At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of August, 2023.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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CHITARA PLASENCIA,

Plaintiff,

-against-

Index No.: 525050/2019

1090 OPERATING CORP., 1096 ATLANTIC OPERATING CORP., ZAP CAR WASH & OIL CHANGE and CASALE REALTY CORPORATION,

DECISION AND ORDER

Defendants.

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The following e-filed papers read herein: NYSCEF Doc. Nos.:

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Defendants 1090 Operating Corp., 1096 Atlantic Operating Corp., and Zap Car Wash & Oil Change (collectively, "Moving Defendants") move for an order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability and dismissing Plaintiff Chitara Plasencia's ("Plaintiff") complaint and all cross-claims against them (Mot. Seq. No. 1). Plaintiff opposes the motion on the grounds that (a) Moving Defendants breached their duty of care, (b) Moving Defendants had constructive notice, and (c) there are issues of fact present entitling Plaintiff to denial of the summary judgment motion.

In this negligence action, Plaintiff alleges that she sustained injuries on February 23, 2019, at around 3:00 a.m., when she tripped and fell due to a dangerous and hazardous condition, namely an uncovered drain. The accident allegedly occurred at Zap Car Wash & Oil Change, which is located at 1090 and 1096 Atlantic Avenue in Brooklyn, New York. The two businesses are adjacent to each other. The oil change portion has three garage doors on Atlantic Avenue:

(1) the door to the far left is under a sign that says Zap Entrance; (2) the next door to the right is under a sign that says Zap Lube; and (3) the final door is partially under a sign that says "10 Min. Oil Change." The car wash has one garage door at its entrance on Atlantic Avenue and its exit is located on Pacific Avenue. The car wash is open 24 hours, the oil change portion is not.

In her deposition testimony, Plaintiff's version of the events leading up the accident are as follows. Plaintiff and three non-party witnesses (Pearl Ozoria, Tyrell and Max) left a hookah lounge around 2:30 a.m. and discovered that Tyrell's vehicle had been vandalized with syrup and eggs. They intended to get a car wash and pulled up to an area that said Zap Entrance. When they arrived, Plaintiff testified that two of the four garage doors were open. According to Plaintiff, an individual of Nigerian descent stopped them and refused them service. Plaintiff then stepped out of the vehicle to have a conversation with an individual sitting by the entrance where it says Zap Lube. This person explained to Plaintiff in Spanish that the business could deny service. Plaintiff asked to speak to a supervisor and walked past the individual and through the garage door to get to the office in the back. Plaintiff contends that this area was dark with no artificial lighting. As she was walking, her left foot went through an uncovered drain, causing her left leg, up to about six inches above her knee, to go down the hole and her right leg to bend. According to Plaintiff, the two individuals who denied her service witnessed her fall. Plaintiff also testified that Ms. Ozoria saw her fall but did not see how the accident happened. Ms. Ozoria then came to Plaintiff's aid and helped her back to their vehicle.

Moving Defendants assert that they are entitled to summary judgment because (1) they did not breach a duty of care to Plaintiff since the facts establish that the accident could not have occurred where and how Plaintiff alleges and (2) they did not have notice of any dangerous or defective condition. Moving Defendants aver that it is physically impossible for the accident to have occurred as Plaintiff testified. Mr. Ramy Awad, the manager of Zap Lube and Oil Change, testified that the oil change facility is open from 8 a.m. to 8 p.m. After 8 p.m., the garage doors are closed and no employees remain there. Mr. Awad spoke to all the employees, including the two working the night shift on the day of the accident, and no one knew anything about the accident. In addition, Mr. Awad stated that the building is illuminated by LED lights at night. According to Mr. Awad and the officer manager Ms. Floridenia Nunez, respectively, there were no employees of Nigerian descent or who spoke Spanish in February 2019. Mr. Vincent Conteh, an employee working the night shift in February 2019, testified that there is no access to the oil

change area when it is closed. According to Defendants' engineering expert, if the garage doors were closed an individual would have to climb over the almost 17-foot-tall doors to access the area where the accident occurred. Defendants' expert also measured the drains in the area. The metal grates over each drain measured 12 inches and the round drains underneath measured 6 inches in diameter and 2 inches in depth and the pipe below measured 2-1/2 inches in diameter. The expert opined that even if Plaintiff was able to access the back area, she would not have been able to fit her entire leg into the drain. At most, Plaintiff would only have been able to get the first 2 inches of her foot into the drain based on the dimensions.

Moving Defendants further assert that there is no evidence to establish that they had actual notice or caused or created the purported dangerous or defective condition. Mr. Awad testified that it would be his duty to repair the drains. When Mr. Awad was asked about the last time the subject drain was repaired or replaced prior to February 23, 2019, he responded that nothing happened to it. According to Mr. Awad, if the screws securing a drain cover broke, it would be fixed the same day or the next day. He further testified that there had never been any instances of someone tripping and falling into the drain areas prior to February 2019. Mr. Conteh testified that he was not aware of anyone tripping or falling inside the car wash or oil change area in February 2019. Mr. Conteh also testified that no one has ever complained to him about the floor of the oil change or car wash area. Thus, they were not made aware of any issues with the drain prior to Plaintiff's accident. In addition, Moving Defendants claim that there is no evidence establishing that they caused or created the condition of the subject drain.

In opposition to the motion, Plaintiff produced an affidavit asserting that due to the pain from her injuries, she may have misstated the extent to which her leg dropped into the drain. Plaintiff claims, in her affidavit, that she believes her left leg went into the hole approximately six inches above her ankle. Plaintiff also produced an affidavit of Ms. Ozoria, in which she claims that two of the garage doors were open when they arrived. Ms. Ozoria also stated that she walked with Plaintiff to the back area and was walking behind her when she saw Plaintiff's left foot and ankle go inside the hole. Plaintiff argues that the parties' depositions and Ms. Ozoria's affidavit raise several issues of fact. First, Plaintiff and Ms. Ozoria allege that some of the garage doors were open, but Messrs. Awad and Conteh testified that the oil change garage doors were closed at the time of Plaintiff's accident. However, Plaintiff asserts that neither of them were present at the time of the accident. Second, if the garage doors were open, there is an issue

as to whether Moving Defendants' employees were there and engaging in conversation with potential customers. Plaintiff avers that one employee was located by the Zap Entrance garage door and the other employee was underneath the other open garage door. However, Moving Defendants assert that these garage doors would have been closed at 3:00 a.m. Finally, Plaintiff claims that an issue of fact exists as to whether Moving Defendants breached their duty of care to Plaintiff by leaving the subject drain uncovered. Plaintiff and Ms. Ozoria state that there was an uncovered drain hole, but Mr. Awad testified that the subject drain cover was never repaired, resecured or replaced. Plaintiff also argues that Mr. Awad did not provide any testimony or evidence about the last time the subject drain hole and cover were inspected prior to the accident. Moreover, Plaintiff claims that Moving Defendants failed to establish that they neither created the hazardous condition nor had actual or constructive notice of it.

In Moving Defendants' reply affirmation, they assert that Plaintiff has not presented any evidence to refute that Mr. Conteh and another individual, Ousmane Diallo, were working on the night of Plaintiff's accident. According to Moving Defendants, Plaintiff also failed to refute their evidence that they did not employ anyone who spoke Spanish or who was of Nigerian descent. Though Plaintiff attempted to suggest that the drains were never repaired, Moving Defendants argue that Mr. Awad testified that he checked the drains daily and if any of the drain covers' screws broke, he would fix it. The subject drain cover, according to Mr. Awad, never required any repairs or replacements prior to Plaintiff's accident. Moving Defendants also argue that Plaintiff failed to refute their expert's evidence that establishes the dimensions of the drain and the extent to which Plaintiff's foot could fall in. Moving Defendants further argue that Plaintiff's and Ms. Ozoria's affidavits must be rejected because they directly contradict Plaintiff's deposition testimony.

Where, as here, a plaintiff's action is based on a trip-and-fall accident, the defendants' entitlement to summary judgment is contingent on establishing that "they maintained the premises in a reasonably safe condition and that they did not create a dangerous or defective condition on their property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76 AD3d 1061, 1061 [2d Dept 2010]). Constructive notice is established if the defect (1) is visible and apparent and (2) existed for a sufficient length of time before the accident to allow the defendant to discover and remedy it (*Gordon v Am. Museum of*

Nat. Hist., 67 NY2d 836, 837 [1986]). The Second Department has determined that mere testimony of general practices is insufficient to establish lack of constructive notice; instead, there must be specific evidence of the last inspection of the subject area prior to the accident. (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Goodyear v Putnam/N. Westchester Bd. of Co-op. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]). It is well-established that on a motion for summary judgment, the burden rests with the movant to demonstrate, through admissible evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*see Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]; CPLR 3212 [b]).

Though Mr. Awad testified that the drains were inspected, especially when it is raining heavily or there is snow, he did not state when was the last time that he inspected the subject drain. Thus, Moving Defendants failed to proffer sufficient evidence of the absence of constructive notice, which precludes the granting of summary judgment [*compare Pena v Pep Boys-Manny, Moe & Jack of Delaware, Inc.*, 216 AD3d 809, 810 [2d Dept 2023] [testimony of manager's regular practice to inspect area multiple times a day is insufficient where there is no evidence as to when the area was last inspected on date of plaintiff's accident], *with Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034, 1036 [2d Dept 2010] [defendants established lack of constructive notice through testimony of employee who walked through same area about 20 minutes prior to plaintiff's fall and did not observe the alleged defect). Since Moving Defendants failed to meet their initial burden, the Court need not consider the sufficiency of Plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Assuming arguendo that Moving Defendants met their initial burden, summary judgment would only be granted if Plaintiff fails to establish the existence of questions of fact (*see Napoli v Transervice Lease Corp.*, 250 AD2d 580, 580–81 [2d Dept 1998]). Plaintiff, Ms. Ozoria and Messrs. Awad and Conteh presented conflicting testimony as to the oil change garage doors being open at the time of the accident. Plaintiff and Ms. Ozoria allege that there were two employees who engaged with Plaintiff, but Messrs. Awad and Conteh testified that they did not know of any employees who witnessed Plaintiff's accident. Finally, Plaintiff and Ms. Ozoria claim that Plaintiff fell due to an uncovered drain, while Mr. Awad stated that nothing had happened to the subject drain. Thus, Moving Defendants' motion would still be denied because

questions of fact and the credibility of witnesses are to be determined by the trier of fact (*Scott v Long Island Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

Moving Defendants take issue with Plaintiff's and Ms. Ozoria's affidavits, which contradicts Plaintiff's deposition testimony concerning how much of her leg went into the uncovered hole and Ms. Ozoria witnessing how the accident took place. Moving Defendants maintain that the Court should reject the claims made in these affidavits. The cases cited by Moving Defendants are distinguishable because Plaintiff maintains that she fell due to an uncovered drain (*Wright v South Nassau Communities Hosp.*, 254 AD2d 277 [2d Dept 1998] [plaintiff testified that she could not say what caused her to slip and fall and in her affidavit, alleged that she slipped on debris]; *Gordon v May Dept. Stores Co.*, 254 AD2d 327 [2d Dept 1998] [affidavit insufficient to establish genuine issue of fact where plaintiff admitted at her deposition she not aware of her confinement, an essential element of her claim for false imprisonment]; *Fontana v Fortunoff*, 246 AD2d 626 [2d Dept 1998] [plaintiff testified she did not notice anything on the floor prior to the accident and in her affidavit, claimed to have noticed flowers petals]; *Garvin v Rosenberg*, 204 AD2d 388 [2nd Dept 1994] [plaintiffs testified that they did not know what caused the accident and later produced an affidavit in which the injured plaintiff claimed that ice was the cause]). The Court acknowledges that there are contradictions, but ultimately, they create an issue of credibility that is not for the Court to determine on a summary judgment motion (*see Singh v Rosenberg*, 32 AD3d 840, 842 [2d Dept 2006]; *Abrajan v Kabasso*, 2003 NY Slip Op. 51391[U] [Sup Ct., Kings County 2003]).

Accordingly, it is hereby

ORDERED, that Moving Defendants' motion is DENIED.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice