SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

DOMINGA ZAVALA,

Plaintiff(s),

-against-

KRCM REALTY COMPANY, INC.,

Defendant(s).

ORIGINAL RETURN DATE:06/29/10
SUBMISSION DATE: 07/16/10
INDEX No.: 22966/08

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted, and the complaint is dismissed.

On or about September 28, 2008, plaintiff, a tenant in defendant's apartment building located at 67 Terrace Avenue, Hempstead, New York, entered the laundry room, located on the same floor as her apartment, to do laundry. She alleges that she slipped and fell while in the process of removing clothes from the washing machine and placing them in the adjacent dryer due to a soap and water accumulation on the laundry room floor. Plaintiff claims that the water and soap condition arose out of a steady leak from the tubing connected to the washer, which defendant referred to as a backup drain. As a result of the fall, plaintiff sustained injuries to her arm, neck and shoulders for which she sought and received medical treatment.

The bases for defendant's motion for summary judgment is its lack of actual or constructive knowledge of the condition that caused the injury and that it did not create the hazardous condition that caused the injury. Moreover, defendant argues that plaintiff's deposition testimony was contradictory as plaintiff radically changed her testimony after a ten-minute break during her deposition. Defendant contends that plaintiff was coached by her counsel in an attempt to correct earlier and possibly damaging testimony. Plaintiff attributes any change in testimony to the manner in which defendant examined plaintiff, while denying that she received coaching from her counsel.

Defendant submitted transcripts of the depositions of plaintiff and Karan Singh, the president of defendant, and an affidavit from Benjamin Salgado, the building mechanic of the subject apartment building in support of its motion. Plaintiff submitted only an affirmation from her counsel.

A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320; *Miceli v. Purex*, 84 AD2d 562 [2d Dept. 1981]).

Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v. Prospect Hosp.*, 68 NY2d 320; *Aghabi v. Serbo*, 256 AD2d 287 [2d Dept. 1998]).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Sloane v. Costco Wholesale Corp.*, 49 AD3d 522 [2d Dept. 2008]).

In the instant action, it is not being alleged that defendant created the unsafe condition which led to plaintiff's fall and resulting injury. Plaintiff apparently relies on actual or constructive notice as a basis for liability on a theory of a dangerous and unremedied condition that defendants allowed to exist in the laundry room.

It is well settled that 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 (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]). It is also well settled that a property owner who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (see *Petri v. Half Off Cards,* 284 AD2d 444 [2d Dept 2001]); *Osorio v. Wendell Terrace Owners Corp.*, 276 AD2d 540 [2d Dept 2000]; *Benn v. Municipal Hous. Auth. for City of Yonkers,* 275 AD2d 755 [2d Dept 2000]).

Here, defendant established its prima facie entitlement to summary judgment. The building president, Mr. Singh, testified that he "walk[ed] the building every day" as it was his duty to inspect the premises and to ensure its cleanliness, and that the appropriate repairs, if needed, were made (Movant's Ex. E, Tr. Karan Singh, p. 8, ln. 4-16; p. 9 , ln. 10 -20). Repairs are taken care of immediately, and a log of such repairs is kept in the usual course of business (*Id.*, p. 10 ln. 2-13). Mr. Singh further testified that there were no prior complaints regarding the backup drains or tubing of the building's washing machines (*Id.*, p.14, ln. 18-25; p.15, ln 2-3; p. 29, ln. 3-8) and he had occasion to be in the laundry rooms and observe tenants using the washing machines on a daily basis, as he routinely collected coins from the machines (*Id.*, p. 18 ln. 19-25, p. 19 ln. 2 - 13). Further, defendant submitted an affidavit from the building mechanic, Benjamin Salgado, stating that he had never been notified of any water condition or leaking from a backup drain or tubing of the washing machines (Movant's Ex. F).

Similarly, defendant established that it did not have actual notice of a recurring dangerous water condition in the area where plaintiff fell. The deposition testimony of defendant's employees and the nonparty maintenance staff at the building established that defendant had no knowledge of any water condition in the laundry room before plaintiff's fall, and it did not receive any complaints regarding such a condition.

In opposition, plaintiff failed to raise a triable issue of fact as to defendant's notice of the water condition as there is an issue regarding the inconsistency of her testimony at her deposition. Generally, the court's role in a motion for summary judgment is not one of resolving issues of credibility. Further, courts have held that any inconsistencies that may exist between the deposition testimony of plaintiff and plaintiff's affidavit submitted in opposition to the summary judgment motion generally present credibility issues for trial (see *Knepka v. Tallman,* 278 AD2d 811 [4th Dept.2000]; *Yaziciyan v. Blancato,* 267 AD2d 152 [1st Dept.1999]). However, it has also been established that where self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment (see *Phillips v. Bronx Lebanon Hosp.,* 268 AD2d 318 [1st Dept 2000]).

Although plaintiff did not include an affidavit in her opposition papers, defendant submitted a transcript of her deposition where she contradicted her initial testimony after returning from the break in the examination before trial. There is no dispute that the parties took a ten-minute break; and defendant emphasized that point when he stated for the record that during that break, plaintiff's counsel appeared to have coached plaintiff, and she changed her testimony as a result (Movant's Ex. D, Tr. Dominga Zavala, p.69, ln, 12 - 17). Notwithstanding defendant's contention, the record indicates that plaintiff's earlier testimony was contradicted by her post- break testimony.

Plaintiff's initial testimony is set forth herein:

> "Q Do you recall any building workers that were working as of September 2008?
> A Just one.

Q Do you know that person's name?
A No.
...
Q Before the accident did you ever speak with that individual?
A. No."
(Movant's Ex. D, Tr. Dominga Zavala, p.14, ln, 9-15, 17-19)
...
"Q When you first walked into the laundry room did you see any water on the floor?
A No.
...
Q On the day of the slip and fall before you slipped did you see any water on the laundry room floor?
A No.
...
Q. When you looked at the tube was water actively coming out of there?
A. Yes, coming out with soap.
Q Did you see that before you slipped and fell?
A No
....
Q Before your accident had you ever seen water in the laundry room floor?
A No."
(*Id.*, p.29, ln, 3 -6, 9- 20; p. 46, ln. 1-7; p.55, ln. 22-25)
...
"Q On the days before the accident did you ever see water on the laundry room floor?
A No"
(*Id.*, p. 57, ln. 6-8)

After a short break in the deposition, plaintiff was deposed by her counsel after interjecting his line of questioning in between defendant's examination of plaintiff:

"Q Before the accident did you complain to anybody like a super, a cleaning person, your landlord or some one like that or anybody about water or soap on the floor of the laundry room; yes or no.

...

A Yes, yes. His name is Chico and Fernando. I complained to him because I had seen water on the floor one week prior."
(*Id.*, p. 67 , ln.23-25; p. 68, ln. 1-18)

It is noted that the foregoing examination by plaintiff's counsel was in no way related to defendant's current line of questioning regarding the extent of plaintiff's injuries to her right hand and how it impacted her ability to engage in certain activities (*Id.*, p. 68 , ln. 6-25).

In addition, plaintiff later testified to having seen water flowing in the laundry room on the morning of her accident but offered evasive answers when asked whether she was in the laundry room that morning, "Well, I passed through there and saw it [the water]... " (*Id.*, p. 70, ln. 20-23).

In sum, plaintiff's deposition testimony was insufficient to raise a triable issue of fact on the issue of constructive and actual notice. Her testimony presented feigned factual issues designed to avoid the consequences of her initial deposition testimony as a stated failure to notify defendant about a water condition and an admission to not actually seeing the water condition before her slip and fall were fatal to her claim (see *Stancil v. Supermarkets General,* 16 AD3d 402 [2d Dept 2005], quoting *Marcelle v. New York City Tr. Auth.,* 289 AD2d 459 [2d Dept 2001]).

In light of the foregoing, defendant established its entitlement to summary judgment, and plaintiff failed to submit any evidence to raise a triable issue of fact. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

This decision constitutes the order of the court.

Dated: 8-24-10

HON THOMAS P. PHELAN

J.S.C.

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