff observed porters cleaning water from the floor only four feet from where she slipped. Further, video surveillance footage shows a guest shaking water off her umbrella and crossing the mat into the area where plaintiff slipped just moments before plaintiff's accident.

The Sheraton argues that the hotel is not obligated to place mats everywhere. Property owners have no obligation to provide a constant remedy for conditions created by tracked-in rainwater and are not liable for injuries unless the property owner created the hazard or had notice of it and failed to take remedial steps to correct it. A general awareness that water will be tracked in by guests and visitors is not sufficient to establish notice of the specific condition on which the plaintiff slipped. Property owners are only liable where it created or have notice of a condition that they failed to remedy, a situation not present here.

Plaintiff's Opposition/Cross-Motion

In opposition, plaintiff argues that an issue of fact exists as to whether the Sheraton created the hazardous condition, had constructive notice of the accumulation of the water, and/or had actual knowledge of a recurrent dangerous condition. Plaintiff contends that the Sheraton

arguably created the condition by wet mopping the area. Alternatively, plaintiff argues that the Sheraton had actual notice of the dangerous condition based on Irizarry's testimony that every time it rained the marble floor in front of the two doors flanking the revolving door would get wet, but no mat was placed in this highly trafficked area. Thus, the Sheraton had actual knowledge of an ongoing and recurring dangerous condition charging them with constructive notice of each specific reoccurrence of the condition.

Although the storm-in-progress doctrine, on which the Sheraton relies, diminishes a landowner's duty during an ongoing rainstorm, the doctrine has never been applied to completely eliminate a landowner's duty to remedy hazardous storm-related conditions occurring inside a building. Further, the storm-in-progress doctrine does not supersede the basic tenet that, in a slip and fall case, a defendant must establish that it had neither actual nor constructive notice of the dangerous condition. The Sheraton had actual notice of the dangerous condition, and cannot argue that it lacked constructive notice because there is no testimony regarding when the porters last inspected the area prior to plaintiff's accident.

Plaintiff further contends that the Sheraton failed to prove it took reasonable precautions to protect its guests and visitors from a dangerous condition. The Sheraton failed to come forward with the actual practices that were employed on the date of the accident, and evidence of the Sheraton's general procedures is insufficient. Carmona and Irizarry testified of the Sheraton's general practices, and did not indicate that the Sheraton followed their inclement weather procedures of placing "Wet Floor" signs in the lobby and assigning porters to patrol and clean the lobby floor. Further, the Sheraton failed to identify the porters assigned to the lobby at the time of plaintiff's accident and has not produced for deposition anyone employed in the

housekeeping department on the day of the accident. And, the approximately one minute video surveillance tape shows no precautions taken by the Sheraton and therefore does not satisfy the Sheraton's initial burden of establishing that, as a matter of law, it acted reasonably to safeguard its guests and visitors during inclement weather. Therefore, an issue of fact exists as to the reasonableness of defendants' actions in regard to remedying the dangerous condition.

In further opposition, plaintiff submits an affidavit from William Marletta ("Marletta"), Ph. D., CSP, a self-employed safety consultant, wherein he states that the Sheraton departed from good and accepted safe practices by failing to maintain the lobby floor, which is smooth marble and becomes slippery and dangerous when wet, failing to barricade the area and/or place warning signs, failing to ensure adequate placement of lobby mats, and failing to keep the hotel entranceways/exitways free and clear of obstructions created by the crowd of people in the lobby (Commander Aff. Ex. C at 2-4).

In support of her cross-motion, plaintiff argues that during the course of discovery, plaintiff demanded the video surveillance tape and deposed Meredith Umstatter, another employee of Sheraton, who could not provide any information of the location of video cameras in the lobby. Subsequent to the filing of defendant's instant motion, plaintiff demanded a longer version of the video surveillance to encompass one hour before and after plaintiff's incident, as well as all videos depicting the lobby for this period. Defendant's counsel advised that defendant did not have these items. Defendant's retention of video from only one camera in the lobby, and retention of only one minute of footage warrants the sanction of striking defendant's answer or directing that a negative inference be given at the time of trial.

