SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

----------X

BERTHA BAUER,

Plaintiff,

- v -

DOG DAYS OF NEW YORK, LLC, and BEWSS COMPANY, A NY LIMITED PARTNERSHIP,

Defendants.

----------X

INDEX NO. 160493/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38-49 were read on this motion for summary judgment.

Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

By summons and complaint dated May 13, 2016, plaintiff commenced this action against defendants alleging that she had sustained injury by slipping and falling at the premises located at 2581 Broadway in Manhattan. (NYSCEF 39). In her verified bill of particulars dated May 2, 2017, plaintiff alleges, as pertinent here, that on December 29, 2015, she slipped and fell while descending a wet and rainy stairway from defendant Dog Days of New York, LLC's (Dog Days) store to the street exit. (NYSCEF 40).

A. Plaintiff's deposition (NYSCEF 42, 45)

Plaintiff testified that on the morning of her accident, it had been snowing and at approximately 11 am, the snow changed to a light rain. She arrived at the premises at

approximately 1:00 pm, while it was still raining, and she ascended the stairs from the street to Dog Days's reception area on the second floor of the building. She claimed to have never had an issue with the stairs and observed that they had a "gray rubber" covering to give them traction. She acknowledged that her coat and boots were wet and recalled that when she ascended the stairs that day, the steps were "glistening" and "shiny," but her feet did not slip, and that the landing at the top of the steps had a small pool of water, which she characterized as likely due to those who had come before her.

In the reception area, she and Dog Days's owner talked about the weather, and he told her that he had "just mopped the steps because they were wet." He added that "he couldn't be responsible for mopping the steps after each and every person came up," and he did not mention the condition of the stairs. Plaintiff saw no warning signs at the premises nor any mops, buckets, or brooms in the reception area. Soon thereafter, plaintiff left the reception area and, while holding the railing with her right hand as she descended, slipped on the stairs, which were still "glistening."

After plaintiff fell, she sat on the stairs and Dog Days's owner called for an ambulance. While waiting for the ambulance, plaintiff took pictures of the stairs. She identified a wet spot in photographs she had taken and denied having seen it when she first arrived. The photos reflect that the stairs were covered in a gray material to add traction, and that there were no mats or rugs on either the top or bottom of the stairway.

B. BEWSS deposition (NYSCEF 43)

At his deposition on March 2, 2018, defendant BEWSS Company's property manager testified that BEWSS owns the premises and that Dog Days is the sole tenant of the second-floor retail space. He denied that BEWSS is responsible for removing water from the stairs, and stated

that Dog Days has "exclusive egress and ingress into Dog Days" and that only Dog Days has the key to the front door of the premises.

C. Dog Days's deposition (NYSCEF 44)

At his deposition on April 25, 2018, Dog Days's owner acknowledged its responsibility for maintaining the stairs. When he arrived at the premises at 12:30 pm on the date of plaintiff's accident, the stairs looked dry and he could discern that they had been cleaned by an employee a few minutes before he arrived. While he did not confirm with the employee that the stairs had just been cleaned, he claimed that there were mud streaks on the stairs which reflected a recent cleaning. While he acknowledged having spoken with plaintiff when she arrived that day, he did not recall the content of their conversation nor did he know whether the stairs were wet where she fell.

II. CONTENTIONS

A. Defendants (NYSCEF 38-47)

Defendants contend that plaintiff fails to meet her *prima facie* burden of showing that defendants created or had notice of the condition that caused her accident. They observe that plaintiff testified that the stairs had rubber traction on them, that she had no difficulty ascending them that day, that her clothes and shoes were wet, that she had not notified anyone at Dog Days about the stairs' wet condition, and that she did not know what or who made the stairs wet or for how long they had been wet before her accident. Defendants rely on the testimony of Dog Days's owner that Dog Days was responsible for maintaining the staircase, that the stairs were dry when he arrived that day because an employee had recently mopped them, and that he observed no water on the steps where plaintiff was sitting after her accident. Absent notice of the condition, they claim to have been unable to discover and remedy it. In addition, defendants

argue that BEWSS is not responsible for maintaining the stairs and thus, cannot be held liable.

In support, defendants submit the affidavit of a professional engineering consultant who conducted an inspection of the premises on September 20, 2018 and opines that the steps, which have tread covers, are "slip resistant in wet conditions and code compliant to American National Standard Institute Safety Standards." He denies that there were any "safety deficiencies, defects or code violations" that may have caused or contributed to plaintiff's accident. (NYSCEF 46).

B. Plaintiff (NYSCEF 48)

In opposition, plaintiff observes that there is no dispute that that she slipped and fell on the staircase, that her coat and rubber boots were wet when she arrived, and that it was snowing and raining that day. She relies on her testimony that the stairs were "glistening and shiny" when she arrived, which prompted her to hold on to the railing, that there was no carpeting or mats in the vestibule to absorb water, that she could only dry her feet at the top of the stairs, which she did, that there was a pool of water at the top of stairs left from other visitors, that during her conversation with Dog Days's owner, he never mentioned wet conditions, that she saw no warning signs, and that she did not recall seeing mops, buckets, or brooms in the reception area. What she recalls from her conversation with Dog Days's owner is that he had told her that he had just mopped the stairs but could not do so continually. She argues that having told her that he himself mopped the stairs, Dog Days's owner lied as he had testified to the contrary at his deposition. Plaintiff thus maintains that there is no proof that a Dog Days employee had mopped the steps before its owner arrived. If an employee had mopped the stairs, she argues that Dog Days's owner would have known of the "need for continued mopping." Thus, questions of fact exist as to whether the stairs were wet before and after plaintiff ascended the stairs, whether there were or should have been mats or rugs in the stairway vestibule to absorb water, and whether

defendants mopped or should have mopped the area after plaintiff's arrival.

Plaintiff maintains that defendants are liable because they knew of the dangerous conditions through their employees, and that they should have mopped the stairs before her accident, and failed place any warning sign, mats, or other devices to the prevent the wet condition. She asks that the opinion of defendants' expert be disregarded as too vague.

C. Reply (NYSCEF 49)

Defendants maintain that regardless of whether they had mopped the floor earlier in the day, there is no obligation to continuously mop, that awareness of the weather does not constitute notice of the hazardous condition, that the steps were water resistant, and that they had no obligation to place mats or caution signs. They rely on the testimony of Dog Days's owner that the stairs were dry when he arrived, approximately 30 minutes before plaintiff slipped, and that there is no evidence that he knew of the wet condition. They assert that their expert's opinion is sufficiently detailed to support his findings.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable

inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. BEWSS

An out-of-possession landlord is generally not liable for injuries that occur on its property. (*Henry v Hamilton Equities, Inc.*, NY3d , 2019 NY Slip Op 07642 [Sup Ct, New York County 2019]; *Grippo v City of New York*, 45 AD3d 639, 640 [2d Dept 2007]). BEWSS's managing agent's testimony that BEWSS has no key to the premises and is not responsible for maintaining or cleaning the staircase establishes *prima facie* that it is an out-of-possession landlord not subject to liability. (*See e.g.*, *De Jesus v Tavares*, 2014 WL 12540283, *1 [Sup Ct, NY County 2014], *affd* 140 AD3d 433 [1st Dept 2016] [defendant landlord's *prima facie* burden met where landlord affirmed that she did not reside in building and was out of possession]; *Lemay v Hush Bar & Lounge, Inc.*, 103 AD3d 854, 855 [2d Dept 2013] [affidavit of landlord's manager that landlord was out-of-possession with no control over premises is sufficient to satisfy *prima facie* burden]).

In opposition, plaintiff does not contest that BEWSS is an out-of-possession landlord nor does she "submit any evidence of either a specific statutory violation or a significant structural or design defect." (*Jeter v Seagull Assocs., Inc.*, 43 AD3d 871, 871 [2d Dept 2007]). Accordingly, BEWSS may not be held liable to plaintiff.

B. Dog Days

A defendant moving for summary judgment in an action involving a dangerous condition bears the *prima facie* burden of establishing that it neither created nor had actual or constructive notice of the condition. (*Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017]). Constructive notice exists when "[the] condition was dangerous ... visible and apparent, and had existed for a sufficient length of time prior to the accident to permit the defendant's employees to

discover and remedy it." (*Harrison v New York City Tr. Auth.*, 113 AD3d 472, 473 [1st Dept 2014]). Lack of constructive notice is established by "evidence of [defendant's] maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]).

While Dog Days's owner's testimony demonstrates that the floor was dry when he arrived at 12:30 pm the day of plaintiff's accident, plaintiff's testimony establishes that they were wet at 1:00 pm. Thus, viewed in the light most favorable to plaintiff, the evidence demonstrates that the condition could have existed for 30 minutes before she fell and defendants offer no evidence that Dog Days had inspected the stairs or as to the condition of the stairs during those 30 minutes. (*See Kowalczyk v Time Warner Entm't Co., L.P.*, 121 AD3d 630, 631 [1st Dept 2014] [denying summary judgment where defendant did not inspect hazardous condition before accident]). As a jury could find that defendants had constructive notice of the wet hazardous condition for up to 30 minutes on a rainy and snowy day, Dog Days does not demonstrate, *prima facie*, its entitlement to summary judgment. (*See Hill v Manhattan N. Mgmt.*, 164 AD3d 1187, 1188 [1st Dept 2018] [whether water was present for sufficient time to discover and remedy condition is a factual issue]; *Sweeney v Riverbay Corp.*, 76 AD3d 847, 848 [1st Dept 2010] [issue of fact if defendant had sufficient time to remedy dangerous condition which existed for approximately 30 minutes]; *Rose v Da Ecib USA*, 259 AD2d 258, 260 [1st Dept 1999] ["a jury could find constructive notice where the plaintiff's evidence suggested that the puddle was created between 10 and 30 minutes before the accident"]).

Plaintiff's assertion that Dog Days's owner lied relates to matters of credibility that cannot be determined on this motion. (*See Genesis Merch. Partners, L.P. v Gilbride, Tusa, Last*

& Spellane, LLC, 157 AD3d 479, 485 [1st Dept 2018] [credibility issues are not appropriately resolved on a summary judgment motion]).

Given this result, defendants' expert evidence need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted to the extent that plaintiff's claims against BEWSS Company, a NY Limited Partnership are severed and dismissed, and is otherwise denied, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

10/25/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE