SHORT FORM ORDER **INDEX NO.: 24537/2014**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 5/04/17
Motion Seq #: 001 MG

Motion Submit Date: 05/04/17
Motion Seq #: 002 MD

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FATIMA EMILIANO,

Plaintiff,

-against-

WESTLAND SOUTH SHORE MALL, L.P. & WESTFIELD, LLC.,

Defendants.

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PLAINTIFF'S ATTORNEY:
Helen Dalton & Associates, P.C.
69-12 Austin St.
Forest Hills, NY 11375

DEFENDANT'S ATTORNEY':
The Law Offices of Richard J. DaVolio, PC
160 Main St.
Sayville, NY 11782

The Court has considered the following in reaching the following determination resolving the pending motions:

1. Plaintiff's Notice of Motion pursuant to CPLR 3025(b) to amend pleadings to join an additional party defendant dated September 23, 2016; Affirmation in Support dated September 23, 2016; and supporting papers;
2. Defendant's Notice of Cross-Motion pursuant to CPLR 3212 for summary judgment dated October 27, 2016; Affirmation in Support dated October 27, 2016; and supporting papers;
3. Plaintiff's Affirmation in Opposition to Cross-Motion dated January 5, 2017;
4. Plaintiff's Reply Affirmation in Further Support of Motion to Amend dated November 2, 2016;
5. Defendant's Reply Affirmation in Further Support of Cross-Motion dated January 9, 2017; it is

ORDERED that plaintiff's motion seeking leave of this Court pursuant to CPLR 1003 & 3025 to amend its pleadings to join an additional party defendant is granted as discussed below; and it is further

ORDERED that defendant's cross-motion seeking the entry of summary judgment dismissing the complaint against it in its entirety pursuant to CPLR 3212 is denied in accord with the following.

Facts and Procedural Background

This premises liability personal injury action was commenced by plaintiff Fatima Emiliano ("plaintiff" or "Emiliano") against defendants Westfield South Shore Mall, L.P., s/h/a Westland South Shore Mall, L.P. and Westfield LLC ("defendants" or collectively "the Mall") seeking money damages for alleged personal injuries suffered by plaintiff.

The action was commenced with plaintiff's filing of her summons and complaint in September 2013. Subsequently, she served a supplemental summons and amended complaint on December 18, 2014. Defendants answered the amended complaint of January 29, 2015. Discovery, supervised by a referee appointed by this Court in an order dated March 8, 2016, is well underway between the parties.

Specifically stated, plaintiff alleges that on December 20, 2013 around 6:00 p.m., she was doing some Christmas shopping for her family with her niece and son in tow in each hand. When she slipped, plaintiff claims that she attempted to brace him to prevent his fall, and in so doing, she herself slipped and fell on a wet tile floor at or near the entrance by the Zales jewelry store at the Westfield South Shore Mall located in Bay Shore, New York.

Pursuant to internal procedure and protocol at the Mall, security and housekeeping responded to scene. Plaintiff refused medical assistance and returned home. The Mall's personnel prepared an incident report which states that plaintiff fell closer to shortly before 5:00 p.m. on a dry and clear weather day. Plaintiff alleged she landed on her back and left side of her body, injuring herself.

The Parties' Respective Positions

Defendants contend that two yellow rectangular "Caution-Wet Floor" signs were present at or near the mall entrance utilized by plaintiff and were present as permanent fixtures year round, despite plaintiff's sworn denial of having noticed their presence. Further, defendant states that housekeeping and cleaning of the mall is outsourced pursuant to contractual agreement to proposed additional defendant Cleaning Systems Management Corporation ("CSMC"). CSMC is thus tasked with cleaning the mall's common areas, and that the area constituting plaintiff's accident site was subject to constant, continuous and regular inspection and patrol every 20 to 40 minutes. Defendant notes this is all documented by cleaning and sweeping logs kept, created and maintained by the Mall pursuant to internal nomenclature as "Deggy sheets." According to its records, the accident site was last inspected for cleanliness at or around 4:45 p.m., with no mention of a wet or slippery condition as plaintiff contends.

DISCUSSION

I. Motion to Amend the Pleadings

In support of her motion to amend, plaintiff argues that she should be granted leave to file an amended complaint naming CSMC as an additional party defendant. This is based on the strength of admissions made by defendant's witnesses, its head of security Jack Barbera and head of operations Stephen Dmuchowsky, which taken in balance stand for the proposition that CSMC is contracted for cleaning and housekeeping, including remedying wet or slippery

conditions in the mall's common areas. Thus, plaintiff argues that joinder of CSMC is rationally related and logically supported to the claims she has advanced in her pleadings that defendants are liable for negligence in failing to detect the wet or slippery condition, or for their failure to rectify it in a non-negligent manner.

