

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY
Justice

IAS PART 16

MICHELLE J. LEONE,

Plaintiff,

- against -

PF CHANG'S CHINA BISTRO, INC.,

Defendant.

INDEX NO. 11753/2004

MOTION
DATE April 11, 2006

MOTION
CAL. NO. 13

PF CHANG'S CHINA BISTRO, INC.,

Third-Party Plaintiff,

- against -

DB MAINTENANCE COMPANY, INC.,

Third-Party Defendant.

The following papers numbered 1 to 7 read on this motion by the defendant PF Chang's China Bistro, Inc. for summary judgment dismissing the plaintiff's complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.-Exhibits.....	6 - 7

Upon the foregoing papers the motion is determined as follows:

In this action, the plaintiff seeks to recover for injuries she sustained when she allegedly slipped and fell in the defendant's premises. On August 10, 2003 at approximately 11:30 a.m., the plaintiff and a friend were entering the defendant's premises, located at 1504 Old Country Road, Westbury, New York, intending upon having lunch. On the day of the accident, the defendant operated a restaurant at the aforementioned location.

The plaintiff testified at her deposition that as she was entering the defendant's establishment traversing a wood floor she was caused to slip and fall by an accumulation of wax on the floor. The plaintiff described the substance as "globs" of "cakey" wax of a "brownish" color.

She admitted never seeing the wax before the accident. The plaintiff averred that after she fell there was wax "embedded on [her] shoe" and that she wiped the wax off her shoe with napkins provided by the defendant's employees. In opposition to the motion, the plaintiff submitted the affidavit of Loretta Dirazzo, the friend who accompanied her to lunch, who witnessed the accident. Dirazzo confirmed the plaintiff's version of events and added that after the accident she noticed wax on the plaintiff's pants and shoes that was similar in color to the floor.

The defendant moves for summary judgment dismissing the plaintiff's complaint on the basis that it had no notice of the condition that caused the plaintiff to fall. While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing a prima facie entitlement to judgment in its favor as a matter of law (See, Zuckerman v City of New York, 49 NY2d 557). In this matter, therefore, the defendant is required to affirmatively establish it neither created nor had actual or constructive notice of the alleged dangerous condition (See, Birthwright v Mid-City Sec., 268 AD2d 401; Dvoskin v Burger King Corp, 249 AD2d 358; Gordon v Waldbaum, Inc., 231 AD2d 673).

In support of its motion, the defendant submitted the deposition testimony of Michael Penna, its employee. Penna averred that on the day of the accident he was the general manager, operating partner and a percentage owner of the restaurant. He further stated that he was "in charge of the full operation" of the restaurant where the plaintiff allegedly fell.

Penna testified that he arrived at the restaurant on the day of the accident at 10:00 a.m. and that prior to opening the restaurant at 11:30 a.m. he performed a walkthrough of the premises that included the area where the plaintiff allegedly fell. Penna stated that the walkthrough included inspecting the floors visually and tactually for debris to ensure that the floors were clean. The defendant contracted with the third-party defendant DB Maintenance Company, Inc. ("DB Maintenance") who performed the cleaning services at the restaurant which encompassed the accident site. Penna testified that DB Maintenance would clean the restaurant while it was closed from 2:00 a.m. to 6:00 a.m. and he would inspect their work on his daily morning walkthrough. With respect to the area where the plaintiff fell, Penna testified that wax was not used to clean the floor and that after the plaintiff's accident he inspected the floor and found it to be clean.

This testimony establishes prima facie that the defendant did not create nor had actual or constructive notice of the condition the plaintiff claims caused her to fall (See, Collins v Mayfair Super Mkts., Inc., 13 AD3d 330; McClarren v Price Chopper Supermarkets, 226 AD2d 982; Maiorano v Price Chopper Operating Co., 221 AD2d 698).

Contrary to the defendant's assertion, however, the plaintiff raised issues of fact requiring a trial. As to the existence of the waxy condition, Penna's testimony is sufficiently contradicted by that

of the plaintiff and Dirazzo. Moreover, Penna's testimony that the defendant did not use wax to clean the wood floor at the accident situs is belied by his own testimony later in the deposition where he acknowledges that he did not know what substance DB Maintenance used to clean the floor.

On the issue of notice, an issue of fact exists as to whether DB Maintenance created the condition that caused the plaintiff to fall. The plaintiff testified that after the accident she spoke to the manager of the restaurant who admitted that wax or polyurethane was used to polish the floor the night before and that "it did not dry up good enough". Penna acknowledged speaking to the plaintiff after the accident, but his deposition does not corroborate the plaintiff's testimony on this point. Although a "store manager" does not ordinarily have "speaking authority" such that his admissions would bind the corporate principal (See e.g., Alvarez v First Nat'l Supermarkets, Inc., 11 AD3d 572), here Penna admitted not only that he was a "general manager", but also an "operating partner" and part owner of the restaurant such that Penna "was far more than a mere employee, and that he clearly had the authority to speak on behalf of defendants" (Candela v City of New York, 8 AD3d 45; see also, Navedo v 250 Willis Ave. Supermarket, 290 AD2d 246).

The aforementioned testimony, in addition to the plaintiff's submission of testimony establishing there was wax on her shoe and pants after the fall sufficiently establishes a triable issue on whether a dangerous residue of wax was present on the floor as opposed to simply a non-actionable slippery condition by reason of the smoothness or polish of the floor (See, Gracchi v Italiano, 290 AD2d 484; Aguilar v Transworld Maintenance Servs., 267 AD2d 85; Ullman v Cohn, 248 AD2d 200; Garrison v Lockheed Aircraft Service-New York, Inc., 24 AD2d 998).

To the extent the defendant's motion is premised on a theory it is absolved of responsibility since it contracted with an independent contractor to perform all the cleaning services at its premises, that claim is without merit. A landowner operating an establishment into which the public is invited has a non-delegable duty to keep the premises reasonably safe (See e.g., Thomassen v J&K Diner, Inc., 152 AD2d 421).

Accordingly, after considering the evidence in a light most favorable to the plaintiff (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendant's motion for summary judgment dismissing the plaintiff's summons and complaint is denied.

Dated: April 18, 2006

Peter J. Kelly, J.S.C.