STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

GLORIA ODIORNE and
DAVID ODIORNE,

Plaintiffs,

-vs-

JASCOR, INC.,

Defendant.

Decision and Order

Index No.: 49029

Appearances:

Anthony S. Bottar, Esq., **Bottar Law PLLC**, for the Plaintiffs
Lisa M. Robinson, Esq., **Goldberg Segalla LLP**, for the Defendant

Daniel J. Doyle, J.

In this slip-and-fall premises liability case, there are two motions pending before the Court: (1) the Defendant's motion for summary judgment dismissing the complaint and (2) Plaintiffs' cross-motion pursuant to CPLR 3126 seeking to strike the Defendant's answer or some other sanction based upon the failure to produce an accident report of the incident.

On February 28, 2014, at around 7:15 A.M., Plaintiff Gloria Odiorne was at the McDonald's in Waterloo, Seneca County. At that time, a McDonald's employee began mopping a portion of the lobby floor that stretched from a side

entry door to the beverage machines. The employee placed two wet floor signs in the area that he was mopping. At approximately 7:31 A.M., the employee mopped the area in front of the entry door and had moved to the other area. Also at 7:31 A.M., a customer entered the McDonald's through the entry door and appeared to have no issue with traction while walking on the mopped floor. At 7:32 A.M., the Plaintiff got up from her table and approached the entry door area where the employee had just mopped. Plaintiff stated that she saw the employee mopping and that she also saw the wet floor sign. At 7:32 A.M., just after she passed the wet floor sign that was placed on the floor, Plaintiff loses her balance and falls forward, sustaining an injury to her shoulder.

Plaintiffs commenced this action thereafter and the Plaintiffs filed the note of issue on December 13, 2017. The accompanying certificate of readiness certified that all discovery now known to be necessary was completed and that there were "no outstanding requests for discovery."

A. The Discovery Motion

Plaintiffs move under CPLR 3126 to strike the Defendant's answer because the Defendant failed to tender a completed accident report of the incident despite a demand for the report.

It is well-settled that a party who files a note of issue and certificate of readiness that states that discovery is complete and that there are no outstanding discovery requests waives any objection to the adequacy of the disclosures made by the opposing party (*Stephano v News Group Publications, Inc.*, 64 NY2d 174, 186 [1984]*K F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC*, 131 AD3d 945, 946 [2d Dept 2015]; *Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]).

Even if the Court were not to find a waiver of discovery, the Plaintiffs have not demonstrated their entitlement to relief under CPLR 3126 in that they did not "file a motion to compel discovery pursuant to CPLR 3124, did not file an affirmation pursuant to 22 NYCRR 202.7(a), and did not establish that any failure to disclose was a willful failure that would justify striking a pleading "*J.N.K. Mach. Corp. v TBW, Ltd.*, 155 AD3d 1611, 1614 [4th Dept 2017]). Therefore, the Plaintiffs' motion to strike the Defendant's answer under CPLR 3124 should be denied.

B. The Summary Judgment Motion

A party seeking summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (*Iselin*

& Co. Inc. v. Mann Judd Landau, 71 NY2d 420 [1988]). The Court must view the evidence presented in the light most favorable to the nonmoving party (*Russo v. YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]). If the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 851 [1985]).

In a premises liability case, though a landowner has a duty to maintain its property in a reasonably safe condition, it is not obligated to warn against a condition that could be readily observed by the reasonable use of one's senses and was not inherently dangerous (*Dawson v Cafiero*, 292 AD2d 488, 488 [2d Dept 2002]).

Here, it is undisputed that the McDonald's employee was mopping the area in question at the time the Plaintiff slipped and that there was a wet floor sign that was placed at the location at which the Plaintiff fell. Plaintiff in her deposition admitted that she saw the wet floor sign and that she saw the employee mopping. Under these facts, courts have found that a defendant has established a prima facie entitlement to summary judgment (see, e.g. *Brown v New York Marriot Marquis Hotel*, 95 AD3d 585, 586 [1st Dept 2012] (defendant entitled to summary judgment where defendant placed warning sign after

mopping, plaintiff saw sign and saw that floor was wet); *Rivero v Spillane Enterprises, Corp.*, 95 AD3d 984, 985 [2d Dept 2012] (defendant entitled to summary judgment in case where employee just mopped floor and placed wet floor sign); *Ramsey v Mt. Vernon Bd. of Educ.*, 32 AD3d 1007, 1008 [2d Dept 2006] (defendant entitled to summary judgment where floor was being mopped at time plaintiff's slipped and fell)).

In response, the Plaintiffs have failed to raise a triable issue of fact. The Plaintiffs' reliance upon *Dolinar v Kaleida Health*, 155 AD3d 1576 (4th Dept 2017) and *Firment v Dick's Sporting Goods, Inc.*, 160 AD3d 1259 [3d Dept 2018] is misplaced; in this case there was no evidence that the floor was excessively wet or that the warning signs placed in the area were inadequate. Indeed, the Plaintiff admitted she saw the warning sign before proceeding onto the floor, and though the Defendant's employee was still engaged in mopping the floor at the time the Plaintiff fell, there was no evidence of excess water on the floor at the time the Plaintiff fell.

The Plaintiffs claim that mopping at that time, which corresponded to the peak breakfast rush at McDonald's breached the McDonald's policy on mopping. Even if that were supported by the record, "internal policies do not provide the standard of care in a negligence case" (*McDaniel v Codi Transp., Ltd.*, 149 AD3d

595, 596 [1st Dept 2017]). Likewise, the statement attributed to the McDonald's manager chastising the employee who was mopping and telling him, "you know that to use a mop on the floor" is not sufficiently probative to defeat summary judgment motion (see *Scherer v Golub Corp.*, 101 AD3d 1286, 1288 [3d Dept 2012]). Finally, Plaintiffs' assertion that the McDonald's manager chastised the employee for mopping rather than using the floor cleaning machine is likewise unavailing. The employee explained that he was mopping the area based upon the build up of rock salt and that using the floor cleaner would only spread the rock salt around the floor. Though there was a dispute whether there was precipitation outside on the day before and the day in question, the Plaintiffs do not dispute the assertion made by the employee that there was a build up of rock salt in the area. Even if the Court were to disregard the unchallenged assertion that the floor cleaning machine would only spread the rock salt around the floor, the Plaintiffs have failed to show that mopping the floor was inherently dangerous. As the Defendant has established its prima facie entitlement to summary judgment and the Plaintiffs have failed to raise a triable issue of fact, the Defendant's motion for summary judgment should be granted.

C. Conclusion

Based upon the foregoing, it is hereby

ORDERED that the Plaintiffs' cross-motion is DENIED in its entirety; and it is further

ORDERED that the Defendant's motion for summary judgment is GRANTED and the Plaintiffs' complaint is dismissed.

Dated: June 1, 2018

The Honorable Daniel J. Doyle
Supreme Court Justice