Defendant's Reply

In reply, the Sheraton contends that the issue of notice is irrelevant because the Sheraton seeks summary judgment based on the reasonable precautions it took to remedy wet conditions on the lobby floor. And, moreover, the Sheraton is not an insurer of absolute safety despite the precautions it took.

The Sheraton also objects to Marletta's affidavit as untimely, speculative, and unsupported by the evidence.

The Sheraton offers the affidavit of Leslie Wynter, the Assistant Director of the Housekeeping Department, which states that neither the porters nor the Housekeeping Managers kept records concerning the lobby in October 2009 (Zincke Reply Aff. Ex. E at 2-3). Thus, there are no records as to the identity or cleaning schedule of the specific porters seen by plaintiff in the lobby on the date of her accident.

In opposition to plaintiff's cross-motion, defendant submits an affidavit from Carmona, stating that he reviewed the portion of the video occurring before and after plaintiff's accident and did not retain these portions because he did not see anything that affected the safety of the guests, that could be used as a safety tool, or that would have prevented a similar accident. The camera is fixed on the lobby door, and does not move from side to side. According to Carmona, nothing in the video showed a condition that merited a correction. Defendant provided a copy of the video to plaintiff's counsel. Since the camera did not take a view of the location where plaintiff slipped, the amount of video retained was reasonable, and defendant cannot provide footage of a video it never had in the first place, an adverse inference is unwarranted.

Further, any discovery sanction is unwarranted because plaintiff did not file her Note of Issue and Certificate of Readiness asserting that discovery is complete.

Plaintiff's Reply

Carmona's unilateral decision to preserve only one minute of footage from the lobby video surveillance camera has a materially adverse effect on plaintiff's ability to conclusively establish the source of the wet area on the marble floor, notice, and that the Sheraton did not take reasonable measures to remedy dangerous conditions due to inclement weather. Carmona's intentional and/or negligent destruction of additional potentially relevant footage merits an adverse inference charge at the time of trial due to his spoliation of the missing surveillance video.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action...has no merit" (CPLR § 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad*, 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the

pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, 49 NY2d 562; Prudential Securities Inc. v Rovello, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, 49 NY2d 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], affd, 62 NY2d 686 [1984]).

"[I]t is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team,* 88 NY2d 628, 646 [1996]; *see Kesselman v Lever House Rest.*, 29 AD3d 302, 304 [1st Dept 2006]).

Plaintiff's own testimony established that it had rained prior to and during the time of her accident. Thus, the evidence here undoubtedly demonstrates that the accident occurred while it

was raining, a time during which defendant had no duty to constantly maintain dry floors (*Richardson v S.I.K. Associates, L.P.*, 102 AD3d 554, 958 NYS2d 144 [1st Dept 2013] ("Defendants were not required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm"); *Solazzo v New York City Transit Auth.*, 21 AD3d 735, 800 NYS2d 698 [1st Dept 2005] *citing Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146–147, 699 NYS2d 27 [1999]). Thus, the storm-in-progress defense is applicable here and defendant had no obligation to provide a constant remedy for tracked-in or leaking water during the rainfall.[1]

However, where the doctrine is available for such indoor accidents, "all of the circumstances regarding a defendant's maintenance efforts must be scrutinized in ascertaining whether the defendant exercised reasonable care in remedying a dangerous condition" (*Pomahac v TrizecHahn 1065 Ave. of the Ams., LLC*, 65 AD3d 462, 465–466, 884 NYS2d 402 [1st Dept 2009]). Notably, defendant is not obligated to put down rubber mats on all of its floors when it rains and the failure to do so is not evidence of negligence (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [2005]; *Pomahac v TrizecHahn 1065 Ave. of the Ams., LLC*, 65 AD3d at 465, *supra* (reasonable care does not demand that a property owner "place a particular number of mats in particular places")). Nor is the defendant under any legal obligation to "continuously" mop up moisture tracked into the premises from outside precipitation (*Pomahac v TrizecHahn 1065 Ave. of the Ams., LLC*, 65 AD3d at 465, *citing Keum Choi v Olympia & York Water St. Co.*, 278

[1] Caselaw indicates that the "storm in progress" doctrine is a *defense* to liability in a slip and fall accident action (*De Los Santos v 4915 Broadway Realty LLC*, 58 AD3d 465, 869 NYS2d 905 [1st Dept 2009]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 800 NYS2d 698 [1st Dept 2005], affd. 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 [2005]; *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 761 NYS2d 181 [1st Dept 2003]).

AD2d 106, 718 NYS2d 42 [1st Dept 2000]).

Here, defendant showed that it took reasonable precautions to address wet conditions by laying mats, in addition to the existing carpet, inside the lobby and assigning porters to mop the floors in the lobby, where there was a canopy outside the building leading to the building (*Guntur v Jetblue Airways Corp.*, 103 AD3d 485, 960 NYS2d 15 [1st Dept 2013] (defendant took reasonable precautions to rectify the wet conditions where laid a carpet runner along the jetbridge and placed a canopy over the aircraft door) *citing Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 464–466, 884 NYS2d 402 [1st Dept 2009]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 800 NYS2d 698 [1st Dept 2005], affd. 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 [2005]). Consistent with the testimony of Carmona and Irizarry regarding defendant's practices during inclement weather, plaintiff testified that she saw a hotel employee mopping the floors to keep them dry and mats in the lobby. Thus, defendant presented a *prima facie* case for dismissal based on the storm-in-progress defense (*Toner v Nat'l R.R. Passenger Corp.*, 71 AD3d 454 [1st Dept 2010] (finding that defendant made a *prima facie* showing of entitlement to judgment as a matter of law where although "parties disputed whether it was raining at the time of the accident and whether warning signs were displayed, it was agreed that mats had been placed at the bottom of the staircase and that workers were mopping the floor")).

Contrary to plaintiff's contention, that defendants had a practice of placing a certain "Wet Floor" signs in the lobby during inclement weather, and failed to adhere to that practice at the time of the accident, is insufficient to raise a triable issue of fact with respect to defendants' negligence (*see Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d 462, *supra*). "A defendant's failure to adhere to its own internal guideline or policy may be some evidence of

negligence" (*Pomahac, supra, citing* 1A PJI3d 2:16, at 254 [2009]). "But where the internal guideline or policy requires a standard that transcends the standard required by the duty of reasonable care, a defendant's breach of the guideline or policy cannot be considered evidence of negligence" (*Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d at 465, *citing Gilson v Metro. Opera*, 5 NY3d 574, 577, 807 NYS2d 588, 841 NE.2d 747 [2005], *quoting Sherman v Robinson*, 80 NY2d 483, 489 n. 3, 591 NYS2d 974, 606 NE2d 1365 [1992]). Thus, defendant's internal policy of placing signs in the lobby and their failure to follow that voluntarily-adopted policy cannot serve as a basis of liability (*Pomahac v TrizecHahn 1065 Ave. of Americas, LLC*, 65 AD3d 462, *supra citing Newsome v Cservak*, 130 AD2d 637, 515 NYS2d 564 [2d Dept 1987]).

The Court also rejects plaintiff's argument that the Sheraton created the slippery condition by virtue of the employee mopping the floors. None of the cases cited by plaintiff for this proposition mention or indicate that it was raining at or about the time of plaintiff's accident, and did not involve the storm-in-progress doctrine.

Likewise, a general awareness of a dangerous condition is an insufficient basis to impose liability based on constructive notice in a negligence action involving a slip-and-fall accident (*Keum Choi v Olympia & York Water St. Co.*, 278 AD2d at 107). Although it may have been raining that day, and the Sheraton did not place a mat in the proximate area where plaintiff fell, this does not amount to "an inference of constructive notice" (*Joseph v Chase Manhattan Bank*, 277 AD2d 96 [1st Dept 2000]). Plaintiff, who had been in the lobby for moments before her fall, did not indicate that she saw the source of the water. There is no evidence of how long the water existed in the area of plaintiff's fall (*Keum Choi v Olympia & York Water St. Co.*, 278 AD2d

106, *supra* ["(e)ven were we to assume that water was visible, despite plaintiff's inability to recall seeing water, there is no evidence from which a jury could reasonably conclude that such condition existed for a sufficient period of time to allow defendants to have discovered and remedied it"; "It is, for example, quite possible that any water on the floor had been tracked into the building by individuals immediately preceding plaintiff. Defendants had no obligation to provide a constant remedy for such a problem"]). Since there is no evidence to permit a finder of fact to infer, without speculating, that the Sheraton had constructive notice of a dangerous condition, plaintiff's argument fails to raise triable issues of fact that would defeat defendants' motion *(see Dombrower v Maharia Realty Corp.*, 296 AD2d 353 [1st Dept 2002]). And, even assuming that the source of the water was not the rain being tracked by hotel guests, there is no indication that defendant was advised by any one of any water stemming from any other source on the floor where plaintiff fell prior to her fall.

Further, the case cited by plaintiff for the proposition that defendant was on "constructive notice" of the water is inapposite, given that in such case, the defendants did not place any mats on the floor, thereby raising an issue of fact as to whether defendants therein followed their procedure of placing mats on the floor during inclement weather.

Plaintiff also seeks to raise triable issues of fact through her expert. Although plaintiff offers Marletta's affidavit to defeat the Sheraton's motion, it does not contain sufficient allegations to demonstrate that the conclusions it contains are more than speculation and that it would, if offered alone at trial, support a verdict in plaintiff's favor *(Ramos v Howard Indus., Inc.*, 10 NY3d 218, 244 [2008]). As defendant points out, that the marble floor was slippery was wet (as pointed out by plaintiff's expert) does not overcome evidence that it was raining at the

time of plaintiff's accident, and that defendant exercised reasonably care by placing mats on the floor and assigning porters to lobby area to dry the floors, which plaintiff observed at the time of her accident.

As to plaintiff's cross-motion, the Court rejects plaintiff's spoliation claim. Plaintiff has not submitted any evidence that the defendants either intentionally or negligently destroyed the tapes (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1st Dept 1997]; *Squitieri v City of New York*, 248 AD2d 201 [1st Dept 1998]; *Marro v St. Vincent's Hosp. & Med. Ctr.*, 294 AD2d 341 [2d Dept 2002]). The Sheraton provided a reasonable explanation for why the tapes were erased. Carmona testified that additional footage did not show anything "that would affect the safety of our guests or staff" (Commander Reply Aff. ¶ 4). The absence of the tapes is not a reason to deny the Sheraton's motion.

Further, given the factual circumstances of plaintiff's accident, according to plaintiff's allegations, the tapes would not have been helpful to her in defeating this motion. The preservation of only one minute of footage from the lobby video surveillance camera does not have a materially adverse effect on plaintiff's ability to establish the source of the wet area on the marble floor, notice, or that the Sheraton did not take reasonable measures to remedy dangerous conditions due to inclement weather.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Sheraton New York Hotel & Towers, Sheraton New York, LLC, The Sheraton, LLC., Manhattan Sheraton Corporation and Starwood Hotels & Resorts Worldwide, Inc., for an order, pursuant to CPLR § 3212, granting summary judgment,

dismissing the complaint of plaintiff Marian Krampf, is granted, the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion to strike the Sheraton's answer, or in the alternative, for an adverse inference charge at trial for spoliation of relevant discovery is denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for plaintiff. This constitutes the decision and order of this Court.

Dated: May 28, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD