SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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MILDRED VILLANO,

Plaintiff,

- v -

MUTUAL REDEVELOPMENT HOUSES, INC., HERCULES CORP.

Defendant.

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INDEX NO. 154224/2017

MOTION DATE 10/17/2019, 10/17/2019

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 78, 83, 84, 85, 86, 87, 88, 92 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 89, 90, 91, 93, 94 were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) by defendant Mutual Redevelopment Houses, Inc. ("Mutual") for summary judgment dismissing this action is granted. The motion (MS003) by defendant Hercules Corp. ("Hercules") for summary judgment dismissing this action is granted.

Background

This action arises out of an alleged slip and fall that took place in the laundry room of a building owned by defendant Mutual. Plaintiff claims that on June 27, 2015, she took down her cart of laundry to the laundry room. Plaintiff admitted that she did not see any liquid on the floor of the laundry room prior to her accident (NYSCEF Doc. No. 48 at 30-31 [plaintiff's deposition

transcript]). Plaintiff also testified that she did not see any water coming out of the machines after she closed the doors of the machines (*id.* at 31).

Plaintiff contends that after starting the machines (plaintiff was doing multiple loads of laundry), she took about four or five steps from the washer before she fell (*id.* at 32). She claimed that "I felt like somebody pulled the floor out from under me. I was walking and all of a sudden I was up in the air and down, a major fall was [sic] on my elbow" (*id.*). While plaintiff was on the ground after falling, she insists she "observed that it was wet. I observed that the water was seeping out of, I believe, one of the machines that I just started. It was seeping out" (*id.* at 35).

Plaintiff admitted that she had not seen water seeping from the subject washing machine prior to the accident and that she had never made complaints about leaking machines (*id.* at 37-38). She claims that puddle of liquid was about two feet by two feet coming from the machine (*id.* at 44).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"It is settled law that a landowner is under a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. However, as a prerequisite for recovering damages, a plaintiff must establish that the landlord created or had either actual or constructive notice of the hazardous condition that precipitated the injury. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it. Moreover, a plaintiff may raise a triable issue of fact regarding constructive notice by adducing sufficient evidence that an ongoing and recurring dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord" (*Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 373, 806 NYS2d 534 [1st Dept 2005] [internal quotations and citations omitted]).

MS002

Mutual claims that it had neither actual nor constructive notice of the unsafe condition (the puddle that allegedly caused plaintiff to fall) and that it cannot be held negligent. Mutual

insists that plaintiff's deposition demonstrates that it had no notice—she admits she did not see any liquid prior to the accident and that she noticed the machine leaking only after she had started a load of laundry.

In opposition, plaintiff emphasizes that Mutual does not keep records about spills or other maintenance jobs in the laundry room. Plaintiff concludes that Mutual has not offered enough evidence to establish it lacked the requisite constructive notice. She claims there is an issue of fact with respect to how long the puddle existed before her accident.

The Court grants Mutual's motion because plaintiff's deposition testimony demonstrates the unsafe condition did not exist when she went down to the laundry room. According to plaintiff's account, the unsafe condition appeared to arise from the washing machine after she started it. That amount of time (a few minutes) is not enough to support a finding that Mutual had constructive notice of the puddle and there is no evidence Mutual had actual notice or created the unsafe condition.

MS003

Hercules claims that it performs maintenance when a complaint is made and it did not receive a complaint for the washing machine at issue here. Hercules points out that there was one prior complaint for the subject machine from February 2015 and it was fixed on February 17, 2015. Hercules theorizes that machines often leak because users overload the washers. Hercules adds that it did not have actual or constructive notice of the defective condition. Hercules also argues that there is no evidence that it created the dangerous condition.

In opposition, plaintiff contends that Hercules created the dangerous condition by failing to exercise reasonable care in its preventative maintenance of the washer. Plaintiff argues that when she returned to the laundry room after her fall (plaintiff apparently completed her laundry

on the day of the accident), there was a rag underneath the machine and the rag was wet. Plaintiff also points out that there was a "corrosive rust" on the door of the machine and water could have leaked from there.

As an initial matter, the Court observes that Hercules had neither actual nor constructive notice of the condition. As stated above, plaintiff testified that the condition arose right after she started her laundry. Therefore, Hercules can only be held liable if it created the condition—here, that means that Hercules failed to properly maintain the washer that allegedly leaked.

For some reason, plaintiff did not present any expert evidence regarding what was wrong with the washer. Rather, plaintiff speculates that there was "corrosive rust" on the door and, somehow, that caused the washer to leak. But that is not enough to raise an issue of fact with respect to Hercules' prospective liability. Plaintiff cannot raise an issue of fact based on pure speculation about how the dangerous condition arose especially where, as here, plaintiff insists there was no water on the ground when she entered the laundry room.

Without an expert report explaining what exactly was wrong with the machine, plaintiff is essentially pursuing a *res ipsa* theory of negligence. In other words, plaintiff claims that because she fell from water emanating from the washer, Hercules must necessarily have failed to properly maintain the machine. But *res ipsa* does not apply here because Hercules does not have exclusive control over the use of these machines (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227, 501 NYS2d 784 [1986] [noting that exclusive control does not arise where the evidence fails to eliminate third-party activities]). As Hercules points out, leaking can occur when a user overstuffs the washing machine.

To be clear, the Court is not finding as a matter of law that plaintiff overstuffed the machine. Instead, the Court finds that *res ipsa* cannot apply because the actions of third parties

could cause the machine to leak. And because plaintiff did not offer a specific explanation of what was wrong with the washing machine, the Court is unable to find an issue of fact. Speculation about Hercules' negligence is not sufficient to raise an issue of fact (*see LoBianco v Lake*, 62 AD3d 590, 690-91, 879 NYS2d 135 [1st Dept 2009]).

Summary

The Court recognizes that plaintiff claims that she slipped and fell on water coming from the washer she had just started. But that does not raise an issue of fact with respect to whether Mutual or Hercules were negligent. There is no question that there was no actual or constructive notice of the puddle (plaintiff had just started the load of laundry). And plaintiff's speculation that Hercules must have failed to properly maintain the washer is not enough to raise an issue of fact. The picture of the door submitted by plaintiff (NYSCEF Doc. No. 81) does not support a claim that the machine was improperly maintained.

The indemnification issues between Mutual and Hercules are moot given that the Court has found that neither party is negligent.

Accordingly, it is hereby

ORDERED that the motion (MS002) by defendant Mutual Redevelopment Houses, Inc. and by defendant Hercules Corp., (MS003) for summary judgment dismissing the complaint is granted and the clerk is directed to enter judgment in favor of both of these defendants, with costs, upon presentation of proper papers therefor.

10/24/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

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