

**Schilt v Coral House**

2008 NY Slip Op 31260(U)

April 23, 2008

Supreme Court, Nassau County

Docket Number: 3265-06/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

LORRAINE SCHILT and DONALD SCHILT,

Plaintiff(s),

MOTION DATE: 2/29/08

INDEX No.:13265/06

-against-

MOTION SEQUENCE NO:1

CAL. NO.:2007H3457

CORAL HOUSE, LAKESIDE INN, INC. and  
LAKESIDE INN, INC., d/b/a/ CORAL HOUSE,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... 1-3
- Answering Affidavits..... 4-7
- Replying Affidavits..... 8,9
- Briefs: .....

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint is denied.

This is an action to recover money damages for personal injuries allegedly sustained as the result of plaintiff Lorraine Schilt's slip and fall at the premises of the Coral House on New Year's Eve in 2005. She alleges that defendant negligently allowed the marble floors in the lobby of the premises to remain in a wet and slippery condition causing her to fall and sustain the injury claimed.

The facts recited by each of the parties and witnesses are inconsistent and raise credibility issues which the court "may not weigh . . . on a motion for summary judgment" (*Conciatori v. Port Authority of New York and New Jersey*, 46 AD3d 501, 503). The facts as stated by the nonmovant must be taken as true and all inferences must be construed in a light most favorable to the nonmoving party (see, *Doize v. Holiday Inn Ronkonkoma*, 6 AD3d 573, 574), "unless it clearly appears that the issues are not genuine, but feigned" (*Conciatori v. Port Authority of New York and New*

Jersey, supra).

Plaintiff avers that she attended a New Year's Eve celebration at the Coral House, a catering hall, with her husband and his brother Richard Schilt and his wife Kim Schilt in 2005. That night it was "raining and sleeting . . . cold and windy." The Shilts arrived at the Coral House at around 8:00 pm and stayed until plaintiff fell shortly after midnight.

Plaintiff Lorraine Schilt testified at deposition that the enclosed entrance vestibule at the Coral House area was protected by a mat but that the marble floors in the lobby were wet from the rain and "people coming and going in and out all night." Plaintiff, her husband and his brother and sister-in law repeatedly passed through the lobby during the evening to go outside to smoke over a four hour period. There were other smokers outside, all of whom could not fit under a small awning over the entrance doors.

Plaintiff testified that she saw water on the floor each time she left the dining room to go outside and have a cigarette and when she returned. She testified that it "got a little worse each time." The last time she went outside for a smoke, after midnight, she slipped in the lobby on her return. She testified that she felt herself slipping on water. When asked if she saw what caused her to fall plaintiff replied "water on the floor." She stated that her hands were on the floor next to her and were damp with dirt, and that her "butt" was wet with flecks of dirt. When asked how long the slick area was there, she answered, "Probably a couple of hours." Follow up questions sought to identify the precise area that plaintiff "slipped in" and "how long" it was there. Although she testified that prior to her fall she passed by there, she did not know how long the precise spot where she fell was wet or whether she saw it on the prior occasions.

Plaintiff said that people in the lobby brought a chair to her where she fell as she was unable to get up. Her husband came in immediately while she was still in the chair. She showed him where she fell.

Plaintiff was asked if she wiped her feet when she came in and she replied that she did. She was asked if the slick area where she fell "came from" her shoes. She said "No, it was from everybody walking in and out." Asked if she knew that it "didn't come" from her shoes, she replied "Well, my shoes, also."

Donald Schilt testified at deposition that "the whole floor was wet . . . from foot traffic going through" where his wife had

fallen. He had walked through the area twice before and it was in the same condition, "wet and muddy." When asked whether he retrieved his coat from the coat room when he went outside he replied that he didn't and wore "[j]ust what we were wearing" indoors.

Plaintiff also submits identical affidavits by Richard and Kim Schilt. They both stated that they were not present when plaintiff fell but were with her "moments" later, and were familiar with the condition of the lobby floor where she fell both "before . . . and immediately after" her fall. They charged that when they first arrived the floor in front of the inner doors was wet. Both went outside approximately five to six times to smoke cigarettes at the same location, the area directly outside the outer doors. Each time they and other smokers "got wet from the windswept rain". The lobby floor was wet and dirty each time they passed, coming or going. People coming in from outside "were transferring water from their shoes and clothing to the floor." The Schilts also averred that they saw Coral House employees walking in the lobby "through and around the water on the lobby floor" and never saw anyone cleaning or drying the floor, or placing any warning signs. They both stated that the condition of the lobby floor "did not improve" from the first time they went outside at around 8:30 to the time of plaintiff's fall after midnight. The floor was "consistently wet."

