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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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NAYELI MORALES,

Plaintiff,

-against-

TRIO RESTAURANT and 114 W. MAIN STREET, INC.,

Defendants.

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DECISION/ORDER
Index No. 159795/2013

HON. CYNTHIA KERN, J.:

Plaintiff Nayeli Morales commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on vomit in the bathroom of a restaurant (the "premises"). Defendants Trio Restaurant ("Trio") and 114 W. Main Street, Inc. ("114") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint. For the reasons set forth below, defendants' motion is denied.

The relevant facts are as follows. 114 owns the premises and Trio operates the restaurant at the premises. On or about August 5, 2012, plaintiff attended a wedding at the premises. According to plaintiff's deposition testimony, between 3:30 a.m. and 4:00 a.m., she went to the bathroom with her mother. There were three stalls in the bathroom, one of which had a puddle of vomit outside the stall door and two of which were missing toilet paper and soiled with urine. Plaintiff chose to use the stall with the puddle of vomit outside its door and jumped over the puddle. After she finished using the stall, plaintiff began walking out when she stepped in the vomit, slipped and twisted her ankle, causing her to fall (the "accident"). In contrast to plaintiff's deposition testimony, Elsa Cardenas ("Cardenas"), Trio's assistant manager, testified that she entered the bathroom at around 4:00 a.m., after the wedding reception was supposed to end, because she heard noises in the bathroom. There was no vomit on the floor when she first entered the bathroom. She testified that plaintiff was in the bathroom with her friend, that they were both drunk and that, after she was in the bathroom for about ten or fifteen minutes, they vomited on the floor. Cardenas opened the bathroom door and called out for help and at some point other staff members entered

the bathroom. One of the other staff members tried to clean the bathroom with a mop. Cardenas testified that she was in the bathroom for a total time of about thirty minutes before the accident occurred and that various persons, including plaintiff's husband, entered and left the bathroom before the accident. She further testified that the accident occurred when plaintiff was trying to help her friend, who could not support herself, out of the bathroom.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

Defendants' motion for summary judgment dismissing plaintiff's complaint on the ground that defendants did not create or have actual or constructive notice of the vomit is denied. A defendant that moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not create the condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). "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 N.Y.2d 836, 837-838 (1986).

In the present case, defendants' motion for summary judgment is denied as they have failed to make a *prima facie* showing that they did not have actual notice of the vomit through their submission of Cardenas' deposition testimony as she testified that she saw plaintiff and her friend vomit on the floor, that she called for the assistance of other staff members and that a staff member attempted to clean the floor before the accident occurred.

Moreover, even if the evidence submitted by defendants had been sufficient to make a *prima facie* showing of their entitlement to summary judgment, which it was not, plaintiff's deposition testimony would raise triable issues of fact as to how the accident occurred. Cardenas' deposition testimony that, when she entered the bathroom at around 4:00 a.m. to investigate the noise plaintiff and her friend were making, she observed that the floor was clean, which defendants contend is *prima facie* evidence of their lack of constructive notice of the vomit, is contradicted by plaintiff's deposition testimony that, when she entered the bathroom between 3:30 a.m. and 4:00 a.m., she saw vomit on the floor but did not know who vomited or when the vomiting occurred and that Cardenas was not in the bathroom at that time.

Defendants' argument that, even if they had notice of the vomit, their motion for summary judgment dismissing the complaint should be granted because they did not have a sufficient opportunity to remedy the allegedly dangerous condition is raised for the first time in reply and thus the court will not consider this argument. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dept 1992).

However, even if the court were to consider this argument, the court would find it without merit. It is well-settled that even if a defendant had actual or constructive notice of a dangerous condition, the defendant must have had a sufficient opportunity, within the exercise of reasonable care, to remedy the dangerous condition after receiving notice to be held liable for negligence. *Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 219 (1st Dept 2007).

In the present case, the court cannot determine as a matter of law that defendants did not have a sufficient opportunity to remedy the allegedly dangerous condition even if the court accepted Cardenas' version of events. Cardenas testified during her deposition that she saw plaintiff and her friend vomit approximately ten to fifteen minutes after she first entered the bathroom and that she was in the bathroom for approximately thirty minutes before the accident occurred, which indicates that their vomiting occurred approximately fifteen to twenty minutes before the accident occurred, although she also testified that the accident occurred approximately five minutes after plaintiff's friend vomited. Further, Cardenas testified

that she called for the assistance of other staff members and that a staff member attempted to clean the floor before the accident occurred. Based on these facts, a jury may find that defendants had a sufficient opportunity to remedy the condition of the vomit.

Defendants' reliance on the First Department's decision in *Aquino* is misplaced as *Aquino* is distinguishable from the instant action. In *Aquino*, the plaintiff slipped and fell on vomit in front of a security guard and then slipped and fell on the vomit a second time when she tried to stand up. *Id.* at 217. The First Department granted the defendants' motion for summary judgment dismissing the complaint, holding that the defendants did not have a sufficient opportunity to remedy the dangerous condition of the vomit after allegedly receiving notice of the condition from the first accident as the second accident occurred almost "instantaneously" after the first accident and the plaintiff was still on the floor in the midst of the vomit after the first accident. *Id.* Here, in contrast, Cardenas testified that she saw plaintiff and her friend vomit and that a staff member actually attempted to clean the floor some minutes before the accident occurred.

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied. This constitutes the decision and order of the court.

DATE : 12/9/16

CK

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.