SHORT FORM ORDER

INDEX No. 12-7380
CAL. No. 14-02005OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 4-9-15
ADJ. DATE 5-21-15
Mot. Seq. #004 - MD

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CHRISTOPHER L. LACOVA,

Plaintiff,

- against -

GERSHOW RECYCLING CORPORATION,

Defendant.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-22 ; Replying Affidavits and supporting papers 23-24 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint against it is denied.

Plaintiff commenced this action in March of 2012 to recover damages for injuries allegedly sustained to his ankle from a trip and fall accident that occurred on November 16, 2010 at a recycling facility owned by defendant Gershow Recycling Corporation. At the time of the accident, plaintiff was working at the subject premises as a security guard. The complaint alleges that while plaintiff was lawfully at the premises during the course of his employment as a security guard, he was caused to fall to the ground and become injured due to defendant's negligence in failing to provide a safe place to walk, in failing to provide a safe place to work, in allowing debris, including pieces of metal, to be on the ground creating a hazard and a trap, in failing to adequately illuminate the premises, in failing to warn plaintiff of the dangerous condition and in failing to inspect the premises for the alleged hazardous condition. By his

verified bill of particulars, plaintiff alleges that while patrolling defendant's premises as a security guard, the subject area was poorly illuminated, and he was injured when he tripped and fell on a piece of metal.

Defendant now moves for summary judgment dismissing the complaint on the grounds that it neither created nor had notice of the alleged dangerous condition. Furthermore, defendant alleges plaintiff cannot identify the cause of the alleged fall and that plaintiff's claim that he tripped on a piece of metal is based on speculation. In support of the motion, defendant submits copies of the pleadings, the verified bill of particulars, and transcripts of the parties' deposition testimony.

Plaintiff testified that he was employed by nonparty Peace Security as a security guard and was working at defendant's Medford facility on the date of the alleged accident. Plaintiff testified that he worked at the premises five days per week from 5:00 p.m. until 12:00 a.m. He testified that his duties were to patrol the premises for trespassers at five different areas of the premises, and that he was required to check in with a "key box" every hour. He testified that each tour of the facility required him to walk between the same five key locations in the same order, and that he usually accomplished seven tours during his shift. Plaintiff testified that at approximately 10:00 p.m., while on his fifth tour, he was walking between the third and fourth key when the incident occurred. Plaintiff testified that the area was not illuminated, that it was dark and that he used a flashlight and looked straight ahead while patrolling the grounds. He testified that while he was walking his right foot stepped on a piece of metal and he fell. He testified that "it felt like a bar but really not like a bar," and that it felt hard and angled. When questioned further, plaintiff testified he did not actually see the object that allegedly caused him to fall.

Charles Keeling, a safety director employed by defendant, testified that he has worked at the subject property for 7 ½ years. He testified that defendant utilizes 50 employees to operate and pick up debris around the metal shredder. He testified that the shredder is located in the center of the property and has an 8-foot pit underneath it. He testified that piles of metal are taken to the shredder by trucks loaded by grapples, a device that has claws on it. He testified that the entire property is illuminated with stadium type lighting and is programmed on a timer set by an electrician, but that the pit has its own light switch. He testified that he did not know if the subject premises was illuminated on the date of the incident. He testified that a night crew of Gershow employees remained on the premises to sort the metal and clean up the debris with front end loaders, putting the debris into piles.

Joseph Bertuccio, the general manager for defendant, testified that employees were on the premises from 6:00 a.m. until 5:00 p.m. during the week, and that every day at 3:30 p.m. they would prep for the next day, perform maintenance work and clean up. He testified that as part of their duties, defendant's employees inspect and clean up any metal debris on a daily basis. He

testified that all operations ceased when the employees' shift ended, and that security guards, employed by Peace Security, were on duty from 5:00 p.m. until 6:00 a.m. to patrol and guard the property from trespassers. He testified that the entire area was illuminated, and that he never received any complaints about dangerous conditions on the subject premises from any of the security guards. He testified that the key stations used by security guards were not always located in the same areas, and that he did not know where the key stations were located on the date of the accident, but that one would be in the vicinity of the shredder.

It is well settled that a party moving for summary judgment 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 (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]). A landowner who holds its property open to the public has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]), and may only be liable if it created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]).

Generally, in a trip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]). However, in a trip and fall case where the plaintiff cannot identify the cause of the trip and fall, the defendant's burden is sustained, as speculation by the plaintiff as to the cause of the trip is insufficient to impose liability (***Ash v City of New York***, 109 AD3d 854, 972 NYS 2d 594 [2d Dept 2013]). While proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based upon the logical inferences to be drawn from the evidence (*see* ***Schneider***

v Kings Highway Hosp. Ctr., 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

Here, plaintiff testified that he did not see the object he stepped on, but that it felt like a bar or a piece of metal. He testified the object, which he described as being hard and angled, was on the ground near the metal shredder. Although he did not actually see the object afterwards, he knew he stepped on something and sufficiently described it. Given the testimony of all the parties concerning the debris which was typically on the premises, and the defendant's duty to ensure that it was properly disposed of by its employees, a logical inference may be drawn to permit a finding of proximate cause based on more than speculation alone (***Grizzell v JQ Assoc., LLC***, 110 AD3d 762, 973 NYS 2d 268 [2d Dept 2013]). Thus, the circumstantial evidence creates material issues of fact which were required to be eliminated by defendant to obtain the requested relief (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS 2d 316.

In a trip and fall negligence action where inadequate lighting is alleged to be a proximate cause of the plaintiff's accident and resulting injuries, the defendant has the initial burden of establishing prima facie entitlement to judgment as a matter of law be showing that the lighting was adequate (*see* ***Gestetner v Teitelbaum***, 52 AD3d 778, 860 NYS2d 208 [2d Dept 2008]; ***Streit v DTUT***, 302 AD2d 450, 753 NYS2d 749 [2d Dept 2003]). Keeling testified that the pit had its own light switch but he did not know if it was turned on the night of the incident. Neither Keeling nor Bertuccio knew whether any of the outside lights were turned on the night of the incident. Thus, the defendant has not established that the lighting in the area was adequate for safe traversal of the walkway near the pit and the key station (*see* ***Gallagher v St. Raymond's R. C. Church,*** 21 NY2d 554, 289 NYS2d 401 [1968]; ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS 2d 127 [2d Dept 2014]). Furthermore, defendant failed to submit proof that the clean up procedures for removal of the metal debris was conducted by Gershow's employees on the day of the incident. Under these circumstances, a jury could logically infer plaintiff fell because of uncleaned scrap metal and a lack of illumination. These factors together with plaintiff's testimony provide more than mere speculation. Thus, defendant did not establish, prima facie, that it did not create a hazardous condition that caused plaintiff to trip and fall.

Defendant further contends that the complaint should be dismissed on the ground that that it did not have constructive notice of the dangerous condition. To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). In order to prevail on its motion for summary judgment on the issue of constructive notice, defendant must offer evidence showing when the subject area was last inspected and/or cleaned relative to the time when plaintiff fell (***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d

Dept 2008]). The defendants failed to satisfy their initial burden. The deposition testimony of defendant's employees only refers to the maintenance and clean up procedures at the recycling facility in a general fashion; and it provides no evidence as to any particularized or specific inspection in the area of plaintiff's fall on the date of the accident. (*see* ***Schiano v Mijul, Inc.***, 79 AD3d 726, 912 NYS2d 134 [2d Dept 2010]). Having failed to show, prima facie, that there were no metal scraps on the ground where plaintiff allegedly fell, or that the metal was not on the ground for such time that the defendant could have discovered the hazardous condition and remedied it, defendant failed to establish its entitlement to judgment as a matter of law (*see* ***Rivera v 2160 Realty Co., L.L.C.***, 4 NY 3d 837, 797 NYS 2d 369 [2005]; ***Gordon v American Museum of Natural History***, 67 NY 2d 836, 501 NYS 2d 646 [1986]; ***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, NYS 2d 917 [2d Dept 2012]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: SEP 0 2 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**