NEW YORK SUPREME COURT - COUNTY OF BRONX

11/23/12

PART 25

Case Disposed ☑
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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GUERRERO,JULIO

Index No. **0308503/2009**

-against-

Hon. **MARK FRIEDLANDER** ,

DUANE READE,INC.

Justice.

----------X

The following papers numbered 1 to 4 Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **May 10 2012** and duly submitted as No. ____ on the Motion Calendar of 8/7/2012

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3, 4	
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH
MEMORANDUM DECISION FILED HEREWITH.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 11/21/12

Hon. _____
MARK FRIEDLANDER, J.S.C.

 FILED Nov 23 2012 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

JULIO GUERRERO,

Plaintiff,

-against-

DUANE READE, INC.,

Defendant.

MEMORANDUM DECISION/ORDER
Index No.: 308503/09

HON. MARK FRIEDLANDER

Defendant moves for an order, pursuant to CPLR§3212, granting summary judgment dismissing plaintiff's complaint. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by plaintiff on November 28, 2008, as a result of the claimed negligence of the defendant. More specifically, plaintiff alleges that he slipped and fell while walking backwards and pulling a hand truck, in the course of making a delivery of soda at defendant's store, located at 300 Park Avenue South, New York, New York ("defendant's store").

The facts, as culled from the pleadings and depositions of the parties, are as follows: On November 28, 2008, plaintiff was employed by Coca Cola Refreshments as a helper to a truck driver. His duties included delivering Coca Cola products to various stores. Normal working hours for him were from 5:30 A.M. to 4:00 or 5:00 P.M. The truck driver, Mr. Granada ("Granada"), and plaintiff left Coca Cola's Bronx facility at approximately 7:00 A.M. Their first stop of the day was defendant's store. After arriving at defendant's store, Granada went inside to ascertain that someone was there

who could accept their delivery of Coca Cola products. Granada was in defendant's store for approximately five or ten minutes and then he came out and informed plaintiff that they could make the delivery. Deliveries to defendant's store were made through the front door. Plaintiff loaded a hand truck with approximately five cases of soda, which weighed approximately 50 pounds. There were two steps before the front entrance to defendant's store. One of the front entrance doors was open. Plaintiff walked backwards with the hand truck, pulled it up the two steps, moved beyond the open front door entrance, slipped, and fell backward, the hand truck falling on top of him.

Plaintiff testified at his deposition that he usually got up at about 4:15 or 4:30 A.M. When he left his house on November 28, 2008, it had just started raining. When plaintiff arrived at Coca Cola's Bronx facility at approximately 5:30 A.M., it was drizzling. It was "pretty much (drizzling) all day from the morning." Prior to the accident, plaintiff did not see what caused him to fall. After he fell plaintiff saw that the floor was wet and an area ten feet wide and fifteen feet long looked like it had been mopped, because he saw a bucket with water and a mop on the top, right next to the counter, about three feet from the area where he slipped. There were no carpets or mats on the floor.

Delroy Benjamin ("Benjamin") testified at his deposition that, at the time of the accident, he was employed as the overnight shift leader at defendant's store, which was open twenty-four hours a day. His working hours were 11:00 P.M. through 8:00A.M., Monday to Friday. As shift leader, he was basically the overnight manager, overseeing about five employees. His duties were to get the defendant's store in order for daytime operation, making sure the store is clean and organized. With respect to the procedure for cleaning the defendant's store, Benjamin testified that, "If you mop the store, you don't put no kind of chemicals in the water, just the mop and water and you don't actually

wet the floor. You dry-mop the floor with a damp mop." It was a regular commercial mop, a little bigger than a regular house mop. "It wasn't like you were wetting the floor. You soak the mop and squeeze it out so the mop was pretty damp and then you would mop the floor." The dry mopping would be done between 4:00 A.M. and 6:00 A.M. One employee would do it because they don't mop the entire store. Benjamin would initially check for dirty spots and tell one of them where to go and mop. The area near the main entrance doors usually gets mopped daily, because that is a heavy traffic area. The floor near the entrance was composed of tiles. There were two mats, each twelve by three or four feet in the area near the main entrance. These mats were black or grey carpeting outlined with rubber. Benjamin had no first hand knowledge of whether plaintiff ever reported the accident to the defendant.

Viewing this matter in a light most favorable to the plaintiff, the court finds that defendant has made a *prima facie* case for summary judgment as a matter of law, which has not been rebutted by the plaintiff. Plaintiff's deposition testimony demonstrates that, at the time of plaintiff's accident, it had been raining for several hours. The fact that it was raining and that water was being tracked into the entranceway area, without more, neither constitutes notice of a dangerous condition nor permits an inference of constructive notice. *Gonzalez-Jarrin v. New York City Dept. Of Educ.*, 50 A.D.3d 334 (1st Dept. 2008); *Weiss v. Gerard Owners Corp.*, 22 A.D.3d 406 (1st Dept. 2005); *Garcia v. Delgado Travel Agency,* 4 A.D.3d 204 (1st Dept. 2004). At a time of inclement weather, a property owner has no obligation to continuously take remedial action and mop up all tracked-in water or moisture accumulating as a result of pedestrian traffic. *Gonzalez-Jarrin v. New York City Dept. Of Educ., supra; Garcia v. Delgado Travel Agency, supra.* Furthermore, the record herein provides no

non-speculative basis to determine whether, and for how long, the water was on the floor before plaintiff entered, or, alternatively, whether plaintiff himself tracked in the moisture on which he slipped. Lastly, the Court notes that while there is an issue of fact as to whether mats were placed in the area where plaintiff fell, the alleged failure to place matting provides no basis for imposing liability absence evidence that defendant had created or had actual or constructive notice of the water accumulation. *Weiss v. Gerard Owners Corp., supra.*

Based upon the foregoing, defendant's motion is granted and plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 11/21/12

MARK FRIEDLANDER, J.S.C.