SHORT FORM ORDER

INDEX No. 14-7292
CAL. No. 16-01545OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-28-16
ADJ. DATE 3-15-17
Mot. Seq. # 002 - MG; CASEDISP

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DEBORAH RADOSTA and MICHAEL RADOSTA,

Plaintiffs,

- against -

ROBERT SCHECHTER d/b/a 7-ELEVEN STORE NO. 11198, 7-ELEVEN INCORPORATED, SOUTHLAND CORPORATION, 7-ELEVEN, INC., and MARY SAID,

Defendants.

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants 7-Eleven, Inc., and Mary Said for summary judgment dismissing the complaint is granted.

Plaintiff Deborah Radosta commenced this action to recover damages for personal injuries she allegedly sustained on November 27, 2013, when she slipped and fell while walking out of a 7-Eleven store operated by defendant Mary Said. Her husband, plaintiff Michael Radosta, brought a derivative claim for loss of services. The complaint alleges that defendant Said, who operates the convenience store as a franchisee, and defendant 7-Eleven, Inc., the franchisor, negligently permitted a hazardous condition to exist in the interior of the premises, and that such condition caused plaintiff Deborah Radosta (hereinafter plaintiff) to sustain serious injuries. More specifically, plaintiffs allege in the bill of

particulars that defendants were negligent, among other things, in failing to remove water that had accumulated on the floor near the front entrance, in failing to remedy a wet, slippery condition in the floor, and in failing to warn of the dangerous condition created by the wet floor.

Defendants now move for summary judgment in their favor on the grounds that 7-Eleven, Inc., does not own the subject premises and does not have an obligation under the franchise agreement to maintain the interior of the premises. Defendants further assert that Said cannot be held liable for plaintiffs' injuries, as she did not create or have actual or constructive notice of the alleged dangerous condition by the front doors that caused plaintiff to slip and fall. In support of the motion, defendants submit copies of the pleadings and the bill of particulars, transcripts of the parties' deposition testimony, and certified copies of meteorological records from Long Island MacArthur Airport for November 27, 2013. Plaintiffs oppose the motion, arguing, in part, that defendants' submissions fail to establish as a matter of law that 7-Eleven, Inc., did not exercise control over the subject store. They also contend defendants failed to establish a prima facie case that they lacked notice of the accumulation of water by the front entrance. In opposition, plaintiffs submit the same deposition transcripts as submitted by defendants, the deposition transcript of Michael Appel, who is employed by 7-Eleven, Inc., as an asset protection specialist, and photographs of the store's entrance.

Plaintiff testified that she went to the 7-Eleven store on Lake Avenue in St. James at approximately 1:30 p.m. on November 27, 2013 to purchase cigarettes. She stated it had been raining all day and was raining when she arrived at the store. Plaintiff testified that she entered the store, made a purchase at the counter located at the front of the store, turned, and then proceeded to walk back toward the entrance. According to plaintiff's testimony, after taking four to seven steps from the counter to the front door, her right foot slipped in water and she fell to the ground. She testified that she did not see the water on the floor until after she was helped up by another customer, at which time she observed a clear puddle of water that spanned the width of the store entrance. Plaintiff further testified there was an interior entrance mat on the floor, approximately five feet away from the doors.

Defendant Said testified that 7-Eleven, Inc., leases the premises from the property owner, Robert Schechter, and that she operates a 7-Eleven store at the site as a franchisee. She testified that she is responsible for maintaining the interior of the store, and that her employees regularly remove debris, sweep and mop the tile floor. Said explained that the regular practice at the store was to dry mop the floor every 15 minutes on rainy days, and that a rubber mat is kept in front of the entrance doors. Said stated that on the day of plaintiff's accident it was raining outside, that the rubber mat was on the floor by the entrance, that she and her employees continually checked the entrance area to see whether the floor was wet, and that an employee named Saiful Islam was dry mopping the tile floor every 15 minutes. Although she was working at the store on November 27, Said did not observe plaintiff's accident, as she had left the premises for approximately 15 minutes to go to the bank. She testified, however, she observed Mr. Islam dry mopping the floor when she left to go to the bank and that the mat was in front of the doors when she returned. Further, defendant Said testified that water is tracked into the store by customers on rainy days, that approximately 700 customers entered her store through the front entrance between 9:00 a.m. and 12:15 p.m. on the date of the accident, and that there have been no prior accidents at the store entrance.

