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

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LUCY COSTANZO, Index No.: 653363/12

Plaintiff,

-against-

HILLSTONE RESTAURANT GROUP,

Defendant.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant, Hillstone Restaurant Group ("Hillstone") moves for summary judgment dismissing the complaint. Plaintiff opposes the motion, which is denied for the reasons below.

FACTS

Plaintiff alleges that she was injured on August 18, 2012, at approximately 8:30 P.M., when she slipped and fell on water on the floor of a restaurant owned by defendant located at 378 Park Avenue South, New York, NY (hereinafter "the restaurant").

Plaintiff testified that on the night of the accident she arrived at the restaurant with her husband at 6:10 pm and that the meal lasted approximately two hours. Plaintiff testified that she fell on a wet area of the floor on her way out near the "greeter stand," at the front of the restaurant. Plaintiff's dep. at 24. She described the wet area as "a puddle." Id. at 23. Plaintiff did not notice the wet area on the floor until after she fell and she noticed that her skirt was wet. She also testified that she did not complain about the condition of the floor before the accident occurred.

Christine Hasircoglu, ("Hasircoglu), one of the managers on duty at the restaurant at the time of the accident, testified as to the safety practices of the restaurant. According

to Hasircoglu, there is a protocol in place where any employee who sees anything on the ground is obligated to either pick it up, or stand over a spill and call for assistance in cleaning the spill up. She also testified that throughout the typical evening at the restaurant, there are "expo sweeps" where servers and other employees sweep the areas around kitchen and front desk area. Hasircoglu dep. at 21.

Hasircoglu testified that the fall occurred on the wooden portion of a ramp on the main walkway in the restaurant. Hasircoglu saw the drops of water before plaintiff fell, and told Alana Frey ("Frey), an assistant manager in training who was standing at the greeter's stand, to "get an emergency floor wipe," and thereafter began walking toward the substance on the floor. Id., at 14, 16. After she alerted Frey, Hasircoglu testified that she proceeded to the drops of water to stand over them but was unable to do so before the accident occurred. She did not know how the water got there, or how long it had been there, and denied receiving any prior complaints about the water. According to Hasircoglu, at the time she first noticed the water condition, plaintiff was "five or six feet" away from the water and that approximately five to six seconds elapsed from the time Hasircoglu observed the condition to the time plaintiff fell. Id. at 37. Hasircoglu did not say anything to plaintiff as she was walking towards the water. Id.

Frey testified that the restaurant follows a policy that requires employees to be "constantly looking at the tables and the floors" for substances that have fallen. When an employee sees something on the floor, no matter what it is, that employee stands over the foreign substance on the floor and makes sure that it gets cleaned up. To ensure no patrons of the restaurant get injured, the substance on the floor is cleaned either using a

vacuum cleaner or towel before the employee moves. Frey testified that she is unaware how the water that plaintiff fell on came to be on the floor.

Defendant moves for summary judgment dismissing the complaint, arguing that it did not cause or create the condition, had no notice of it, pointing to evidence that plaintiff nor any other customers complained about the condition of the floor prior to the accident. With respect to the testimony of Hasircoglu who stated that she noticed the water before plaintiff fell, defendant argues Hasircoglu followed the restaurant's protocols for remedying the condition and asked Alana Frey's an assistant manger in training to perform "an emergency floor wipe" Defendant also argues that it has appropriate procedures in place for remedying conditions on the floor like the one that allegedly caused plaintiff to fall.

Plaintiff opposes the motion, arguing, inter alia, that defendant has not met its burden of showing lack of notice as it failed to offer "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell[1]," citing, Birnbaum v. New York Racing Association, Inc., 57 AD3d 598, 599 (2nd Dep't 2008). Plaintiff also points to Hasircoglu's testimony that she saw plaintiff walking towards the water. In further support of her opposition, plaintiff relies on plaintiff's affidavit and errata sheet to her deposition that after she fell a restaurant employee apologized and stated that she was aware of the water prior to the fall.

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[1]Plaintiff also argues that the deposition testimony cannot be considered as they are unsworn and unsigned. However, as noted by defendant, this argument is without merit, as plaintiff does not dispute the authenticity or the accuracy of the transcripts, which are certified by a court reporter. See Franco v Rolling Frito-Lay Sales, Ltd., 103 AD3d 543, 543 (1st Dept 2013)(where the plaintiff did not challenge the accuracy of the deposition transcript, which was certified by the reporter, it was deemed admissible), citing Sass v TMT Restoration Consultants Ltd., 100 AD3d 443, 443 [1st Dept 2012]).

In reply, defendants argue, inter alia, that even if it knew about the water before plaintiff fell the record establishes that it did not have sufficient time to remedy the condition, even though if followed the restaurant's procedures for cleaning up substances on the floor.

Discussion

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case ..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

A property owner is under a duty to maintain its premises in a reasonably safe condition in view of all circumstances, including among others, the likelihood of avoiding injury to others and the burden of avoiding the risk. Basso v. Miller, 40 NY2d 233 (1976). To demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant either created the dangerous or defective condition or had actual or constructive notice of the condition which caused the accident. Piacquadio v. Recine Realty Corp., 84 NY2d 967 (1994); Acquino v. Kuczinski, Vila & Assocs., P.C., 39 AD3d 216 (1st Dept 2007).

Here, there is no evidence that defendant created the condition, and therefore the only issue is whether defendant had actual or constructive notice of it, and a reasonable time to remedy the condition. See Brock v. Catherdral Parkway Towers Management

Co., 259 AD2d 263 (1st Dep't 1999); see also Gordon v. American Museum of Natural History, 67 NY2d 836 (1986).

In the case of an alleged slip and fall on a foreign substance on the floor, the defendant meets its initial burden on the issue of lack of constructive notice by offering "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 Association, Inc., 57 AD3d at 599 (2nd Dep't 2008); see also Granillo v. Toys "R" Us. Inc., 69 AD3d 1024 (2nd Dept 2010). This line of cases holds that a defendant's burden on summary judgment is not met by a showing of a "general practice" of inspections and cleaning. See Porco v Marshalls Department Stores, 30 AD3d 284, 285 (1st Dept 2006)(evidence that a store is "cleaned daily," and inspections made "on a regular basis" not proof of cleaning and inspections conducted on the date in question). Instead, the movant must submit evidence of "frequent inspections for debris and tripping hazards ... performed by [defendant's] employees on the date of the accident, but prior to the accident." Insook Lee v. Port Chester Costco Wholesale, 82 AD3d 842, 842 (2nd Dep't 2011).

Here, defendant has not provided evidence as to when the area at issue was last cleaned and inspected. However, even assuming *arguendo* that defendant met its burden of showing lack of constructive notice based, inter alia, on its cleaning practices on the night of the accident, the record raises issues of fact as to whether defendant had actual notice of the condition and an adequate time to remedy it. Specifically, the record contains evidence that defendant's employees knew about the water on the floor before plaintiff fell, including Hariscoglu's testimony that plaintiff was five or six feet away at the time she noticed the condition, and directed that it be cleaned up. Moreover, different

inferences can be drawn from the record as to whether defendant had sufficient time to remedy the condition or otherwise acted reasonably before plaintiff fell.

Accordingly, summary judgment must be denied.

In view of the above, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: November 25, 2014

HON. JOAN A. MADDEN
J.S.C.

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