SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:
Hon. Carmen Victoria St. George
Justice of the Supreme Court

MARIA BUESTAN,

Plaintiff,

-against-

TIFF REALTY PROPERTY INC.,

Defendant.

Index No.
600110/2017

Motion Seq:
002 MG
Decision/Order

The following numbered papers were read upon this motion:

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Before the Court is an action to recover for personal injuries suffered by plaintiff on June 25, 2016, when she slipped and fell on an "oily substance" in the lobby of the defendant's building located at 1 Maple Avenue, Patchogue, New York.

Defendant moves this Court for an Order pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing plaintiff's Complaint in its entirety. Plaintiff opposes defendant's motion. Defendant's motion is granted.

Plaintiff is a resident in defendant's apartment complex. On June 25, 2016, at approximately 8am, plaintiff was leaving the apartment building to go to work. She testified that she exited the elevator at the location and slipped and fell. She further testified that after she fell, she noticed a yellow caution sign and that the floor looked recently mopped. Plaintiff states that when the building porter assisted her after the fall, he told her there was an "oily substance" on the floor. However, as per the building porter's deposition testimony, the porter does not remember having any conversation with the plaintiff regarding an "oily substance." Plaintiff commenced the action by filing a Summons and Complaint on January 4, 2017 and defendant

joined issue by Answer on April 3, 2017. A Note of Issue was filed on February 26, 2019 and the instant motion was filed on June 25, 2019.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (***Alvarez v. Prospect Hosp.***, 68 NY2d 320 [1986]; ***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). Once such proof has been offered the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and "must show facts sufficient to require a trial of any issue of fact" (**CPLR § 3212[b]; *Zuckerman v. City of New York***, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (***see Roth v. Barreto***, 289 AD2d 557 [2d Dept 2001]; ***O'Neil v. Town of Fishkill***, 134 AD2d 487 [2d Dept 1987]).

A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v. American Museum of Natural History***, 67 N.Y.2d 836, 837–838 [1986]; ***Butts v. SJF, LLC***, 171 A.D.3d 688, 689 [2d Dept 2019]; ***Cho Lun Yeung v. Selfhelp [KIV] Assoc.***, *L.P.*, 170 A.D.3d 653, 653 [2d Dept 2019]). "'To meet its initial burden on the issue of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' " (***Radosta v. Schechter***, 171 A.D.3d 1112, 1113, [2d Dept 2019], quoting ***Birnbaum v. New York Racing Assn., Inc.***, 57 A.D.3d 598, 598–599 [2d Dept 2008]; *see* ***Lombardo v. Kimco Cent. Islip Venture, LLC***, 153 A.D.3d 1340 [2d Dept 2017]). " 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' " (***Butts v. SJF, LLC***, 171 A.D.3d at 689, *supra*, quoting ***Herman v. Lifeplex, LLC***, 106 A.D.3d 1050, 1051 [2d Dept 2013]; *see* ***Giantomaso v. T. Weiss Realty Corp.***, 142 A.D.3d 950, 951 [2d Dept 2016]).

Defendant herein submits the pleadings, Verified Bill of Particulars and the parties' deposition testimony with its moving papers. Upon a reading of all submissions, the defendant's *prima facie* burden has been met particularly by submitting the deposition of the building's porter who testified that the area in question had been mopped in the hour between 7am and 8am

on the date in question. Specifically, he testified that he mopped the area outside the elevators after emptying the garbage cans which took him about 10 minutes. The porter further stated it took him 20 minutes to mop the area. As such, his deposition testimony indicates that he mopped the area between 7:10am-7:30am. The plaintiff testified that she fell at 8:00am.

