STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JACQUELINE DUVAL and DENNIS DUVAL,

Plaintiffs,

-vs-

DELTA-SONIC CARWASH SYSTEMS, INC.,

Defendant.

DECISION & ORDER

Index No: 2015EF2566

APPEARANCES: Stephanie A. Palmer, Esq.
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Attorneys for Plaintiffs

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Attorneys for Defendant

PARIS, J.:

This action arises from Plaintiff Jacqueline Duval's alleged slip and fall in the hallway of the waiting room at the Delta-Sonic store on Erie Boulevard in the City of Syracuse on March 12, 2014. The action was commenced by the filing of a Summons and Complaint on June 11, 2015. Issue was joined by Defendant's Answer on August 20, 2015. The Complaint was amended to include a derivative claim on behalf of Duval's husband.

Defendant now moves pursuant to CPLR §3212 for summary

judgment to dismiss Plaintiffs' Amended Complaint based on its storm in progress defense. Plaintiff opposes dismissal under the storm in progress defense, and also alleges that Defendant created a dangerous condition based on a greasy waxy residue present on the floor which was allegedly tracked from the vehicle detailing bays into the common hallway.

In support of the storm in progress defense, Defendant submits deposition testimony and the Affidavit of Meteorologist Aaron Mentkowski establishing that a moderate snow had been falling steadily at the Syracuse Airport which is located about four miles from Defendant's business for two hours prior to Plaintiff's fall at 9:30 a.m., and it had been precipitating since 12:54 a.m. The forecast was for six to ten inches of snow and a winter storm warning was in effect.

A landowner will not be held liable in negligence for a Plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter. *Sherman v. NYS Thruway Auth.*, 27 NY3d 119 (2016). The doctrine applies to indoor areas that are naturally impacted by the tracking of snow, ice and water from people traversing into a building from an ongoing "storm in progress" outdoors. *Boarman v. Siegel, Kelleher,* 41 AD3d 1247 (4th Dept. 2007); *Zonitch v. Plaza at Latam*, 255 AD2d 808 (3d Dept. 1998).

Here, the Defendant has met its prima facie burden of establishing a storm in progress defense. It had been snowing for several hours by the time Plaintiff arrived at Delta-Sonic, and the snow was predicted to continue throughout the day. Delta-Sonic had no duty to ensure that no moisture had been tracked in from the outside as a reasonable amount of time had yet to pass following the cessation of the storm. Delta-Sonic was not required to provide a constant, ongoing remedy for any slippery condition caused by moisture tracked indoors during the storm. *O'Sullivan v. 7-Eleven*, 151 AD3d 658 (1st Dept. 2017).

Defendant having met its initial burden, the burden next shifts to Plaintiffs to raise an issue of fact relative to Defendant's storm in progress defense. *Zuckerman v. City of New York*, 49 NY2d 557 (1980). Plaintiffs have not done so here. A landowner is not required to take extraordinary or unreasonable precautions during a snow storm such as covering all floors with mats or continuously mopping the water brought in. *Negron v. St. Patrick's Nursing Home*, 248 AD2d 687 (2d Dept. 1998). This is especially applicable here where the hallway where Plaintiff fell is located near the outside entrance as opposed to further into the interior of the building.

While Defendant has established its storm in progress defense, it is not entitled to dismissal of the Complaint as the Plaintiffs have alleged another

theory in both the Amended Complaint and Verified Bill of Particulars, that Defendant was negligent in creating a dangerous condition by allowing water, wax, armorall residue, or other accumulation to remain on the floor surface of the hallway leading to the pedestrian waiting room, causing Plaintiff's fall. Plaintiff testified at her deposition that when she was on the floor after she fell, she noticed the floor was all wet and seemed to have some kind of a sticky greasy feel to it. She immediately noticed the wetness to her clothes as a result of the fall.

According to the evidence before the Court, the hallway where Plaintiff fell also had two doorways leading off from the hallway. One leads into the detail shop and the other leads into the full detail bays. Plaintiffs allege that the detailing shops use a paste wax or similar substance when cleaning the cars for details. There is evidence of employee foot traffic from the shop and bays into the subject hallway and back. Defendant did not provide its employees with booties or protective covers for their shoes, nor were any rugs placed at the door entrances for the employees' use.

An owner owes a duty to maintain the property in a reasonably safe condition and must warn of any dangerous or defective condition of which it has actual or constructive notice. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986). There must be evidence tending to show the existence of a

dangerous or defective condition, and that the Defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time. *Brown-Phifer v. Cross County Mall Multiplex*, 282 AD2d 564 (2d Dept. 2001).

To be entitled to dismissal of the Amended Complaint, the Defendant had the burden to establish that all of Plaintiffs' theories of liability were without merit as a matter of law. Defendant failed to address Plaintiffs' contention that Defendant had created and allowed a dangerous condition to exist on the floor of the subject hallway which condition caused Plaintiff's fall and injury. Therefore, Defendant did not meet its prima facie burden on the creation of a dangerous defect claim.

Defendant cannot cure that deficiency by addressing it for the first time in its Reply, and in any event Defendant's argument that a waxy or greasy floor may not give rise to liability in the absence of negligence is irrelevant here where Plaintiffs' claim is in fact that Defendant was negligent in allowing the greasy wax residue to be tracked onto the floor.

Based on the foregoing, the Defendant has established its defense based on a storm in progress as a matter of law, and therefore that branch of its motion for summary judgment is **GRANTED.** However, Defendant is not entitled

to dismissal of the Amended Complaint as it failed to address the Plaintiffs' claim regarding creation of a dangerous defective condition. Therefore, Defendant's motion to dismiss the Amended Complaint is **DENIED.**

This constitutes the Decision and Order of the Court.

ANTHONY J. PARIS
JUSTICE OF SUPREME COURT

DATED: September 15, 2020.
Syracuse, New York