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SCANNED ON 4/16/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH PART 54

Index Number : 115925/2005

MCGUINESS, MICHELE

/S

DUANE READE

Sequence Number : 003

SUMMARY JUDGEMENT

INDEX NO. 115925/05

MOTION DATE 12/6/07

MOTION SEQ. NO. 3

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 16 2008
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/11/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

MICHELLE McGUINNESS,

Plaintiff,

Index No.: 115925/05

-against-

DECISION
and ORDER

DUANE READE,

Defendant.

---------- X

KORNREICH, SHIRLEY WERNER, J.:

This action arises out of a slip and fall inside a Duane Reade located at 194 East 2nd Street, New York, N.Y. Defendant now moves for summary judgment, pursuant to CPLR § 3212, on the grounds that it neither created the condition which caused plaintiffs accident nor had actual or constructive notice. Plaintiff opposes.

I. Background

Plaintiff Michelle McGuinness avers the following. On March 20, 2005, she entered a Duane Reade at approximately 1pm to re-fill a prescription before heading to an afternoon get-together. While walking down isle two, she suddenly slipped and fell landing on her left knee. Following her fall, plaintiff avers she saw something on the floor that appeared to be water. However, upon closer inspection, she noticed that it looked like Vaseline or some type of clear shampoo. There were no witnesses to the accident. Plaintiff avers she did not see the substance prior to falling and did not know how the substance got there.

Plaintiff claims two Duane Reade employees knew that the substance which caused her to fall was on the floor in isle two, prior to her accident. The first was a cashier named Marissa Pantoja. According to plaintiff, after she fell, she approached the front counter and spoke with

Marissa. During this conversation, plaintiff avers that following her explanation as to how she fell, Marissa told her "there is nothing there [because] we just cleaned it up." Plaintiff then asked to speak with the store's manager Charles Lopez. She avers Lopez gave her a hard time and was obnoxious. When asked whether Lopez was aware of the substance prior to her fall, plaintiff stated:

> A: The only thing that indicated to me that he knew was that he was aware and said, we are getting it cleaned up, do you want me to use my hands to clean it up? So it made me think he was aware of it.
> Q: He said that after your accident?
> A: Yes. When I asked him why it hadn't been cleaned up, if the cashier knew it was already there, why didn't he clean it up already.
> Q: Did he respond to you?
> A. He did, he said we are getting to it. Do you want me to use my hands to clean it up? We are getting a mop. I think it was inappropriate, I told him so.

EBT of Michelle McGuinness p. 39. Plaintiff then requested that an accident report be filled out. Lopez refused and offered to call her an ambulance. According to plaintiff, if she agreed to emergency care, Lopez would then fill out the report. Plaintiff refused because she wanted to go to her regular doctor. She then left to attend a party and did not see her regular doctor for several days. Neither Marissa nor Lopez testified in this action.

II. Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie*

showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Liability in a slip and fall action requires proof of a dangerous condition and that the defendant had actual or constrictive notice of the condition prior to the fall. *Navedo v. 250 Willis Avenue Supermarket*, 290 A.D.2d 246, 247 (1st Dept 2002). For constructive notice to exist, the condition must be visible, apparent, and exist for a sufficient length of time prior to the accident so the defendant's employees can discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Plaintiff argues the hearsay statements of Marissa and Lopez create an issue of fact as to whether Duane Reade had constrictive notice of the alleged dangerous condition. Although hearsay can be used in opposition to a summary judgment motion, it will not create a triable issue of fact where it is the only evidence submitted. *Candela v. City of New York*, 8 A.D.3d 45, 47

(1st Dept 2004) citing *Navarez v. NYRAC*, 290 A.D.2d 400, 401 (1st Dept 2002); *Navedo*, 290 A.D.2d at 247. A hearsay statement made by an agent is admissible against his employer under the admissions exception to the hearsay rule where "the making of the statement is an activity within the scope of his authority." *Candela*, 8 A.D.3d at 47 quoting *Loschiavo v. Port Auth.*, 58 N.Y.2d 1040, 1041 (1983). A store manager has the authority to bind his employer through an admission made as an agent on the employer's behalf. *Candela*, 8 A.D.3d at 47 citing *Navedo*, 290 A.D.2d at 247 (store manager's statement admissible on issue of whether defendant store had actual knowledge of allegedly hazardous condition).

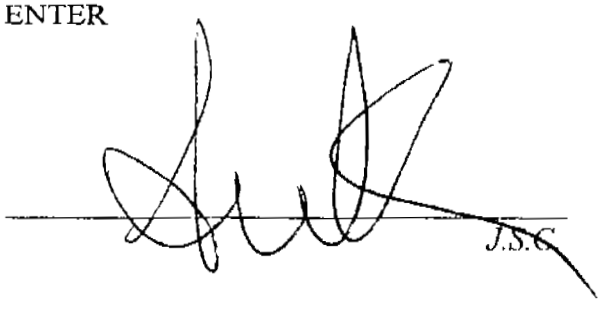
Here, Marissa's hearsay statement is inadmissible. Plaintiff has offered no evidence to show that making such a statement was within the scope of her authority. Conversely, Lopez's statement, since he is Duane Reade's manager, is admissible on the issue of whether defendant knew of the alleged dangerous condition prior to the accident. However, Lopez's ambiguous statement is not enough to defeat this motion. *Candela*, 8 A.D.3d at 47; *Navarez*, 290 A.D.2d at 401; *Navedo*, 290 A.D.2d at 247. Plaintiff does not offer any other admissible evidence on the issue of notice. There were no witnesses to the accident. No accident report was filed. Neither Marissa nor Lopez testified. Consequently, plaintiff has failed to raise an issue of fact warranting a trial. *See Pascarella v. Sears, Roebuck and Co.*, 280 A.D.2d 279 (1st Dept 2001) (summary judgment proper where plaintiff failed to submit competent evidence that defendant had either actual or constrictive notice of alleged hazard); *see also Navarez*, 290 A.D.2d at 401 (summary judgment appropriate where only evidence linking defendant to alleged accident was hearsay report); *cf. Parra v. 167 Allison Meat Corp.*, 7 A.D.3d 451 (1st Dept 2004) (summary judgment denied where plaintiff offered testimony of store employee as to alleged hazardous condition);

Navedo, 290 A.D.2d at 247 (summary judgment denied where in addition to plaintiff's hearsay statements, witnesses' deposition testimony established store manager was present, responded to accident, spoke with plaintiff, and filled out accident report). Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER



J.S.C.

DATE: April 11, 2008
New York, NY

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KAREN S. SMITH Justice

PART

Index Number : 102233/2008
ALLSTATE INSURANCE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : # 001
LEAVE TO SERVE LATE NOTICE OF CLAIM

INDEX NO. 102233-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

FILED
APR 16 2008
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this~~ petitioner's motion for an order for leave to file a late notice of claim is granted on default by defendant. The petition is on notice that this decision includes the instant petition under this index number and is further instructed that the action requires the purchase of a new index number and service of the summons and complaint as provided in the CPLR. Petitioner shall serve a copy of this order on respondent with notice of entry. This constitutes the decision and order of the Court.

Dated: 4-9-08

K S S
Karen S. Smith, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE