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

PRESENT: Hon. John A. Michalek PART 11

Justice

Index Number : 100101/2006

HEAVY, CAROLINE

vs

STARBUCKS COFFEE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 4-10-08

MOTION SEQ. NO.

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

FILED
JUN 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 20, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SCANNED ON 6/26/2008

CASE DISPOSED | NON-FINAL DISPOSITION | GRANTED | DENIED | GRANTED IN PART | OTHER | SETTLE ORDER | SUBMIT ORDER | DO NOT POST | FIDUCIARY APPOINTMENT | REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------X

CAROLINE HEAVEY and JAMES J. HEAVEY,

Plaintiffs,

-against-

Index No. 100101/06

STARBUCKS COFFEE COMPANY, LINCOLN TRIANGLE PARTNERS, L.P., LINCOLN ASSOCIATES AND 148-154 COLUMBUS AVENUE PARTNERS L.P.,

Defendants.

Joan A. Madden, J.

In this personal injury action, defendant Starbucks Coffee Company and its landlord Lincoln Triangle Partners, L.P., Lincoln Associates and 148-154 Columbus Avenue Partners L.P. (together "Starbucks") move for summary judgment dismissing the complaint against them filed by Caroline Heavey ("Heavey") and James J. Heavey ("J. Heavey"). Plaintiffs oppose the motion, which is granted for the reasons below.

Background

Heavey alleges that she sustained personal injuries on October 11, 2004, at approximately 4:00 pm at the Starbucks located at Columbus Avenue and 67th Street, when she slipped and fell inside the 67th Street entrance. Plaintiffs contend that Heavey slipped due to the dangerous condition of the entranceway area where plaintiff fell. Specifically, plaintiffs contend that the absence of a mat in the entranceway, the insufficient number of employees to clean the floor in the area, and the slippery condition of the floor caused Heavey's fall.

Heavey testified at her deposition that she fell just after entering Starbucks (Heavey dep. at 18). It was not snowing or raining on the date of the accident and Heavey testified that "it was a nice day" (Id., at 13). According to Heavey, after she opened the door, she took one step and

then she was on the floor (Id., at 18). When asked how she fell, Heavey replied, "You know, it happened, I don't remember. I just remember stepping in. The next thing I remember is being on the floor quite a distance from the door" (Id. at 19). She further testified that neither she nor her husband looked to see if there was any liquid on the floor where she fell (Id. at 33). J. Heavey testified that he did not see any liquid, debris, broken tiles or garbage on the floor where Heavey fell (J. Heavey dep. at 10,11). He further testified that the floor looked "uneven" and "slick," but that he could not specifically identify the cause of his wife's fall (Id. at 10).

Joshua Jennison ("Jennison"), the Starbucks store manager at the time of Heavey's fall, also testified. According to Jennison, a permanent mat was in place at the 67th Street Starbucks entrance prior to January 2003, but that the mat would get dirty from a build-up of snow and rain, along with debris from the preparation station located eight feet from the 67th Street entrance door (Jennison dep. at 39). The mat was removed in January 2003 when the floor was replaced and tile was placed down in lieu of the mat as a "test" to determine if the tile floor was easier to keep clean (Id.). Jennison also testified that there were no temporary or removable mats placed on the floor on October 11, 2004, the day of Mrs. Heavey's accident (Id. at 39, 40). According to Jennison, prior to the October 11, 2004 accident, there were no slip and falls at that entrance and no complaints regarding that entrance (Id. at 45-47).

With respect to maintenance of the Starbucks lobby area, Jennison testified as follows. As per Starbucks policy, it is the responsibility of various employees to maintain the lobby area. A supervisor does a walk-through of the premises every ten minutes (Id. at 28). The 67th Street Starbucks location at the time of Heavey's accident also employed busers whose sole responsibility was to maintain the lobby area and any other area available to customers (Id. at

23,24). A buser was generally scheduled to work any time the store was open (Id. at 24). The busers have no set schedule for cleaning the lobby area; it is their responsibility to clean it periodically throughout the day as necessary (Id. at 28).

Starbucks moves for summary judgment on the grounds that plaintiffs have failed to identify any defect in the premises that caused Heavey to fall. In support of its motion, Starbucks relies on the deposition testimony of Heavey that she did not know what caused her to fall, and on J. Heavey's testimony that he did not observe any debris, liquid or broken tiles in the area where Heavey fell. Starbucks also argues that there is no evidence that it created any condition that caused Heavey to fall or had notice of such a condition.

Plaintiffs oppose the motion, asserting that there are triable issues of fact as to whether the absence of a mat in the entranceway and the inadequate staffing of the area allowed the floor to become wet and slippery. In support of its opposition, plaintiffs rely on Jennison's testimony regarding the procedures for monitoring and cleaning the entranceway. Plaintiffs also submit the affidavit of William Marletta, a qualified safety consultant in the areas of slip resistance and slip and fall prevention (Marletta aff. at ¶2-4) who inspected the 67th Street Starbucks on October 7, 2007 (Id. at ¶6).

