SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 10305/2010

PATRICIA JAMES-SINGLETON,

Plaintiff(s),

-against-

LYNDONNA DUBLIN,

Defendant(s).

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant's motion for summary judgment must be denied in its entirety. This lawsuit arises out of a slip and fall accident on a wet surface on the second floor landing of the only stairwell of Defendant's building located at 23 Somers Avenue, Brooklyn, NY in the late morning / early afternoon of February 20, 2010.

Several issues of fact exist as to whether Defendant's conduct, including multiples breaches of duties imposed on her by the Multiple Dwelling Law and the NYC Administrative Code, resulted in Plaintiff's injuries.

1) Defendant admits that as of the date and time of the accident, all stairway lights were off because she had installed an automatic timer that turned them off during daylight hours – a clear breach of the duties imposed on her by Multiple Dwelling Law § 37(3) and NYC Administrative Code § 27-2039(b). Therefore, the Court must reject Defendant's assertion that the condition which caused Plaintiff's accident was "readily observable" at the time she slipped and fell and Defendant's argument that she lacked notice of the dangerous condition.

2) Defendant admits that the landing in question is surfaced with linoleum, a surface known to be very slippery, especially when wet. Allowing Plaintiff the opportunity to have an expert test the friction factor of the surface will put to rest whether the Defendant is negligent *per se* for failing to properly surface the stairway landing with a "nonskid material" as required by NYC Administrative Code § 27-375(h).

3) Defendant admits to losing control of the premises. She admits to never mopping the landing in question or having directed the area to be mopped, yet all parties agree that the surface where the Plaintiff slipped and fell was wet and that a wet mop and bucket were left on the landing. While Defendant's admissions may be a *per se* violation of Multiple Dwelling Law § 80 and NYC Administrative Code § 27-2011, there remains a triable issue of fact as to whether Defendant's negligent loss of control of the premises caused the Plaintiff's injuries.

STATEMENT OF FACTS

This lawsuit arises out of an accident where Plaintiff PATRICIA JAMES-SINGLETON slipped and fell on a wet linoleum surface on the second floor landing of the only stairwell of Defendant LYNDONNA DUBLIN's building located at 23 Somers Avenue, Brooklyn, NY in the late morning / early afternoon of February 20, 2010, injuring her back, right side, right knee and right ankle.

A. Description of Occurrence

On the date and time in question, Plaintiff was accompanying her daughter and grandchild to her daughter's apartment located on the third floor of the Defendant's building. (Plaintiff's EBT, p. 45, lines 11-19; p. 48, lines 16-22). The stairs in question are the only means of reaching the third floor. As she was traveling down the stairs in order to exit the premises, the Plaintiff slipped and fell on the linoleum surface of the landing, (Plaintiff's EBT, p. 72, line 18 - p. 73, line 11) which was wet at the time, (Plaintiff's EBT, p. 58, lines 11-12, p. 64, lines 2-4) and fell backwards onto the landing on her right side and slid down the stairs until she reached a landing between the first and second floors. (Plaintiff's EBT, p. 73, line 17 – p.75, line 21). Plaintiff suffered injuries to her back, and her entire right side, including her right hip, knee and ankle.

B. Undisputed Facts

1. Lights Were Off: According to all accounts, the only exposure where natural light would shine through is a skylight located in the ceiling of the third floor. (Plaintiff's EBT, p. 39, lines 22-25, p.40, lines 2-3; Defendant's EBT, p. 30, Lines 6-12;). According to the Defendant's Testimony, all artificial lighting in the stairwell located on various points throughout the stairwell were shut off by an automatic timer located in the basement which the Defendant had installed upon acquiring the property. (Defendant's EBT, p. 29, Lines 7-12). Thus, there was no lighting on in the stairs whatsoever at the time of the accident.

2. Surface: According to the Defendant's testimony, the second floor landing is covered with linoleum, while the steps themselves are made of concrete. (Defendant's EBT, p. 31, lines 3-17).

3. Loss of Control of Premises: Defendant states that she did not mop the landing that day – and has never mopped that landing or had the landing mopped during her entire ownership of the premises. (Defendant's EBT, p.52, Line 13-14).

ARGUMENT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

The issue herein is whether summary judgment in favor of the Defendant should be denied when there are genuine issues of fact as to

(1) whether the wet, slippery linoleum stairway landing was "readily observable" when the lights in the stairway were shut off by the Defendant, breaching both the NYS Multiple Dwelling law and the NYC Administrative Code, (2) whether said wet, slippery linoleum stairway landing is a "nonskid material" according to both statute and industry standards and (3) whether the Defendant's loss of control of the premises and her failure to maintain the premises were proximate causes of Plaintiff's injuries when the Defendant admits to never cleaning the area where the accident occurred with water and a mop,

Summary judgment is a drastic remedy which is not to be granted unless it is clear that no material and triable issue exists. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S2d 498 (1957); Ugarriza v. Schmeider, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979); Licari v. Elliot, 57 N.Y.2d 203, 455 N.Y.S.2d 570 (1982). On such motions, the Court should draw all reasonable inferences in favor of the non-moving party.

A. *The condition was not "readily observable" because the Defendant violated laws governing adequate lighting in a multiple dwelling.*

Section 37(3) of the Multiple Dwelling Law states that "Every light in every fire-stair and fire-tower at every story, and in every stair and public hall at every story where there is no window opening to the outer air, shall be kept burning continuously...." Further, NYC Administrative Code § 27-2039(b) states that "the owner of a multiple dwelling shall keep all required lights burning continuously in every stair and public hall where there is no window opening. When alleging inadequate lighting conditions in a multiple dwelling as a proximate cause of injury, the Defendant has the burden of proving she lacked notice that the lights in the staircase were out. Green v. NYCHA, 776 N.Y.S.2d 52, 53, 7 A.D.2d 287, 288 (1st Dept 2004). In addition, any perceived failure to specifically plead Multiple Dwelling Law § 37 in a bill of particulars is not a fatal defect to Plaintiff's action so long as the bill of particulars alleges that inadequate lighting constituted a proximate cause of injury. Santiago v. NYCHA, 701 N.Y.S.2d 31, 32, 268 A.D.2d 203, 204 (1st Dept 2000).

There is no issue between the parties that the lights in all public areas of the building, including the stairs where the Plaintiff slipped and fell, were off on the date and time of the accident. (Defendant's EBT, p. 16-20; Plaintiff's EBT, p. 142, lines 6-20). Defendant admits that when she purchased the property, the lights in the stairwell "were on all the time." (Defendant's EBT, p.16, line 6; p.17. lines 2-5). Defendant also admits to modifying the lighting in the stairwell by hiring an electrician to install an automatic timer that turns the lights off and on automatically depending on the time of day. (Defendant's EBT, p. 17, line 9-23). The timer that controls the lights is in the basement (Defendant's EBT, p. 19, line 11-20), an area under the sole control of the Defendant and her agents. (Defendant's EBT, p. 48, line 22 – p. 49, line 3). On the date of the accident, the timer was set so that the lights would turn on at approximately sunset and turn off at approximately sunrise (Defendant's EBT, p.20, line 6-25) without regard to how much light is in the hallway itself (Defendant's EBT, p. 21, lines 2-7). Defendant admits that "cost" was the sole reason for altering the lighting, which "were

always on."(Defendant's EBT, p.18, line 16 - p. 19, line 7). Defendant even stipulated that all the lights in the stairway were off. (Defendant's EBT, p. 29, Lines 7-12).

Defendant relies on Lawson v. One Source Faculty Services, Inc., 51 A.D.3d 983, 859 N.Y.S.2d 249 (2d Dept 2008) and Ramsey v. M.T. Vernon Bd. Of Educ., 32 A.D.3d 1007, 821 N.Y.S.2d 651 (2d Dept 2006), which hold that Defendants are not liable for accidents that occur on wet floors if the facts and circumstances show that the conditions are "readily observable by a reasonable use of the plaintiff's senses" and "not inherently dangerous". The facts herein are undisputed - (1) the Defendant created the condition by turning off the lights in the stairwell in clear violation of state and city law and (2) the Plaintiff slipped while traveling down that darkened stairs on a wet, slippery linoleum surface on the second-floor landing, injuring herself. Under these facts, Defendant cannot possibly claim that she should be free from liability - especially in light of her admission of an intentional violation of the Multiple Dwelling Law and the NYC Administrative Code.

It should be noted that there is also no dispute amongst the parties that there exists a skylight in the ceiling of the third floor. However, whether the skylight provided light adequate to allow the Plaintiff to readily observe any condition on the stairs would be at issue. First, the positioning of the skylight is such that any light shining from the skylight above would result in a shadow in front of the Plaintiff, who was looking into blackness while traversing down the unlit stairwell. Second, the amount of light entering the building is an issue of fact in and of itself, as the skylight was covered by some 15 inches of snow, which had fallen in the 10 days prior to the accident. See: Exhibit 1. Given these facts, neither party can definitively prove that the skylight provided enough light to make the condition readily observable.

Based on the foregoing, the facts do not support the Defendant's contention that the dangerous condition should have been "readily observable" to the Plaintiff.

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Defendant's argument that Plaintiff must prove notice is contrary to case law, as discussed above. The Court in Green held that the burden of proving lack of notice is

borne by the Defendant – not the Plaintiff – when the Plaintiff alleges inadequate lighting conditions.

Here, the Defendant cannot meet that burden as she admits that she changed the lighting conditions to a scheme that is contrary to the Multiple Dwelling Law and the NYC Administrative Code.

Based on the foregoing, Defendant's motion cannot be granted on the basis of lack of notice.

B. There is an issue of fact as to whether the surface area of the landing in defendant's building conforms to the NYC Administrative Code.

The issue herein is whether the Defendant's summary judgment motion fails given that (1) the Defendant admits that the surface where the Plaintiff fell was wet linoleum and (2) plaintiff has not had the opportunity to test the surface in question to determine whether the surface is in violation of the NYC Administrative Code and industry standards.

NYC Administrative Code § 27-375(h) states that stairs are to be constructed with treads and landings "surfaced with nonskid materials", an industry standard computed by measuring the coefficient of friction of a given surface material. Courts have held that whether the condition of the area where one slips and falls constitutes the defect of a trap or a snare - specifically where wet linoleum on stairs is the surface in question -is an issue of fact for a jury to decide. Mayo v. Santis, 74 A.D.3d 470, 905 N.Y.S.2d 21 (1st Dept, 2010). An adequate expert report indicating (1) results of the testing of a particular area on which plaintiff slipped and (2) reference a specific standard by asserting a minimum acceptable coefficient of friction would be sufficient as evidence proving whether a surface is made of nonskid material. Sanders v. Morris Heights Mews Associates, 69 A.D.3d 432, 432-433, 892 N.Y.S.2d 99, 100 (1st Dept, 2010).

Defendant admits that the landing in question is surfaced with linoleum, a surface commonly known to be very slippery - especially when wet. Plaintiff would need access to the Defendant's premises to allow an expert to measure the static

coefficient of friction for this surface and report on whether the linoleum in question meets the standards of NYC Administrative Code § 27-375(h). If it deemed not to be a "nonskid material", then Defendant is negligent *pro se*. However, even after testing, determining whether the linoleum in question is a slippery surface is a fact left to a jury to decide.

Based on the foregoing, there remains a genuine issue of fact for a jury to decide as to whether the wet linoleum surface in question meets the industry standard to be deemed a "nonskid material" required to be present on the stairway landing in accordance with NYC Administrative Code § 27-375(h).

C. *There is an issue of fact as to whether the Defendant's loss of control and failure to maintain the premises caused the Plaintiff's accident.*

The issue herein is whether the Defendant's summary judgment motion fails given that Defendant admits to failing to properly maintain the premises, specifically her admission that she has never mopped the landing in question or having directed the area to be mopped since she has purchased the building, yet the fact that Plaintiff slipped and fell was on a wet surface and that a wet mop and bucket were left on the landing is seemingly conceded.

In determining whether Defendant was negligent, it is black-letter law that Plaintiff must prove (1) what duty/duties Defendant owed to it, (2) how Defendant breached its duty/duties to it, (3) how Defendant's breach of duty/duties was the proximate cause of it's harm and (4) proof of damages. The existence of proximate cause is a question of fact for the jury when the facts are subject to conflicting evidence that would support various reasonable inferences. Alexander v. Eldred, 63 N.Y.2d 460 (1984). To establish proximate cause, the defendant's negligence must have been a "substantial factor" in bringing about events that produced the injury. Kush v. Buffalo, 59 N.Y.2d 26 (1983). In this context, the word "substantial" means such an effect in producing the harm as to lead a reasonable person to regard it as a cause. Hoggard v. Otis Elevator Co., 28 A.D.2d 1207, 276 N.Y.S.2d 681 (1st Dept 1967). An obvious or

apparent risk of danger does not absolve a Defendant from liability, as there is still a duty to protect others from conditions – even in the absence of a statutory obligation - where it is foreseeable that injury will result despite its obviousness. Jacqueline S. by Ludovina S. v. City of New York, 81 N.Y.2d 288 (1993).

Both Multiple Dwelling Law § 80 and NYC Administrative Code § 27-2011 charge the owner of a dwelling with the duty to maintain the public parts of the premises in a clean and sanitary condition.

The Defendant has common-law duties to maintain the premises as well. Landowners, including the owner of a multiple dwelling or a landlord, have a duty to maintain their property in a reasonably safe condition whether the property is open to the public or not. Peralta v. Henriquez, 100 N.Y.2d 139 (N.Y. 2003). The affirmative obligation of a landlord to exercise reasonable care to inspect and repair common areas of the leased premises is uniformly accepted. Loeser v. Nathan Hale Gardens, Inc., 73 A.D.2d 187, 425 N.Y.S.2d 104 (1st Dept 1980). Landowners have the duty to maintain the property in a reasonably safe condition in view of all the circumstances, including (1) the likelihood of injury to others, (2) the seriousness of the injury, and (3) the burden of avoiding the risk so as to prevent the occurrence of foreseeable injuries. Barker v. Parnossa, Inc., 39 N.Y.2d 926 (N.Y. 1976); Meyer v. Tyner, 273 A.D.2d 364, 709 N.Y.S.2d 618 (2d Dept 2000).

