Adams v Price Chopper, Inc.
2017 NY Slip Op 33427(U)
March 29, 2017
Supreme Court, Onondaga County
Docket Number: Index No. 2014EF363
Judge: Donald A. Greenwood

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on March 28, 2017.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

TONYA A. ADAMS,

Plaintiff,

v.

THE PRICE CHOPPER, INC., PRICE CHOPPER OPERATING CO., INC., PRICE CHOPPER SUPERMARKETS, THE GOLUB CORPORATION, STEVEN BLUMENFELD and TERRY BLUMENFELD,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2014EF363
RJI No.: 33-17-0561

APPEARANCES: **SARA T. WALLITT, ESQ., OF WILLIAM MATTER, P.C.**
For Plaintiff

KAREN J. KROGMAN DAUM, ESQ., OF SMITH, SOVIK, KENDRICK & SUGNET, P.C.
For Defendants

Defendants move for summary judgment dismissal in this matter that concerns plaintiff's slip and fall on April 13, 2013 in the vestibule area at Price Chopper in Syracuse. The grounds for the motion are that defendant did not create the allegedly dangerous condition, nor did they have actual or constructive notice of the slippery condition where plaintiff fell. In moving for summary judgment dismissal, defendants are required to establish their entitlement to dismissal as a matter of law. *See, Smalls v. AJI Indus.*,10 NY3d 733 (2008). Defendants have done so through their reliance upon plaintiff's deposition testimony, as well as the testimony of John

Dean, the store manager and Dylan Capales, the shift supervisor. Plaintiff testified that when she first entered the store through the entrance door, she did not remember observing any defects or liquids in the vestibule area. After shopping, she initially exited the store through the exit door to pull up her car because it was raining outside. She did not have any difficulty walking out of the exit door in the moments before her fall to pull up her car, nor did she notice any liquids or defect in the vestibule area. She pulled up her vehicle while it was raining outside, walked through the rain water and then entered the store through the exit door, where she slipped and fell. Plaintiff testified that she observed that the floor was wet after her fall, but did not know what substance was on the floor or how long it had been there. Defendants also rely upon an accident report completed after plaintiff's fall indicating that the area was inspected ten minutes before and the floor was dry. Surveillance video depicting the vestibule area around the time of plaintiff's fall was disclosed during discovery. A copy of the footage is provided where defendants note that it confirms there was no liquid or water on the floor before the fall and that plaintiff clearly entered through the exit door upon her return to the store.

Both the deposition testimony and an affidavit from store manager John Dean are provided. He describes the store policies and procedures which were in place to ensure the aisles and floors were clear, safe and dry for customers. According to Dean, throughout the day either himself or another employee checked to make sure the isles and floors, including the vestibule areas, were clear, dry and safe for customers. He was at the store on the day of plaintiff's fall and he completed the report. As noted in the report, Dylan Capales inspected the vestibule floors within ten minutes after plaintiff's fall. Because he was the store manager on duty and authored the accident report, it was part of Dean's responsibility to fill out an associate statement

pertaining to the circumstances of the fall. As noted in that statement, Dean also checked the vestibule floors within fifteen to twenty minutes before the fall. According to Dean, he did not create the alleged slippery condition, nor did any other employee. Dean also did not notice any condition on the floor prior to the fall or receive any complaints thereof.

In moving for summary judgment dismissal, defendants have established in the first instance that they did not create the allegedly slippery condition. Where a plaintiff does not know how the slippery condition was created and merely speculates, there is no triable issue of fact pertaining to defendant's creation thereof. *See, Quinn v. Holiday Health and Fitness Centers of New York, Inc.*, 15 AD3d 857 (4th Dept. 2005); *see also, Bellassai v. Robert Welesyan College*, 59 AD3d 1125 (4th Dept. 2009). Defendants have shown that plaintiff did not know herself what the liquid substance was on the floor, how long it was there or how it got there, and Dean attests in his affidavit that neither he or any other employee created the condition.

Defendants have likewise met their burden of showing that they did not have actual notice of the condition. Where defendant establishes it did not receive any complaints about the allegedly wet floor before a plaintiff's fall, there is no actual notice. *See, Quinn, supra; see also, Vetta v. Onondaga Galleries Limited Liability Co.*, 106 AD3d 1468 (4th Dept. 2013). They have shown that they did not have actual knowledge nor where any complaints ever received concerning the area. Defendants have also shown in the first instance that they did not have constructive notice of the alleged slippery condition. To constitute constructive notice a defect must be visible and apparent and it must also exist for a sufficient length of time prior to the accident to allow a defendant's employee to discover and remedy it. *See, Gordon v. American Museum of Natural History*, 67 NY2d 836 (2007). Absent any proof that would warrant a

finding that the slippery condition had been on the floor for any appreciable length of time so as to permit defendant's employees to discover and remedy it, a defendant cannot be charged with constructive notice. *See, Gordon, supra.* Defendants have shown that constructive notice cannot be attributed to them inasmuch as an employee inspected the area near plaintiff's fall minutes before the fall and did not notice any liquid substance (*see, Fernandez v. Paradigm Management Group, LLC*, 32 Misc3d 1239(A) [Queens Co. 2011]) and because plaintiff did not know how long the liquid substance was on the floor prior to her fall. *See, Williams v. County of Erie*, 119 AD3d 1344 (4th Dept. 2014). The defendants have established that plaintiff did not notice the slippery condition until after she fell, did not know what was on the floor, how long it was there or how it got on the floor. The plaintiff herself walked through the same door only moments before and did not notice any liquid condition on the floor. Also, the area where plaintiff fell was inspected ten minutes before hand and there was no liquid on the floor show that they have established in the first instance that they did not have constructive notice. *See, Sloan v. Costo Wholesale Corp.*, 49 AD3d 522 (2d Dept. 2008); *see also, Payen v. Western Beef Supermarket*, 106 AD3d 710 (2d Dept. 2013). Therefore the burden shifts to plaintiff to raise an issue of fact. *See, Smalls, supra.*

The plaintiff has failed in her burden. Plaintiff does not refute that she does know how the alleged slippery condition was created and offers only speculation. *See, Quinn, supra*; *see also, Bellassai, supra.* Thus, no triable issue of fact exists on the issue of whether defendants created the allegedly dangerous condition.

