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SHORT FORM ORDER

INDEX No. 15-1169
CAL. No. 16-01146OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-26-16
ADJ. DATE 10-21-16
Mot. Seq. # 002 - MG; CASEDISP

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GIOVANNA SAMMARTINO,

Plaintiff,

- against -

BUONADONNA SHOP RITE, L.L.C.,

Defendant.

---X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated July 29, 2016, and supporting papers (including Memorandum of Law, dated July 29, 2016); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated September 28, 2016, and supporting papers; (4) Reply Affirmation by the defendant, dated October 17, 2016, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Buonadonna Shop Rite, LLC for summary judgment in its favor is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Giovanna Sammartino on October 29, 2014, when she slipped and fell at the Shop Rite supermarket, located at 1905 Sunrise Highway, Bay Shore, New York. Plaintiff claims that defendant was negligent in, among other things, allowing the floor to be "tacky and/or sticky."

According to plaintiff's testimony, the accident took place in the second aisle of defendant's store, near a display in the center of the aisle, while she was grocery shopping with her daughter,

Geraldine Condy. She testified that her right shoe got stuck on a sticky substance on the floor, that her foot dislodged from the shoe completely, and that she fell on her right side.

Condy testified that she was walking in front of plaintiff at the time of the accident and did not see her mother fall. However, Condy saw a sticky substance on the floor when she was walking through the aisle before the accident and again after plaintiff fell. Upon picking up plaintiff's shoe, which she felt stick to the floor, Condy observed that the substance was brown and contained dirt, and that there was a sticky substance on the bottom of the shoe. Condy further testified that in the emergency room later that day, plaintiff told Condy that her foot got caught on the sticky substance, that her shoe came off, and that she then fell.

Defendant now moves for summary judgment in its favor, arguing that it did not create the alleged dangerous condition, or have actual or constructive notice of it, because it conducted regular inspections of the floor and found no substance during the last inspection before the accident. Defendant submits, in support, copies of the pleadings; the transcripts of the deposition testimony of plaintiff, Phillip DeCicco, and Geraldine Condy; the affidavits of Darius Dorival, Renee Ramlal, and Phillip DeCicco; a discovery response; a supplemental response to a preliminary conference order; and a photograph. In opposition, plaintiff argues that defendant failed to make a prima facie showing that it did not create or have constructive notice of the sticky substance on the floor, because the Floor Safety Walk form and the affidavit of Darius Dorival are inadmissible. Plaintiff submits, in opposition, copies of the pleadings; the transcripts of the deposition testimony of plaintiff, Phillip DeCicco, and Geraldine Condy; the affidavit of Geraldine Condy; a supplemental response to a preliminary conference order; and a photograph.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). A

defendant moving 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 the condition [for a sufficient length of time to discover and remedy it] (*see* ***Petersel v Good Samaritan Hosp of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Johnson v Culinary Inst. of Am.***, 95 AD3d 1077, 944 NYS2d 307 [2d Dept 2012]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). To constitute constructive notice, the condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; *see* ***Schubert-Fanning v Stop & Shop Supermarket Co., LLC***, 118 AD3d 862, 988 NYS2d 245 [2d Dept 2014]; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]). Proof of the defendant's general awareness that a dangerous condition may be present is insufficient to establish notice of the condition (*see* ***Gonzalez v Jenel Management Corp.***, 11 AD3d 656, 784 NYS2d 135 [2d Dept 2004]). Further, in a slip and fall action, a plaintiff's "inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (***Capasso v Capasso***, 84 AD3d 997, 998, 923 NYS2d 199 [2d Dept 2011]; *see* ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]).

Defendant established a prima facie case that it had no actual or constructive notice of the alleged dangerous condition, as it showed the floor was regularly inspected and no substance was on the floor during the inspection prior to the accident (*see* ***Ferro v 43 Bronx River Road***, 139 AD3d 897, 32 NYS3d 581 [2d Dept 2016]; ***Farren v Board of Educ. of City of New York***, 119 AD3d 518, 988 NYS2d 684 [2d Dept 2014]; ***Gomez v J.C. Penny Corp., Inc.***, 113 AD3d 571, 979 NYS2d 323 [1st Dept 2014]). Here, defendant's employee, Darius Dorival, affirmed that he inspected the floor once per hour and that no substance was on the floor during the inspection prior to the accident. Dorival, Shop Rite's Maintenance Porter, stated in an affidavit that between 2:00 p.m. and the time of plaintiff's accident, approximately 2:35-2:40 p.m., he inspected aisle two and found it to be clean and dry, which he confirmed by marking his initials in the appropriate box on page one of the Floor Safety Walk form and not completing the second page wherein he could indicate any breakage, spillage, or debris found. The Floor Safety Walk form was included with the affidavit of Phillip DeCicco, Shop Rite's Assistant Manager. Furthermore, DeCicco testified that a cleaning crew cleaned the store's floor at night when the store was closed, and that between four and seven employees passed through the aisle per hour during working hours. Each of these employees were responsible for floor cleanliness, and were trained to clean any dangerous condition or block off the condition and stand guard until another employee could clean it. DeCicco further testified that after he was called to the accident scene, he inspected nearly the entire aisle and did not find any substance on the floor. He also testified that he was not aware of any substance on the floor in the aisle prior to the accident.