Defendant admits to never mopping the second floor stairway landing in question herein at any time since she had purchased the premises (Defendant's EBT, p.52, Line 13-14). Also, as discussed earlier, Defendant admits to voluntarily shutting off the lights in the stairway and relying on an automatic timer in direct violation of the applicable law. Therefore, Defendant has conceded to breaches of statutory duties. Her breaches of statutory duties amount to a breach of her common-law duty to maintain the property in a reasonable safe condition, especially in light of (1) the likelihood of injury to people who may slip in a poorly lit stairway surfaced with linoleum mopped by person(s) outside of the Defendant's control, (2) the seriousness of injury that result from falling down a staircase after slipping in a poorly lit stairway with a wet linoleum

surface and (3) the small burden of Defendant to mop the stairway with a "wet floor" sign posted in a stairway with the lights turned on.

D. In the alternative, there is much outstanding discovery concerning this matter.

This matter is not ripe for summary judgment for any party. As mentioned earlier, additional discovery is needed in this matter to determine outstanding issues of fact, including, but not limited to:

1) the full name and last known address of the electrician who installed the automatic timer on the Defendant's stairway lights,
2) the name and model number of the automatic timer in question,
3) access to the stairway in question to allow a Plaintiff expert to test the surface of the stairway landing in question,
4) A copy of the Lease used by the Defendant with all tenants to determine whether Defendant delegated by contract any duties to maintain or clean the stairway landing in question.

This discovery, much of which was demanded on the record at Defendant's deposition, would shed additional light on outstanding issues of fact regarding the surface in question, and Defendant's possible abrogation of duties with regards to provides adequate lighting as proscribed by statute and rules and to maintain her premises.

CONCLUSION

Based on the foregoing, Defendant's motion for Summary Judgment must be denied.

Dated: New York, New York
October 20, 2011

Respectfully submitted,

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Our File No. 10-1044

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 5th day of July, 2012.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

PATRICIA JAMES-SINGLETON,

Plaintiff,

-VS-

LYNDONNA DUBLIN,

Defendants.

Motion Sequence #3

INDEX No. 10305/10

The following papers numbered 1 to 3 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers, defendant Lyndonna Dublin ("defendant") moves, pursuant to CPLR § 3212, for an order granting summary judgment in her favor on the grounds that Patricia James-Singleton ("plaintiff") has failed to make out a prima facie case of negligence against her.

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained on February 20, 2010 as the result of a slip and fall accident at defendant's property located at 23 Somers Street in Kings County, New York. At the time of the accident, plaintiff was visiting her daughter who resided on the third floor of defendant's apartment building. She was injured when she slipped and fell on a stairway which had been recently mopped.

To demonstrate entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it (*Gregg v Key Food Supermarket*, 50 AD3d 1093, 1093 [2011]).

The Court finds that defendant has failed to meet her prima facie burden of establishing that there are no material issues of fact (*see id.*; *Bradley v DiPaterio Management Corp.*, 78 AD3D 1096, 1096 [2010]). In support of her motion, defendant contends that the wet condition on the stairway was readily observable and not inherently dangerous. As proof, she submits plaintiff's deposition testimony in which she admits that she observed the wet condition of the stairway about ten minutes prior to her fall (*see* Deposition of Patricia James-Singleton, December 15, 2010, 58:7-15, 64:2-15). However, the issue of whether a dangerous condition is open and obvious is fact specific, and usually a question for the jury (*Villano v Strathmore Terrace*, 76 AD3d 1061, 1062 [2010]). Further, a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*id*).

Here, defendant concedes that during the day, which is when plaintiff slipped and fell, all the lights are turned off (Deposition of Lyndonna Dublin, 29:7-12). As such, it is unclear whether plaintiff's view of the wet condition was in any way obscured by the lighting conditions as she walked down the stairs (*see Gregg*, 50 AD3d at 1093; *see Villano*, 76 AD3d at 1062). Moreover, evidence that the condition which caused plaintiff's fall was readily apparent raises a question of fact as to the plaintiff's possible comparative negligence, but does not negate defendant's duty to maintain its premises in a safe condition (*see Massucci v Amoco Oil Co.*, 292 AD2d 351, 352 [2002]).

Accordingly, defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

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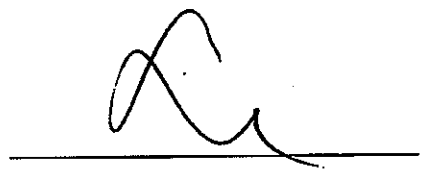

HON. LARRY D. MARTIN

J.S.C.

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Motion Seq. #

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