SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

KATHLEEN LOHLE,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Defendant.

Index No.: 18304/2010

Motion Date: 05/24/12

Motion No.: 33

Motion Seq.: 1

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The following papers numbered 1 to 18 were read on this motion by defendant, THE STOP & SHOP SUPERMARKET COMPANY, LLC, for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 10
Affirmation in Opposition-Affidavits-Exhibits	11 - 16
Reply affirmation	17 - 18

This is an action for damages for personal injuries sustained by the plaintiff, KATHLEEN LOHLE, on April 25, 2010, when she purportedly slipped and fell on a plastic strap used for bundling newspapers which was on the ground, outside the store, at or near the entrance/exit of the Stop & Shop Supermarket located at 249-26 Northern Boulevard, Little Neck, N.Y. Plaintiff alleges that as a result of the accident she sustained, inter alia, a fractured left wrist.

The plaintiff commenced this action by filing of a summons and complaint on July 20, 2010. In her bill of particulars the plaintiff alleges that the supermarket employees or their agents were negligent in throwing and leaving the band on the ground;

causing and/or permitting the band to be on the ground where people can trip; and not cleaning up and/or removing the band from the ground. Plaintiff contends that defendants created the dangerous condition and had both actual and constructive notice.

Issue was joined by service of the defendant's answer dated August 20, 2010. The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. The defendant contends that it did not create the condition nor did it have actual or constructive knowledge of it, and therefore did not have a legal duty or responsibility to remedy the alleged hazardous condition. In support of the motion, the defendant submits an affidavit from counsel, Christine M. Capitolo, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a customer incident report; photographs marked as exhibits at the plaintiff's deposition; and copies of the transcripts of the examination before trial of the plaintiff, Ms. Lohle, and Stop & Shop manager, Ajisha Vaughn; as well as affidavits from store employees Ajisha Vaughn, Nereida Davis and Roopa Bhatia.

The plaintiff, age 48, testified that on the day of the accident, April 25, 2010, after completing her shopping at the Stop & Shop Supermarket, she exited the supermarket carrying one shopping bag. When asked how her accident occurred, Ms. Lohle stated: "I was walking out the second exit door and I was walking out the door, all of a sudden my leg would not come with me..my right leg, it was caught on something. And with that, I then tumbled over and fell." When asked if she knew what her foot was caught on she stated, "not at that time, no." She stated that after the accident she learned from the store manager that it was a grayish white "newspaper band," in a closed circle, approximately a quarter inch thick and a foot to a foot and half long. She did not personally know how the band came to be there and she did not know how long the band was there before the accident. She testified that a store cashier and the store manager told her the band came from the newspaper delivery. She did not see the band before the accident and never made any previous complaints regarding bands outside the store. She stated that she fell in a forward direction and she hit her head, left hand, and her right knee on the ground.

Ms. Davis, a store worker who witnessed her fall responded immediately. The store manager, Ms. Vaughn, responded about three minutes later. Ms. Vaughn escorted plaintiff into the store, had her sit down, gave her ice and called the plaintiff's husband. Plaintiff's husband arrived twenty minutes later and took her home and then to North Shore Hospital. Plaintiff testified that

she was treated at the emergency room for a fractured left wrist and injury to her right knee and released after a few hours with a cast on her wrist.

Ms. Vaughn, a manager at Stop and Shop testified that on the date of the accident, April 25, 2010, she was a customer service manager and received a loudspeaker page notifying her that there was an accident. She responded to the scene and observed Ms. Lohle on the ground outside near the store exit. She observed that a plastic strap was still tangled up underneath plaintiff's foot. She brought her inside the store where she was able to sit down. The plaintiff told her that as she was exiting the store she slipped on plastic that was outside and hit her knee and her hand. Ms. Vaughn stated that she saw the object that plaintiff slipped on and she described it as a round clear plastic band that is used to wrap newspapers. She said it was approximately 12 inches in diameter and ½ inch thick and was connected all around. She stated that the store receives daily newspaper deliveries from the Daily News, New York Post and The New York Times. She stated that she recognized the plastic to be the same type that was used to wrap the newspapers. The newspaper bundles are dropped in front of the store during the night and brought into the store at 6:30 a.m by one of the cashiers. She stated that she did not see the strap on the ground that morning when she arrived. She stated that she continuously passes by the area in question because "we have to make sure the parking lot has shopping carts and we do have to make sure the area is contained. We do that continuously." They do not have a schedule but the process of checking the area is ongoing. She stated that she picked up the strap she saw near the plaintiff but did not keep it. She testified that prior to the accident no one ever complained to her regarding straps on the floor. She did not recall ever picking up straps inside or outside the store on prior occasions.

With respect to the issue of constructive notice, defendant submits the affidavit of Ms. Vaughn, dated March 13, 2012 in which she states that on the day of the incident she was working in the capacity of the Store Manager. She states that her duties include overseeing the stores service department and operations as well as walking the entire store, including the entrance/exit area, both inside and out, to ensure that the store is clean, free of debris and running smoothly." She states that on the day of the accident she arrived at the store at 7:00 a.m. She entered the store through the same entranceway doors where plaintiff tripped. She states that as she approached the doors she did not observe any debris, strap or band on the ground. After being paged she observed the plaintiff who told her that as

she was leaving the store she tripped and fell on a plastic strap which she saw underneath her foot. She stated that prior to the incident she did not observe any straps or bands during her frequent inspections of the incident location. She states that from the time she entered the store at 7:00 a.m. up to the time of the accident at 9:30 a.m. she did not receive any complaints regarding straps or bands at the subject location.

Ms. Nereida Davis, who was employed at Stop and Shop on the date of the incident, also submitted an affidavit dated March 12, 2012. She states that she reported to work at 7:00 a.m., entered through the same entranceway where the accident occurred and did not observe any plastic strap or band on the ground before entering the store. She states that, "at approximately 9:15 a.m. I exited the store for a break. I left through the exit doors which are part of the same entrance area I had passed through on my way into the store that morning. As I exited the store at this time, I did not observe a plastic strap or band on the ground at the location." She stated that 15 minutes later she saw the plaintiff exit the store and fall before she reached the parking lot.

Another store employee, Roopa Bhatia, stated in an affidavit that she was working as a cashier on the date of the accident. She states that she arrived at the store at 6:30 a.m. the morning of the accident and she walked through the same entranceway where the accident took place. She sates that she did not see any plastic strap or band on the ground before entering the store at that time. She stated that she assembled the newspapers that morning but did not do so near the entranceway to the store.

Defendant contends that the deposition testimony of the plaintiff and the store manager do not substantiate the plaintiff's contention that the store caused or had actual or constructive notice of the allegedly dangerous condition (citing Williams v SNS Realty of Long Island, 70 AD3d 1034 [2d Dept. 2010]; Hayden v. Waldbaum, Inc., 63 AD3d 679 [2d Dept. 2009]; Gallier v Watnick, 23 AD3d 615 [2d Dept. 2005]). Defendant contends that in order to establish that the defendant created the condition, the plaintiff is required to prove that the defendant itself rather than an intervening party such as a shopper or a third-party created the condition (citing Cameron v Bohack, 27 AD2d 362 [2d Dept. 1967]; Benware v Big V Supermarkets Inc., 177 AD2d 846 [3rd Dept. 1991]). Counsel claims in this regard that the plaintiff's deposition does not state with specificity who created the condition, how the condition was created or when the condition was created and therefore her allegation that store employees created the condition is

speculative. Counsel also asserts that the plaintiff has failed to show that the store had actual or constructive notice of the condition. Defendant asserts that there is no evidence in the record as to how long the plastic band was on the ground prior to the accident and how the strap came to be on the ground in front of the store exit. In this regard, the defendant points out that the plaintiff testified that she did not see the band before the accident when she entered the store at 9:00 a.m. one half hour prior to the accident and she did not know how long the band was at that specific location.

Defendants counsel also submits that the affidavits of the store employees demonstrate, prima facie, that the defendant did not have constructive notice of the band on the floor within a sufficient time to discover and remedy it (see Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]). Defendant asserts that the affidavits of the store employees show that the store could not have constructive notice as all three employees passed the area at 6:30 or 7:00 a.m. and did not see the band. In addition, plaintiff stated she also did not see the band at 9:00 a.m when she entered the store. Further, Ms. Vaughn stated that she did not see the band during her continuous inspections of the subject location and Ms. Davis stated she did not see the band when she went through the exit at 9:15 a.m. to take a cigarette break. Thus, defendant asserts that plaintiff's claim that Stop and Shop created the condition or had prior notice is speculative and is insufficient to sustain her cause of action (citing Williams v. SNS Realty of Long Is., Inc., 70 AD3d 1034 [2d Dept. 2010]; Hayden v Waldbaum Inc., 63 AD3d 679 [2d Dept. 2009]). Thus, counsel contends that defendant has demonstrated, prima facie, that Stop and Shop had no knowledge that there was anything unsafe about the area prior to the occurrence as it did not create or have prior actual or constructive notice that there may have been a plastic strap present on the ground.

In opposition, plaintiff's counsel, Christopher B. Cosolito, Esq. submits his own affirmation as well as copies of the deposition testimony of Ms. Lohle, Ms. Vaughn and copies of the same affidavits of the three store workers also submitted by the defendant. In his affirmation counsel argues that defendant failed to make a prima facie showing of entitlement to judgment as a matter of law. Counsel states that to sustain that burden, the defendant must offer some evidence as to when the area in question was last inspected relative to the accident (citing Birnbaum v New York Racing Assn., Inc., 57 AD3d 598 [2d Dept. 2008]; , Bruk v Razaq, 60 AD3d 715[2d Dept.2005]; Soto-Lopez v Bd. of Mgrs. of Crescent Tower Condominium, 44 AD3d 846 [2d Dept. 2007]; Porco v Marshalls Dept. Stores, 30 AD3d 284 [1st Dept.

2006]). Counsel argues that the affidavits of the store employees are insufficient to demonstrate lack of constructive notice because he asserts that proof that an employee simply walked over or past the incident area is insufficient proof as to whether that employee performed an actual inspection of the area (citing Baratta v Eden Roc NY, LLC, 95 AD3d 802[2d Dept. 2012]). Counsel also states that defendant must offer proof of a particularized or specific inspection as opposed to evidence of general daily cleaning practices (citing Birnbaum v New York Racing Assn., Inc., 57 AD3d 598 [2d Dept. 2008]). Plaintiff's counsel argues that the affidavits of the store employees are insufficient as they each stated that they walked through the area but did not state that they performed an actual inspection. Further, counsel argues that Ms. Vaughn's statement that she made regular inspections on a ongoing basis is insufficient as she did not state when she made an actual inspection prior to the plaintiff's accident.

Lastly, plaintiff argues that the defendant failed to show that it did not create the actual condition because they did not produce an affidavit from the store employee who was responsible for removing the bundles from the incident location and bringing them into the store, thus failing to show that a night employee did not leave the strap in the incident area. Further, counsel argues that there is a material question of fact as to whether the strap was placed in the incident area by an employee or third party during the fifteen minutes prior to plaintiff's fall. Counsel argues that a jury can determine that even a fifteen minute period could have been long enough for a Stop and Shop employee to notice the dangerous condition and remedy it.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property 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 Bloomfield v Jericho Union Free School Dist, 80 AD3d 637 [2d Dept. 2011]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razaq, Inc., 60 AD3d 715 [2d Dept. 2009]).

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds that the evidence submitted by the defendant was not sufficient to demonstrate, prima facie, that the defendant did not create the condition nor to show that it did it have actual or constructive notice of the band on the ground prior to the plaintiff's accident.

In order for a plaintiff in a "slip and fall" case to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition. 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 defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). "To meet [their] initial burden on the issue of lack of constructive notice, [the defendants] must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Pryzywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Here, this court finds that the defendant failed to proffer sufficient evidence as to when the entranceway to the store where the plaintiff fell had last been inspected or cleaned prior to the injured plaintiff's fall. Although the manager and the three employees who submitted affidavits all passed by the area on their way into the store in the morning and during a cigarette break, none of the witnesses stated that they actually made an inspection of the premises for purposes of clearing away debris. Walking past or through an area does not serve the same purpose as an inspection, the purpose of which is to look for debris or dangerous conditions. When one walks past an area to go into the store it is likely that it is not to look for debris on the ground (see Baratta v Eden Roc NY, LLC, 95 AD2d 802 [2d Dept. 2012][the defendant offered no evidence as to when the mat was last inspected prior to the accident as opposed to the last time its superintendent walked over it]). Further, the deposition testimony of the defendant's manager, which merely referred to the general inspection practices of the supermarket and her "frequent inspections of the area" and provided no evidence as to when the entranceway was actually last inspected before the plaintiff's fall, was insufficient to satisfy the defendant's initial burden on the issue of lack of constructive notice (see

Klerman v Fine Fare Supermarket, 946 NYS2d 506 [2d Dept. 2012]; Levine v Amverserve Assn., Inc., 92 AD3d 728 [2d Dept. 2012]).

Thus, defendant failed to make a prima facie showing that it did not have constructive notice of the alleged dangerous condition of the band which caused the plaintiff's fall (see Baratta v Eden Roc NY, LLC, 95 AD3d 802 [2d Dept. 2012]; Levine v Amverserve Assn., Inc., 92 AD3d 728 [2d Dept. 2012]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]). In addition, the defendant failed to submit sufficient evidence to make a prima facie showing that its employees did not create the allegedly dangerous condition that caused the plaintiff to slip . Although there was testimony that the newspapers are delivered in bundles with plastic straps, and the night crew or store cashier take the bundles from the area in shopping carts and bring them into the store in the morning, there was no affidavit from said employee to show that the band did not fall from the papers at the time they were brought in to the store.

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the opposition papers submitted by the plaintiff (see Giraldo v Twins Ambulette Serv., Inc., 946 NYS2d 871 [2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 A.D.3d 1002 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the defendant's motion for summary judgment is denied.

Dated: August 20, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.