SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

CINDY ROSA,

Plaintiff,

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

INDEX NO. 160099/2014

MOTION DATE 6/25/18

MOTION SEQ. NO. 002

NYSCEF Doc Nos. 18–50 were read on this motion for summary judgment.

Motion by Defendant Terence Cardinal Cooke Health Care Center pursuant to CPLR 3212 for summary judgment in favor of Defendant and against Plaintiff Cindy Rosa ("Rosa") is denied.

BACKGROUND

Plaintiff commenced the instant action on October 15, 2014, by e-filing a summons and verified complaint ("Complaint"). The Complaint alleges that, on July 20, 2014, Plaintiff slipped and fell at 1249 Fifth Avenue, New York, New York 10029 due to the negligence of Defendant. On February 11, 2015, Defendant interposed its answer, and on March 16, 2015, the parties appeared for a preliminary conference before the Hon. Justice Shlomo Hagler, J.S.C. The resulting preliminary conference order provided that "[a]ny dispositive motion(s) shall be made on or before 60 days after [the note of issue] is filed."[1] (NYSCEF Doc No. 6, at 2 [PCO].)

Thereafter, the parties engaged in discovery, and Justice Hagler issued five further discovery conference orders, with his last dated July 18, 2016. (NYSCEF Doc Nos. 7–11.) On August 16, 2016, the action was transferred to this Court by an order of the administrative justice. After this Court issued five discovery conference orders of its own (NYSCEF Doc Nos. 12–16), on August 16, 2017, Plaintiff filed her certificate of readiness and note of issue. (NYSCEF Doc No. 17 [First NOI].)

Sixty days later, on October 16, 2017, Defendant filed motion seq. 001 pursuant to CPLR 3212 for summary judgment dismissing the Complaint. (NYSCEF Doc No. 18.) On October 27, 2017, this Court signed an order that withdrew motion seq. 001, vacated the First NOI, directed further discovery, directed that the note of issue be refiled no later than January 31, 2018, and stated "[a]fter the Note of Issue is filed, Defendant is permitted to re-file its Motion for Summary Judgment *as per CPLR guidelines*." (NYSCEF Doc No. 30 [emphasis added].)

[1] The number "60" was handwritten above a crossed-out handwritten number "120".

On January 31, 2018, Plaintiff refiled her certificate of readiness and note of issue. (NYSCEF Doc No. 31 [Second NOI].) On May 10, 2018, Defendant filed the instant motion, seq. 002, pursuant to CPLR 3212 for summary judgment dismissing the Complaint.

Defendant argues that Plaintiff fell near elevator 2C on the second-floor lobby at its medical facility. Defendant further argues that Plaintiff had recently had knee replacement surgery and was rehabilitating at the time of the accident. Defendant then argues that Plaintiff used the second-floor elevator bank, which consisted of two elevator cars, to go up to the fourth floor. Defendant then argues that Plaintiff slipped and fell in water when she returned to the second floor.

Defendant argues that Plaintiff never saw the water on which she slipped when she went up the elevator. Specifically, Defendant argues that Rosa said that, before going up to the fourth floor, she did not notice anything on the floor next to the elevator where she would later fall. Defendant further argues that the lighting was adequate. Defendant further argues that Plaintiff has failed to establish that there were any leaks, spills, or other water sources nearby indicating that Defendant did anything to cause or create the condition. Defendant further argues that it had no notice of the alleged hazard. In sum, Defendant argues that "the evidence fails to support plaintiff's claims and, therefore, summary judgment should be granted because there exists no triable issue of fact.

Plaintiff argues in opposition that Rosa had been undergoing substantial treatment and physical therapy at Defendant's medical facility after a June 30, 2014 knee replacement surgery. Plaintiff further argues that Rosa had been using a rolling walker after the surgery and on the date of the accident. Plaintiff then argues that, on the date of the accident, Rosa went up to the fourth floor using one of the two elevators (the "first elevator") in the second-floor elevator bank. Plaintiff further argues that, when Rosa came down from the fourth floor to the second floor, she used the other of the two elevators that opens to the second-floor elevator bank (the "second elevator").

Plaintiff also argues that Rosa, when asked, "Did you notice anything on the floor next to the second elevator, in front of the second elevator?" responded, "No, I did not." (Tr at 33, lines 17–20.) Plaintiff then argues that Rosa never testified that there was no water or puddle there, only that she did not "notice" anything there. Plaintiff further argues it is undisputed that the water was a clear or light color and that the floor was also a light color. Plaintiff argues, in sum, that Rosa would not have noticed any spilled water on her way up to the fourth floor because she did not take the same elevator on her way up as she took on her way back.

Plaintiff argues that, as such, Defendant has failed to show that it did not have notice of the water that caused Rosa's fall. Plaintiff argues that Defendant failed to provide inspection logs, video, or witness testimony from witnesses with personal knowledge as to the subject location prior to the accident.

Defendant argues in reply, in sum and substance, that Plaintiff cannot establish that Defendant caused the alleged hazard or had actual or constructive notice of it. Defendant further

argues that, even if certain witnesses did not personally witness the subject area prior to the accident, those witnesses had knowledge of the policies and procedures in place at the time of the accident. Defendant also argues that the daily floor cleaning plan called for the subject area to have been cleaned several hours prior to the incident.

DISCUSSION

CPLR 3212 (a) provides as follows:

> "Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. *If no such date is set by the court*, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

(Emphasis added.) A showing of good cause requires that the movant explain its tardiness to the motion court satisfactorily. (*See Brill v City of New York*, 2 NY 3d 648, 652 [2004].) That a motion for summary judgment may be meritorious or nonprejudicial does not affect this bright-line rule. (*Id.*; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 83 [1st Dept 2013]; *Glasser v Abramovitz*, 37 AD3d 194 [2d Dept 2007].)

In his affirmation in support of motion seq. 001, Defendant's counsel stated that "[a]ccording to the timeframe set forth in the [PCO] [], the instant motion is timely." (NYSCEF Doc No. 19, ¶ 7.) In the instant motion, Defendant's counsel recalled the procedural history of its first motion for summary judgment and again noted that its prior motion was timely. (Affirmation of Atlas ¶ 7.) Defendant's counsel then stated that, "[p]ursuant to the [October 27, 2017] Order, [Defendant] is permitted to re-file its motion for summary judgment, *in accordance with CPLR guidelines*[.] [] Consequently, the instant motion for summary judgment is timely." (*Id.* ¶ 9.)

The Court disagrees. In the instant action, the PCO directed that a motion for summary judgment must be filed within 60 days of the filing of the note of issue. The First NOI was filed on August 16, 2017. The first motion for summary judgment was filed on October 16, 2017. Accordingly, Defendant's first motion for summary judgment was properly filed within 60 days after the filing of the First NOI and was timely.

The Court's October 27, 2017 order did not vacate or amend the PCO. Rather, it permitted Defendant to refile its motion for summary judgment "as per CPLR guidelines." Those "guidelines" are codified in CPLR 3212 (a) in that the court may set a date after which no motion for summary judgment may be made that is anywhere from 30 to 120 days after the filing of the note of issue. In the absence of such a date, the default is 120 days. Here, the PCO was clear—60 days—and this was clear to Defendant, as its first motion was filed 60 days after the filing of the First NOI. The Second NOI was filed on January 31, 2018. Based upon the PCO, and consistent with the October 27, 2017 order, Defendant was permitted to refile its motion for summary

judgment within 60 days of the filing of the note of issue, as per the "guidelines" in CPLR 3212 providing that the court may fix a deadline for filing dispositive motions. Defendant was thus permitted to refile no later than Monday, April 2, 2018. Defendant refiled on May 10, 2018, 38 days later. As such, the instant motion is not timely.

In *Quinones v Joan and Sanford I. Weill Medical College and Graduate School of Medical Sciences of Cornell University*, the Appellate Division, First Department affirmed the motion court's denial of a defendant's motion to extend the time to move for summary judgment under similar circumstances. (114 AD3d 472 [1st Dept 2014].) The January 5, 2011 preliminary conference order, entered by Justice Goodman, directed that dispositive motions were to be filed within 45 days of the filing of the note of issue. Subsequently, the matter was reassigned to Justice Hagler. About 75 days after the filing of the note of issue, the defendant moved pursuant to CPLR 2004 to modify the January 5, 2011 order or extend the time to move for summary judgment. In support of its motion, the defendant stated that it had overlooked the deadline. The motion court declined to modify the order or extend the time to move for summary judgment.

The Appellate Division, First Department found that the defendant's motion for summary judgment would not have been timely under the schedule set by the January 5, 2011 preliminary conference order. The court stated that a showing of good cause for the delay must be "something more than mere law office failure." (*Id.* at 473.) The court held that counsel's claim that it inadvertently overlooked the date was "a perfunctory claim of law office failure" and affirmed. (*Id.* at 474.)

The instant situation parallels what the court faced in *Quinones*, except here, instead of Justice Hagler having another justice's preliminary conference order reassigned to him, it is now this Court that has had Justice Hagler's PCO reassigned to it. The Court finds nothing in its October 27, 2017 order that could be construed as abrogating the timeline set forth in the PCO and extending Defendant's time to file a dispositive motion by 60 days. At best, Defendant's only cognizable excuse would be a claim of misreading the October 27, 2017 order. Such a mistaken belief amounts to a perfunctory claim of law office failure and does not constitute good cause for the delay. It was incumbent upon Defendant to contact the Court were there any doubt of the meaning of the October 27, 2017 order, which was drafted by Defendant's counsel. Nevertheless, this was not done.

Assuming for the sake of argument that the Court found good cause for the delay—which it has not—and considered the instant motion on the merits, the Court would have found that Defendant failed to show prima facie entitlement to judgment as a matter of law. It is Defendant's burden on its motion for summary judgment, not Plaintiff's, to show that it did not create the dangerous condition or have notice thereof. (*See Bryan v 250 Church Assoc.*, 60 AD3d 578, 578 [1st Dept 2009]; *DeMilia v DeMico Bros.*, 294 AD2d 264, 264 [1st Dept 2002].) Defendant failed to show both that it did not create or cause the dangerous condition and that it did not have actual or constructive notice of the dangerous condition. Defendant's proof submitted consisted of statements of witnesses with no personal knowledge as to the condition of the floor at the time of Plaintiff's accident. That Plaintiff herself did not observe any water on the floor prior to her fall is of no moment. Her own testimony submitted on the instant motion,

together with her affidavit submitted in opposition, raise an issue of fact as to how long the floor was wet prior to Plaintiff's fall.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Terence Cardinal Cooke Health Care Center pursuant to CPLR 3212 for summary judgment in favor of Defendant and against Plaintiff Cindy Rosa is denied; and it is further

ORDERED that, within 20 days of entry, Plaintiff shall serve a copy of this order with notice of entry upon Defendant.

The foregoing constitutes the decision and order of the Court.

Dated: August 10, 2018
New York, New York

HON. ROBERT D. KALISH J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
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☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE