SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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PAUL TOBOLA,

Plaintiff,

-against-

123 WASHINGTON, LLC, STARWOOD HOTEL & RESORTS WORLDWIDE, LLC, BOARD OF MANAGERS OF 123 WASHINGTON CONDOMINIUM, W HOTEL MANAGEMENT, INC., AND TOWN HOUSE SPECIALTY CLEANING CO.,

Defendants.

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Index No. 152130/18
Motion Sequence 02

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, defendants 123 Washington, LLC (123 Washington), W Hotel Management, Inc. (Hotel), and Town House Specialty Cleaning Co. (Townhouse) (collectively, Defendants) move for summary judgment dismissing all claims against them. Plaintiff Paul Tobola (Plaintiff) opposes Defendants' motion and cross-moves for summary judgment against Townhouse. As more fully set forth below, both the motion and cross-motion are denied.

At the outset, the court notes that there is video footage of the accident itself. As such, many of the facts are undisputed. Indeed, there is no question that the accident took place on January 8, 2018 when Plaintiff slipped and fell on a combination of water and cleaning floor solution that had been spread by a housekeeper on the 5th floor lobby of the W Hotel located at 123 Albany Street in Manhattan.[1]

In addition to the video evidence, the Plaintiff, hotel manager, and housekeeper were deposed. According to Plaintiff[2] the incident occurred at approximately 2:00AM as he was

[1] 123 Washington owned the hotel and hired Townhouse as its cleaning contractor.

[2] Plaintiff was deposed on April 26, 2019 (Tobola Deposition).

[1]

preparing to check-in to the Hotel. He exited the lobby elevator, placed his bags down by the front desk, and walked through the lobby in order to use the bathroom. On his way back to the front desk to retrieve his bags he slipped and fell onto his right side, injuring his head and wrist. Plaintiff testified that before he slipped he did not see the puddle that caused him to fall. He also did not see any workers cleaning the floor or yellow warning signs in the lobby or hallway leading to the restroom (Tobola Deposition pp. 37-39).

Ms. Joanna Sanchez, the Hotel's general manager, was deposed on behalf of 123 Washington and W Hotel.[3] Among other things, Ms. Sanchez testified that she was on duty the night of the incident but did not witness Plaintiff's fall. She testified that she reviewed an incident report prepared by the Hotel's security officer[4] before speaking with the Plaintiff in person at about 11:00AM, about nine hours after the accident (Sanchez Deposition p. 53):

> A. [Plaintiff] stated he arrived at the hotel very late, checked in, walked over towards the rest rooms. I recall him saying he noticed wet floor signs. He walked around them, went to the rest room. When he came back out [he] stated the floor was wet, slipped, fell, hit his head and broke his glasses. . . .

The Hotel's security cameras captured the area in question before and during the accident.[5] It was played back to Ms. Sanchez at her deposition. At time stamp 14:40 (2:19AM), the video depicts a person employed by Townhouse cleaning the floor. At 15:04 the video shows Plaintiff walking through the lobby towards the bathroom. At 15:17, while Plaintiff is in the bathroom, the video depicts the Townhouse employee pouring a bottle of cleaning solution onto the floor in front of the guest elevators. Ms. Sanchez confirmed that there were two yellow wet floor signs in view of the camera, but they were placed near the entrance to the rest room. At 17:19 the Townhouse employee steps away. At 19:51 Plaintiff is seen walking towards the front desk. At 19:55 he is

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[3] Ms. Sanchez was deposed on April 30, 2019 (Sanchez Deposition).

[4] Defendants' exhibit L (Incident Report).

[5] The court has reviewed the video and deems it to be part of the record.

seen falling. Ms. Sanchez conceded that the Townhouse employee was not in the area at the time of the accident (Sanchez Deposition pp. 67-71). However, about 15 minutes before the accident, Ms. Sanchez personally observed the Townhouse employee who cleaned the floor place down caution signs (*id.* at 81):

> A. I recall him placing . . . three signs I saw him move. Originally it had one in the hallway by the rest rooms. One in front of the elevators and one on the other side of the elevators in the hallway, and then he moved to put two in front of the rest room, kind of blocking it off, and he moved the third sign out of view on the other side closer to the welcome desk....

She also testified that she had never seen an employee pour cleaning solution onto the floor in a manner depicted in the video (*id.* at 75-76):

> Q. When your staff does their mopping they do small areas at a time because they are using a spray bottle?
>
> A. Yes.
>
> Q. They don't pour any wet fluid on the ground like in the video?
>
> A. I have never seen anybody pour fluid on the ground, no.
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> Q. Ms. Sanchez, in your 20 years experience and all the training you got through Marriot and also outside of Marriot and W Hotel, is pouring water, cleaning solution and then walking away, would you agree that's not a safe practice?
>
> A. It is not how I would clean it or how I was trained to clean it.
>
> Q. If your security people saw a wet area the size that we just saw in the video what are they trained to do?
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> A. They would go to the area and secure that area and honestly they would probably clean it up themselves or put down a couple more floor signs.
>
> Q. Would that also be true of your housekeeping staff?
>
> A. Yes.

Mr. Juan Burgos, the person who cleaned the floor the night of the incident, was deposed on behalf of Townhouse.[6] He testified that he was supervised by the Hotel's front desk manager and was given instructions by his Townhouse supervisor, Michelle. He received training from both his

[6] Mr. Burgos was deposed on July 10, 2019 (Burgos Deposition).

employer and from Hotel staff (Burgos Deposition pp. 14, 16). Mr. Burgos described his normal mopping procedure as follows (*id.* at 27-28):

Q. What about Michelle. What did she instruct you as far as keeping the area safe where you were mopping and cleaning?

A. She told me to put the cones between the front desk and the guest elevators.

Q. Anything else?

A. No.

Q. Were you ever given any instructions as to place the cones in the area that you were immediately working on that you had applied the liquid solution to?

A. Yes.

Q. And how would you do that?

A. I would first sweep, then put the cones, and then mop.

Q. Where would you put the cones with respect to the area where you were going to apply liquid solution.

A. I would put two where the guests elevators area are [sic] and then another two in the lobby front area.

When the floor was very dirty he would pour a cleaning solution, Fabuloso, directly onto the floor using a bucket. He would then squeegee the area, ask his supervisor to close off the area, dispose of the dirty water in a drain near the bar, and come back to mop (*id.* at 34-41).

Before watching the video Mr. Burgos was asked a series of questions about his cleaning practices on the night of Plaintiff's accident. In response he testified that he placed two warning signs next to the elevators and two outside the bathroom. He then claims to have checked the bathroom for guests but saw no one there. Afterward, he poured the cleaning solution onto the floor and testified that he did not leave the area (*id.* at 51, 54, 60).

The video was then played for Mr. Burgos. He confirmed that it shows him placing down three warning signs, two by the bathrooms and one near the elevator bank. At time stamp 13:30 he is shown pouring cleaning solution onto the floor next to a red table in the hotel lobby. There are no warning signs immediately surrounding the area, but Mr. Burgos claims that his supervisor closed the area and instructed guests to walk through another corridor to access the elevator banks. At

15:33 he is cleaning another area (off screen) and testified that he did not see Mr. Tobola walk into the bathroom. At time stamp 17:18 Mr. Burgos exits the area to dispose of the dirty water. Again, at 19:55 the video depicts Mr. Tobola falling. At 20:09 Mr. Burgos returns to the area and asks Mr. Tobola if he needs assistance (*id.* at pp. 77-79, 86-87, 88). After watching the video Mr. Burgos was asked if he felt he needed additional warning signs in order to do his job. He responded that he would have liked to have placed two more cones between the red tables (*id.* at 96).

In support of his cross-motion Plaintiff submits an affidavit from safety consultant Dr. William Marletta. Among other things, Mr. Marletta avers (Marletta Affidavit, ¶¶ 10, 15, 25):

> Video surveillance shows that the floor was in a dry condition when Mr. Tobola first crossed the elevator towards the bathrooms. Video surveillance then shows that while Mr. Tobola was in the restroom, Mr. Burgos poured liquid cleaning solution directly onto the floor in the area by the elevators, where Mr. Tobola was caused to slip and fall. Therefore, when Mr. Tobola exited the restroom, the same area was covered in liquid, thus it is reasonable that Mr. Tobola did not expect the floor conditions to change in the approximate five minutes spent in the restroom.
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> While Mr. Burgos' testimony as well as video surveillance footage shows that some warning signs were posted remote from the wet area, the placement of these signs was inappropriate as they were not reasonably close to the wet floor surface and there were no signs on the opposite side of the area to be cleaned. Moreover, placing two signs in front of the bathroom entrance could reasonably be interpreted to indicate that the bathrooms are wet rather than the area in front of the elevator which was no where near the placement of signs. . . .
>
> . . . it is my professional opinion . . . that housekeeping staff responsible for mopping the walking surfaces should be in the presence of the hazard for the duration of its existence. The failure of Burgos to remain in the area while the floor was still wet was a departure from good and accepted safe practice.

Defendants argue that they are entitled to summary judgment because they had no duty to warn Plaintiff of an open and obvious condition, did not cause or create the water condition, and had no notice of the water condition. Defendants also argue that Plaintiff's own carelessness was the proximate cause of his fall. In opposition Plaintiff argues that there is a question of fact whether Defendants knew or should have known about the dangerous condition and that the condition was clearly not open and obvious. Plaintiff also cross-moves for summary judgment against Townhouse, arguing that the video demonstrates its negligence as a matter of law.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

It is settled that business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]) they must reasonably ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use." *Miller v Gimbel Bros.*, 262 NY 107, 108 (1933); *see also Hackbarth v McDonalds Corp.*, 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *See Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept

2006). Businesses owners who operate places of public assembly have a duty to provide members a "safe means of ingress and egress". *Id.*

Defendants assert that they owed no duty to warn the Plaintiff because the water condition was open and obvious. "Whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997) (quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993]). Summary judgment is appropriate if the condition complained of is "both open and obvious and, as a matter of law, not inherently dangerous." *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 (1st Dept 2009). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 (1st Dept 2004). "To establish an open and obvious condition, a defendant must prove that the hazard 'could not reasonably be overlooked by anyone in the area whose eyes were open.'" *Powers v 31 E 31 LLC*, 123 AD3d 421, 422 (1st Dept 2014) (citing *Westbrook*, 5 AD3d at 72). "The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses." *Powers*, 123 AD3d at 422.

Defendants have failed to meet their burden in this regard, and in fact, the video shows that the condition was anything but obvious. As noted by Dr. Marletta, the condition was not present when Plaintiff first entered the bathroom, and as such, Plaintiff had no reason to believe that it would exist on his way back to the front desk. In any event, the liquid itself was clear and had been poured onto a shiny black marble tile, raising a question whether it was difficult to see to the naked eye. At the very least this creates an issue of fact as to the "obvious" nature of the condition. Had

Mr. Burgos or another staff member been standing near the water condition one could argue that Plaintiff should have noticed it, but that was not the case here.

For these reasons, the cases Defendants cite to are inapposite. For example, *Zhao v Brookfield Off. Props., Inc.*, 128 AD3d 623 (1st Dept 2015) involved a low concrete platform leading to a cobblestone-covered surface. In *Lawson v OneSource Facility Servs., Inc.*, 51 AD3d 983, 984 (2d Dept 2008), the plaintiff slipped and fell on a freshly mopped surface that was unquestionably visible to a reasonable observer and not inherently dangerous. Nor can it be said that Defendants satisfied their duty to warn as a matter of law just because there were yellow signs in the area. *See Rivero v Spillane Enterprises*, 95 AD3d 984 (2d Dept 2012); *Odiorne v Jascor, Inc.* 175 AD3d 1016 (4th Dept 2019). As set forth above, the video of Plaintiff's accident clearly raises a question whether the warning signs meant to signal hotel patrons were placed in a way that would adequately warn someone exiting the bathroom of the danger near the elevator.

Defendants also make the extraordinary claim that they had no notice of the condition. To be awarded summary judgment on notice grounds, Defendants must show that it "neither created the hazardous condition, nor had actual or constructive notice of its existence." *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 (1st Dept 2010); *see also Atashi v Fred-Doug*, 117 LLC, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . ."); *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) ("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 defendant's employees to discover and remedy it"). Here, there can be no dispute that Townhouse employee Mr. Burgos "created" the condition for notice purposes. As for W Hotel and 123 Washington, the testimony shows that Mr. Burgos reported to the Hotel's front desk manager

and was working near the front desk and two security personnel. Given these circumstances, Defendants cannot demonstrate a lack of notice.

Defendants also argue that Plaintiff assumed the risk of walking on a wet surface because the cleaning process was underway at the time of the accident. Again, the cases Defendants cite in support do not apply here. In *McMullin v Martins Food*, 122 AD3d 1103 (3rd Dept 2014), two grocery store employees were responding to a spill when one left to get warning signs and the other started to mop. The employee who was mopping warned other customers in the vicinity, but was not able to warn the plaintiff because she entered the area from behind him. And in *Toner v National Railroad Passenger Corp.*, 71 AD3d 454 (1st Dept 2010), the defendant satisfied its duty to clean up a wet floor by placing mats on the ground, putting up signs and cones in the vicinity of the spill, and deployed several workers to dry the floor. Here, the warning signs were demonstrably not near the spill and there was no one in the vicinity who could actively warn the Plaintiff of the wet condition. Under these circumstances, for Defendants to say that Plaintiff assumed the risk of walking on a wet surface is simply not correct.

In sum, the evidence raises an issue of fact whether Plaintiff's injuries were proximately caused by Defendant's negligence. Defendants' motion for summary judgment is therefore denied in its entirety.

Plaintiff's cross-motion for summary judgment is also denied. While the video evidence and deposition testimony are enough to raise an issue of fact as to Townhouse's negligence, this is not one of the extraordinarily unique cases where the question of a party's negligence should be determined by the trial court as a matter of law. In other words, the question of whether Townhouse's actions were reasonable under the circumstances should be left to the trier of fact.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED that counsel appear for a virtual settlement conference on July 30, 2020 at 10:00AM.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

DATED: June 29, 2020

SHERRY KLEIN HEITLER, J.S.C.