SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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MOZELLE DAYAN and MICHAEL BLITZ,

Plaintiffs,

Index No. 02580/09
Sequence #003
Part 37

- against -

05/03/11

NAMASTE THE YOGA SPA, LLC,

Defendant,

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Notice of Motion..1
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Upon the foregoing papers, defendant's motion for summary judgment pursuant to CPLR 3212 is denied.

In this action plaintiff seeks damages for injuries allegedly sustained when she slipped and fell at defendant's studio designed for Bikram "hot" yoga classes.

Bikram yoga is a discipline involving 26 body poses or positions that are performed in an enclosed room which is maintained at a temperature of approximately 105 degrees. Defendant's classes are conducted in a basement studio with no exterior windows but with large interior windows facing the adjacent hallway and front desk. The far wall opposite the doorway connecting the hallway to the yoga room is mirrored.

The sessions last from one to one hour 30 minutes. Students are told to bring water and are reminded to drink throughout the class. Afterwards, they may clean their personal yoga mats with the spray bottles and paper towels provided by defendant for that purpose.

According to plaintiff's testimony, on the day of the incident after the class concluded she remained on her mat for about 5 minutes to cool down. The lights in the studio were off but the room was lit through the window wall and open double door facing the hallway.

When plaintiff walked to leave the room she slipped on a puddle of water or other liquid that was on the studio floor. ✳ Plaintiff admits she did not see the liquid before she fell or knew how long it was there.

✳ The floor was covered with a wall to wall mat.

In addition to plaintiff's deposition transcript, defendant submits an affidavit from its studio manager, Joanne Delafuente, who attests that there were no prior accidents or general complaints about the condition of the yoga room. Furthermore, she stated there were no specific complaints of a water problem or spill that day.

The Court determines in the first instance that defendant has met its *prima facie* burden of proof of entitlement to judgment as a matter of law (see *Kennedy v. Wegman's Food Markets*, 90 NY2d 923; see also *Gordon v. American Museum of Natural History*, 67 NY2d 836; *Richardson-Dorn v. Golub Corp.*, 252 AD2d 790; PJI 2:91).

Defendant has demonstrated that it did not have actual or constructive notice of liquid on the floor nor did it create the puddle. Any suggestion that the spill was caused by the spray bottles supplied by defendant is purely speculative.

In opposition plaintiff submits the deposition testimony of Donna Kleiman, defendant's current employee, who also took hot yoga classes several times a week prior to working for defendant.

She testified she had taken the same class as plaintiff that evening and learned about plaintiff's fall shortly afterwards. She did not observe any discarded water bottles or any spilled water on the floor during class, but when plaintiff told her there was water on the mat both she and the instructor, Gina, went back into the studio to check.

There she observed a water puddle the size of a saucer on the mat near where she and plaintiff had been performing their yoga exercises.

Ms. Kleiman was unable to recall the lighting other than to say the high hats and fluorescent bulbs were dimmed the second half of the class period and the studio was bright when she returned to the room to find the presumed spill. She explained that when the instructor concludes the class and leaves, the lights are still on for the students' personal unwinding period. She also described the two clear windows facing the hallway which has fluorescent lighting.

In addition, Ms. Kleiman noted that the class members are requested to clean up their areas after each session.

Plaintiff also includes the testimony of Gina Gallo, who was the instructor that day and testified that the room is lit by high hats that are on a dimmer and the fluorescent lights, which are turned off before you enter to begin class. She turns the dimmer lights up before starting the class.

Once the students finish the last posture they are told to relax on their backs and when everyone is on the floor the dimmer lights are turned off. After 2 to 3 minutes she leaves the room while some students still stay behind.

Ms. Gallo described the double doors with a window and one large glass window and two smaller glass panes on the wall adjacent to the hallway from which you could see into the studio and which provided light to the interior of the yoga room.

The deposition of Jamie Scher, defendant's owner, who at times taught plaintiff's class is submitted in opposition to defendant's motion.

She described the hallway as having thirty feet of long fluorescent light fixtures. These lights are turned off during class. There are also fluorescent fixtures and high hat dimmers in the studio.

The wall facing the hallway has four 4' by 4' clear windows.

Ms. Scher clarified that during class the fluorescent fixtures are off, including the ones in the hallway, and the dimmers are turned up. There are two lights in the hallway on a dimmer.

Instructors may stay or leave during the unwinding period. Usually, the lights are dimmed, not completely off. Also, she corroborates that the students are instructed to clean up their surroundings before leaving.

When all of the students have left the room the staff cleans the mat within a half hour with a mop and bucket unless there is a following class.

She had never received any complaints about the condition of the studio.

Finally plaintiff includes her own affidavit in which she claims the lack of adequate lighting as well as the unsafe condition on the floor mat caused her to slip and fall. Plaintiff maintains that the instructor turned off the lights in the studio when she left. Plaintiff states, "with the lights off it was very dark and there was no lighting inside the studio."

It should be noted, however, that at her deposition plaintiff did not mention the lighting was a factor in causing the accident.

There is no doubt that plaintiff has failed to raise a genuine question of fact regarding notice or creation of the alleged hazardous condition. It appears to the undersigned that when plaintiff realized her case could not be established on that basis the alleged lack of sufficient lighting took center stage.

Nevertheless, it is mentioned in plaintiff's bill of particulars, if not in her examination before trial, and the Court is prohibited from considering credibility in determining a summary judgment motion, especially on what has now become a material issue to be resolved. All doubts must be determined against the party moving for summary judgment (see *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307; *Torres v. Jeremias*, 283 AD2d 484; compare *Fernandez v. VLA Realty, LLC*, 45 AD3d 391).

Accordingly, the motion is denied and the action is ready for trial.

ENTERED
MAY 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

May 5, 2011

Hon. John M. Galasso, J.S.C.

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