To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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CHYRISSE IVORY,

Plaintiff,

-against-

DECISION & ORDER
Index No. 67029/2016
Motion Sequence 1

EAST THIRD CORNER, INC. D/B/A RQ CONVENIENCE STORE, CAPITAL EIGHT, LLC, PARAMOUNT PROPERTY REALTY AND PEPSI-COLA BOTTLING COMPANY OF NEW YORK INC.,

Defendants.

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The following papers were read and considered in connection with the defendant's motion for summary judgment:

Notice of Motion/Affirmation/Exhibits A-H	1-10
Affirmation in Opposition/Exhibits A-B	11-13
Affirmation in Opposition	14
Reply Affirmation/Exhibit A	15
Reply Affirmation/Exhibit A	16

Procedural and Factual Background

The plaintiff, Chyrisse Ivory ("Ivory"), commenced this action against the defendants, seeking damages for injuries she allegedly sustained on July 6, 2016, when she slipped and fell on water she alleges was on the floor of RQ Convenience Store. The defendant, East Third Corner, Inc. d/b/a RQ Convenience Store is the operator of the store and the tenant of the premises, owned by the defendant, Capital Eight, LLC. Pepsi-Cola Bottling Company of New York, Inc. ("Pepsi") is the owner of a refrigerator in the store, which Ivory

alleges was leaking water onto the floor of the convenience store and caused her to slip and fall.

Pepsi now moves for summary judgment pursuant to CPLR 3212, to dismiss the complaint as against it. Pepsi argues that there are no triable issues as to its freedom from negligence because Ivory has only her own speculation to support her claim that Pepsi's refrigerator was the source of the alleged water on the floor. Pepsi asserts that its refrigerator could not in fact have been the source of the condition described by the plaintiff; and even if Ivory had slipped on water that had leaked from the refrigerator, Pepsi did not create the leak nor did it have actual or constructive notice of the leak.

In opposition, East Third Corner, Inc., and Capital Eight, LLC argue that Pepsi's motion fails to establish that it was not negligent in the installation, maintenance, and/or repair of its refrigerator, since the parties' testimony, viewed in a light most favorable to the non-moving parties, raises triable issues of fact as to whether Pepsi created or had actual notice of the condition alleged by the plaintiff. Those defendants assert that Pepsi failed to submit relevant testimony from the owner of the store, who testified that Pepsi's refrigerator leaked, that he had told a Pepsi driver about the leak, and that he called Pepsi's service telephone number and reported the leak.

The defendants further assert that their cross claims for contribution and indemnity should not be dismissed, as Pepsi entered into a written agreement expressly stating that it would service and repair its refrigerator without any condition precedent. The defendants further argue that Pepsi's witness admitted that Pepsi was responsible for maintenance and repair of the refrigerator and admitted that the refrigerator could leak in the manner

described by the defendants' witnesses. The defendants contend that the opinion by Pepsi's witness that the leak alleged could not have come from Pepsi's refrigerator or could not have generated the amount of water alleged, is speculative and conclusory, as there is no indication that Pepsi's witness inspected or has any personal knowledge of the condition of the refrigerator and the opinion is contradicted by his previous deposition testimony, in which he admitted that the refrigerator could leak in the manner alleged by the defendants. The plaintiff also opposed the motion, arguing that it is obvious from the record that questions of fact exist requiring a jury's determination.

In support of the motion, Pepsi relies upon, *inter alia*, the plaintiff's deposition transcript; the deposition of Fadhle Alghiem, the convenience store employee; the deposition and affidavit of Michael Merritt, director of marketing equipment; photos of the convenience store; and copies of the pleadings.

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that Pepsi has failed to meet its burden and there are issue of fact that require a jury's determination.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact," *(Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (*See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden shifts to the party opposing the motion to show the existence of material issues of fact by producing evidentiary proof, in admissible form, in support of their position.

In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v Vrettos Realty Corp.*, 106 AD3d 847, 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308).

Here, Pepsi did not submit documentation to show that it had no duty to inspect the soda machine and that it was only responsible for the repairs of the machine. Pepsi did not submit the contract with its original motion and cannot rely on a submission in opposition to make its prima facie case as to whether is was required to inspect the machine regularly.

Pepsi also submitted an affidavit from Michael Merritt stating that the refrigerator could not have leaked that much, but the plaintiff's deposition contradicts Merritt's affidavit. The plaintiff was clear in her testimony that she observed water coming from the refrigerator all the way to where she fell. Further, Merritt's affidavit is speculative as to his determination that the refrigerator could not have leaked so much in one night. He does not provide a proper foundation for his knowledge of his assertions. These are issues of fact for a jury to decide. There are also issues of fact as to exactly how much water was

on the floor and whether or not the convenience store owner actually called the number to report a leak. Although Merritt states that Pepsi did not receive any requests to repair the machine, either prior to the plaintiff's accident or subsequent to the accident, this is contradicted by the other testimony provided. Therefore, the defendant has not established that it did not create the dangerous condition or have actual or constructive notice of the condition.

Therefore, Pepsi has not met its burden for summary judgment, since there are material issues of fact.

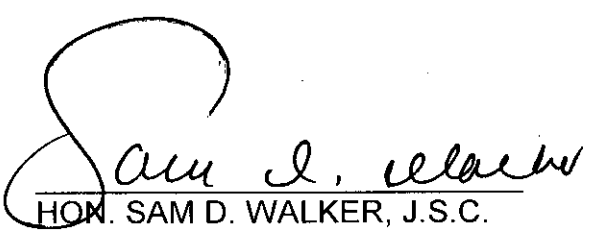
Accordingly, it is

ORDERED that the motion is denied;

The parties are directed to appear before the Settlement Conference Part on November 13, 2018 at 9:15 a.m.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2018



HON. SAM D. WALKER, J.S.C.