According to Mr. Marletta, the floor at issue would be dangerously slippery when wet based on its slip resistance rating (Id. at ¶7). Specifically, Mr. Marletta states that a slip resistance rating of .5 or greater indicates a slip resistant surface, and that the floor of the 67th Street Starbucks has a rating of better than .59 when dry, and a rating of approximately .36 when wet or when containing loose foreign debris (Id. at ¶8). He stated this .36 rating on the wet floor indicates that the floor is not slip resistant for wet conditions and is unusually dangerous when

wet (Id. at ¶7).

Mr. Marletta also opined that "good and accepted safe practice required adequate placement of mats be provided to maintain the floor surface dry, clean and safe" and that the absence of matting in the entranceway "represented a significant departure from good and accepted safe practice as this floor is slippery when wet or contaminated." (Id. at ¶11).

In reply, Starbucks does not challenge Mr. Marletta's opinion, but notes that there is no evidence that Heavey fell on a wet or slippery substance.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, Starbucks has met its burden based on Heavey's deposition testimony that she did not know what caused her to fall (Heavey dep. at 32-34). See Fishman v. Westminster House Owners, Inc., 24 A.D.3d 394 (1st Dep't 2005)(holding that in a slip and fall case, a plaintiff's lack of knowledge regarding the cause of the slip and fall prima facie establishes defendants' entitlement to judgment as a matter of law); Christopher v. New York City Transit Auth., 300 A.D.2d 336 (2nd Dep't 2002) (holding that defendants made a prima facie showing entitling them to summary judgment based on plaintiff's deposition testimony that she did now know what

defect in a mat caused her to fall).

Moreover, in order for Starbucks to be liable, there must be evidence that Starbucks either created the dangerous condition or had constructive or actual notice of it. "It is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106, 106 (1st Dep't 1996) (citations omitted). However, an "owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner either created the hazardous condition or had actual or constructive notice of the condition for such a reasonable amount of time that in the exercise of reasonable care, the owner should have corrected it." Trujillo v. Riverbay Corp., 153 A.D.2d 793, 794 (1st Dep't 1989).

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 allow defendant's employees to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986). A general awareness that litter or some other dangerous condition may be present on the premises is insufficient to maintain liability. Id. at 838.

Here, there is no dispute that Starbucks did not create the condition on which Heavey allegedly fell. In addition, Starbucks has met its burden of showing that it did not have either actual or constructive knowledge of such condition based on Jennison's testimony that there were no complaints about the floor and no prior slip and fall accidents in the entranceway, including during the period of time since the removal of the mat in January 2003.

Furthermore, notwithstanding plaintiffs' expert affidavit, they have not countered Starbucks' showing of a prima facie entitlement to summary judgment, including through the submission of an expert affidavit. While plaintiff's expert opined that the Starbucks floor is dangerously slippery when wet or when it contained debris, there is no evidence in the record that there was liquid or debris on the floor at the time of Heavey's fall. See O'Rourke v. Williamson, Picket, Gross, Inc., 260 A.D.2d 260, 261 (1st Dep't 1999)(holding that liability cannot be predicated upon the theory of a recurring dangerously slippery condition absent evidence that the floor was actually slippery before plaintiff walked into the building on the day of the accident).

Moreover, Mr. Marletta acknowledged that when dry, the floor at the Starbucks had a slip resistance rating above the .5 minimal threshold needed to qualify as a slip resistant surface. In addition, while J. Heavey testified that the tile floor looked "slick" such testimony is insufficient to show that the floor was wet, particularly as he also testified that he did not observe any liquid or other substances on the floor. In any event, Starbucks cannot be liable in the absence of any evidence that it had notice that the floor was wet or otherwise dangerous at the time of the accident. Gordon v. American Museum of Natural History, 67 N.Y.2d at 837.

Finally, Starbucks' failure to place a permanent or temporary mat at the 67th Street Starbucks entrance does not establish liability since there is no evidence that this failure caused Heavey's fall, or that Starbucks created or had actual or constructive notice of any dangerous condition resulting from the absence of such a matting. Weiss v. Gerard Owners Corp., 22 A.D.3d 406 (1st Dep't 2005) (holding that the defendants' failure to place matting provides no basis for liability in the absence of evidence that they created or had actual or constructive notice of water accumulation).

Accordingly, Starbucks is entitled to summary judgment dismissing the complaint against them.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendants Starbuck's Coffee Company, Lincoln Triangle Partners, L.P., Lincoln Associates and 148-154 Columbus Avenue Partners, L.P. is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint accordingly.

Dated: June 26, 2008

J.S.C.