Defendant offered the testimony of Cesar Gutierrez, a porter whose job it was to clean the premises at the Coral House, including mopping and sweeping the lobby. He testified that on New Year's Eve, the night of plaintiff's accident, there were three people on duty to clean. They would rotate every fifteen minutes when one would mop the lobby. A wet floor sign was used. Gutierrez admitted that the lobby was wet from "strong" snow. He testified that he and the other porters would dry the lobby floor with cloth rags, and wait until they were dry. At that time they would remove the wet floor sign and put it in a closet.

Frank Esposito, the banquet manager for the Coral House also provided an affidavit. He was on duty the night of plaintiff's fall and "was constantly going back and forth" through the lobby, walking there "50 to a hundred times." He did not see the porters mopping the lobby at any point in that evening. Nevertheless, it was the duty of the porters to check the condition of the lobby every fifteen minutes, and on the evening in question he did not see any wet floors in the lobby. He did not remember what the weather conditions were like that evening.

On this motion defendants contend that plaintiff is not able to establish that it had notice of a wet or dangerous condition as

a matter of law.

"A property owner may be held liable for a dangerous or defective condition on the property if the owner created the condition or had actual or constructive notice of it" (*Khamis v. CG Foods*, \_\_\_ AD3d \_\_\_, 2008 WL 669878). "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 defendant's employees to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837).

Here plaintiffs' deposition testimony and affidavits, when regarded as true with every inference taken in their favor, satisfy the requirements for constructive notice, i.e., they permit a reasonable inference that the lobby floor remained essentially unchanged and in a wet condition throughout the evening of December 31, 2005, a sufficient length of time to constitute constructive notice (see, *Kelsey v. Port Auth. of N.Y. and N.J.*, 52 AD2d 801 [reasonable inference that the condition remained unchanged for 15 to 20 minutes and was the proximate cause of the fall]). Although plaintiff's husband and his brother and sister-in-law did not witness the fall, they were present immediately after plaintiff fell and while she remained where she fell. The discrepancy in their affidavits over whether plaintiff was in a chair as she stated, or whether she was on the floor as they stated does not impair or alter their ability to observe the conditions where plaintiff fell.

Although there are credibility issues with testimony indicating that smokers stood outside repeatedly in the cold winter sleet and rain to smoke cigarettes without coats, they do not appear to constitute "feigned" testimony intended to "avoid the consequences of . . . earlier admission[s]" and thus may not be resolved on this motion (*Rosenblatt v. Venizelos*, \_\_\_ AD3d \_\_\_, 2008 WL 597275).

Defendants also contend that plaintiffs failed to establish that the spot where she fell was observed to be wet before her fall, and thus "that the water and dirt that the Schilts had seen earlier in the lobby was the same water and dirt that plaintiff allegedly slipped on." Plaintiff need not establish the exact place where she fell (*Gramm v. State*, 28 AD2d 787, 788, *aff'd* 21 NY2d 1025 on majority opn. at App. Div.; *Kelsey v. Port Authority of New York and New Jersey*, 52 AD2d 801), or prove that defendants knew of the exact wet spot which caused her fall (cf. *Weisenthal v. Pickman*, 153 AD2d 849, 851 [plaintiff need not prove defendants knew of exact piece of debris that caused accident]), as the law "does not apply so unreasonable a requirement of certitude, usually impossible of achievement" (*Gramm v. State*, *supra*). Rather, if as

a matter of ordinary experience "a particular act or omission might be expected, under the circumstances, to produce a particular result" and in fact that result follows, "the conclusion may be permissible that the causal relation exists. Circumstantial evidence . . . may provide a basis from which the causal sequence may be inferred" (*supra*). Accordingly, the motion for summary judgment is denied.

Dated: APR 23 2008

*Ulloa* J.S.C.

**ENTERED**  
APR 25 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE