At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the City of Binghamton, New York, on the 22nd day of June, 2007.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

DEBRA PAGLIARELLA, Individually, and as Natural Parent and Guardian of NICOLE PAGLIARELLA, an Infant,

Plaintiffs,

-vs-

KESSLER FAMILY, LLC d/b/a FRIENDLY'S RESTAURANT,

Defendant.

DECISION AND ORDER

Index No. 2005-0247
RJI No. 2005-0094-M

APPEARANCES:

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FERRIS D. LEBOUS, J.S.C.

The defendant Kessler Family, LLC d/b/a Friendly's Restaurant moves for summary judgment dismissing plaintiffs' complaint pursuant to CPLR § 3212. Plaintiffs oppose the motion.

Background

This is an action to recover for personal injuries sustained by plaintiff[1] Nicole Pagliarella when she allegedly slipped on an unidentified liquid, presumably water, in the women's restroom of a Friendly's Restaurant located at 1148 Front Street, in the Town of Chenango, New York.

On Friday, July 11, 2003, at approximately 4:00 p.m., plaintiff, age 15 at the time, and her mother, Debra,[2] went out for dinner at this particular Friendly's Restaurant which they had previously frequented.[3] Plaintiff described the restaurant as extremely busy and recalled they had been in the restaurant for a total of an hour-and-a-half when she decided to use the women's restroom located at the rear of the restaurant.

Plaintiff describes her fall as she entered the women's restroom as follows: "[l]eft hand on doorknob, pushed open, take right foot step, slip, I went forward a few feet and what happened was my heel like kind of came up, landed straight and then twisted on my left leg and then went

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[1]The term plaintiff will refer to Nicole Pagliarella.

[2]Debra Pagliarella has remarried and is now known as Debra Schoonover.

[3]An unrelated three-year-old child for whom plaintiff was babysitting was also present.

down on my right shoulder" (Plaintiff's EBT, p 24).[4] Plaintiff stated that she laid on the floor for about 30 seconds, was crying and in pain, but was able to get up and make her way back to her mother (Pl's EBT, pp 26-27). Plaintiff stated that she did not see any liquid on the restroom floor prior to opening the door nor were there any wet floor warning signs (Pl's EBT, p 28). Plaintiff stated that her shirt and pants were soaked after her fall from laying on the floor (Plaintiff's Aff, ¶ 5; Pl's EBT, p 27).

Ms. Schoonover, plaintiff's mother, did not witness her daughter's fall, but confirmed in her deposition that her daughter came back to the table crying and in pain. Ms. Schoonover did not examine the restroom herself because she was attending to her daughter. Ms. Schoonover recalls asking for ice, briefly speaking to the manager, and then taking her daughter to the hospital (Schoonover EBT, pp 62-63).

Defendant submits an affidavit and deposition transcript of William Estep, the general manager at the Friendly's restaurant at time of plaintiff's fall. Mr. Estep testified he inspected the restaurant's restrooms before this incident stating "[t]here was not any water on the floor of the ladies room when I inspected the restroom at around 6:00PM" (Estep Affidavit, ¶ 7; Estep EBT, p 14). Additionally, Mr. Estep indicated that he personally initialed or signed a daily restroom checklist contemporaneously with his inspection of said restroom pursuant to Friendly's policy (hereinafter "Inspection Checklist") (Estep EBT, p 15).

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[4]Transcripts of all three depositions (plaintiff, Ms. Schoonover, and Mr. Estep) are annexed to defendant's papers as Exhibit D.

After learning of plaintiff's fall, Mr. Estep avers he instructed a waitress (whom he could not identify) to examine the women's restroom and recalls the waitress coming back to tell him there was a small amount of water on the floor like someone had shaken their hands to dry them rather than using a paper towel (Estep EBT, p 12). Mr. Estep never checked the restroom himself after the accident, but did fill out an Incident Report following his discussion with plaintiff and her mother (Estep Affidavit, Ex A, ¶ 3). Further, Mr. Estep states that there were no reported problems with the toilet or sinks in this restroom prior to this incident (Estep Affidavit, ¶ 8). Finally, Mr. Estep stated he faxed the Inspection Checklist to Kessler's human resource director and, as part of regular business practice, discarded his original copy two or three months later (Estep EBT, pp 15-16). Defendant also represents that it is unable to produce the faxed version of the Inspection Checklist.

Plaintiff suffered, among other things, an anterior cruciate ligament ("ACL") tear of her left knee necessitating three surgeries including arthroscopy, ACL replacement, and removal of the staple holding the ACL in place. Plaintiff was also diagnosed with an aggravation of previously asymptomatic degenerative changes and a baker's cyst on the back of her left knee. Plaintiff commenced this action seeking to recover damages for said personal injuries. By way of this motion, defendant moves for summary judgment alleging there are no triable issues of fact on the issue of liability, namely the lack of notice of a dangerous condition.