Additionally, Saiful Islam testified that plaintiff came into the 7-Eleven store, purchased a pack of cigarettes from him at the register closest to the entrance, and then fell as she was walking out of the front door. Islam testified that it was raining at the time of plaintiff's accident and had been raining since the morning, that there was a mat by the front doors, and that he had mopped the store approximately 25 minutes before plaintiff's accident. He also testified he did not observe the floor inside the store was wet before the accident.

To establish a prima facie case of negligence, a plaintiff must establish a duty of care owed by the defendant to such plaintiff, a breach of such duty, and that such breach was a proximate cause of the plaintiff's injury (***Akins v Glens Falls City Sch. Dist.***, 53 NY2d 325, 333; *see* ***Donatien v Long Is. Coll. Hosp.***, 2017 NY Slip Op 06061; ***Coral v State of New York***, 29 AD3d 851). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708; ***Gover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729; *see also* ***Butler v Rafferty***, 100 NY2d 265). Owners and possessors of property have a duty to maintain the property in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139; ***Basso v Miller***, 40 NY2d 233). However, they are not insurers of the safety of people on their premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149).

Thus, to impose liability in a slip-and-fall action, a plaintiff must show that the defendant owed him or her a duty of care, that his or her injuries were caused by a dangerous or defective condition on the subject property, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Lawrence v Norberto***, 94 AD3d 822; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629). To provide constructive notice, the dangerous or defective condition must have been visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836; ***Kyte v Mid Hudson Wendico, Inc.***, 131 AD3d 452; ***Bravo v 564 Seneca Ave. Corp.***, 83 AD3d 633).

The branch of the motion seeking summary judgment in favor of 7-Eleven, Inc., is granted. The evidence submitted by defendants establishes a prima facie case that 7-Eleven, Inc., did not breach a duty of care owed to plaintiff, as it does not own, possess, or exercise control over the day-to-day maintenance or operation of the store where plaintiff's accident occurred (*see* ***Hart v Marriott Intl.***, 304 AD2d 1057). Contrary to the conclusory assertions by plaintiffs, the deposition testimony that 7-Eleven, Inc., is responsible under the franchise agreement for maintaining the building and the parking lot, and that it maintains three surveillance cameras inside the store, is insufficient to raise a triable issue as to whether it had a duty to clean or take other steps to remedy a water condition on the floor of the store (*see* ***Alonzo v McDonald's Corp.***, 282 AD2d 395). "The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee" (***Martinez v Higher Powered Pizza, Inc.***, 43 AD3d 670, 671; *see* ***O'Sullivan v 7-Eleven, Inc.***, 151 AD3d 658; ***Khanimov v McDonald's Corp.***, 121 AD3d 1050; ***Schoenwandt v Jamfro Corp.***, 261 AD2d 117). Here, the deposition testimony establishes Said was responsible for the daily operations of the store.

The branch of the motion seeking summary judgment in favor of Said also is granted. An owner or operator of a store or other business must take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use" (***Miller v Gimbel Bros.***, 262 NY 107, 108; *see* ***Hackbarth v McDonalds Corp.***, 31 AD3d 498). However, an owner or operator of a store is not obligated to provide a constant remedy to the problem of water being tracked inside the store during inclement weather, and does not have a duty to cover all of the floors with mats or to continuously clean up moisture from tracked-in precipitation (*see* ***Razla v Surgical Sock Shop II, Inc.***, 70 AD3d 916; ***Gullo-Georgio v Dunkin' Donuts, Inc.***, 38 AD3d 836; ***Hackbarth v McDonalds Corp.***, 31 AD3d 498; *see also* ***Paduano v 686 Forest Ave., LLC***, 119 AD3d 845; ***Negron v St. Patrick's Nursing Home***, 248 AD2d 687). A general awareness that water is likely to be tracked on a floor during rainy weather is insufficient, without more, to demonstrate constructive notice of a particular wet condition (*see* ***Musante v Department of Educ. of City of N.Y.***, 97 AD3d 731; ***Pinto v Metropolitan Opera***, 61 AD3d 949; ***Rogers v Rockefeller Group Intl., Inc.***, 38 AD3d 747; ***Perlongo v Park City 3 & 4 Apts., Inc.***, 31 AD3d 409; ***Yearwood v Cushman & Wakefield, Inc.***, 294 AD2d 568; *see also* ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734).

Here, defendants' submissions demonstrate prima facie that Said or her employees did not create the alleged dangerous condition that caused plaintiff's fall, i.e., the accumulation of water by the entrance doors, or have actual or constructive notice of such condition (*see* ***Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307; ***Zerilli v Western Beef Retail, Inc.***, 72 AD3d 681; *see also* ***Sarandrea v St. Charles Sch.***, 118 AD3d 690; ***Rogers v Rockefeller Group Intl., Inc.***, 38 AD3d 747). As discussed above, the deposition testimony shows it had started raining the morning of plaintiff's accident and was still raining when plaintiff arrived at the store; that plaintiff spent approximately one to two minutes inside of the store; that plaintiff did not observe any water on the floor until after the accident; and that the floor was dry-mopped 15 to 25 minutes before the accident. Moreover, the evidence shows Said discharged her duty of care by taking reasonable precautions to remedy the problem of water being tracked into the store by customers during the rainstorm (*see* ***Ruck v Levittown Norse Assoc., LLC***, 27 AD3d 444; ***Ford v Citibank, N.A.***, 11 AD3d 508; ***Sook Ja Lee v Yi Mei Bakery Corp.***, 305 AD2d 579).

The burden, therefore, shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320). In opposition, plaintiffs failed to offer evidence raising a triable issue of fact as to whether Said had actual or constructive notice of the alleged dangerous condition on the floor by the entrance doors, particularly in view of plaintiff's deposition testimony that she did not observe the wet condition that actually caused her to slip until after she stood up (*see* ***Zerilli v Western Beef Retail, Inc.***, 72 AD3d 681; ***Pinto v Metropolitan Opera***, 61 AD3d 949; ***Rogers v Rockefeller Group Intl., Inc.***, 38 AD3d 747). Here, the deposition testimony shows the floor was dry mopped 15 to 25 minutes prior to plaintiff's fall, and the accumulation of water by the entrance doors was discovered only after plaintiff fell. Thus, any finding that the accumulation of water on which plaintiff allegedly slipped was visible for a sufficient period of time to allow Said's employees to discover and remedy it before the accident would be mere speculation (*see* ***Zerilli v Western Beef Retail, Inc.***, 72 AD3d 681; ***Perlongo v Park City 3 &4 Apts., Inc.***, 31 AD3d 409; ***Gibbs v Port Auth. of New York***, 17 AD3d 252; ***Ford v Citibank, N.A.***, 11 AD3d

508; ***McDuffie v Fleet Fin. Group, Inc.***, 269 AD2d 575; ***Yearwood v Cushman & Wakefield, Inc.***, 294 AD2d 568). "A general awareness that water may be tracked into a building when it rains is insufficient to impute to impute to the defendants constructive notice of the particular dangerous condition" (***Muscante v Department of Educ. of City of N.Y.***, 97 AD3d 731, 731).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: September 6, 2017

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION