SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Acting Justice

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DENIS BACON,

Plaintiff,

- v -

EQUINOX HOLDINGS, INC.,D/B/A, EQUINOX FITNESS CLUB, PARAMOUNT GROUP, INC.,PGREF I 1633 BROADWAY TOWER, L.P.

Defendant.

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INDEX NO. 157735/2018

MOTION DATE 08/05/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This action arises out of an accident that occurred on June 25, 2018 in an Equinox Fitness Club located at 1633 Broadway New York, New York owned and operated by Equinox Holdings, Inc., ("Equinox Club"). Defendants Paramount Group and PGREF I 1633 Broadway Tower LP own and manage the building at that location. In particular, Plaintiff asserts he was caused to slip and fall on a wet area near the water fountain in the men's locker room in the Equinox Club.

On August 20, 2018, Plaintiff commenced this action by filing his summons and complaint alleging one cause of action in negligence against Defendants. Defendants now move for summary judgment dismissing the complaint asserting that they are not negligent as a matter of law given that Plaintiff cannot identify the defect that cause him to fall. Moreover, Defendants claim that they neither created the dangerous condition at issue nor had actual or constructive notice of the said condition. Further, Defendants maintain that they had no duty to warn Plaintiff of said dangerous condition.

While it is ultimately the Plaintiff's burden at trial to establish a *prima facie* case of negligence against the Defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557). In support of its motion, Defendants were required to demonstrate *prima facie,* that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]).

Contrary to the Defendants' contentions, Plaintiff identified the location of his fall was near the water fountain in the men's locker room and attributed his fall to the "wet substance" located near the fountain as he made his way back to his locker from the shower. Plaintiff, in his deposition also testified that the wet substance appeared like "black ice… on a shinier kind of slick surface." Further, Plaintiff testified that after he slipped, "he fell into a puddle."

Defendants' reliance on cases in which the courts dismissed personal injury claims arising out of slipping on water in gyms based on the reasoning that "water was necessarily incidental" to the use of the area is misplaced (*see Grossman v TCR,* 142 AD3d 854 [1st Dept 2016]; *citing to Noboa-Jaquez v Town Sports Intl., LLC,* 138 AD3d 493 [1st Dept 2016]; *Dove v Manhattan Plaza Health Club*, 113 AD3d 455 [1st Dept 2015]). The court in *Dove* and *Noboa-Jaquez* held that "[t]he mere presence of water on a tiled floor adjacent to the gym's showers cannot impart liability, particularly since water was necessarily incidental to the use of the area" (*Noboa-Jaquez v Town Sports Intl., LLC supra*). In its motion papers, Defendants also refer to *Fox v Equinox Columbus Centre Inc.,* No. 114321/2008 [Sup Ct. NY County, Sept 20, 2010] in which the court granted summary judgment for Defendant and found that Defendant had sufficiently demonstrated that the mere presence of water outside of the shower is not sufficient to impute negligence to the premise holder and that floors of locker rooms in the vicinity of showers and swimming pools are bound to be wet and that such condition was held to be incidental to the use of such facility.

However, the holdings in *Dove, Noboa-Jaquez* and *Fox* do not stand for the broader proposition that any water on a tiled floor anywhere in a locker room precludes a claim for negligence because water is "necessarily incidental to the entire locker room's intended use" (*see Grossman v TCR, supra.)* As set forth in the motion, it does not appear that the Plaintiff was in the shower area. Distinguishing from *Dove,* the court in *Grossman* held that neither the presence of the water fountain in the men's locker room nor the use of the water fountain justifies concluding as a matter of law that the presence of water was "necessarily incidental" to the use of the area of the locker room as to preclude a finding of liability (*see Willeboordse v Asphalt Green, Inc.*, NY Slip Op 32304(U) [Sup Ct. New York County, 2020]*; see also Grossman v TCR, supra)*. On the contrary, Plaintiff's observation of an employee with a mop in the vicinity of the men's locker can support the finding that there was a defective condition in the locker room during the time of the incident. (see *Grossman v TCR, supra).*

A Defendant who moves for summary judgment in a case such as this, has a *prima facie* burden of showing that "it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discovery and remedy it" (*see Ceron v Yeshiva Univ.*, 126 AD3d 630 [1st Dept 2015]). 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 employee to discovery and remedy it (see *Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.,* 185 AD3d 671 [2d Dept 2020]; *see also Gordon v. American Museum of Natural History, supra).* To meet its burden on the issue of lack of constructive notice, a Defendant must offer some evidence as to when the accident site was last cleaned, inspected prior to the accident (*see Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp., supra*).

In this present case, the Defendants have failed to meet their burden that they did not have constructive notice of the condition that the Plaintiff claims cause him to fall. The submitted evidence precludes determination as a matter of law regarding whether Defendants had constructive notice of the hazardous wet condition (*see Grossman v TCR, supra.*). In particular, the Defendants submitted, *inter alia* the deposition testimony of the general manager, Steven Lewis ('Lewis"), who testified he did not have actual notice of the defective condition at the time of the incident. However, he did not offer any pertinent testimony on the issue of constructive notice and only testified that there were standards of procedure for repairs, and cleaning the gym locker rooms along with a maintenance staff that was charged with dry mopping the locker room floors as needed.

Defendants also proffered the deposition testimony from the assistant manager David Emerson ("Emerson"), who was on site during the incident. He testified that he was notified of the incident by a staff member. He observed the Plaintiff on the floor next to the water fountain and was informed by the Plaintiff that after coming out of the steam room, he walked over to the fountain where he slipped when turning towards his locker. Emerson further testified that a maintenance porter was assigned to the locker room to fulfill duties such as taking out the garbage, cleaning and mopping the floors. The submitted evidence precludes determination as a matter of law regarding whether Defendant had constructive notice of a hazardous wet condition. In particular, Emerson acknowledged that there was no written schedule or written confirmation of mopping performed and he was unable to affirmatively state when or whether the area in question has been mopped that day. The "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" (see *Johnson v 101-105 S. Eighth St. Apts. Housing. Dev. Fund Corp., supra*; *see also Butts v SJF, LLC*, 171 AD3d 688 [2d Dept 2019]).

Additionally, Defendants, in their motion cite Plaintiff's own deposition testimony to demonstrate that he did not notice any purportedly dangerous condition and therefore did not establish that there was a dangerous condition that was visible and apparent prior to the accident to impute constructive notice upon Defendants. The Defendants' arguments concerning the Plaintiff's failure to establish notice are unavailing as "a defendant moving for summary judgment does not carry its burden mere by citing gaps in the Plaintiff's case *(see Lauzon v Stop & Shop Supermarket, supra; see also Seedat v Capital One Bank,* 170 AD3d 769 [2d Dept 2019]; *Ariza v Number One Star Mgt. Corp.,* 170 AD3d 639 [2d Dept 2019]).

As to Defendants' argument that it did not have a duty to warn Plaintiff of the wet conditions near a shower is without merit. "[E]ven if a hazard qualifies as an 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*see Matos v Azure Holding II, LP,* 181 AD3d 406 [1st Dept 2020]). The burden is on the Defendants to demonstrate that the condition that caused the Plaintiff to fall was readily observable by the Plaintiff employing the reasonable use of his senses (*see Powers v 31 E 31st LLC,* 123 AD3d 421 [1st Dept 2014]). Here, although Defendants indicate that Plaintiff, in his deposition testimony stated that he observed the water on the floor near the showers and water fountain, and concluded that it was open and obvious, it does not absolve the Defendants from

maintaining the locker room in a reasonable safe condition. Further, "whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case," (*see Powers v 31 E 31st LLC, supra; see also Russo v Home Goods, Inc.*, 119 AD3d 924 [2d Dept 2014]). Viewing the evidence in the light most favorable to the Plaintiff, movants have no established as a matter of law that the wet substance on the floor was an open and obvious condition that was not inherently dangerous.

To the extent Defendants argue that the evidence 'firmly suggests that the moisture or water came from the bottom of Plaintiff's own feet,' this testimony does not conclusively determine the cause of Plaintiff's fall without resorting to speculation (*see Rivera v Waterview Towers, Inc.*, 181 AD3d 844 [2d Dept 2020]; *Steele v Samaritan Found., Inc.*, 176 AD3d 998 [2d Dept 2019]; *Pajovic v 94-06 34th Rd Realty Co., LLC* 152 AD3d 781 [2d Dept 2017]).

Since the Defendants' have not demonstrated their entitlement to judgment as a matter of law, it not necessary to consider the sufficiency of the Plaintiff's opposition papers (*see Lauzon v Stop & Shop Supermarket, supra; Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]).

Accordingly, Defendants' motion for summary judgment is denied.

1/7/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

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