ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Robert J. McDonald
Justice

IAS Part 34

RENEE FRIEDENTHAL, x

Plaintiff,

- against -

MACERICH QUEENS EXPANSION, LLC, et al. MACERICH QUEENS LIMITED PARTNERSHIP MACERICH PROPERTY MANAGEMENT COMPANY, LLC, STANDARD PARKING CORPORATION, STANDARD PARKING CORPORATION IL and CONTROL FACILITY SERVICES, LLC,

Defendants.

x

Index Number 5053 2009

Motion Date April 28 2011

Motion Cal. Number 13 & 14

Motion Seq. Nos. 3&4

Motion Seq. No. 3 & 4

The following papers numbered 1 to 41 read on this motion by Control Facility Services, LLC ("Control"), for summary judgment in its favor pursuant to CPLR 3212; motion by Macerich Queens Expansion, LLC, Macerich Queens Limited Partnership, Macerich Property Management Company, LLC, Standard Parking Corporation and Standard Parking Corporation IL (herein collectively referred to as the "Macerich defendants"), for summary judgment in their favor pursuant to CPLR 3212; cross motion by the Macerich defendants for leave to amend their cross claims asserted against Control; and cross motion by Control for summary judgment dismissing the cross claims of the Macerich defendants and for summary judgment on Control's cross claims pursuant to CPLR 3212.

	Papers Numbered
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Upon the foregoing papers it is ordered that the motions and cross motions are decides as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on March 6,2008, at approximately 7:30 a.m., when she slipped and fell inside parking lot staircase "A", inside of the Queens Center Mall, located at 90-15 Queens Boulevard, Elmhurst, New York (premises). The premises are jointly owned by Macerich Queens Expansion, LLC and Macerich Queens Limited Partnership, and managed by Macerich Property Management Company, LLC. Standard Parking Corporation and Standard Parking Corporation IL, manage and operate the parking garages/lots of the Queens Center Mall. Control provides certain maintenance and housekeeping services for the Queens Center Mall.

Plaintiff alleges that on the date of the accident, it was an overcast morning with sunrise at 6:22 a.m., and that therefore there was limited natural lighting at the time of the occurrence. The weather records relied upon by moving defendants indicate that it had rained on the two days prior to the date of the accident with wind gusts up to 53 miles per hour, however that the weather, on the date of the accident, was clear. It is further alleged that plaintiff was descending the steps of the stairwell when she was caused to fall due to the negligently designed, negligently constructed and/or negligently maintained stairs and treads; recurring wet, slippery, slick and/or damp condition of their stairwell; and unlit or improperly lit condition of their stairwell. The record reveals that the steps are made of cement that is white in color and that there are strip/tread at the edge/nose of each step prior to descending to the next level, that are dark brown or charcoal-colored, and is contrasting in color from the concrete steps. There are also handrails on both sides of the stairs in the subject stairwell. Furthermore, there was artificial lighting from fluorescent light fixtures that are attached to the walls and are on "24/7"; and there was natural light from the windows facing the north side of the East parking structure, which are sealed shut.

Control and, separately, the Macerich defendants move to dismiss the complaint on the ground that they did not create nor did they have notice of the alleged dangerous condition at issue. The motions are opposed by plaintiff. The Macerich defendants further cross move for leave to amend their cross claims asserted against Control; and Control cross moves for summary judgment dismissing the cross claims of the Macerich defendants and for summary judgment on Control's cross claims pursuant to CPLR 3212. The cross motions are opposed by the respective parties.

Motion by Control

An owner of property has a duty to maintain his or her premises in a reasonably safe condition (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871[1995]; *Basso v Miller*, 40 NY2d 233 [1976]), and here that duty included providing a reasonably safe means of ingress and egress to and from the parking garage (*see Peralta v Henriquez*, 100 NY2d 139 [2003]; *Gallagher v St. Raymond's R.C. Church*, 21 NY2d 554 [1968]; *Backiel v Citibank*, 299 AD2d 504 [2002]). A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing 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 Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436 [2005]; *Murphy v Lawrence Towers Apts., LLC*, 15 AD3d 371 [2005]; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409 [2004]; *Ford v Citibank, N.A.*, 11 AD3d 508 [2004]; *Friedman v Gannett Satellite Info. Network*, 302 AD2d 491 [2003]). "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 [the] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). To meet its initial burden on the issue of lack 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 (*see Porco v Marshalls Dept. Stores*, 30 AD3d 284 [2006]; *Feldmus v Ryan Food Corp.*, 29 AD3d 940 [2006]; *Yioves v T.J. Maxx, Inc.*, 29 AD3d 573 [2006]; *Britto v Great Atl. & Pac. Tea Co., Inc., supra*; *Lorenzo v Plitt Theatres*, 267 AD2d 54 [1999]).

Here, Control met its burden of establishing its prima facie entitlement to judgment as a matter of law by demonstrating that Control neither created nor had actual or constructive notice of the allegedly dangerous stairwell. In addition to evidence of its general daily cleaning practices, Control submitted the affidavits of three housekeeping employees whose duties it was to clean the area where plaintiff fell. Edson Colon avers that he had last cleaned the area at some point between 4:00 a.m. and 7:30 a.m., on the date of plaintiff's accident, and did not notice any spills or liquids or anything out of the ordinary regarding the stairs. Rafael Disla avers that he worked the overnight shift (11 p.m. to 7:30 a.m.), and was assigned to sweep the eastside and westside parking garages and exterior of the Queens Center Mall, including staircase "A" where plaintiff fell. Disla avers that during his shift, he did not notice any liquid or spills on staircase "A" and that the staircase was well-lit. Finally, Trifon Guarachi, a housekeeper at the Queens Center Mall, assigned to clean the eastside and westside parking garages between the hours of 5:30 a.m. and 3:30 p.m., avers that he too cleaned the area and did not notice any spills or liquid in staircase "A", where plaintiff fell. Control also submitted evidence indicating that it had not received any prior complaints about the area prior to plaintiff's fall.

Plaintiff has offered testimony that on prior occasions, she observed water on the stairs and lack of lighting in staircase "A", to impute constructive notice. However, a general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; Mormile v Jamestown Management Corp., 71 AD3d 748 [2010]).

In addition, Control submits that shortly after plaintiff's fall, Roman Animo, a Macerich security officer arrived at the accident site while plaintiff was still present. Control submits that Animo observed that the staircase was dry and well-lit by both natural and artificial lighting and observed that plaintiff's clothing were not wet. Animo then prepared an incident report reflecting the fact that the staircase was dry and well-lit, and observed another Macerich security officer, Narine Parbunath, take two (2) photographs of the unaltered area. The photographs depict a dry and ligbted area.

In opposition to Control's prima facie showing, plaintiff failed to raise a triable issue of fact as to whether there was water or some other liquid on the stairwell where she fell (*see Larsen v Congregation B'Nai Jeshurun of Staten Is.*, 29 AD3d 644 [2006]; *Kasner v Pathmark Stores, Inc.*, 18 AD3d 440 [2005]), or whether Control created or had actual or constructive notice of the allegedly dangerous condition (*see Hayden v Waldbaum, Inc.*, 63 AD3d 680 [2009]; *Larsen v Congregation B'Nai Jeshurun of Staten Is., supra*; *Collins v Mayfair Super Mkts. Inc.*, 13 AD3d 330 [2004]; *Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 [2008]). In the absence of evidence establishing the elements of actual or constructive notice, any conclusion that such notice existed would be based upon pure speculation, which is legally insufficient to support plaintiff's cause of action (see Gordon v American Musenm of Natural History, 67 NY2d 836 [1986]).

Although a plaintiff bears no burden to identify precisely what caused her slip and fall, mere speculation about causation is inadequate to sustain the cause of action (*Segretti v Shorenstein Co., E.*, 256 AD2d 234 [1998]). And a plaintiff's own self-serving surmise as to the source or creation of an alleged water condition is insufficient to meet the burden (Thomas v Our Lady of Mercy Medical Center, 289 AD2d 37 [2001]). Altbough proximate cause can be established in "the absence of direct evidence of causation [and] . . . may be inferred from the facts and circumstances underlying the injury" (*Hartman v Mountain Val. Brew Pub*, 301 AD2d 570 [2003]), "[m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action" (*Garvin v Rosenberg*, 204 AD2d 388 [1994]). Here, "[s]ince it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (see Teplitskaya v 3096

Owners Corp., 289 AD2d 477 [2001]; see Robinson v Lupo, 261 AD2d 525 [1999]; *Babino v City of New York*, 234 AD2d 241 [1996]).

Plaintiff also alleges that there were defects in the stairway (oversized treads) which, according to plaintiff's expert are in violation of certain statutes and codes. Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate (*Jefferson v Temco Servs. Indus.*, 272 AD2d 196 [2000]; *Bitterman v Grotyohann*, 295 AD2d 383 [2002]).

Defendant Control met its burden of demonstrating the absence of notice as a matter of law, and that it did not create the condition at issue.

Motion by the Macerich defendants

As owners, the Macerich defendants were responsible for the lighting of the premises. In addition to the water condition, plaintiff alleges that the premises were inadequately lit. The Macerich defendant contend that the premises were properly lit and, in any event, such alleged inadequate lighting was not the proximate cause of the accident.

"Although the issue of proximate cause is generally one to be determined by the finder of fact, it is the function of the court to determine if a prima facie case of causation has been established in the first instance" (*Rubinfeld v City of New York*, 263 AD2d 448, 450 [1999]). It is the plaintiff's initial burden to show that the "defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]; *see Kush v City of Buffalo*, 59 NY2d 26 [1983]). Plaintiff's claim that her fall was caused by inadequate illumination is belied by her admission upon her examination before trial testimony that she fell as a result of slipping on water on the stair with no mention of being unable to properly see. In fact, plaintiff also testified at her deposition that there was adequate lighting to descend the subject stairs and to perceive any alleged water on the subject stairs. Consequently, no matter what the lighting condition, it was not a proximate cause of her fall.

The Macerich defendants also submitted the affidavit of Vincent Ettari, P.E., who inspected the premises on March 7, 2011, approximately one (1) hour after sunrise, in order to be consistent with the time plaintiff's accident allegedly occurred. The inspection was conducted immediately following the cessation of a significant rain storm marked by high wind gusts and it was overcast at the time of the inspection. Following the inspection wherein it was revealed that the illumination levels in the staircase exceeded the illumination

requirements of the 1968 New York City Building Code, Mr. Ettari opined that the lighting condition was not the proximate cause of plaintiff's accident.

Accordingly, the motion for summary judgment by the Macerich defendants is granted.

Cross Motion by Control

In light of the court's finding above dismissing the action insofar as asserted against Control, the cross motion by Control is denied as academic.

Cross Motion by the Macerich defendants

In light of the court's finding above dismissing the action insofar as asserted against the Macerich defendants, the cross motion by the Macerich defendants is denied as academic.

Dated: June 20, 2011
Long Island City, NY

ROBERT J. McDONALD, J.S.C.

J.S.C.