NEW YORK SUPREME COURT - COUNTY OF BRONX

C

PART 04

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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TORRES,THERESA

Index №. **0008198/2007**

-against-

Hon. Lizbeth Gonzalez,

SONTAG ADVISORY LLC.

Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **March 23 2011** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance to the annexed Decision and Order.

ENTER:

NOV - 3 2011

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/31/11

Hon. _____
Lizbeth Gonzalez, AJSC

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

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Theresa Torres,

Plaintiff,

DECISION
Index No 8198/07

-against-

Sontag Advisory LLC, Spar Holdings LLC, Spar L.P., Zar Realty Management, 260/261 Madison Equities Corp. and 260/261 Madison Ave LLC,

Defendants.

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Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR §2219(a):

Notice of Motion and annexed Exhibits.....1
Affirmation in Opposition and annexed Exhibits.....2
Reply Affirmation.....3

Plaintiff Torres is a letter carrier who claims that she sustained injuries to her neck, back and left knee as a result of the defendants' negligence. On 3/28/08, the plaintiff alleges that accumulated water in the 14th floor vestibule of a building located at 261 Madison Avenue caused her to slip and fall. Defendant Sontag Advisory LLC ("Sontag") moves for summary judgment on the ground that it is a tenant of 261 Madison Avenue and therefore not liable for building maintenance. Plaintiff Torres opposes the motion.

DISCUSSION

It is well settled that summary judgment is a drastic remedy which can only be granted when it is clear that no triable issues of fact exist. *(Andre v Pomeroy,* 35 NY 2d 361 [1974]; *Middle Village Associates v Pergament Home Centers, Inc.*, 184 Misc 2d 552 [2000], quoting

Alvarez v Prospect Hospital, 68 NY 2d 320 [1986]; (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997].)

To establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition that caused her to trip and fall or that the defendant had actual or constructive notice of that condition. *(Uhlich* v *Canada Dry Bottling Company of New York*, 305 AD2d 107 [1st Dept 2003].) Constructive notice is established when a defect is visible, apparent and existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy the defect. (*Luzinski v Kenvic Associates*, 242 AD2d 242 [1st Dept 2007].)

In support of its motion for summary judgment, defendant Sontag proffers its Office Lease Agreement, location photos and the deposition testimony of Dorothy Jean Williams, Arlene Hearne, Craig Shackatano and the plaintiff.

Plaintiff Torres testified at her 8/26/09 deposition that she was working as a letter carrier on the day of the accident. She entered the building using the freight elevator, following her routine for the past 1½ years, to deliver mail to Mr. Crowley's and Sontag's respective 14th floor offices. The Sontag office is located to the left of the elevator and Crowley's office is located to the right of the elevator. Ms. Torres observed no wetness or water on the floor in the vestibule between the elevator and the offices at any time during the past 1½ years. On the day of the accident, plaintiff Torres exited the freight elevator to deliver mail to the Sontag office when she slipped and fell in a "puddle" that she described as sprinkles and individual droplets. Although it was raining heavily outside, Ms. Torres observed no wetness, water or wet footprints on the floor.

Craig Shackatano, defendant Sontag's chief compliance officer, testified during his 8/26/09 deposition that he has been an employee of Sontag for four years. He handles the firm's regulatory and legal matters. Mr. Shackatano stated that an Office Lease Agreement ("Agreement") allows defendant Sontag to lease 14th floor space from defendant 260/261 Madison Equities Corporation. The area where the plaintiff allegedly fell is a "common area" or vestibule that is not leased by defendant Sontag who bears no responsibility to clean or maintain the area. Ms. Joanne Lynne, an executive assistant, would contact building management whenever a cleaning issue arose. Mr. Shackatano stated that he never observed cracks or holes in the vestibule or was aware of any slip and fall complaints. Although the flooring was marble, building management never placed mats or rugs in the vestibule during inclement weather nor did Sontag make this request.

For the past 36 years, Arlene Hearne has been employed as a freight elevator operator of Sapir, the managing agent of the building for defendant 260/261 Madison Equities Corp. ("260/261 Madison"). Ms. Hearne transported the plaintiff by elevator to the tenant floors for mail delivery on the day of the accident. Ms. Hearne testified at deposition that the plaintiff exited the elevator, took a few steps and fell in the vestibule outside defendant Sontag's closed glass doors. Ms. Hearne informed the porter that there was water on the 14th floor and the water was subsequently cleaned up. Ms. Hearne was unaware of any other slip and falls on the 14th floor.

Dorothy Jean Williams, another Sapir employee, testified during her 3/17/10 deposition that the area where the plaintiff slipped and fell is a "common area." Her title or position is undisclosed and the basis of her knowledge is unknown. The Court declines to credit Ms. Williams' testimony accordingly.

The August 1997 Agreement between defendants 260/261 Madison Equities Corp and Sontag Advisory LLC identifies the parties as landlord and tenant, respectively. The premises is described as "Portion 15th Floor, 261 Madison Avenue, New York, New York." The third 2003 amendment states that defendant Sontag shall occupy a portion of the 14th Floor. The Agreement states that the landlord "shall maintain and repair the exterior of and public portions of the building" (Page 3- ¶ 4) and provide cleaning services to the tenant. (Page 11 - ¶ 29 [B].)

Plaintiff Torres opposes defendant Sontag's motion. Ms. Torres contends that the defendant had actual notice of the hazardous condition and breached its duty to remedy it. In support of her position, the plaintiff proffers the deposition testimony of Ms. Williams and Craig Shackatano to establish that defendant Sontag, as a tenant, should have notified management of the hazardous condition outside its office doors.

The plaintiff testified at deposition that she slipped and fell in a puddle of droplets approximately six to twelve inches wide in front of defendant Sontag's glass office doors. Sontag's receptionist assisted her after she fell and said that a messenger wearing wet outer clothing who had "just left" was "maybe" responsible.

CONCLUSION

Defendant Sontag, as a movant for summary judgment, bears the burden to make a prima facie showing of entitlement to judgment as a matter of law by submitting sufficient evidence to demonstrate the absence of any material issues of fact. *(JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986].) The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*Perez v Rodriguez*, 25 AD 3d 506 [1st Dept 2006].)

Defendant Sontag has met its burden through the deposition testimony of Arlene Hearne, Craig Shackatano and the plaintiff. Sontag establishes that it was not responsible for cleaning the common area; no complaints were made before or on the day of the accident about wet floors on the 14th Floor; and it neither created the condition nor possessed actual or constructive notice of the hazardous condition that caused the plaintiff to slip and fall.

After a careful review of the evidence, the Court finds that plaintiff Torres has not met her shifting burden. The plaintiff's evidence establishes that defendant Sontag had a duty to notify management of all hazardous conditions upon its actual notice of the condition. The plaintiff has not, however, established that the defendant created the condition that caused her to trip and fall or had actual or constructive notice of the condition. The statements uttered by defendant Sontag's receptionist are hearsay in the absence of an affidavit or deposition testimony. The photographs are immaterial to the extent that they depict glass doors opposite the elevator, not the Sontag glass doors located to its left. Without deposition testimony or additional documentation, this Court cannot speculate that defendant Sontag could see water droplets on the vestibule floor outside its glass doors or had constructive notice because a wet messenger had "just left."

Based on the foregoing reasons, defendant Sontag's motion for summary judgment is granted.

This is the Decision and Order of the Court. A copy of this Decision with Notice of Entry shall be served within 10 days.

Dated: October 31, 2011

So ordered,

Hon. Lizbeth González, AJSC