**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES** **PART 17**

**Justice**

**----------X**

**FRANK ZERILLI and MAUREEN ZERILLI,**

**Plaintiff,** **Index No.: 9807/07**

**Motion Date: 12/17/08**

**-against-** **Calendar Number: 55**

**WESTERN BEEF RETAIL, INC.**

**Defendant.**

**----------X**

The following papers numbered 1 to 9 read on this motion by defendant for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affirmation-Exhibits..... | 1-4 |
| Affirmation in Opposition-Affirmation-Exhibits..... | 5-7 |
| Reply Affirmation..... | 8-9 |

Upon the foregoing papers it is ordered that defendant's motion for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint is granted, for the following reasons.

According to the complaint, the action herein stems from plaintiff Frank Zerilli slipping and falling upon a wet and slippery while walking inside defendant's premises, a Western Beef retail food store, located at 61 Second Street, Mineola, New York, on November 2, 2006. Plaintiffs allege that defendant's negligently and carelessly allowed this wet and dangerous condition to exist and remain upon floors located at the premises. Plaintiffs also claim that defendant was negligent in failing to block off, rope off or otherwise prevent persons from walking across or upon this dangerous wet and slippery floor. Plaintiffs also claim that failure to place mats or runners on the floor caused water to accumulate and he slipped on this water. As a result of his fall, Frank Zerilli suffered injuries and brought this action to recover damages, and his wife plaintiff Maureen Zerilli brought a claim to recover for the loss of her husband's services due to the injuries he suffered as a result of this fall.

Defendant now moves for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint on the grounds that it did not create the condition which caused plaintiff's accident and it did not have actual or constructive notice of the alleged condition which plaintiff claims caused her accident. Plaintiff opposes this motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there

are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

It is well settled that in order to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition and a reasonable time to undertake remedial actions. Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.) Pollio v Nelson Cleaning Company, 269 AD2d 512, (2d. Dept. 2000.) On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. *See*, Colt v. Great Atlantic & Pacific Tea Company, Inc. 209 AD2d 294 (1st. Dept. 1994. )

Initially, this court is satisfied that defendant has made a prima facie showing of entitlement to judgment as a matter of law. It has submitted evidence, inter alia, deposition testimony of plaintiff Clifford Winston, assistant manager at the subject Western Beef, who was on duty on the day in question, and Hugo Drovetta, manager of the subject store. At his deposition, plaintiff stated that he had shopped at the subject store many times prior to the accident and he had noticed rugs at the entrance of the store in the past. On the subject date, he was driven to the store by his wife and it was raining. Frank Zerilli left the car and his wife parked it and remained outside of the store until after the accident. He noticed the ground was wet which caused his shoes to get wet. He did not recall drying his shoes in any manner prior to entering the store and when he entered, through the front door, his right foot slipped, causing him to fall backwards. Plaintiff did not see what caused him to fall, but he claimed there was no rug or mat near the door and the floor was wet, despite not having seen any water on the ground.

Clifford Winston stated he was at work before plaintiff's fall and it was raining outside. About fifteen minutes prior to plaintiff's fall, he noticed the rug located inside the front door, about three feet from the door's saddle, was clean and dry, and the area around the door was clean and dry. He recalled seeing the store's porter cleaning and mopping the entranceway prior to plaintiff's fall. After plaintiff's fall, Mr. Winston observed that the area around plaintiff was clean and dry. He did not receive any complaints that day regarding a wet condition at the store. Mr. Drovetta stated that the rugs used at the store are cleaned on a regular basis and placed on the floors near entrances when the weather is inclement.

This evidence establishes that defendants neither created the dangerous condition nor had actual or constructive notice of the condition. Pollio v Nelson Cleaning Company, 269 AD2d 512 (2d Dept 2000.) Plaintiff's deposition testimony indicates that he did not know when the wet condition, allegedly caused by tracked in rain was created. There is no indication that prior to his fall he noticed any water on the floor and his testimony indicates that it is more likely than not that he slipped due to is own shoes being wet from the rain and wet ground outside of the store. Mr. Winston's testimony indicates that on the day and time in question, the area in front of the front door was clean and dry and there was a rug. The burden thus shifted to plaintiffs to show that defendant created the condition or had actual or constructive knowledge of the dangerous condition which caused plaintiff to fall and that defendant had a reasonable time to correct the condition. *See*, Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.)

Plaintiffs claims that defendant was on notice of the wet floor and they have submitted, inter alia, an affidavit of Frank Zerilli, Maureen Zerilli, Chris Reardon, the responding Medical Technician, and Stephen Hayduk, an engineer. According to plaintiff Frank Zerilli's affidavit, the area he fell in was wet and the nearest rug was several feet away. He also states that on previous days, whenever it rained, this area would get wet. Maureen Zerilli stated that when she saw her husband, after the fall, she noticed the area was wet. Chris Reardon states that plaintiff told him he slipped on a wet floor. Contrary to plaintiffs' assertion, Mr. Reardon does not indicate he noticed the area to be wet. Stephen Hayduk, an engineer visited the store on October 21, 2008 and reviewed the deposition testimony of plaintiffs and defendant's witnesses. He found that "defendant failed to properly place its rug/mat at the appropriate area at the entranceway, thereby exposing a wet tile floor to customers on rainy days" He also stated that the wetness was created on a recurring basis and was easy to fix. Based on the above evidence, plaintiffs claim that defendants created the condition by failing to take appropriate remedial steps because they did not place the mat runners properly and the exposed area became wet and that is where Frank Zerilli fell. Plaintiffs also claim that this led to a dangerous condition due to the floor being more slippery when wet than the mat and this caused his accident and this condition was a recurrent one.

Contrary to plaintiff's argument, even if the mat was not properly placed, there is nothing but speculation to suggest this caused the wet condition. This speculation includes the peculiar happenstance that Frank Zerilli entered the store with wet shoes and, at his deposition stated that there was no rug or mat in the area. Similarly, Maureen Zerilli's deposition testimony is devoid of any reference to there being water in the area, yet her affidavit does. The court finds that plaintiffs' initial descriptions of the area in question are more accurate and their affidavits seek to present a feigned issue of fact designed to avoid the consequences of his earlier deposition testimony. *See* Bongiorno v Penske Auto. Ctr., 289 AD 2d 520, (2 Dept 2001.) As such, there was no evidence that the defendant created a wet condition. In any event, plaintiff's

claim regarding the placing of the mats does not negate the need to show notice of the wet condition. Ford v Citibank, N.A. 11 AD3d 508 (2d Dept 2004.) Furthermore, the engineer's inspection of the store was conducted about two years after the event and does not offer any opinion regarding its condition on the relevant date. Furthermore, his report fails to specify any safety standard or practice which defendant violated. Mroz v Ela Corporation, 262 AD2d 465 (2d Dept. 1999.) Accordingly, plaintiff has failed to demonstrate that defendant had actual notice of the particular accumulation of water that allegedly caused the plaintiff to fall.

Regarding 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 the defendant's employees to discover and remedy. Masotti v Waldbaums Supermarket 227 AD2d 532 (2d Dept. 1996). Plaintiff's deposition testimony lacks any clear reference to water on the floor and as such there is not evidence that the alleged water existed for a sufficient period of time to establish constructive notice. The fact that it was raining does nothing to suggest a wet condition was present inside the store for such an extensive period of time as to permit an inference that the defendant had constructive notice of the condition. *See*, Kershner v Pathmark Stores, Inc. 280 AD2d 583 (2d. Dept 2001.) Nor does it create a duty to place mats or rugs so as to cover a complete path over the floor. Since there is no evidence that the condition complained of was present for a sufficient period of time for the defendant to have discovered and remedied it, there is no basis for an inference that the defendants had constructive notice of the condition. *See* Ford v Citibank, N.A., *supra* at 509. This renders plaintiff's expert's testimony nothing more than speculation and incapable of defeating this summary judgment motion since there is no suggestion that the floor was inherently dangerous and needed to be completely covered. Finally, the Court rejects plaintiffs' claim that this was a recurring condition, since, there is insufficient proof that any dangerous condition existed. Moreover, while rain will create wet floors, the evidence establishes that defendant's took all necessary precautions to render any wet condition safe.

Consequently, plaintiff has failed to raise a triable issue of fact regarding whether the defendant created or had actual or constructive notice of the dangerous condition. *Id.* Accordingly, plaintiffs have not met their burdens and defendant's motion for summary judgment is granted and the complaint is dismissed.

**DATED: December 23, 2008**

_____

**ORIN R. KITZES, J.S.C.**