Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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RUFFINA GARCIA,
Plaintiff(s),

- against -

HERCULES CORP., 40-45 HAMPTON LLC, PINNACLE HOLDING COMPANY X LLC and WIENER REALTY LLC,
Defendant(s).

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Index No.:17555/08

Motion Date:07/13/10

Motion Cal. No.: 12

Motion Seq. No: 1

The following papers numbered 1 - 17 read on this motion by the defendant Hercules Corp. for an order granting summary judgment or, in the alternative, striking the defendants 40-45 Hampton LLC, Pinnacle Holding Company LLC and Wiener Realty LLC cross-claims; and a cross-motion by the defendants 40-45 Hampton LLC, Pinnacle Holding Company LLC and Wiener Realty LLC for an order granting summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on April 11, 2008 when she slipped and fell on an accumulation of water in the laundry room located in the basement of the apartment building in which she resides. The water is alleged to have originated from three drain pipes located behind their corresponding washing machines that overflowed with water when the washers were in use. Defendant Hercules Corp. ("Hercules") now moves, and defendants 40-45 Hampton LLC, Pinnacle Holding X LLC and Weiner Realty (collectively referred to as "the Hampton defendants") now cross-move for summary judgment.

In the absence of a court-ordered rule to the contrary, CPLR 3212 (a) requires motions for summary judgment to be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown. *Brill v City of New York* (2 NY3d 648 [2004]) and its progeny require a moving party to demonstrate "good cause" for the delay in making a motion for summary judgment, "rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*id.* at 652).

The note of issue in this action was filed on August 10, 2009. Pursuant to a so-ordered stipulation dated November 30, 2009, the parties agreed that discovery was to continue while the matter remained on the trial calendar. The stipulation also stated that all motions for summary judgment must be made returnable on or before January 12, 2010. Hercules' motion and the Hampton defendants' cross-motion were both made returnable on February 19, 2010. Thus, both submissions are late. In its motion, Hercules contends that the Hampton defendants have, to date, failed to produce the building superintendent for a deposition as directed by the above-mentioned stipulation. Instead, the superintendent's wife, a non-party witness, was produced on January 8, 2010.

Since Hercules was forced to wait for any deposition testimony from the Hampton defendants, and this testimony was necessary for a motion for summary judgment, Hercules has demonstrated good cause for the delay, and its motion will be considered on the merits (*see, Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803 [2009]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743 [2008]). However, as the Hampton defendants have failed to demonstrate good cause, their delay is not excused, and the cross-motion is denied as untimely (*see, Brill, supra*).

On its motion for summary judgment, Hercules must demonstrate, *prima facie*, that it did not create the condition which caused plaintiff's accident and that it did not have actual or constructive notice thereof (*see Cunningham v Bay Shore Middle School*, 55 AD3d 778 [2008]; *Kaplan v DePetro*, 51 AD3d 730 [2008]; *Miguel v SJS Assoc., LLC*, 40 AD3d 942 [2007]). Constructive notice exists when the condition is visible and apparent and has existed for a sufficient length of time before plaintiff's accident such that Hercules had time to discover it and to take remedial measures (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rubin v Cryder House*, 39 AD3d 840 [2007]; *Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409 [2006]).

In support of its motion, Hercules submits, *inter alia*, plaintiff's deposition transcript in which she describes the circumstances surrounding her accident. Plaintiff testified that every week, when she went to the basement to do laundry, she noticed water on the laundry room floor underneath the washers.

Plaintiff also testified that on the day of the accident, she filled three washers with her laundry, that she observed water covering the surface area in front of the washers and part of the dryers and that the water continued to accumulate on the floor throughout the time she was in the room. Plaintiff stated that the water came from the three pipes behind the washers during the spin cycle and accumulated both inside the area in which the washers were located and around the base of the rest of the laundry room floor. Plaintiff further testified that, while attempting to leave the room to get fabric softener, she slipped and fell near the laundry room door on a half-inch-deep mixture of water and detergent and that "there was no other way for [her] to go around it but through [it]." Finally, plaintiff testified that she never made complaints to any of the named defendants regarding the condition of the laundry room.

John Abraham ("Abraham"), Assistant Vice-President of Sales of the Hercules corporation, testified on Hercules' behalf. Abraham stated that Hercules is in the business of installing commercial laundry equipment in multiple dwelling buildings, that Hercules installed laundry equipment at the subject location and that Hercules is obligated to maintain the equipment but not to clean the laundry rooms. Abraham also testified that plumbing repairs to major leaks are Hercules' responsibility and that mechanics visit the premises when Hercules is called for a machine in need of repair or to perform periodic diagnostic tests.

In his deposition, Abraham described the subject washers' drainage system in detail. He stated that the water ejection system is an elevated drain system in which a standard pump is housed within the machine that pumps water into rubber hoses attached thereto; that the water is pumped into a PVC pipe (drainpipe) which goes directly into the waste line; that Hercules maintains, but does not install, the PVC pipes and that check valves prevent water from gushing over the top of the drainpipe onto the floor. Abraham was unable to say whether the subject equipment contained check valves but he stated that Hercules was responsible for repair to anything in front of the wall, while the building is responsible for any repairs needed behind the wall. Abraham also testified that leaks could also occur if PVC pipes were not properly cleaned as water can backup and gush from the top of the pipes. Finally, Abraham stated that Hercules never received service calls regarding leaks from the subject washers.

Hercules also submits the deposition testimony of non-party witness Nita Lakhai ("Lakhai") in support of its motion. In her deposition, Lakhai stated that she regularly assists her husband, the building's superintendent, in cleaning the building and that she checks the floors and the basement every day. Lakhai further testified that she has never seen water on the laundry room floor

outside the lip located around the base, nor has she seen water leaking from the machines. Although Lakhai stated that she has observed water come up from the PVC pipes, run down to the floor and into a drain located on the base of the floor near the washers, she believes that this is the drainage system associated with these machines. Lakhai avers that she has witnessed the machines drain water this way since they was installed by Hercules. Finally, Lakhai stated that she has not received any complaints, nor has she ever made any complaints to Hercules regarding the drainage system.

Based on the above, Hercules has failed to establish that it did not create the condition which caused plaintiff's fall. Hercules' assertion that plaintiff has not demonstrated that Hercules created the hazardous condition does not sufficiently prove that Hercules was not actually liable for the happening of plaintiff's accident (*see Stroppel v Wal-Mart Stores, Inc.*, 53 AD3d 651 [2008]; *Velasquez v Gomez*, 44 AD3d 649 [2007]; *Picart v Brookhaven Country Day School*, 37 AD3d 798 [2007]). Additionally, Abraham testified that water could gush out of the PVC pipes if the pipes lacked a check valve or if the pipes were clogged. This assertion, coupled with plaintiff's testimony that water was, in fact, gushing out of the pipes prior to her accident, supports an inference that one of these two scenarios described by Abraham may have occurred. However, Abraham was unable to state whether the subject machines actually contained check valves. Thus, questions of fact remain as to whether Hercules caused or had actual notice of the condition that caused plaintiff's accident.

Even assuming, *arguendo*, that Hercules had sufficiently demonstrated that it did not create the condition, or have actual notice thereof, the record reveals it may have had constructive notice of the condition. While Abraham testified that periodic diagnostic tests were performed on the machines, there was no testimony elicited as to when the last test was performed prior to plaintiff's accident. As such, the alleged condition could have existed for a sufficient amount of time which could have remained undetected by Hercules in the absence of one of its diagnostic tests (*see Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949 [2009]; *Braudy v Best Buy Co., Inc.*, 63 AD3d 1092 [2009]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598 [2008]). Moreover, Lakhai's testimony, in which she states that water from the machines has been coming out of the PVC pipes and onto the floor since the machines were installed by Hercules in 2006, indicates that this issue has occurred for a substantial time prior to plaintiff's accident. Thus, Hercules may be deemed to have constructive notice of the condition alleged to have caused plaintiff's accident (*see Hutchinson v Medical Data Resources, Inc.*, 54 AD3d 362 [2008]; *Doherty v Smithtown Cent. School Dist.*, 49 AD3d 801 [2008]). Consequently, questions of fact remain as to whether Hercules had constructive notice of the condition which

caused plaintiff's accident. Accordingly, that portion of Hercules' motion which seeks summary judgment is denied.

Hercules also moves for an order striking the cross-claims of the Hampton defendants for their failure to comply with the court-ordered discovery schedule. In order to prevail on discovery-related motions, an affirmation of good faith specifically delineating the conversations between counsel in an attempt to comply with the above directive is required. The affirmation must indicate the time, place and nature of the consultations between attorneys, the issues discussed, and what resolutions, if any were made (*See*, 22 N.Y.C.R.R. §202.7 [a],[c]). As no such affirmation is annexed to the instant motion, that portion of Hercules' motion which seeks to strike the cross-claims of the Hampton defendants is denied.

For all of the foregoing reasons, Hercules' motion is denied in its entirety. The Hampton defendants' cross-motion is also denied as it is untimely.

Dated: September 8, 2010

JANICE A. TAYLOR, J.S.C.

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