Hooper v 1517 Voorhies Ave, LLC
2018 NY Slip Op 31163(U)
May 10, 2018
Supreme Court, Kings County
Docket Number: 513539/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of May, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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RENEE HOOPER,
Plaintiff,

- against -

1517 VOORHIES AVE, LLC, KORA DEVELOPERS, LLC and ALEX KOSTOVESTKY,
Defendants.

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1517 VOORHIES AVE, LLC, KORA DEVELOPERS, LLC and ALEX KOSTOVESTKY,
Third-Party Plaintiffs,

- against -

IGOR GROSMAN, D.O. P.C.,
Third-Party Defendants.

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DECISION AND ORDER

Motion Sequence #2

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3,
Reply Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a slip and fall incident that allegedly occurred on February 29, 2016. On that day the Plaintiff Renee Hooper (hereinafter "the Plaintiff") allegedly injured herself on a flight of stairs inside the premises located at 1517 Voorhies Avenue, Brooklyn, New York (hereinafter "the Premises").

Defendants 1517 Voorhies Ave, LLC, Kora Developers, LLC and Alex Kostovestky (hereinafter "the Defendants") now move (motion sequence #2) for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint of the Plaintiff. The Defendants argue that the instant matter should be dismissed because they did not have actual or constructive notice of the alleged condition that caused the alleged incident and because the Plaintiff made inconsistent statements regarding her activities on the day of the alleged accident.

In opposition, the Plaintiff argues that the Defendants have failed to meet their *prima facie* burden and the motion should be denied. The Plaintiff argues that the Defendants' initial argument that statements made by the Plaintiff regarding where she received medical care on the date of the accident are not determinative of whether the Plaintiff fell at the Premises and that any issue relating to the Plaintiff's inconsistency is one of credibility that is properly determined by a jury and not by means of a summary judgment application. In addition, the Plaintiff argues that the Defendants have not met their *prima facie* burden regarding whether the Defendants had actual or constructive notice of the alleged condition of the flight of stairs given that the testimony they rely on to support their position is insufficient as a matter of law.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In a slip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

Turning to the merits of the instant motion, the Defendants have failed to sufficiently show through testimony or other evidence that they "neither created the allegedly dangerous condition" ... or "...had actual or constructive notice of it." *Hudlin v. Epicurean Deli*, 46 A.D.3d 752, 847 N.Y.S.2d 479 [2nd Dept, 2007]. In support of their position that they did not have actual or constructive notice, the Defendants rely on the deposition testimony of Alex Kostovestky, a

managing member of Defendant Kora Developers, LLC. When asked what his responsibilities are as the manager of the Premises, Alex Kostovesky testified (Defendants' Motion, Exhibit "G," Page 17) that it involved "[l]easing vacant offices, collecting rents, and maintaining the property in clean and good shape." When asked (Defendants' Motion, Exhibit "G," Page 18) whether this involved sweeping, mopping and making sure the common areas were free from debris he answered "[y]es." When asked what the responsibilities of the superintendent of the Premises were, Kostovesky answered (Defendants' Motion, Exhibit "G," Page 19) that "[h]e's coming daily in the evening to sweep and mop the common area." When asked whether he himself cleans, sweeps and mops the Premises he answered (Defendants' Motion, Exhibit "G," Page 21) no "[w]hat I meant is overseeing the superintendent doing that." However, as the Plaintiff points out in her Affirmation in Opposition, this testimony generally relates to the Defendants' custom and practice and the responsibilities of the superintendent, who did not testify. It does not relate specifically to Kostovesky's own activities on the day in question or shortly prior to the incident at issue. Moreover, the Defendants presented no documentary evidence such as log books or sign in sheets relating to cleanings and/or inspections. A motion will fail if it merely presents testimony regarding general cleaning and inspection procedures, but fail to provide evidence regarding when the area in question was last cleaned or inspected relative to when the Plaintiff's injury occurred. *See Farrell v. Waldbaum's, Inc.,* 73 A.D.3d 846, 847, 900 N.Y.S.2d 453, 454 [2nd Dept, 2010].

The Court is also not persuaded by the Defendants' contention that the Plaintiff's inconsistent statements prove that the alleged incident did not occur at the Premises. A court may not grant summary judgment based upon a determination of a party's credibility. *See Gaither v. Saga Corp.*, 203 A.D.2d 239, 240, 609 N.Y.S.2d 654, 655 [2nd Dept, 1994]. Moreover, "[a]ll of the evidence must be viewed in the light most favorable to the plaintiff, as the opponent of the

motion for summary judgment, and all reasonable inferences must be resolved in her favor." *Boyd v. Rome Realty Leasing Ltd. P'ship*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340, 341 [2nd Dept, 2005]. As the Plaintiff contends in her Affirmation in Opposition, it is reasonable to infer that the Plaintiff went to the Premises first and then at some later time to the 214 Avenue P location for her colonoscopy. Finally, the notice to admit (Defendants' Motion Exhibit "J"), which seeks an admission concerning where the Plaintiff had her colonoscopy, cannot be used as an admission by Plaintiff (by omission) that the Plaintiff did not injure herself at the Premises. That issue goes to the heart of the controversy in this case. *See Ramcharran v. New York Airport Servs., LLC*, 108 A.D.3d 610, 611, 969 N.Y.S.2d 497, 498 [2nd Dept, 2013]; *Altman v. Kelly*, 128 A.D.3d 741, 743, 9 N.Y.S.3d 359, 361 [2nd Dept, 2015].

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion is denied.

The foregoing constitutes the Decision and Order of the Court.

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Date: May 10, 2018

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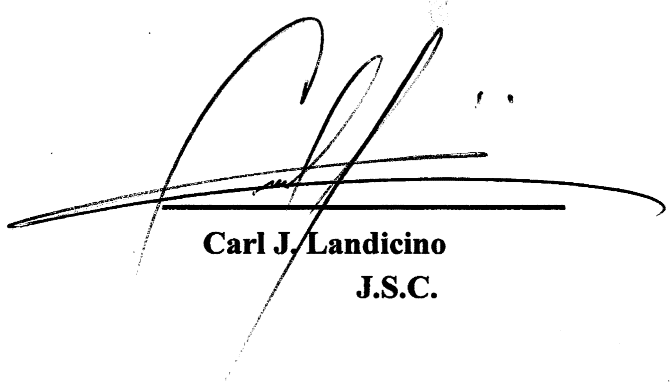

Carl J. Landicino
J.S.C.