Discussion

It is well-settled that on a defense motion for summary judgment to dismiss the complaint

based upon lack of notice, defendants are required to make a prima facie showing affirmatively establishing the absence of notice - actual or constructive - as a matter of law (*Goldman v Waldbaum, Inc*., 248 AD2d 436, 437 [1998], *lv denied* 92 NY2d 805 [1998]; *Sosa v Golub Corp*., 273 AD2d 762 [2000]). Constructive notice arises only if the dangerous or defective condition is visible and apparent and has existed for a sufficient length of time for defendant to have discovered and remedied or warned of the same (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Stated another way, defendant's burden here is to establish as a matter of law that the substance on the floor occurred "[s]o close in time to the accident that [defendant] could not reasonably have been expected to notice and remedy the condition" (*Jordan v Musinger*, 197 AD2d 889, 890 [1993]; *Conklin v Ulm*, __ AD3d __, 2007 NY Slip Op 05041 [2007]).

Defendant argues it has met its burden by submitting the affidavit and deposition testimony of Mr. Estep who avers that he inspected the restroom approximately one-half hour prior to plaintiff's fall and saw no water or any substance on the floor. Further, defendant argues that plaintiff's inability to establish how long the substance was on the floor in the first instance is fatal to her case. Finally, defendant asserts that the missing Inspection Checklist is irrelevant in cases such as this one involving transitory conditions, rather than recurrent conditions.

In opposition, plaintiff argues that the missing Inspection Checklist prevents her from establishing the very fact that defendant argues is lacking, namely how long the substance was on the floor. As previously noted, Mr. Estep testified that he faxed the Inspection Checklist to

defendant's human resources director, Kelly Meyers, and that she was aware it pertained to a slip and fall at the restaurant (Estep EBT, p 16). Mr. Estep then testified that he threw the original Inspection Checklist away after several months in keeping with normal business practice. There is no explanation as to the location of the faxed version other than defense counsel's representation that it too is missing. Plaintiff urges this court to draw a negative inference from the absence of the Inspection Checklist, akin to a missing document charge at trial.

Defendant relies heavily on the First Department case, *Branham v Loews Orpheum Cinemas, Inc. et al*, 31 AD3d 319 (2006), *affd* 8 NY3d 931 (2007). In *Branham*, the plaintiff was in a movie theater when she left by way of the center aisle to use the restroom. Plaintiff was gone from the theater for seven or eight minutes when she returned to the theater, again using the center aisle, when she fell over a young boy sitting in the aisle. The First Department stated, among other things, that defendant's failure to produce the theater's aisle-check records did not warrant denial of summary judgment because there was no evidence as to what time the boy arrived in the aisle in relation to plaintiff's own testimony that he was not there when she walked out. Defendant argues that the facts of this case, particularly the missing records, are similar to *Branham*.

This court finds *Branham* distinguishable from the case at bar. In *Branham*, the beginning of the time line was established by plaintiff's own testimony that she left the theater only seven or eight minutes prior and the boy was not in the aisle. Here, plaintiff was not in the restroom at any time prior to her fall on this date. Rather, the front end of this time line (what

was or was not present on the restroom floor at 6:00 p.m.) can only be found in the missing Inspection Checklist and Mr. Estep's affidavit and deposition testimony. Although defendant would have this court rely on Mr. Estep's affidavit and deposition testimony alone to establish the condition of the restroom floor at 6:00 p.m., this court is troubled by the missing Inspection Checklist. For example, at trial, the absence of this document could result in the court issuing to the jury a charge on defendant's failure to produce a document which permits, but does not require, the jury to infer that the missing Inspection Checklist would not have supported Mr. Estep's statements regarding the condition of the restroom floor at 6:00 p.m. (PJI 1:77). Plaintiff should be entitled to the same benefit on this motion as she would be at trial and, as such, the court finds that the missing Inspection Checklist creates a question of fact relative to the condition of the restroom floor prior to plaintiff's fall. Additionally, Mr. Estep's credibility is not a proper issue which can be resolved on a summary judgment motion (*Kurth v Lawlor*, 183 AD2d 1060 [1992]). In this court's view, defendant has not met its initial burden of establishing a lack of constructive notice as a matter of law (*Ulu v ITT Sheraton Corp*., 27 AD3d 554, 554-555 [2006]).[5]

Conclusion

For the reasons stated, defendant's motion for summary judgment is denied.

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[5]Parenthetically, the court notes that even if it had found defendant to have met its burden of establishing a lack of constructive notice as a matter of law based upon Mr. Estep's affidavit and deposition testimony, then the court would have found plaintiff to have successfully raised questions of fact regarding Mr. Estep's credibility based upon defendant's failure to produce the Inspection Checklist.

The foregoing constitutes an Order of the court. The mailing of a copy of this Decision and Order by this court shall not constitute notice of entry.

It is so ordered.

Dated: July 12, 2007
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court