Plaintiff unsuccessfully attempts to create a question of fact with respect to the issue of constructive notice by alleging that defendants had knowledge of the alleged defective condition

because water was tracked into the vestibule and because the alleged dangerous condition was recurring in nature. The defendants however established that the area where the plaintiff fell was inspected ten minutes prior to the fall by Capales and between fifteen and twenty minutes before by Dean. According to their testimony both floors were dry and clear for both inspections. *See, Costanzo v. Women's Christian Association of Jamestown, New York*, 92 AD3d 1256 (4th Dept. 2012). Plaintiff failed to meet her burden of showing the source of the alleged dangerous condition and/or length of time that it was on the floor and failed to offer any facts as to the existence of the alleged condition, the source thereof and the length of time it was present. *See, Anthony v. Wegmans Food Markets*, 11 AD3d 953 (4th Dept. 2004); *see also, Bellassai, supra.* Although plaintiff contends that a question of fact exists because Capales cannot be seen on their surveillance video inspecting the subject area ten minutes before the fall, the defendants have demonstrated that Capales inspected the area ten minutes prior to the fall and Dean inspected it fifteen to twenty minutes thereafter, and thus there were two inspections of the area within fifteen to twenty minutes of the fall, which both revealed clear and dry floors. Plaintiff's argument that the surveillance camera did not record every inch of the vestibule area actually support defendants' position that the employee could inspect the area without being filmed by the surveillance camera. The fact that the surveillance footage did not show Capales or Dean completing their inspections is not proof that the inspections were not conducted. *See, Crayton v. City of New York*, 2017 WL (SDNY 2017). Inasmuch as defendants met their burden in the first instance of establishing the inspections and plaintiff failed to provide any proof as to the source of the alleged dangerous condition or length of time it was present, she failed to create a question of fact as to the issue of constructive notice in this regard. Nor does an issue of fact

exist as to whether the alleged condition was visible and apparent. Plaintiff testified that when she walked through the exit door in the minute or two prior to her fall she did not observe any liquid or defect in the area. *See, Williams v. County of Erie*, 119 AD3d 1344 (4th Dept. 2014). She offered no proof in opposition to dispute this and thus no issue of fact was created with respect to whether the alleged defect was visible and apparent to raise an issue of fact as to the issue of constructive notice.

Likewise plaintiff's arguments with respect to the issue of actual notice alleging that water was tracked into the area, thus making the defendants liable, is without support in the record and plaintiff conceded this point in oral argument. A defendant is not required to cover all of its floor with mats or to continuously mop up all moisture resulting from rain that has been tracked in. *See, Hale v. Wilmorite, Inc.*, 35 AD3d 1251 (4th Dept. 2006). A general awareness that an area may become wet during inclement whether is insufficient to establish constructive notice. *See, Hale, supra*. A defendant is not liable for injuries caused by rain tracked in unless the plaintiff demonstrates that the construction of the store is inherently dangerous or that the defendant failed to use care to remedy conditions which had become dangerous after either actual or constructive notice of those conditions. *See, Miller v. Gimbel Bros.*, 262 NY 107 (1933).

Nor did the plaintiff raise an issue of fact as to whether the defendant had actual notice through her allegation that the allegedly dangerous condition was recurring in nature. In order to prove liability under this theory, the plaintiff must demonstrate that the recurrent condition existed prior to her fall and established actual notice of at least one occurrence of the condition, as well as the existence of the condition on the date in question. *See, Allen v. Turyali Fast Food, Inc.*, 25 Misc.3d 1201 (A) (Bronx Co. 2007). The undisputed records shows that plaintiff walked

through the exit door in the minute or two before her fall without difficulty and did not notice any liquid or defect on the floor. Thus there is no proof in the record that the water accumulated throughout the day. Nor did plaintiff provide proof that the alleged recurrent condition existed prior to her fall, inasmuch as the record is devoid of any evidence thereof. *See, Mauer v. Tops Markets, LLC*, 70 AD3d 1504 (4th Dept. 2010). Moreover proof of the defendants' general awareness that water was tracked in is insufficient as a matter of law. *See, Hammer v. K-Mart Corp.*, 267 AD2d 1100 (4th Dept. 1999); *see also, Hale, supra*. Therefore, plaintiff has failed to raise an issue of fact as to whether the defendants created an alleged dangerous condition or had actual or constructive knowledge thereof.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendants' motion for summary judgment dismissal is granted.

ENTER

Dated: March 29, 2017
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion for Summary Judgment, dated February 16, 2017;

2. Affidavit of Karen J. Krogman Daum, Esq. in support of defendants' motion, dated February 16, 2017, and attached exhibits;

3. Affidavit of John Dean in support of defendants' motion, dated February 10, 2017, and attached exhibits;

4. Defendants' Memorandum of Law, dated February 16, 2017;

5. Affirmation of Sara T. Wallitt, Esq. in opposition to defendants' motion, dated March 21, 2017;

6. Plaintiff's Memorandum of Law, dated March 21, 2017;

7. Reply Affidavit of Karen J. Krogman Daum, Esq., dated March 27, 2017;

8. Affidavit of John Dean, dated March 24, 2017; and

9. Defendants' Reply Memorandum of Law, dated March 27, 2017;