SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE** TRIAL/IAS PART 14

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MARIE McGUFFIE,

Plaintiff,

-against

Index No.: 008790/10
Motion Sequence...02
Motion Date...02/24/12
**XXX**

COSTCO, COSTCO WHOLESALE CORPORATION, COSTCO WHOLESALE MEMBERSHIP, INC., and TIMES SQUARE STORES CORPORATION,

Defendants.

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Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Affirmation in Reply.....x

Upon the foregoing papers, the motion by the Defendants, COSTCO, COSTCO WHOLESALE CORPORATION ("COSTCO") and COSTCO WHOLESALE MEMBERSHIP, INC. ("MEMBERSHIP"), seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissing the Plaintiff's complaint, is determined as hereinafter provided.

The Plaintiff's complaint alleges that on October 3, 2009 at approximately 3:30

p.m., she was caused to slip and fall on a wet floor in the customer service area of the COSTCO tire shop located at 605 Rockaway Turnpike, Lawrence, New York. The Plaintiff commenced this action by the filing of a summons and verified complaint on May 5, 2010. Issue was joined by the service of the Defendants' verified answer on June 25, 2010. The Defendants seek dismissal of the Plaintiff's complaint on the grounds that the Defendants did not have actual or constructive notice of the alleged dangerous condition, and, further, that the Plaintiff's claims are barred by the "storm in progress" rule. The Defendants also submit that the Plaintiff's claims against the Defendant, MEMBERSHIP, should be dismissed on the additional ground that said Defendant had no duty to maintain the premises.

The Plaintiff testified at an Examination Before Trial that on the day of the accident, it was raining when she arrived at COSTCO. (*See* EBT Transcript, dated May 26, 2011, page 15, attached to the Defendants' Notice of Motion as Exhibit "D") The Plaintiff entered the COSTCO tire shop through the customer service entrance. (*Id.* at page 16) After waiting in a chair in the customer service area for about five to ten minutes, the Plaintiff decided to go out to her husband's car to obtain an umbrella. (*Id.* at page 25) To leave the customer service area, the Plaintiff walked around a divider that separated the customer service area from the area where the cars were being serviced. (*Id.* at page 25) While attempting to walk around the divider, the Plaintiff's left foot slipped and she fell on the wet floor. (*Id.* at page 26) The Plaintiff testified that she was looking at the floor when she fell and she observed many spots of water on the floor at that time. (*Id.* at page 32) According

to the Plaintiff, she was not able to alter her path because the floor was wet all over. (*Id.* at page 36) The Plaintiff testified that she did not know how long the floor was wet before she fell. (*Id.* at page 34) After the Plaintiff fell, she left the tire shop and went to the main office to complete an Accident Report. (*Id.* at pages 42-44) The Accident Report states that the Plaintiff slipped and fell in the tire shop. (*See* Accident Report, dated October 3, 2009, attached to the Defendants' Notice of Motion as Exhibit "G")

On behalf of the Defendants, Shawn Latimer, a COSTCO employee, appeared for an Examination Before Trial on May 26, 2011. Mr. Latimer testified that on the day of the accident, it was drizzling on and off. (*See* Transcript, dated May 26, 2011, page 11, attached to the Defendants' Notice of Motion as Exhibit "F") It had just started to drizzle just before the Plaintiff's accident. (*Id.*) According to Mr. Latimer, there is no custom or practice at the tire shop of placing mats on the floor when it rains. He further testified that on the day of the accident, just before the Plaintiff fell, the floor was completely dry. (*Id.* at page 23) There was a sign before entering the work area of the tire shop that read, "Do Not Enter". (*Id.* at page 16) Mr. Latimer did not see the Plaintiff fall. After hearing a loud noise, Mr. Latimer saw the Plaintiff laying on the floor in the first bay in the work area of the tire shop. (*Id.* at 26) In the event there was a spill in tire shop, Mr. Latimer had access to a mop to clean it up. (*Id.* at page 25) On the day of the accident, no one mopped up the floor because, according to Mr. Latimer, "there was nothing to mop up". (*Id.* at 25)

The Defendants contend that they neither created the condition nor had actual

or constructive notice of same. The Defendants submit that the condition was visible and apparent and did not exist for a sufficient length of time to permit the Defendants' employees to discover and remedy the problem. The Defendants further contend that, as a premises owner, they are not required by law to constantly maintain dry floors by continuously mopping the floor or cover the entire floor with mats during a storm in progress until such time as the weather condition has abated. As such, the Defendants argue, that COSTCO had no duty to mop the floor or cover the floor of the customer service waiting area while the "rainstorm" was still ongoing. (*See* Affirmation in Support, dated October 6, 2011, ¶ 23)

With respect to the Defendant, MEMBERSHIP, counsel for the Defendants states that the Defendant, COSTCO, maintains exclusive control over the warehouse located at 605 Rockaway Turnpike, Lawrence, New York. Further, the Defendant, COSTCO, admitted in its verified answer that it managed and controlled the tire center at said location. (*See* Verified Answer, dated June 24, 2010, attached to the Defendants' Notice of Motion as Exhibit "A") Based upon the Defendant, COSTCO's exclusive control over the premises, the Defendants seek dismissal of the Plaintiff's claims as against the Defendant, MEMBERSHIP.

In opposition, The Plaintiff contends that issues of fact exist, arguing that the Defendants did have notice of the condition complained of and also created the condition which caused her to slip and fall. The Plaintiff further contends that despite the fact that it had been raining all morning, the Defendants failed to install mats in the customer service

area of the tire shop. The Plaintiff avers that the Defendants created the hazardous condition in that the Defendants' employees may have tracked in the water from outside. Moreover, the Plaintiff argues that the dangerous condition was created by the Defendants' employees when cleaning the floor with a scrubber the morning of the accident. Based upon these facts, the Plaintiff urges that it is highly probable that the Defendants' employees created the dangerous condition, and, as such, the Defendants' motion for summary judgment should be denied.

Additionally, the Plaintiff argues that the Defendants failed to show when the area where the Plaintiff fell was last inspected or cleaned relative to the time of the accident. The Plaintiff analogizes the instant matter to *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598 (2d Dept. 2008), where the Appellate Division, Second Department, denied summary judgment to the defendant based upon its failure to offer evidence as to when the subject location was last cleaned or inspected relative to the time of the accident.

Summary Judgment is a drastic remedy and should only be granted where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). 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 or remedy it. *See Joachim v. 1824 Church Ave. Inc.*, 12A.D.3d 409, 410 (2d Dept. 2004); *Goldman v. Waldbaum, Inc.*, 228 A.D.2d 436 (2d Dept. 1998). A Defendant who had actual knowledge of an ongoing and

recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition. *Freund v. Ross-Rodney Hous. Corp.*, 292 A.D.2d 341, 342 (2d Dept. 2002) quoting *Osorio v. Wendell Terrace Owners Corp.*, 276 A.D.2d 540 (2d Dept. 2000).

The Defendants have established their prima facie entitlement to summary judgment as a matter of law. The Defendants set forth sufficient evidence that they neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover or remedy it. In opposition the Plaintiff failed to raise an issue of fact.

Preliminarily, the Plaintiff failed to submit any evidence to oppose the Defendants' contention that the Defendant, MEMBERSHIP, did not maintain or control the premises where the accident occurred. Accordingly, the Plaintiff's complaint is **DISMISSED** as to the Defendant, MEMBERSHIP.

With respect to the Defendant, COSTCO, the Defendants submitted evidence that the floor was dry immediately prior to the accident. Further, the Defendants submitted sworn testimony that it had just started drizzling prior to the time of the accident. In the event there was a spill on the floor, the Defendants' employees had access to a mop to clean it up.

The Plaintiff failed to set forth any evidence regarding the length of time the hazardous condition existed or whether the Defendants had any notice of same. The Plaintiff

testified that, although she observed the water on the floor before she fell, she was not aware of the length of time the floor was wet prior to the accident. The Plaintiff also testified that she did not hear anyone make any complaints regarding the condition of the floor prior to her accident. Based upon a review of the record, the facts presented by the Plaintiff raise issues that are trivial in nature.

Moreover, the case of *Birnbaum, supra*, relied upon by the Plaintiff is readily distinguishable. In that case, the employee on behalf of the defendant testified as to its general daily cleaning practices without proffering any evidence as to when the area was cleaned or inspected that particular day. To the contrary, in this case, a COSTCO employee testified that the floor was observed and that after observing the floor, cleaning it was not necessary. He further testified that in the event there was a spill, he had access to a mop to clean same. In opposition, the Plaintiff failed to proffer any evidence that raised a material issue of fact.

Accordingly, it is hereby

**ORDERED**, that the Defendants' motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissing the Plaintiff's complaint, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
April 12, 2012

**Hon. Randy Sue Marber, J.S.C.**
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