Additionally, defendant established plaintiff's inability to identify the cause of her fall without resorting to speculation (*see* ***Dennis v Lakhani***, *supra*). Plaintiff testified that she did not see a substance on the floor before she fell, and that she never looked under her shoe or at the bottom of her shoe after her foot dislodged from it and she fell. Such deposition testimony shows that plaintiff could not identify the cause of her fall without resorting to speculation that the sticky substance on the floor caused her fall, because she did not see anything on the floor before falling, after falling, or after getting

up from the floor (*see* ***Kramer v SBR & C***, 62 AD3d 667, 879 NYS2d 158 [2d Dept 2009]; ***Taylor v Jaslove***, 61 AD3d 743, 878 NYS2d 78 [2d Dept 2009]). Additionally, the deposition testimony showed neither plaintiff nor her daughter could identify how long the sticky substance was on the floor or how it got there, which further demonstrates plaintiff's inability to identify the cause of her fall without resorting to speculation (*see* ***Patrick v Costco Wholesale Corp.***, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]).

In opposition, plaintiff failed to raise a triable issue of fact. Affidavits presented in opposition to summary judgment may establish a triable issue of fact, unless they are tailored to raise "a feigned factual issue designed to avoid the consequences of the plaintiff's earlier admissions" (***Israel v Fairharbor Owners, Inc.***, 20 AD3d 392, 392, 798 NYS2d 139 [2d Dept 2005]; *see* ***Ackerman v Iskhakov***, 139 AD3d 987, 30 NYS3d 850 [2d Dept 2016]; ***Blochl v RT Long Is. Franchise, LLC***, 70 AD3d 993, 895 NYS2d 511 [2d Dept 2010]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]). Plaintiff submits the affidavit of Geraldine Condy, which states that there was debris on the floor of the produce section during every previous visit to defendant's store, and that such debris regularly extended to aisle two where plaintiff fell. She also affirmed that upon inspection after the accident, she observed several sticky patches at regular intervals on the floor of the aisle. However, Condy's affidavit is inconsistent with her deposition testimony, as she testified at her deposition that she observed the sticky patch that allegedly caused plaintiff's accident, yet did not mention the "series of these patches" of sticky substance along the aisle described in her affidavit. Therefore, Condy's affidavit merely raises feigned issues of fact unsupported by her own description of the surrounding circumstances, and has failed to raise a triable issue of fact sufficient to defeat summary judgment (*see* ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]; ***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Additionally, as Condy testified and affirmed that she did not witness plaintiff's accident, her conclusion that plaintiff fell due to the sticky substance that she observed on the floor before the accident was based purely on speculation (*see* ***Defino v Interlaken Owners, Inc.***, 125 AD3d 717, 4 NYS3d 89 [2d Dept 2015]). As it is just as likely that the accident was caused by some other factor, any determination as to defendant's negligence would be based on speculation (*see* ***Dennis v Lakhani***, *supra*; ***Costantino v Webel***, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]; ***Oettinger v Amerada Hess Corp.***, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; ***Teplitskaya v 3096 Owners Corp.***, 289 AD2d 477, 735 NYS2d 585 [2d Dept 2001]).

Plaintiff argues that Dorival's affidavit is inadmissible, because his existence as a potential witness was not disclosed to plaintiff until approximately one month before the case was certified for trial. However, Dorival's affidavit was considered by the Court, as he was disclosed as a potential witness prior to filing the note of issue (*see* ***Lara v City of New York***, 135 AD3d 712, 24 NYS3d 126 [2d Dept 2016]; ***Rodriguez v New York City Hous. Auth.***, 304 AD2d 468, 758 NYS2d 53 [1st Dept 2003]). Plaintiff also argues that Dorival's photocopied affidavit submitted by defendant is inadmissible. However, photocopies of affidavits submitted in support of a motion for summary judgment are admissible (*see* ***Rechler Equity B-1, LLC v AKR Corp.***, 98 AD3d 496, 949 NYS2d 457 [2d Dept 2012]; *see generally* ***Billingy v Blagrove***, 84 AD3d 848, 922 NYS2d 565 [2d Dept 2011]). Plaintiff further argues that the Floor Safety Walk form is inadmissible, because it had not been properly authenticated as a business record. While Dorival did not authenticate the Floor Safety Walk form

submitted with DeCicco's earlier affirmation as a business record in his affidavit (*see* CPLR 4518), it refreshed Dorival's recollection and enabled him to make sworn statements regarding same; therefore, the Court considered only his affidavit (*see* ***Seaberg v North Shore Lincoln-Mercury, Inc.***, 85 AD3d 1148, 1151, 925 NYS2d 669, 672 [2d Dept 2011]). Dorival's recollection provided that he inspected the floor of aisle two no more than forty minutes before plaintiff's accident and found no breakage, spillage, debris, or water on the floor.

Accordingly, defendant's motion for summary judgment in its favor is granted.

Dated: December 23, 2016

PETER H. MAYER, J.S.C.