SHORT FORM ORDER

INDEX No. 04-8672
CAL. No. 06-02441-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

***PRESENT:***

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-29-06
ADJ. DATE 3-16-07
Mot. Seq. # 002 -MG
003 - XMD

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| JAMES BOYKIN, | : | SIBEN & SIBEN, LLP |
| | : | Attorneys for Plaintiff |
| | : | 90 East Main Street |
| Plaintiff, | : | Bay Shore, New York 11706 |
| | : | |
| - against - | : | KRAL, CLERKIN, REDMOND, et al. |
| | : | Attys for Deft Lashelda Maintenance Corp. |
| | : | 69 East Jericho Turnpike |
| KING KULLEN GROCERY CO., INC., and | : | Mineola, New York 11501 |
| LASHELLDA MAINTENANCE CORP., | : | |
| | : | KENNEDY & GILLEN |
| | : | Attys for Deft King Kullen |
| Defendants. | : | 1050 Franklin Avenue |
| | | Garden City, New York 11530 |

Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 20 ; Answering Affidavits and supporting papers 21 - 24 ; Replying Affidavits and supporting papers 25 - 29 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#002) by defendants La Shellda Maintenance Corp. for summary judgment is granted.

***ORDERED*** that the cross-motion (#003) by defendant King Kullen Grocery Co., Inc. for summary judgment is denied.

This is an action by plaintiff, James Boykin, to recover damages for injuries he allegedly sustained on March 6, 2003 when he slipped and fell on a wet area in defendant's supermarket located at 160 North Research Drive in Central Islip.

Defendant LaShellda Maintenance Corp. ("LaShellda") now moves for summary judgment on the grounds the wet area was not created by them nor is there any evidence they had actual or constructive knowledge of the alleged dangerous condition. In support, they submit, *inter alia*, the pleadings, the deposition testimony of plaintiff James Boykin and of defendants' representatives, Joseph

DeNoto, night manager at King Kullen, and Charlie Williams, area supervisor for LaShellda.

Defendant King Kullen Grocery Co., Inc. ("King Kullen") has cross-moved for summary judgment on the same grounds advanced by LaShellda. In addition to the evidence submitted by LaShellda, King Kullen has also offered the store's accident report and certified weather records from the National Weather Service.

To prove a prima facie case of negligence in a slip and fall action, plaintiff is required to show either that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition (*see*, ***Goldman v Waldbaum, Inc.***, 248 AD2d 436, 669 NYS2d 669 [2d Dept 1998]). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (*see*, ***Werner v Neary***, 264 AD2d 731, 694 NYS2d 734 [2d Dept 1999]; ***Murphy v Conner***, 84 NY2d 969, 622 NYS2d 494 [1994]) unless it can be shown that defendant created or increased a hazardous condition (*see,* ***Genen v Metro-North Commuter Railroad,*** 261 AD2d 211, 690 NYS2d 213 [1st Dept 1999]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant 's employees to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]).

Plaintiff James Boykin was deposed on two occasions concerning the facts and circumstances of this accident. On February 11, 2005, he was deposed by King Kullen. On January 4, 2006, he was deposed by LaShellda. At his examination before trial on February 11, 2005, plaintiff testified he arrived at King Kullen on March 6, 2003 between 5:45 p.m. and 6:00 p.m. with his friend Donna Relitz. After shopping for about 20 minutes, he proceeded to the check-out located at the front of the store. While Relitz paid for her groceries, plaintiff decided to purchase cigarettes from a nearby courtesy counter. After taking a single step toward the courtesy counter, plaintiff slipped and fell to the ground. About 10 to 15 minutes after the accident, plaintiff noticed a puddle of discolored water with particles in it on the floor. He did not see the water on the floor before he fell. He testified the water "looked like it had been there for a while". When the managers of King Kullen came to his assistance, plaintiff testified he saw them shaking their heads, pointing at the floor, and acknowledging the floor was wet and slippery. Plaintiff testified that it had either snowed early that day or the day before. He stated that the snow had stopped several hours before the accident and there were several inches of snow on the ground when he arrived at the store.

Joseph DeNoto, the night manager at King Kullen testified that all the employees of the store are responsible for maintaining the store's floor and that inspections occur on a continuous basis throughout the day. In the event of inclement weather, mats and floor signs are placed near the store's entrance/exit. Mops and paper towels are also readily available in the event water is discovered on the floor. Although DeNoto prepared an accident report in connection with the incident, he had no independent recollection of that day. The report states "the floor was slick due to wet sneakers".

Charlie Williams, area supervisor for LaShellda at the time of the incident, testified that his company was hired to perform overnight cleaning services, including floor cleaning services, at the Central Islip King Kullen. He noted that overnight cleaning services were only performed at this store

on Monday, Wednesday, and Friday after 7:00 p.m.(plaintiff's fall occurred on Thursday March 6, 2003). Upon arrival, the crew would clean the store's bathrooms and offices. At the time the store was beginning to close, (9:00-10:00 p.m.), the crew would sweep the floor. Thereafter, the floor would be scrubbed and buffed. In addition, LaShellda waxed the floor on a monthly basis. He did not know the last time the floor had been waxed.

On a motion for summary judgment, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (***Altieri v Golub Corporation***, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

Defendant LaShellda has demonstrated their entitlement to summary judgment. They were not present at the time of defendant's accident nor were they responsible for maintaining the floor during shopping hours. In opposition, plaintiff has failed to present any evidence that the alleged dangerous condition was created by LaShellda or that they had actual or constructive notice of the condition. In fact, there is no claim by either plaintiff or King Kullen that LaShellda owed a duty of care to plaintiff.

King Kullen argues that the alleged dangerous condition was a result of inclement weather. In support, they offer certified records from the National Weather Service which reveal that on the day of the accident, several inches of snow and freezing rain fell in the vicinity of defendant's store. According to the records, the snow and rain began to fall at approximately 9:00 a.m. and continued to 7:00 p.m.

It is well settled that the owner or operator of a store must take reasonable care that its customers shall not be exposed to danger of injury through conditions in the store or at the store's entrance which it invites the public to use ***(Miller v Gimbel Bros., Inc.,*** 262 NY 107, 186 NE 410 [1933]**).** However, a store owner or operator is not obligated to provide a constant remedy to the problem of water or snow being tracked into the store caused by inclement weather ***(Hackbarth v McDonalds Corp.,*** 31 AD3d 498, 818 NYS 2d 578 [2006]). To impose liability for an injury proximately caused by a dangerous condition created by water or snow being tracked into a building on a snowy day, a defendant must either have created the dangerous condition, or had actual or constructive notice of the condition, and reasonable time to undertake remedial actions.***(Murphy v Lawrence Towers Apts., LLC,*** 15 AD3d 371, 789 NYS2d 532 [2005]***; Ford v Citibank, N.A.,***11 AD3d 508, 783 NYS2d 622 [2004]).

Defendant King Kullen, however, has not demonstrated its entitlement to summary judgment. According to the evidence proffered by King Kullen , this is a slip and fall under winter weather conditions that continued throughout the day. While the store manager testified mats, wet floor signs, mops and paper towels would be utilized under such conditions, there is no evidence of what precautions were actually taken that day and/or when that particular aisle had been inspected. Defendant has not established it neither created the dangerous condition or that it had existed for a

sufficient period of time to require remedial action. The credibility of witnesses, issues concerning the delegation of duties, and the reasonableness of efforts to prevent foreseeable harm are subject to jury determination (CPLR 3212; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Pomeroy v Buccina***, 289 AD2d 944, 735 NYS2d 678 [2001]).

Dated: MAY 14 2007

J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**