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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 109753/2010
DAKAS, KONSTANTINA
vs.
WATERSIDE BAR RESTAURANT
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 109753/10
MOTION DATE 6/26/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 14, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1 - 10

Answering Affidavits — Exhibits ____ No(s). 11, 12, 13

Replying Affidavits ____ No(s). 14

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/10/12

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Konstantina Dakas,

Plaintiff,

-against-

Waterside Bar Restaurant Catering, Inc. d/b/a H20 Bar & Grill, and Waterside Plaza LLC,

Defendants.

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DECISION AND ORDER
Index Number: 109753/10
Motion Seq. No.: 003

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment dismissing the complaint.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-9
Opposition Affirmations, and Exhibits	10-11
Reply Affirmation	12

In this personal injury action, defendants, Waterside Bar Restaurant Catering, Inc. d/b/a H20 Bar & Grill, and Waterside Plaza, LLC., move for an Order, pursuant to CPLR 3212, dismissing the complaint.

Factual Background

On February 18, 2008 plaintiff, Konstantina Dakas, allegedly slipped and fell while at defendants' establishment, sustaining personal injuries (the accident). On the night of the accident, at some time in between 11pm and 1am, and while at defendants' restaurant, plaintiff claims she slipped on what appeared to be olive oil or cooking oil while dancing with a group of friends.

Due to plaintiff having a group of approximately 40 people, and the restaurant not being able to accommodate the large group in the main part of the restaurant, plaintiff and her group

were seated in the rear of the restaurant, right by the kitchen doors where the wait staff was constantly walking to and from the kitchen with the dinners being served at the restaurant. Plaintiff alleges that her dinner was served with a large amount of olive oil, and that perhaps this was the substance she slipped on, after it was spilled by one of the waiters or bus boys tending to the tables.

Defendants deny that there was anything on the floor. They assert that plaintiff must have slipped on her own after she had a few alcoholic drinks. In defendants' examination before trial, the manager of the restaurant at the time of the accident, Pete Bourekas, does not state any knowledge of when the area may have been inspected, or provide any sort of procedure or schedule for inspecting the premises for safety hazards.

Plaintiff does not know how long the substance may have been on the floor, but claims that it was spilled by one of the defendants' employees.

Arguments

Defendants argue that since plaintiff cannot prove any actual or constructive notice she is merely speculating on the cause of the spill and thus cannot meet her burden to prove negligence.

Plaintiff contends that defendants' own employees created the dangerous condition, and therefore she does not have to prove any notice.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of

action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous 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 (see *Strowman v. Great Atl. & Pac. Tea Co., Inc.*, 252 A.D.2d 384, 675 N.Y.S.2d 82 [1998]).

In *Deluna Cole v Tonali, Inc.*, the plaintiff sustained an injury after a slip in fall in a restaurant. The Court denied defendant's motion for summary judgment because there was a "genuine issue of material fact as to whether restaurant staff had notice of, and opportunity to remove, broken glass on floor before patron slipped and fell...[thus] preclud[ing] summary judgment for [the] restaurant." (*Deluna Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept. 2003]). The Court stated that according to the "sworn statements of defendants' hostess...her duties included 'walking around the restaurant looking for hazardous conditions' and that the head of the busboys is in charge of cleaning the restaurant." (*Id.*). This did not adequately describe defendants' floor-cleaning routines, and "did not address how often or when the passageway where plaintiff fell is checked or when it was last checked for spills or breakage before plaintiff fell." (*Deluna Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept. 2003]; see also *Jacques v Richal Enters*, 300 AD2d 45 [1st Dept. 2002]). Plaintiff's evidence that she slipped in an area near the kitchen doors, a "center of activity" for the restaurant staff, permitted "inferences that defendants' employees" created the dangerous condition, or at least had time to discover and remedy the situation was sufficient to raise material issues of fact. (*Id.*).

Here, like in *Deluna*, plaintiff maintains that one of defendants' wait staff was responsible for the spill, thus creating the dangerous condition, and negating plaintiff's need to establish any actual or constructive notice. As such, defendants are required to prove that they did not create the alleged dangerous condition and/or that they did not have any actual or timely notice. Defendants do not provide any testimony stating when or if the area in question was

inspected, or even a procedure that is followed for discovering such situations. This creates a material issue of fact as to whether the restaurant created, had notice of, or had time to discover the dangerous condition. Moreover, it is hornbook law that only the trier of fact can determine the proximate cause of the accident. (see *Peter McKinnon v Bell Security*, 268 AD2d 220 [1st Dept. 2000]). In this case it is not at all clear what the proximate cause of the accident was. Accordingly, it is hereby

ORDERED, that defendants' summary judgment motion, is denied, in its entirety, and it is further

ORDERED, that the parties proceed to mediation forthwith.

Dated: 9/10/12

ENTER:

Joan M. Kenney, J.S.C.