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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

PHYLLIS BRADLEY,

Plaintiff,

-against-

STOP & SHOP SUPERMARKET COMPANY, LLC d/b/a STOP & SHOP,

Defendant.

Motion Sequence #002
Submitted May 27, 2008

INDEX NO: 3228/07

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Requested Relief

Defendant. STOP & SHOP SUPERMARKET COMPANY LLC d/b/a STOP & SHOP (hereinafter referred to as "STOP & SHOP"), moves for an order, pursuant to CPLR § 3212, granting it summary judgment and dismissing the complaint against it on the ground that no triable issues of fact of negligence exist with respect to defendant. Counsel for plaintiff, PHYLLIS BRADLEY, opposes the motion which is determined as follows:

Background

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, PHYLLIS BRADLEY, on March 2, 2006 at approximately 9:30 P.M., when she slipped and fell on a wet substance on the floor of the STOP & SHOP supermarket located at 248 Sunrise Highway, Freeport, New York. According to the testimony of the plaintiff at her deposition, she claims that she was at the check out register of the store when, because of a broken bag on an item, she decided to replace the item and walked back into the shopping aisle where she slipped and fell. Plaintiff testified that both of her feet slipped and she fell backward and was lying on the floor on her back. She stated that, once on the floor, she realized that her clothes were wet and that she had slipped on a wet substance. She claims that she heard the store manager ask the cashier why he had not been called about the spill and that the cashier said that she had called and was then told she should have called again. In the Bill of Particulars, dated April 2, 2007, plaintiff claimed that the substance that contributed to plaintiff's accident was mouth wash, and that she did not observe the substance at any time prior to the subject occurrence. She also claimed that she suffered injuries to her cervical and thoracic spine, as well as right hip internal derangement, chest wall contusion, contusion and laceration to her left lower leg, cerebral concussion and post-concussion syndrome, headaches, severe pain and limitation of movement and an emotional reaction and depression.

In support of the motion to dismiss, STOP & SHOP asserts that plaintiff had notice of the spill, which was open and obvious, and had walked around a yellow warning cone placed at the subject location two (2) times prior to her fall. Defendant argues that there was a brief time period between notice of the spill and plaintiff's accident and that, although

its remedial efforts began immediately with the placement of the warning cone minutes before the accident, it had no opportunity to clean up the spill. It is defendant's position that the accident was the result of plaintiff's own culpable conduct and lack of due care, as the spill on the floor was open and obvious, not inherently dangerous, and could have been discerned with the reasonable use of her senses. STOP & SHOP urges that it is entitled to summary judgment and that the complaint be dismissed as a matter of law.

In opposition to the motion, counsel for plaintiff asserts that STOP & SHOP had notice of the spill prior to plaintiff's fall and had sufficient time to clean it but did nothing. Counsel for plaintiff annexes a copy of a surveillance tape taken at STOP & SHOP on the night of the accident, which he asserts raises questions of fact about defendant's actions on the night of the incident. The tape reflects that, prior to plaintiff's fall, a customer in a red hat enters the subject check out counter and, while she is unloading her items, the cashier leaves the check out counter and returns shortly thereafter carrying a yellow plastic cone which she places on the floor in the shopping aisle near her check out counter, but which is not visible to the video recorder. Thereafter, the cashier returns to the check out counter and converses with the lady in the red hat and rings up her items. Said customer eventually leaves and it appears that the cashier picks up a magazine or other document to read while waiting for the next customer. After the passage of several minutes, the plaintiff, apparently passing the yellow warning cone in the aisle, arrives at the check out counter and begins to place her items on the check out counter. Then, she is seen leaving the check out counter, allegedly to exchange one of her items, and she heads back to the shopping aisle where she slips and falls near or around the yellow warning cone. It appears that, after lying on the floor for a few moments, several other shoppers or

individuals come to her aid and help her to her feet.

Furthermore, counsel for plaintiff points out that, although the cashier and night manager who were present on the night of the accident were not produced for a deposition, STOP & SHOP's witness, Kyle Hoffman, a customer service manager who was to take charge if any spillage occurred, testified that he was not present at the time of the incident but that there was a general procedure followed when a spill occurred. He stated that the first priority was to get precaution cones in the area and, next, to get someone from maintenance to mop up the spill. He further indicated that, if there is a breakage that results in a spill, the employee is supposed to remain in the area until the cones are placed or someone from maintenance arrives in the area. He stated that, after the cones are placed, an employee is supposed to wait for maintenance to clean up the spill. Counsel for plaintiff argues that no evidence is presented that there was too short a period of time to actually clean up the spill and, based on the record herein, it is clear that STOP & SHOP did not follow their general procedure in the event of a spill. Plaintiff urges that there are issues of fact before the Court as to STOP & SHOP's negligence and that the motion for summary judgment should be denied.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488,

594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

In an action for negligence, the law provides that a defendant is not an insurer, and negligence may not be inferred solely from the happening of an accident, but rather claimant must prove that the defendant breached a duty of care owed to claimant and that the breach of duty proximately caused the claimant's injury. *Valentine v State of New York*, 192 Misc. 2nd 706, 747 NYS2d 282 (Court of Claims, 2002). *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 (2nd Dept. 2002), instructs that, while the owner or possessor of property has a duty to maintain the property in a reasonably safe condition and may be held liable for injures arising from a "dangerous condition" on the property, liability attaches to the owner or possessor only if the owner possessor created the condition or had actual knowledge or constructive notice of it, and a reasonable time to remedy it. 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 835, 501 NYS2d 646, 492 NE2d 774 (C.A. 1986).

To be entitled to summary judgment in a case involving a slip and fall on liquid or debris on a supermarket floor, the defendant must set forth *prima facie* evidence that it did not create the alleged slippery condition and that it did not have actual or constructive notice of its existence. *Licatese v Waldbaums*, Inc., 277 AD2d 429, 717 NYS2d 226 (2nd Dept. 2000); *Dwoskin v Burger King Corp.*, 24 AD2d 358, 671 NYS2d 494 (2nd Dept. 1998). The burden then shifts to the plaintiff to come forward with sufficient evidence to raise a triable issue of fact. *Licatese v Waldbaums, Inc., supra*.

Discussion

After a careful reading of the submissions herein, and giving the non-moving plaintiff the benefit of every favorable inference, it is the judgment of the Court that defendant has failed to make a *prima facie* showing of its entitlement to summary judgment. It is acknowledged that STOP & SHOP had actual knowledge of the alleged slippery condition but questions remain as to whether it had a reasonable time to remedy the condition and failed to act. Issues of credibility should not be determined by the Court on motions for summary judgment. *Combs v Incorporated Village of Freeport*, 139 AD2d 688, 527 NYS2d 443 (2nd Dept. 1988); *Heller v Trustees of Town of East Hampton*, 166 AD2d 554, 560 NYS2d 836 (2nd Dept. 1990). Credibility issues are to be left for the trier of facts. *Seltzer v Razzi,* 6 Misc.3d 1002A, 800 NYS2d 357 (Civil Ct. NY 2004); *People v Govan,* 127 AD2d 690, 511 NYS2d 680 (2nd Dept, 1987).

Conclusion

Accordingly, it is hereby

ORDERED, that STOP & SHOP's motion for an order, pursuant to CPLR § 3212, dismissing the complaint and granting defendant summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 4, 2008

WILLIAM R. LaMARCA, J.S.C.

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