Plaintiff bases this motion on joining the actual entity which has contracted with the Mall to provide its cleaning services. Sworn testimony given at deposition by both CSMC and the Mall's representatives corroborates that the proposed additional defendant both regularly and routinely provides cleaning services in the area where plaintiff fell. More importantly, the facts as presently presented support a finding that Therefore,

During pretrial discovery, plaintiff deposed the middle manager responsible for oversight of housekeeping and cleaning at the Mall, Dianna Vazquez-Melendez, a non-party employed by CSMC. She testified that she noticed a wet condition at the Zales Mall entrance roughly two hours prior to plaintiff's fall. On this discovery, she directed subordinate cleaning staff to remedy the condition. Lastly, this is further supported by Barbera's deposition testimony where he stated that upon responding to plaintiff's accident scene, he personally observed first hand a wet condition on the tile floor where plaintiff allegedly suffered her fall. Both witnesses attributed the wet condition to moisture tracked in by heavy customer foot traffic at the entrance, given the time of year and the fact that it had snowed earlier in the week.

Defendants arguing in opposition claims that plaintiff's amendment is futile and at this point in the litigation, plaintiff cannot make an adequate case of premises liability against the defendants. This argument misses the mark.

CPLR 3025(b) provides that courts may grant leave to parties to amend or supplement their pleadings, and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***Tirpack v 125 N. 10, LLC***, 130 AD3d 917, 919, 14 NYS3d 110, 113 [2d Dept 2015]).

Our courts have generally held that leave to grant or deny an amendment is committed to the court's sound discretion, the exercise of which should not be lightly disturbed (*see* ***Edenwald Contr. Co. v City of New York,*** 60 NY2d 957, 959, 471 NYS2d 55; ***Castagne v Barouh***, 249 AD2d 257, 671 NYS2d 283). Leave to amend pleadings shall be freely given in the absence of prejudice or surprise to the opposing parties (*see* CPLR 3025 [b]; ***Public Adm'r of Kings County v. Hossain Constr. Corp.***, 27 AD3d 714, 716, 815 NYS2d 621;***Anderson St. Realty Corp. v New Rochelle Revitalization, LLC***, 78 AD3d 972, 974, 913 NYS2d 114, 116 [2d Dept 2010]). The application should also be granted, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see* ***Aurora Loan Services v Dimura***, 104 AD3d 796 [2d Dept. 2013]; ***Gitlin v Chirinkin***, 60 AD3d 901 [2d Dept. 2009]; ***Sheila Props. Inc. v A Real Good Plumbers Inc.,*** 59 AD3d 424 [2d Dept. 2009]); ***U.S. Fidelity and Guaranty Company v. Delmar Development Partners, LLC.***, 22 AD3d 1017, 803 NYS2d 254 [3d Dept. 2005]).

Thus, this Court's role on plaintiff's application is not as defendant suggests to determine the likelihood of success of plaintiff's proposed theory of liability against the proposed additional defendant, but rather to determine the reasonable likelihood of the existence of

significant and unfair prejudice to defendant should plaintiff's application be granted or whether the proposed amendment is palpably improper or lacking on the merits. Defendant instead has argued that the fact adduced during discovery thus far do not support any liability to defendants, arguments more apropos to its pending motion for summary judgment addressed below.

Therefore, this Court finds that no significant or unfair prejudice will befall defendants with joinder of its housekeeping contractor CSMC as a party defendant to this litigation. Further, based upon the showing plaintiff has made, it cannot be reasonably said that the proposed amendment is palpably improper or wholly without any rational basis on the present record. As a result, plaintiff's motion to amend her complaint to join non-party CSMC as an additional party defendant is hereby granted over defendants' opposition.

Accordingly, it is

ORDERED that plaintiff's motion seeking leave to amend the complaint pursuant to CPLR 3025(b) to join as an additional party defendant non-party CSMC is **GRANTED**; and it is further

ORDERED that plaintiff shall serve the amended pleadings on CSMC within 30 days of entry of this decision.

II. Summary Judgment

Plaintiff presents this as a directly contradicting defendants' narrative and as the existence of a triable issue of fact necessitating denial of summary judgment and resolution by the trier of fact of the ultimate issue of defendants' negligence for plaintiff's alleged injuries. Essentially, plaintiff argues that through its cleaning agent, defendant was afforded notice, actual or constructive of the wet or slippery condition, raising a material and triable question of fact going to heart of the slip and fall negligence case.

Defendants move for summary judgment determining that as a matter of law no negligence may be found as against them for plaintiff's injuries on the basis that plaintiff has failed to prove to this point in the litigation that it had actual or constructive notice of the slippery or wet condition causing her slip and fall at its mall. This motion is premised largely on the Mall's representatives' testimony that the common areas are subject to constant roving inspection and patrol on 2o to 40 minute intervals, and that plaintiff has failed to adduce competent and admissible evidence rebutting the inference that the alleged slippery and wet condition was anything more than a transitory condition, not caused or created by defendants; or conversely that defendants had notice of the condition before her incident.

As noted above, plaintiff has presented proof, when viewed in the light most favorable to her as non-movant, that defendants' housekeeping contractor CSMC had notice of the condition at least two hours prior to plaintiff's alleged accident. Moreover, CSMC took steps to remedy the condition. Further, the existing motion record contains evidence that defendants were aware of an issue with customer foot traffic introducing moisture on the mall's tile floors at heavily trafficked entrance such as the Zales entrance where plaintiff fell. This is evidenced by the presence of permanent wet floor signage. Thus, defendant's argument of lack of notice falls flat.

This notwithstanding however, plaintiff argues that defendants' motion is premature as additional discovery within the sole and exclusive possession, dominion or control of CSMC exists which is material and relevant to the issues *sub judice*. Thus, plaintiff seeks denial of defendants' motion pursuant to CPLR 3212(f). Plaintiff is correct.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***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];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated.@ ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015][AA party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment@]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682;

FamilyBFriendly Media, Inc. v. Recorder Tel. Network, 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 AD3d 855, 856, 988 NYS2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), Awhere facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion@ (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

In a slip-and-fall premises liability action to establish a prima facie case, plaintiff must demonstrate with competent and admissible evidence defendants created, or had actual or constructive notice of, the defective condition which allegedly caused the injured plaintiff to fall. Constructive notice has been shown via proof of a defect that is "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" (***Rocco v St. Matthew's Rw.C. Church***, 265 AD2d 472, 473, 696 NYS2d 703 [2d Dept 1999]). Defendants must also meet their initial burden on the issue of lack of constructive notice and 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 Ass'n, Inc.***, 57 AD3d 598, 598–99, 869 NYS2d 222, 223 [2d Dept 2008]). Where, as here, defendant premises owner seeks summary judgment dismissing the complaint on a defense of lack of notice, movant must make a *prima fa*cie showing affirmatively establishing the absence of notice as a matter of law" (***Cusack v Waldbaum, Inc.***, 290 AD2d 474, 475, 736 NYS2d 687, 689 [2d Dept 2002]).

At her deposition, Vazquez-Melendez testified that in addition to the mall's own internal incident reporting, that CSMC itself prepares, maintains and keeps reports on incidents it responds to and cleans as follow up. Further, the witness gave sworn testimony that such reporting was conducted in the aftermath of plaintiff's alleged fall. Additionally and arguable more importantly, Vazquez-Melendez stated that either a unnamed porter or a member of the cleaning crew, Rafael Zapata, cleaned the area of plaintiff's on her directive to remedy the existing wet condition, two hours prior to plaintiff' incident.

Thus, this Court finds that plaintiff is correct that additional discovery bearing on the relevant and material issues of liability in this case exist. Given the present posture of this action whereby plaintiff now has leave to join CSMC, this Court will not prohibit plaintiff from conduction reasonable fact discovery on what role CSMC played in contributing or causing plaintiff's alleged fall at defendants' mall.

At any rate, defendant's motion for judgment as a matter of law finding no negligence on defendants' part and dismissing the complaint is hereby denied, as this Court determines the motion both premature and that the existence of triable issues of fact preclude entry of summary judgment at this time. Contrary to defendants arguments otherwise, plaintiff at this point in the litigation has done more than offer pure speculation or mere surmise as to the cause of the alleged wet or slippery condition, having offered concrete evidence that within two hours of her fall, defendant's in-house housekeeping service was actually aware of customer foot traffic introducing water onto the tile floor and took steps to remedy it. Additionally, plaintiff's own

testimony, in addition to that of the responding security personnel, has established that the wet condition continued to exist from the time it was discovered by CSMC personnel until plaintiff's fall. Thus, plaintiff's submission in opposition to the motion evidences more than general awareness by defendants, and thrusts into the spotlight and lends even greater emphasis and importance on the unproduced incident reports generated by CSMC as testified to by Vazquez-Melendez.

Accordingly, defendants have failed to meet their burden of demonstrating *prima facie* that no triable issue of fact exists on whether they had notice of the alleged wet or slippery condition which plaintiff alleges caused her fall.

Therefore, it is

ORDERED that defendant's cross-motion seeking the entry of summary judgment on the question of premises liability and negligence is **DENIED**; and it is further

ORDERED that plaintiff shall serve a copy of this decision with notice of entry on defendants by June 12, 2017.

The foregoing constitutes the decision and order of this Court.

Dated: May 10, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**