SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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JAMES KEANE,

Plaintiff,

- v -

TARGET CORPORATION and TARGET STORES,

Defendants.

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INDEX NO. 160766/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this premises liability action, defendants Target Corporation and Target Stores move, pursuant to CPLR 2221(d), for leave to reargue their motion for summary judgment dismissing the complaint.

I. Factual and Procedural Background

As set forth in this Court's February 24, 2023 order (NYSCEF Doc No. 67), plaintiff commenced this action in November 2019 after he was allegedly injured when he slipped and fell on spilled liquid detergent in an aisle of a department store operated by defendant Target Corporation (Doc Nos. 1, 5).[1] Following joinder of issue, Target moved for summary dismissal of plaintiff's complaint, arguing that it made a prima facie showing that it neither created the spill, nor had actual or constructive notice of it. (Doc Nos. 45-47). In support of its motion, it submitted,

[1] In their answer, defendants asserted that defendant Target Stores was a "fictitious entity" and incorrectly sued herein, and that defendant Target Corporation was the only entity involved in this case (Doc No. 5). For purposes of this decision, defendants will be collectively referred to as Target.

among other things, video surveillance footage of the aisle where plaintiff fell and deposition testimony from plaintiff and two former Target employees (Doc Nos. 48, 52-54). The video surveillance footage was approximately 45 minutes long and showed that roughly nine minutes elapsed between the time the spill occurred and plaintiff's accident.

By decision and order of February 24, 2023, Target's motion was denied after it was determined that it failed to make a prima facie showing that it lacked constructive notice of the spill because it presented no evidence of maintenance activities on the day of the incident (Doc No. 67). Target's contention that nine minutes was sufficiently short enough, as a matter of law, to find that it lacked constructive notice was also rejected specifically.

Target moves for leave to reargue its initial summary judgment motion, arguing that this Court misapprehended the law by concluding that nine minutes was insufficient to find a lack of constructive notice (Doc Nos. 69-70). The motion is unopposed.

II. Legal Analysis and Conclusions

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv dismissed and denied* 80 NY2d 1005 [1992]; *see Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

Here, Target fails to establish that this Court overlooked facts or misapprehended the law in determining that it did not make a prima facie showing that it lacked constructive notice. Target argues that the singular fact that the spill was present on the floor for nine minutes is dispositive and, standing alone, is sufficient to make a prima facie showing that it lacked constructive notice

given the cases that it cited. However, the authority it cites in support of that assertion does not demand such a conclusion.

In cases involving slips and falls, the absence of constructive notice is generally found based on two distinct grounds, those where evidence of maintenance activities is presented and those where a plaintiff injures himself or herself immediately after returning to an area he or she previously walked through unharmed. In the first category, it is well established that "[t]o meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Finch v Dake Bros., Inc.*, 139 AD3d 1001, 1002 [2d Dept 2016] [finding defendants made prima facie showing of lack of constructive notice because they submitted "deposition testimony of an employee who inspected the accident site about 15 minutes prior to the incident"]; *see Aguilera v BJ's Wholesale Club, Inc.*, 210 AD3d 572, 573 [1st Dept 2022] [granting defendant summary judgment after finding lack of constructive notice because "maintenance worker testified that she worked on the day of plaintiff's accident and followed her set schedule, pursuant to which she would inspect and clean the entire bathroom and each stall twice per hour"]; *Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545 [1st Dept 2019]; *Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571-572 [1st Dept 2014]).

With respect to the second category, a finding that the defendant lacked constructive notice is made when the evidence demonstrates that the plaintiff previously walked through a nonhazardous area without incident and was only injured upon his or her return through such area that contained a newly-created hazard. In those instances, the evidence "indicate[d] that the [allegedly hazardous] condition was created only moments before the accident" (*Nepomuceno v City of New York*, 137 AD3d 646, 646-647 [1st Dept 2016] [finding lack of constructive notice

because "approximately one minute had elapsed between the time (plaintiff) had successfully walked through the accident location . . . and the time she returned to the (area)"]; *see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838-839 [2005] ["On the evidence presented, the beer bottle that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident" (internal quotation marks, brackets, and citations omitted)]; *Rosario v Haber*, 146 AD3d 685, 685 [1st Dept 2017] [finding lack of constructive notice because of "plaintiff's testimony that, two minutes before the accident, she had ascended the stairs without incident and had not noticed the puddle"]).

In the prior decision denying Target's motion, this Court held that Target failed to make a prima facie showing absent evidence of its maintenance activities on the date of the accident. Target essentially argues that its motion should have been granted based on the short span of time between the spill and the accident, relying on *Espinal v New York City Hous. Auth.*, 215 AD2d 281 (1st Dept 1995). There, the First Department stated that, "The lapse of a five-minute interval between the deposit of a banana peel or other debris and the accident is insufficient, as a matter of law, to establish constructive notice to the defendant of the condition and an opportunity to remedy it" (*id.* at 281-282 [citations omitted]).

However, nine minutes is almost twice as long as the five minutes in *Espinal*, and is much longer than other cases involving even shorter intervals (*see Rosario*, 146 AD3d at 685 [two minutes]; *Nepomuceno*, 137 AD3d at 646-647 [approximately one minute]); and Target cites no authority supporting its contention that nine minutes, by itself, without the inclusion of other factors like evidence of maintenance activities, is sufficient as a matter of law to find a defendant lacked constructive notice (*cf. Aguilera*, 210 AD3d at 573 [finding prima facie showing of lack of constructive notice because evidence of maintenance activities allowed for conclusion that

defendant "had as little as four minutes and no more than 30 minutes, to find the condition plaintiff slipped on and remediate it"]). Thus, this is not a case where the spill was created "only moments before" (*Nepomuceno*, 137 AD3d at 647), or "only minutes or seconds" before plaintiff's accident (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *accord Rivera*, 4 NY3d at 838-839), where a prima facie showing could be made without evidence of maintenance activities.

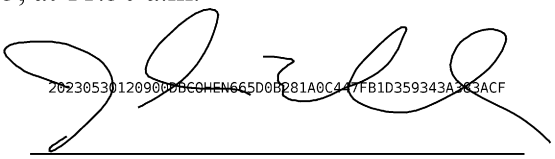
To the extent that Target argues that this Court overlooked its contention that plaintiff could not prove that the spill was visible and apparent because such contention was not specifically addressed in the February 2023 order, "[i]t is a mistake for [a party] to assume that any particular portion of his [or her] argument, which has not been the subject of express reference in the opinion, has been overlooked" (*Fosdick v Town of Hempstead*, 126 NY 651, 652-653 [1891]; *see* 4 NY Jur 2d, Appellate Review § 398 ["It cannot be assumed that any particular point has been overlooked because it was not discussed in the opinion"]). Target made that contention in support of its initial summary judgment motion and it was considered in deciding such motion (Doc No. 58). Thus, that issue has been "carefully considered and decided by [this Court]" (*Fosdick*, 126 NY at 653).

Therefore, as Target fails to demonstrate how this Court overlooked facts or misapprehended the law, its request for leave to reargue is denied (*see William P. Pahl Equip. Corp.*, 182 AD2d at 28).

Accordingly, it is hereby:

ORDERED that the motion for leave to reargue by defendants Target Corporation and Target Stores is denied; and it is further

ORDERED that the parties shall appear for a trial scheduling/settlement conference in person at 71 Thomas Street, Room 305, on July 18, 2023, at 11:30 a.m.



5/30/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE