Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

BEATRICE BONNER, Index No. 16565/05

Plaintiff, Motion
-against- Date September 18, 2007

PATHMARK STORES, INC., D/B/A PATHMARK OF SPRINGFIELD, Motion Cal. No. 5

Defendant. Motion Seq. No. 1

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on February 28, 2004 due to a slip and fall in the frozen food aisle of the Pathmark Supermarket in Springfield Gardens, in the County of Queens, City and State of New York.

Defendant Pathmark Stores, Inc., d/b/a Pathmark of Springfield moves for an order pursuant to CPLR 3212 granting summary judgment in its favor on the ground that plaintiff cannot meet her burden of proof on the issue of notice.

Contentions of the Parties

Defendant submits the deposition testimony of the plaintiff. She testified that she was in the store for about 20 minutes prior to the accident. There were customers in the frozen food aisle but she did not see any employees. She did not see anything on the floor prior to her fall nor did she see any wet floor signs, cones or anything of that nature. She did not hear any announcements over the store's loudspeaker. After the accident, she saw

what looked like a trail of yellow liquid on either side of her and she was sitting in some liquid. She was not sure if it was orange juice but it was orangey-yellow and went about two feet from her on either side. She did not know how the liquid got on the floor nor was she aware of any prior complaints made to anyone at the store prior to the accident.

Defendant also submits the deposition testimony of Eddie Lugo, a frozen food clerk at the store. He first learned of the accident when he came out of the back room and saw a customer lying on the floor. He had previously seen her in the aisle where he had been working. She was shopping and was drinking from something in her hand. It was Jamaican coca-cola. When he left to go to the back room there was nothing on the floor. When he returned, the plaintiff had already fallen. He saw a clear orange liquid on the floor. He had a conversation with Mr. Burzotta, the store manager, that the liquid on the floor was the same liquid that plaintiff had been drinking.

Eugene Burzotta testified that he was advised by an employee, Candace St. Evans, that an accident had occurred. Upon arrival at the frozen food section, he observed a lady lying on the floor. He did not know how long the liquid was on the floor prior to the accident. Eddie Lugo told him that the customer had been seen minutes before drinking a Jamaican cola champagne.

Defense counsel asserts that Candace Stevens (St. Evans) testified but the transcript has not yet been received. Counsel states that he was present at said deposition and the witness testified that she did not remember the incident. She also stated that everyone in the store would clean the aisles and pick up anything they saw on the floor. She never saw empty cans or bottles on the floor.

Defendant argues that, in order for plaintiff to make out a prima facie case, she must establish that the defendant created the condition that brought about the accident or had actual or constructive notice of said condition. The testimony submitted fails to establish that the substance that plaintiff claims to have fallen upon was a condition created by the defendant, its agents, servants and/or employees. There is no proof that any employees were notified of the condition prior to the accident or that the condition existed for more than several moments prior to the

accident.

Plaintiff opposes the motion and submits her affidavit. She states that she was walking in the frozen food aisle, when she suddenly slipped and fell backwards. She looked down and saw a yellow-orange substance on the floor. She did not see any bottles, containers, signs or cones in the area. Another customer, whom she had never met before, Doris Goodman, came to her assistance. Ms. Goodman told her that she saw the accident and gave her and the manager her name and telephone number. Eddie Lugo's claim that he saw her carrying and drinking a Jamaican cola soda is not true. She never drinks soda and was not drinking anything in the store on that day. No one found any long necked bottle. She believes that the condition existed on the floor for a long time and that Ms. Goodman had heard a conversation between the manager and an employee. The manager was aware of the condition and had told the employee to clean it up, but he had neglected to do so.

Plaintiff submits the affidavit of Doris Goodman. She states that she had noticed a yellowish, sticky type liquid on the floor, which was made up of twelve inch by twelve inch vinyl tiles, in the frozen food aisle in the subject store. It was near the base of one of the horizontal freezers. She did not know what it was but it appeared to have been there for a while. It was a sugary substance that had partially hardened around the outer edges especially. It was a large spill that covered two tiles about twelve inches by twenty four inches. She did not see any broken containers or packages in the area. After she saw the spill, she remained in the area for another ten minutes. She saw the plaintiff walking toward the spill looking straight ahead. When they made eye contact, the plaintiff must have stepped on the spill because both of her legs went forward and flew out beneath her. She fell backwards and came down hard on her back. Her clothing was covered with a sticky liquid. Mrs. Goodman gave her name to the plaintiff and the store manager as a witness. Right after the accident, she overheard a conversation between the manager and a younger employee. The older man was admonishing the younger one. She distinctly recalls him saying "I thought you cleaned it up." The younger man said something to the effect that he was going to get to it or he didn't get to it yet.

Plaintiff argues that her affidavit contradicts the testimony of Eddie Lugo. The independent witnesses'

affidavit indicates that the substance had been present for some time and also raises an issue as to whether the store manager and an employee were aware of the condition. Ms. Goodman had been in the area for over ten minutes with the substance on the floor. A duty to warn plaintiff and other shoppers arose because sufficient reasonable time had elapsed for defendant to have rectified the condition. The statements made by the manager and the employee are admissible as admissions against interest. Further, such comments can be considered part of the res gestae made during the course of the incident investigation. Sufficient evidence has been submitted to raise questions of fact.

In reply, defendant argues that plaintiff's affidavit is devoid of any fact that would imply that defendant had either constructive or actual notice of the condition. She offers no evidence as to how long the condition existed nor does she state that defendant had actual notice of same. As to Ms. Goodman's affidavit, concerning the overheard conversation, it is well settled that a plaintiff may not rely upon the hearsay statements of an employee where there is no evidence that the employee had any authority to speak on behalf of its principal. There is no evidence that the person referred to by Ms. Goodman was actually a store manager. Even if he were a manager, such fact, without more, does not imply the necessary authority. In any event, the conversation does not show that defendant knew of the condition for a sufficient period of time to remedy it.

Decision of the Court

The motion by defendant is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

As noted by the court in Borenkoff v. Old Navy, 37 Ad3d 749: "The imposition of liability in a slip-and-fall case requires evidence that the defendant created the dangerous condition which caused the accident, or had actual or constructive notice of that condition (see Gordon v.

American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774; Dulgov v. City of New York, 33 AD3d 584, 822 NYS2d 298; Perlongo v. Park City 3 & 4 Apts., 31 AD3d 409, 818 NYS2d 158). To constitute constructive notice, a defective condition must be visible and apparent, and must exist for a sufficient period of time before the accident for a defendant to discover and correct it (see Gordon v. American Museum of Natural History, supra; Monte v. T.J. Maxx, 293 AD2d 722, 741 NYS2d 117)."

In the instant case, the defendant has established its entitlement to justice as a matter of law. The deposition testimony of plaintiff, Mr. Lugo and Mr. Burzotta sustained defendant's burden of showing that it did not create the condition or had actual or constructive notice thereof.

In opposition to the motion, plaintiff submits, inter alia, the affidavit of Ms. Goodman. The court finds that such affidavit raises an issue of fact with respect to whether constructive notice existed as she states that the wet condition was present for at least ten minutes. However, the court notes that her statement concerning the overheard statement by the store manager cannot be used by plaintiff to raise an issue of fact as to notice. As stated in Cohn v. Mayfair Supermarkets, Inc., 305 AD2d 528: "In opposition, the plaintiff relied upon the store manager's alleged post-accident statement, in which he reprimanded an employee for not cleaning the wet spot 15 minutes earlier when the employee was told to do so. Contrary to the plaintiff's contention, that statement is hearsay which cannot be used by the plaintiff to raise a triable issue of fact as to the defendant's actual or constructive notice [citations omitted].

The store manager's statement is also not admissible as an exception to the hearsay rule. Under the speaking authority exception to hearsay, an employee's comments can be binding on an employer if the plaintiff submits evidence in admissible form establishing that the employee's statement was made within the scope of the employee's authority to speak for the employer (see Melendez v. Melmarkets, Inc., 276 AD2d 535, 536, 714 NYS2d 688; Williams v. Waldbaum's Supermarkets, 236 AD2d 605, 606, 653 NYS2d 962). Here, the plaintiff did not provide evidence that the store manager had such authority to speak on behalf of the defendant (see Risoli v. Long Is. Lighting Co., 195 AD2d 543, 544, 600 NYS2d 497). Therefore, to the extent that the plaintiff seeks to use the store manager's post-accident

statement to raise a triable issue of fact, the statement is not admissible against the defendant as evidence of actual or constructive notice of the wet condition."

Accordingly, the motion by defendant is denied.

Dated:November 19,2007

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HON. DAVID ELLIOT