SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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FERNANDO DIAZ,

Plaintiff,

- v –

CHARLES H. HOUSING ASSOCIATES, CHARLES HILL TOWER ASSOCIATES, and DALTON MANAGEMENT CO.,

Defendants.

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INDEX NO. 160548/13

MOTION DATE

MOTION SEQ. NO. 5

DECISION AND ORDER

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

On August 23, 2012 between 6 and 7 pm, plaintiff allegedly slipped and fell on water on the floor of a hallway in defendants' building. (NYSCEF 70). At his deposition, plaintiff testified that it had rained and thundered that day, between 3 and 4 pm, and that the rain was "forceful." When he stepped into the hallway, his right foot slipped but he did not see anything on the floor that caused him to slip. After he fell, he touched the ground, felt that it was wet, and saw a three to four-foot long puddle of water on the floor. He did not know how long the water had been present on the floor, but believed that it had come from a leak in the ceiling as he had seen a water stain on the ceiling and felt a few drops of water fall on him. (NYSCEF 71).

Defendants' employee testified at his deposition that he had found plaintiff lying on the hallway floor. saw no water on the floor, leaking from the ceiling, water stain, or indication that plaintiff's clothes were wet. (NYSCEF 72). In an affidavit dated February 2, 2017, a certified meteorologist states that, based on his review of weather data from the accident date, it did not rain at all that day. (NYSCEF 77).

A defendant moving for summary dismissal in a slip and fall case has the initial burden of establishing, *prima facie,* that it neither created the defective condition, nor had actual or constructive notice of it. (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]; *Dow v Hermes Realty, LLC*, 155 AD3d 824, 825 [2d Dept 2017]; *Rosario v Prana Nine Props., LLC*, 143 AD3d 409, 410 [1st Dept 2016]). When a defendant demonstrates entitlement to summary dismissal, the burden of proof shifts to the plaintiff to demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1022 [2016]; *Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017]). The plaintiff must "lay bare" its evidence (*Silberstein, Awad & Miklos v Carson, P.C.*, 304 AD2d 817, 818 [2d Dept 2003); "unsubstantiated allegations or assertions are insufficient" (*Lau v Margaret E. Pescatore Parking, Inc.*, 30 NY3d 1025, 1025 [2017]).

Defendants submit evidence of their daily routine for inspecting the premises, and confirm that the routine was followed the day of plaintiff's accident, and that their hourly inspections that day, including one between 6:08 pm and 6:36 pm and another between 7:19 pm and 7:38 pm, did not reveal any water on the hallway floor before or after plaintiff's fall. (NYSCEF 72). They thus establish, *prima facie*, that they did not have actual or constructive notice of the water. (*See Rodriguez v New York City Hous. Auth.*, 102 AD3d 407, 407-08 [1st Dept 2013] [defendant established *prima facie* entitlement to summary judgment by offering

evidence that janitorial schedule existed and was followed]; *Love v New York City Hous. Auth.*, 82 AD3d 588, 588 [1st Dept 2011] [defendant established prima facie entitlement to summary judgment by offering caretaker's testimony that she followed janitorial schedule, swept all staircases in morning and mopped any wet conditions, and informed supervisor of any complaints made]).

Defendants also deny having created the wet condition as there were no leaks in the building or tenant complaints about leaks in 2012, and as there is no evidence of a leak from the ceiling or that it was raining that day.

In opposing the motion, plaintiff contends that there is no evidence that the ceiling leak was due to rain and that plaintiff "testified that he did not know what caused the ceiling leak or the source of the water," and argues that the water's source is insignificant as the leak existed and caused the water condition on the floor which caused plaintiff's accident. (NYSCEF 81). At oral argument, plaintiff's attorney stated that he "understand[s] it wasn't raining that day, and . . . there's maybe no pipes in the roof, but there could be a myriad of reasons why there was water on the roof." Counsel thus argued that defendants' denial that there was water on the roof is speculative and does not eliminate the factual issue. (NYSCEF 101).

Plaintiff concedes that he does not know the source of the water which caused his fall, and relies on the allegation that the ceiling sometimes leaked in attempting to raise a triable issue as to whether defendants had actual notice of the water condition or created it. Absent any evidence of rainfall or any other water accumulation, it would be impermissibly speculative to conclude that the water which caused plaintiff's fall originated from a leak in the roof or from any negligent conduct by defendants. (*See Gibbs v 3220 Netherlands Owners Corp.*, 99 AD3d 621 [1st Dept 2012] [allegation that water might have come from source other than weather

conditions "wholly speculative" and insufficient to raise triable issue as to defendant's actual or constructive notice of wet or slippery condition in stairwell]; *Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125, 1125 [4th Dept 2009] [speculation as to source of wetness and length of time it existed failed to raise triable issue]; *see also Segretti v Shorenstein Co., E., L.P.*, 256 AD2d 234 [1st Dept 1998] [while plaintiff does not bear burden to identify substance which caused fall, "mere speculation regarding causation is inadequate to sustain the cause of action"]).

Moreover, plaintiff submits no evidence that there were frequent leaks of the roof and ceiling that would cause water to accumulate on the hallway floor, within the year before his accident, or, even if there was a recurring leak, that the cause of his fall was water from a leak. (*See Zanki v Cahill*, 2 AD3d 197 [1st Dept 2003], *affd* 2 NY3d 783 [2004] [even assuming that plaintiff showed that defendants had notice of recurring dangerous condition, no evidence that condition existed at time of fall or that it caused fall; fact that plaintiff's sleeve was wet after fall did not support inference that condition existed]).

Thus, absent evidence of an ongoing and recurring dangerous condition existing at the site of the accident which was routinely left unaddressed by defendants, plaintiff fails to raise a triable issue of fact as to defendants' actual notice or creation of the condition. (*Compare McGee v New York City Hous. Auth.*, 122 AD3d 695, 696 [2d Dept 2014] [while defendant established that stairwell inspected before accident and no water condition was found there and that it had not received complaints regarding condition, plaintiff raised triable issue by submitting evidence of recent rainfall during which water accumulated and that previous complaints had been made about leak in roof area above stairwell which allowed water to accumulate whenever it rained]).

I do not consider the affidavit of Patricia Mack submitted by plaintiff in opposition to the motion, as plaintiff never disclosed her as a witness before submitting the affidavit, nor did he

explain his failure to do so even though the affidavit is dated December 9, 2015. (*See Dunson v Riverbay Corp.*, 103 AD3d 578 [1st Dept 2013] [court property refused to consider letter and affidavit from previously undisclosed witness]; *Perez v New York City Hous. Auth.*, 75 AD3d 629 [2d Dept 2010] [affidavit of witness on which plaintiff relied to establish defendant's actual notice of recurrent condition in stairwell should not have been considered as plaintiff did not disclose witness, and absent consideration of affidavits, plaintiff failed to raise triable issue as to notice]; *Garcia v Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept 2009] [submission of previously undisclosed witness's affidavit for first time in opposition to summary judgment improper]; *Ravagnan v One Ninety Realty Co.*, 64 AD3d 481 [1st Dept 2009] [triable issue as to constructive notice not raised as plaintiff precluded from offering affidavit from witness disclosed only after defendants filed summary judgment motion]).

In any event, Mack's affidavit is too conclusory to raise a triable issue as defendants' actual notice. She identifies the substance in which plaintiff was lying as a "puddle of water/clear liquid," and although she states that the hallway, presumably meaning the ceiling of the hallway, "leak[ed] on a constant basis" during the year before plaintiff's accident and that she complained about it at least one to two times a month, she does not state that the ceiling leaked the day of the accident or identify the puddle as having originated from a ceiling leak. Nor does she state to whom she registered the complaints or provide any other details. (*See eg, Clark v New York City Hous. Auth.*, 7 AD3d 440 [1st Dept 2004] [allegations by plaintiff and father that prior complaints made too conclusory to raise triable issue]).

In addition, defendants interviewed Mack at the beginning of this case, apparently as part of their investigation into plaintiff's claims, and recorded the interview, during which she stated that she did not see any water or a leak in the ceiling in the area of plaintiff fell. (NYSCEF 90).

Defendants were thus warranted in believing that Mack was not a witness to the accident, especially as plaintiff did not disclose her as such, and are thus, rejudiced and surprised by her late disclosure and affidavit as they had no opportunity to depose her and ask her about her contradictory statements.

In any event, the affidavit, which conflicts with Mack's recorded statement, can only be considered to have been tailored to avoid the consequences of her earlier statement, and therefore raises no triable issue. (*Cf. Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007] ["affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity," creates feigned factual issue and is insufficient to defeat summary judgment]; *Rodriguez v New York City Hous. Auth.*, 304 AD2d 468 [1st Dept 2003] [same]).

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted in its entirety, and the compliant is dismissed, with costs and disbursements to defendants upon submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly.

2/13/2018
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE