Iddrisu v 2440 Webb Ave., LLC
2016 NY Slip Op 32724(U)
February 15, 2016
Supreme Court, Bronx County
Docket Number: 24362/2015E
Judge: Mary Ann Brigantti
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FILED: BRONX COUNTY CLERK 03/01/2017 12:02 PM INDEX NO. 24362/2015E
NYSCEF DOC. NO. 65 RECEIVED NYSCEF: 03/01/2017

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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HUMU IDDRISU,

Plaintiff,

-against-

DECISION / ORDER
Index No. 24362/2015E

2440 WEBB AVENUE, LLC.,

Defendant.

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The following papers numbered 1 to 6 read on the below motion noticed on September 15, 2016 and duly submitted on the Part IA15 Motion calendar of **November 14, 2016:**

Papers Submitted	Numbered
Defs.' Notice of Motion, Exhibits, Memo. of Law	1,2
Pl. Aff. In Opp., Exhibits	3,4
Defs' Aff. in Reply, Exhibits	5,6

Upon the foregoing papers, the defendant 2440 Webb Avenue, LLC ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Humu Idrisu ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged slip and fall accident that occurred on February 17, 2015, at approximately 6:15AM inside of the premises located at 2440 Webb Avenue in the Bronx, New York. Plaintiff, a tenant of the building, testified that it had been snowing continuously for a few days leading up to and including the date of this incident. That morning, she and her husband left their 4th floor apartment and began descending down an interior staircase to a landing. Once she reached the landing, Plaintiff descending "about five steps" before she slipped and fell, and sustained injuries. When asked if she observed the cause of her fall, Plaintiff testified "I found that I was all wet and there was water all over, all over the floor, all over the place. My husband observed that there was water all over. Oh, my husband went to observe the area and found that there was water on the steps" (Pl. EBT at 22:17-25). Plaintiff further testified that she never previously saw water on the steps (*id* at 45), and didn't know if her husband had ever seen water on the steps before the accident (*id*). Plaintiff was also unaware of

anyone ever complaining to the building about a water condition on the steps (*id* at 45, 46).

In support of its motion, Defendant submits the deposition transcript of Lulzim Mani, the building's superintendent since 2000. Mr. Mani's duties included sweeping and mopping the common areas of the whole building from the basement to the 5th floor. He testified that the building's stairs were made of marble, four-to-five feet wide, with a hand rail on one side. Mr. Mani testified that he keeps a daily schedule whereby he checks the building's lobby, floor, stairs, and windows at 9:00AM, 1:00PM, and between 5:00 and 6:00PM each day. Mr. Mani explained that he maintained a written log of these checks where he would report any issue that he observed, including any wet condition (Mani EBT at p53 - 56). If he saw something serious, Mani would e-mail his supervisors and photograph the issue (*id*). Mr. Mani testified that whenever he mops, he would place a "wet floor" sign in the area. When it is snowing, he would check the building 3-4 times per day and mop any condition that he noticed. Mani also testified that he would place a "wet floor" sign at the entrance of the building on rainy or snowy days. Mani recalled that it was snowing in the two weeks leading up to this February 17, 2015 accident, but he never received a complaint regarding a wet condition on the staircase. Mr. Mani's maintenance log from that date does not contain a notation indicating the presence of a wet condition on the stairs.

Defendant now moves for summary judgment, arguing that there is no evidence that it created, or had actual or constructive notice of any allegedly hazardous condition. On the issue of constructive notice, Defendant asserts that there is no evidence of how long the condition existed. Furthermore, it is not disputed that it was snowing at the time of the incident, and Defendant had no obligation to provide a constant remedy to the problem of tracked-in water into the building lobby and staircase. Even if there was a defective condition on the premises, it did not exist for an appreciable amount of time, as Plaintiff herself did not readily observe it or take any measures to avoid the fall. Defendant also argues that it took reasonable precautionary measures in response to the inclement weather, and the testimony and maintenance log from Mr. Mani establish that the area was regularly inspected. Defendant finally asserts that Plaintiff's complaint must be dismissed because she failed to identify the cause of her fall. Plaintiff admitted that she did not see the water condition before she fell, and she was merely assuming that she fell in water because her pants were wet after she fell.

In opposition to the motion, Plaintiff first argues that Defendant failed to meet its initial burden with respect to the absence of constructive notice. Superintendent Mani only referred to his general cleaning schedule, and did not testify that this schedule was actually adhered to on or near the date of this incident. Plaintiff further contends that the "maintenance log" was merely a janitorial schedule and no evidence of actual maintenance. Mr. Mani admitted that he did not know when the stairs were last mopped and stated that there was no log of mopping activity. Plaintiff also argues that the motion must be denied because Defendant wholly failed to address Plaintiff's claims that the subject staircase violated the Administrative Code of the City of New York, §§27-375(f) and (h). Plaintiff also avers that there are issues of fact regarding notice that preclude summary judgment. Plaintiff submits an affidavit from her husband, Rahmat Al-Hassan, who asserts that Plaintiff slipped on a trail of "dirty water footprints" and "puddles of water" originating from the building's entrance. Mr. Al-Hassan alleges that he saw the same trail of footprints and water for three weeks leading up to the accident, and the condition had grown "progressively worse" over those weeks. Furthermore, it had been snowing continuously for weeks leading up to this accident, and yet, as Mr. Mani acknowledged, there were no mats placed near the main entrance to the building. Plaintiff argues that the foregoing raises a factual issue as to whether Defendant took reasonable steps to maintain the premises in light of the storms, and whether there was a recurring dangerous condition on the premises that was routinely left unaddressed. Plaintiff asserts that Mr. Mani testified that he placed a "wet floor" sign inside of the premises on the date of this incident, thus raising an issue of fact as to notice of a hazardous or slippery condition.

Furthermore, Mr. Al-Hassan alleges in his affidavit that Mr. Mani was not actually working and maintaining the premises for about a month before this accident occurred. Mr. Al-Hassan allegedly learned that Mr. Mani had injured himself in January 2015, and as a resukt, was not working or performing his regular cleaning duties. Plaintiff submits a document from the Workers' Compensation Board indicating that Mr. Mani sustained an injury on January 4, 2015. Plaintiff alleges that this evidence raises an issue of fact as to whether the Defendant actually made regular inspections of the premises or performed cleaning in accordance with a set schedule. Plaintiff states that she is not alleging that the condition that caused her fall was the result of an ongoing storm. Rather, the condition was the result of several prior storms that

resulted in various tenants and/or guests tracking in snow, that was routinely left unaddressed, for at least three weeks leading up to this accident. Finally, Plaintiff asserts that she identified the cause of her fall through her own testimony and that of her husband, Mr. Al-Hassan, who witnessed the accident.

In reply, Defendant argues that the Court must not consider the "self-serving" affidavit from Plaintiff's husband, as it was clearly tailored to avoid the consequences of Plaintiff's earlier deposition testimony. Plaintiff admitted that she never saw water on the steps before the accident, she did not know if her husband had ever seen water on the step, and she was unaware of anyone ever complain to building personnel about water on the steps. The affidavit from her husband, now claiming that a dirty footprint and water condition had existed on the steps and in fact had grown progressively worse at least three weeks before the accident, is a feigned attempt to create an issue of fact. Furthermore, Defendant alleges that it submitted competent evidence of adherence to a maintenance schedule, thus proving a lack of constructive notice. Regarding the statutory claims, Defendants allege that they are entitled to argue against them in reply because Plaintiff raised them for the first time in opposition papers. Defendant contends that the 1968 Building Code is not applicable to this premises because it was constructed and last renovated before 1968. Even if the Code did apply, the Plaintiff has not submitted admissible evidence of a violation, and moreover, Plaintiff failed to demonstrate that any violation was a proximate cause of this accident.

III. Applicable Law and Analysis

To impose liability upon a landowner or occupier in a premises liability-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*see Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it (*see Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986]). The notice required must be more than general notice of any defective condition. (*Id.*) The law requires notice of the specific condition alleged at the specific location alleged (*Id.*). Landowners, however, may be

excused from liability for hazardous conditions caused by an ongoing storm (see *Gleeson v. NYCTA*, 74 A.D.3d 161 [1st Dept. 2010]). Thus, the duty "to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Pippo v. City of New York*, 43 A.D.3d 303 [1st Dept. 2007]). This doctrine has been extended to accidents occurring inside of building entrances (*see Hilsman v. Sarwil Assoc., L.P.*, 13 A.D.3d 692 [3rd Dept. 2004]). Furthermore, a property owner has no duty to continuously mop up all moisture resulting from tracked-in, melting snow (see *Solazzo v. New York City Transit Authority*, 21 A.D.3d 735 [1st Dept. 2005]; citing *Kovelsky v. City Univ.*, 221 A.D.3d 234 (1st Dept. 1995). Still, under such circumstances, a landowner may be liable where the he or she failed to use care to remedy conditions which became dangerous after actual or constructive notice of such conditions (*see Hilsman v. Sarwil Assoc., L.P.*, 13 A.D.3d 692 [3rd Dept. 2004], quoting *Miller v. Gimbel Bros.*, 262 N.Y. 107, 108-109 [1933]; *see also Rijos v. Riverbay Corp.*, 105 A.D.3d 423 [1st Dept. 2013]). As noted by the First Department, even where the storm-in-progress doctrine applies, "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" (*see Rijos v. Riverbay Corp.*, *supra.*, quoting *Pomahac v. TrizecHahn 1065 Ave. of the Americas*, 65 A.D.3d 462, 465-466 [1st Dept. 2009]).

First, the Court must note that Plaintiff adequately identified the cause of her fall at her examination before trial. When asked"[d]id you observe what caused you to slip before the accident" she replied "After I fell I fell on my buttocks. I found that I was all wet and there was water all over, all over the floor, all over the place. My husband observed that there was water all over. Oh, my husband went to observe the area and found that there was water on the steps" (Pl. EBT at 22:17-22). Plaintiff did not simply testify that her clothes were wet after she fell. Rather, she clearly stated that she saw water "all over" the area.

Nevertheless, Defendant satisfied its initial burden of proving entitlement to summary judgment by presented evidence that there was an ongoing winter storm as of the date of this incident. Defendant also presented evidence in the form of testimony from its superintendent indicating that he inspected the premises at least three times per day around the time of this incident, and found no hazardous condition as of 4:00PM the night before this 6:00AM accident,

and noted no dangerous condition the date of the accident. Defendant also produced their superintendent's maintenance log which documents his inspection of the premises on the specific date and contains no notation concerning any hazardous condition. Furthermore, Defendant carried their burden of proving lack of constructive notice by submitted plaintiff's own testimony indicating that she had never seen a wet condition on the stairs before this accident (*see Richardson v. S.I.K. Assoc., LP*, 102 A.D.3d 554 [1st Dept. 2013]).

Contrary to Plaintiff's conditions, Mr. Mani's testimony concerning his daily routine and lack of notice, coupled with the maintenance logs indicating that the routine was adhered to on the date of this accident, is sufficient to shift the burden to plaintiff to demonstrate the existence of questions of fact (*see Raghu v. New York City Hous. Auth.*, 72 A.D.3d 480, 482 [1st Dept. 2010]; *see also Rodriguez v. New York City Hous. Auth.*, 102 A.D.3d 407 [1st Dept. 2013]; *see Pfeuffer v. New York City Transit Authority*, 93 A.D.3d 470, 472 [1st Dept. 2012][caretaker's logbook from accident date did not indicate that a hazardous condition existed on the morning of accident]; *Boachie v. 57-115 Associates, LP*, 105 A.D.3d 603 [1st Dept. 2013]). Mr. Mani clearly testified that he kept a maintenance log indicating his regular building checks (Mani EBT at 53, 54), and he produced those records in response to Plaintiff's discovery demands. While he testified that there were no mats or carpets ever placed in the building, this is not in itself evidence of negligence, as Defendant has presented evidence of ongoing inspections of the premises that adequately discharged its duty of care during a snow storm (*see Pomahac v. TrizecHahn 1065 Ave. of the Americas*, 65 A.D.3d 462, 465-466). Defendant's duty to remedy tracked-in water from pedestrians was suspended until a reasonable time after the storm had ended (*Solazzo v. New York City Transit Authority*, 21 A.D.3d 735; *see also Rosario v. Prana Nine Properties, LLC.*, 143 A.D.3d 409 [1st Dept. 2016]). Furthermore, the law imposes no obligation to take continuous remedial action to remove moisture accumulating as a result of pedestrian traffic (*see Thomas v. Boston Properties,* 76 A.D.3d 460 [1st Dept. 2010]).

In opposition to the motion, Plaintiff fails to raise a genuine issue of material fact with respect to notice. Plaintiff submits an affidavit from her husband who states, among other things, that after the accident, he saw a trail of old and dirty water footprints and puddles of water all the way down to the front entrance of the building, leading him to believe that people had tracked this wet condition from outside of the building. The witness alleges that he had seen this "same

trail" of dirty water footprints and puddles of water during the month of February 2015, when there were a lot of snow storms. He specifically alleges that for three weeks leading up to the accident date, he noticed trails of dirty water inside the building that "grew progressively worse every day up until the day of" his wife's accident. The foregoing attestations are not considered by this Court because they constitute feigned evidence that is tailored to avoid the consequences of Plaintiff's deposition testimony, wherein she testified that she saw no water on the steps at any point before she fell, and she was unaware of any prior complaints concerning water on the steps (*see Carter v. New York City Housing Authority*, 101 A.D.3d 510 [1st Dept. 2012]; *Vilomar v. 490 E. 181st St. Hous. Dev. Fund Corp.*, 50 A.D.3d 469 [1st Dept. 2008]; *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318 [1st Dept. 2000]; *Perez v. Bronx Park South Associates*, 285 A.D.2d 402 [1st Dept. 2001], *lv den*, 97 N.Y.2d 610 [2002]).

Plaintiff's husband's additional allegations that the superintendent was not actually performing any maintenance activities for approximately three weeks leading up to the accident date are premised solely on alleged hearsay conversations, and an uncertified document from the Workers' Compensation Board scheduling a hearing date in October 2016 for a January 2015 injury, but offering little other information. While hearsay may be considered in opposition to a motion for summary judgment, it cannot be the sole evidence upon which the opposition to summary judgment is predicated (*see Narvaez v. NYRAC*, 290 A.D.2d 400 [1st Dept. 2002]). Furthermore, Mr. Al-Hassan presented no evidence that Defendant was ever made aware of the specific condition that caused this accident, and the general awareness that the stairs would become wet during inclement weather is insufficient to establish constrictive notice (*see Rosario v. Bronx Park South III Assoc., LP.*, 90 A.D.3d 421 [1st Dept. 2011]; *Rodriguez v. 520 Audubon Assoc.*, 71 A.D.3d 417 [1st Dept. 2010]). Plaintiff's own deposition testimony established defendants' lack of constructive notice of the transient condition that could have manifested itself only minutes before the accident (*see, e.g., Brooks-Torrence v. Twin Parks Southwest*, 133 A.D.3d 536 [1st Dept. 2015]).

Defendant, however, failed to carry its initial burden of demonstrating that the Building Code violations, as claimed in Plaintiff's verified bill of particulars, were not viable. Where, as here, a plaintiff is also alleging that her accident was caused by New York City Building Code violations that existed on the premises, a defendant moving for summary judgment has the

burden of proving that the violations were not a proximate cause of the accident (*see Ridolfi*, 49 A.D.3d 295), that the premises complied with the Building Code, or that the Building Code was inapplicable to the property in question (*see Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134 [1st Dept. 2000]; *see Powers ex rel. Powers v. 31 E.31 LLC.*, 24 N.Y.3d 84, 92 [2014][it is defendant's burden to "eliminate any doubt" as to the applicability of the building code]). Here, Defendant's moving papers do not address Plaintiff's claims that her accident was caused by violations of Admin Code of City of New York §27-375(f) or (h). Under these circumstances, Defendant never shifted the burden to Plaintiff to raise an issue of fact (*see Sarmiento v. C&E Assoc.*, 40 A.D.3d 524, 528 [1st Dept. 2007][defendant has failed to meet its burden of demonstrating the inapplicability section 27-375 (h)]; *see also Martinez v. 1261 Realty Co., LLC.*, 121 A.D.3d 955, 956 [2nd Dept. 2014]). Contrary to Defendants' contentions, this deficiency in their moving papers may not be rectified in reply (*Migdol v. City of New York*, 291 A.D.2d 201 [1st Dept. 2002]). In light of the foregoing, Defendant failed to demonstrate that these claims are without merit, and its motion for summary judgment seeking dismissal of Plaintiff's claims predicated on violations of the Building Code must be denied (*Sarmiento v. C&E Assoc.*, 40 A.D.3d 524, 528).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is denied on the ground that it failed to carry its burden solely with respect to Plaintiff's statutory claims; and it is further,

ORDERED, that Plaintiff's non-statutory claims are dismissed, for the reasons stated *supra*.

This constitutes the Decision and Order of this Court.

Dated: 2/15/16

Hon. Mary Ann Brigantti, J.S.C.