SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 47
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Yvonne Lynch Foy,

Plaintiff,

Index Number:

-against-

153330/2014

JMDH Real Estate of Hunts Point, LLC and JRD Unico, Inc. d/b/a Jetro Cash & Carry,

Motion Seq. #003

Defendants.
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Paul Goetz, J.:

In this slip and fall personal injury action, defendants move for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint, based upon plaintiff's alleged inability to identify the cause of the accident and for lack of notice of the allegedly defective condition.

Underlying Allegations

Plaintiff states that, on November 26, 2013, in the afternoon, she went with her friend, Earlean Golson (Earlean), to a Jetro store (the Store), owned by defendants and located at 100 Oak Point Avenue, Bronx, New York, to buy a turkey for Thanksgiving (bill of particulars, items 3, 5; plaintiff EBT at 12, 27, 35). She further states that, when she was at the cash register, she left Earlean and decided to go back to purchase a snack item that was on sale, and that after she got the products, she started walking back to the register (*id.* at 37-38, 42, 76,

78). She also states that she was in aisle four of the Store and that she observed a blue floor cleaning machine (the Sweeper) in the vicinity five to ten minutes before her accident and that the Sweeper was moving (*id.* at 49, 51, 54).

Plaintiff alleges that, in aisle four (the Accident Location), the floor was "shiny" and slippery looking, and that she slipped and fell to the ground (supplemental bill of particulars, item 4; plaintiff EBT at 54, 56, 63, 79, 212, 219). She contends that, due to her fall, she suffered injuries to her right arm, her neck and lower back, and her right shoulder, for which surgery was recommended (bill of particulars, item 10; plaintiff EBT at 94, 100-101, 113, 126, 132, 170, 179, 181, 183-185). Plaintiff identified stains at the Accident Location in photographs, but stated that there was no debris or liquid at the Accident Location (*id.* at 41, 45, 57, 223-224). She also stated that after the accident, yellow caution signs were placed at the Accident Location (*id.* at 83-84).

Defendants assert that the Store's floor was concrete and that the Sweeper did not use wax, but sprayed and sucked up water to clean the floors and that it was used after the Store closed (Mota EBT at 17, 24, 96, 120-121, 155). They state that Arthur Mota (Mota), an assistant manager at the Store, regularly performed walk-through inspections of the Store (*id.* at 28, 37, 77-79).

Defendants contend that the Accident Location did not have debris or liquid that would cause an unsafe condition. They state that Mota had inspected the Accident Location between 10 to 15 minutes prior to plaintiff's accident and he did not see any liquid or debris there (*id.* at 96, 123, 161-163) and that Earlean had "walked through the [A]ccident [L]ocation approximately 10 minutes before the accident and [she] did not observe any liquid or debris where [plaintiff] fell" (Earlean affidavit, ¶¶ 8, 11). Defendants also state that there were no prior complaints regarding the Accident Location (Mota EBT at 161) and plaintiff stated that she had not seen any liquid or debris at the Accident Location (plaintiff EBT at 41, 45, 57, 223-224). Consequently, they assert that their motion for summary judgment dismissing plaintiff's complaint should be granted.

Discussion

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a defendant must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition, or constructive notice of it through the defect's visibility for a

sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]). However, "a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]; *see also Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]). "Once a defendant establishes prima facie entitlement to [summary judgment based upon a showing that it did not create or have actual or constructive notice of the allegedly dangerous condition], the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]; *see also Del Marte v Leka Realty LLC*, 156 AD3d 453, 453 [1st Dept 2017; *Goodwin v Western Beef Retail, Inc.*, 117 AD3d 537, 538 [1st Dept 2014]).

Finally, "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of any proof of the negligent application of wax or polish, does not give rise to a cause of action, or an inference of negligence" (*Pagan v Local 23-25 Intl. Ladies Garment Workers Union*, 234 AD2d 37, 38 [1st Dept 1996]; *see also Thomas v Caldor's*, 224 AD2d 171, 171 [1st Dept 1996]). Where "the only evidence regarding the condition of the floor upon which plaintiff allegedly fell, . . . establishes that the floor was shiny . . ., summary judgment was properly granted" (*Drillings v Beth Israel Med. Ctr.*, 200 AD2d 381, 382 [1st Dept 1994]; *see also Kruimer v National Cleaning Contrs.*, 256 AD2d 1 [1st Dept 1998]).

Defendants have presented evidence that the Sweeper only used water to clean the floor of the Store and that there was no liquid or debris at the Accident Location approximately 10 to 15 minutes before plaintiff's accident, including plaintiff's own deposition testimony that there was no liquid or debris there. Plaintiff has not presented any evidence of the improper use of wax or polish to create an unsafe condition (*see Pagan*, 234 AD2d at 38). Consequently, defendants have established they did not create the allegedly dangerous condition. They have also shown that the Accident Location was inspected by Mota 10 to 15 minutes before the accident, without observing any liquid or debris there and this observation was confirmed by plaintiff's friend,

Earlean. Defendants have therefore shown that they did not have actual or constructive knowledge of the purportedly dangerous condition (*see Gordon*, 67 NY2d at 837; *Goodwin*, 117 Ad3d at 538; Ross, 86 AD3d at 421). Plaintiff has not presented any evidence that controverts this showing. The placement of caution signs after plaintiff's fall does not relate to defendants' awareness of the condition of the Accident Location immediately prior to the accident and accordingly, defendants' motion for summary judgment dismissing the complaint must be granted.

Order

It is, therefore,

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212, is granted, the complaint is dismissed, with costs and disbursements, as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 26, 2018

ENTER:

Hon. Paul A. Goetz, JSC