Based upon the foregoing, defendant has established his *prima facie* entitlement to summary judgment as a matter of law in its favor on the issue of liability. Therefore, the burden shifted to plaintiff to produce evidentiary proof in admissible form establishing the existence of material questions of fact. "[F]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (***Kuehne & Nagel, Inc. v. Baden***, 36 NY2d 539, 544 (1975): *see also* ***McNamee Construction Corp. v. City of New Rochelle***, 29 AD3d 544 [2d Dept 2006]). Contrary to the plaintiffs' contention, it is incumbent upon them to come forth with evidence that the defendant had either created the allegedly dangerous condition or that it had actual or constructive notice of it, and the mere fact that the defendant had not cleaned the area for 30 minutes, or had placed a caution sign in a particular area, or that it was disputed that there was an "oily substance" are all insufficient to raise a triable issue with respect to notice to the defendant (*see* ***Anderson v. Klein's Foods***, 139 A.D.2d 904 [4th Dept 1988], *affd.*, 73 N.Y.2d 835 [1988]). There was no evidence that the defendant had created the allegedly dangerous "oily substance," or had actual notice of it prior to the accident, and from the evidence which was presented, any finding that the "oily substance" had been on the floor for any appreciable period of time would be mere speculation. It is well settled that, without evidence that the defendant created the dangerous condition or had actual notice of it, and absent a showing of evidentiary facts from which a jury can infer constructive notice from the amount of time that the dangerous condition existed, the complaint is dismissed (*see* ***Fasolino v. Charming Stores***, 77 N.Y.2d 847, 848 [1991]; *see also*, ***Cafiero v. Inserra Supermarkets***, 195 A.D.2d 681 [3d Dept 1993], *affd.*, 82 N.Y.2d 787 [1993]; ***Batiancela v. Staten Is. Mall***, 189 A.D.2d 743, 743–744 [2d Dept 1993]; ***Edwards v. Terryville Meat Co.***, 178 A.D.2d 580 [2d Dept 1991]; ***Paolucci v. First Natl. Supermarket Co.***, 178 A.D.2d 636 [2d Dept 1991]; ***Monje v. Wegman's Enters.***, 192 A.D.2d 1133 [4th Dept 1993]; ***Grimes v. Golub Corp.***, 188 A.D.2d 721, 722 [3d Dept 1992]; ***Grier v. Macy & Co.***, 173 A.D.2d 238 [1st Dept 1991]; *cf.*, ***Catanzaro v. King Kullen Grocery Co.***, 194 A.D.2d 584, 584–585 [2d Dept 1993]; ***Farrar v. Teichholz***, 173 A.D.2d 674, 676 [2d Dept 1991]).

In this case, plaintiff submits the affirmation of counsel, which is not evidence (***Desola v. Made, Inc.***, 213 AD2d 445 [2d Dept 1995]) and a marked photograph from her deposition which had not been provided with the transcript submitted with defendant's moving papers. Plaintiff's submission attempted for the first time to create a theory of liability against defendant different from that asserted in the Complaint and the Bill of Particulars. This new theory was predicated on plaintiff falling on a recently mopped floor and not an "oily substance." Just as the burden of a party opposing a motion for summary judgment is not met merely by repeating or incorporating by reference the allegations contained in the pleadings or bills of particulars (***Indig v. Finkelstein***, 23 N.Y.2d 728, 729 [1968]), that burden is not met by unsubstantiated assertions or speculations of plaintiff's counsel that a defendant may have breached a possible duty of care (***Zuckerman v. City of New York***, 49 N.Y.2d , 562 [1980]). In this case, plaintiff never testified

that she slipped because of a freshly mopped floor, nor does she submit an affidavit to that effect in opposition. Such an assertion as contained in the affirmation of plaintiff's counsel, who neither possessed personal knowledge of the events in question nor had any special expertise in the area of floor maintenance, cannot "'supply the evidentiary showing necessary to successfully resist the motion'" (***GTF Mktg. v Colonial Aluminum Sales***, 66 NY2d 965, 968 [1985], quoting ***Roche v Hearst Corp.***, 53 NY2d 767, 769 [1981]). Additionally, the Second Department has held that a recently mopped floor is readily observable and not inherently dangerous (***Cunningham v. Bay Shore Middle School***, 55 AD3d 788 [2d Dept 2008]; ***Ramsay v. Mt. Vernon Bd. of Educ.***, 32 AD3d 1007 [2d Dept 2006]). Finally, this new theory is advanced after the Note of Issue was which would require this Court's leave for an Amended Bill of Particulars (***CPLR § 3043[b]***). As plaintiff has failed to offer any such reasons for her delay in supplementing her claims this Court will not consider the plaintiff's new theory (***Hernandez v. Ezrow***, 24 AD2d 730 [4th Dept 1965]; *see also* ***Siegel, N.Y. Prac. § 240 [5th ed.]***).

Defendant's motion for summary judgment is granted and the Complaint is dismissed in its entirety.

The foregoing constitutes the Order of this Court.

Dated: January 16, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]