

**Masina v Stop & Shop Supermarket Co., LLC**

2010 NY Slip Op 30600(U)

March 10, 2010

Supreme Court, Queens County

Docket Number: 7880/08

Judge: Orin R. Kitzes

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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES,  
Justice**

**PART 17**

-----X  
**VIOLET MASINA,**

**Plaintiffs,**

**-against-**

**Index No.: 7880/08  
Motion Date: 3/3/10  
Motion Cal. No.: 37**

**THE STOP & SHOP SUPERMARKET COMPANY,  
LLC and FC GRAND AVENUE ASSOCIATES,  
Defendants.**

-----X

The following papers numbered 1 to 11 read on this motion by defendants for an order granting summary judgment in their favor pursuant to CPLR § 3212 and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition-Exhibits.....	6-8
Reply Affirmation-Exhibits.....	9-11

Upon the foregoing papers it is ordered that the motion by defendants for summary judgment in their favor pursuant to CPLR § 3212 and dismissing the complaint is granted, for the following reasons:

According to the complaint, this action stems from plaintiff slipping and falling on a curb, on July 8, 2005, on the premises located at 7417 Grand Avenue, Maspeth, Queens, New York. Stop & Shop Supermarket Company, LLC's ("Stop & Shop") operated a store at these premises, and it leased the premises from defendant FC Grand Avenue Associates, L.P. ("FC") Plaintiff claims that she was walking on the premises when she slipped and or tripped, and fell due to a defective condition and suffered injuries. She thereafter brought this action to recover damages for her personal injuries, claiming that defendants' negligence caused the accident and they had actual and constructive notice of the defective condition. In plaintiff's Bill of Particulars plaintiff stated that the "occurrence complained of took place at the parking ramp area adjacent to Stop and Shop supermarket. . . .when Plaintiff Violet Masina was walking at the parking ramp area when she slipped and fell on the curb, which was slippery.

Defendants have now moved for summary judgment on the grounds that plaintiff's accident was not caused by any negligence on their part and they had no actual or constructive

notice of the alleged dangerous condition. Stop & Shop also claims that the accident took place at a location it did not have a duty to maintain and thus owed no duty to the plaintiff with respect to the condition of the subject area. It also claims that plaintiff is barred from bringing this action pursuant to the Workers' Compensation Law. Plaintiff opposes this motion.

Initially, the Court notes that plaintiff's claim that additional discovery is needed that renders this motion premature is without merit. Plaintiff filed her Note of Issue indicating that discovery was complete and there is no indication that the parties agreed to continue discovery after the Note was filed. As such, this motion shall be determined by this Court.

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."

Regarding Stop & Shop's claim that the action is barred by the Workers' Compensation Law, plaintiff stated at her deposition that she was walking to work when the accident occurred. An injury sustained by an employee is compensable under the Workers' Compensation Law if it "aris[es] out of and in the course of the employment" (see, Workers' Compensation Law § 10 [1]; § 2 [7]). The general rule is that injuries sustained during travel to and from the place of employment do not come within the statute. *Neacosia v. New York Power Auth.*, 85 N.Y.2d 471 (N.Y. 1995.) There are exceptions to this "going and coming" rule, for example, an employee who has engaged in travel for dual purposes-both business and personal. *Id.* However, Stop & Shop does not claim plaintiff was performing this type of exempted activity when she was walking to work. Accordingly, the branch of the motion seeking dismissal of the complaint against Stop & Shop based upon the Workers' Compensation Law bar is denied.

Regarding Stop & Shop's claim that it did not owe plaintiff a duty to maintain the area in which she fell, liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" *Minott v City of New York*, 230 AD2d 719 (2d Dept 1996.) (Citations omitted.) Defendant Stop & Shop has submitted evidence, including the lease agreement between it and FC, the landlord of the premises, plaintiff's Bill of Particulars, deposition testimony of plaintiff, and an affidavit of Mr. Bob Smith, manager at the subject Stop & Shop.

A clear reading of the lease provisions between it and FC shows FC had the sole duty to maintain and repair the area in which plaintiff fell. Accordingly, Stop & Shop has established its entitlement to summary judgment as a matter of law.

Plaintiff has not addressed Stop & Shop's claims regarding the Lease, however, in a somewhat cryptic manner she argues that one of the sources of the water she slipped in was a "poorly functioning air-conditioning system for the Stop & Shop." In her affidavit, plaintiff claims that the condition of the air-conditioner and its causing water accumulation was known by Stop & Shop. This claim has not been raised before in any pleading, Bill of Particulars, or deposition. In fact, at plaintiff's deposition she indicated it was rain that caused the water to pool, not any other cause. Moreover, plaintiff fails to submit any evidence that supports her bald assertion of a poorly functioning air conditioning causing water to accumulate. As such, this Court finds plaintiff's claims regarding the air conditioner to be a feigned issue of fact designed to avoid the consequences of the failings of her testimony and pleadings. *See, Blochl v RT Long Is. Franchise, LLC*, 2010 NY Slip Op 1611 (N.Y. App. Div. 2d Dep't Feb. 23, 2010.) *Central Irrigation Supply v. Putnam Country Club Assoc., LLC*, 27 AD3d 684 (2d Dep't 2006) Based on the above, no issue of fact has been raised as to Stop & Shop's having caused water to accumulate in the area plaintiff fell. Accordingly, the branch of the motion seeking dismissal of the complaint as against Stop & Shop on the ground of lack of duty, is granted and the complaint is dismissed as to Stop & Shop. *Calcaterra v. Home Fed. Sav. Bank*, 294 A.D.2d 324 (2d Dept 2002.)

Regarding the branch of the motion seeking dismissal of the complaint as against both defendants on the grounds they did not create or have notice of the condition, 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 defendants have made a prima facie showing of entitlement to judgment as a matter of law on the grounds that they did not create or have notice of the condition that caused plaintiff to slip and fall. Defendants have submitted evidence, *inter alia*, deposition testimony of plaintiff and Bob Smith's affidavit. Plaintiff's deposition indicates that it was raining at the time she slipped on the curb and she slipped on the curb because it was slippery. Bob Smith, stated that the procedure at the store was if a complaint was made

regarding a dangerous curb, a report would be made by the store and sent to FC, the landlord. Mr. Smith stated that there were no complaints of the curb being dangerous. 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.) The burden thus shifted to plaintiff 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.)

Plaintiff claims that defendants created the condition by painting the curb with a “slick, glossy yellow paint” that made the curb slippery. Plaintiff also claims that water accumulated in the area in which she fell on a recurring basis. In support of her claims, plaintiff has submitted her affidavit and the affidavit of several of her family members. Regarding the paint on the curb, plaintiff has not submitted any admissible evidence that shows this paint was in any way capable of creating an unreasonably slippery surface on the curb. There is no expert evidence and the affidavits offer only unsubstantiated allegations, which are insufficient to raise a triable issue of fact regarding either defendant having created the dangerous condition. Ford v Domino’s Pizza, 67 AD3d 633 (2d Dept 2009.)

Regarding defendants’ notice of the slippery curb, plaintiff claims that there were poor drains near the subject curb and rainwater backed up and pooled around the curb. This condition existed, apparently, for an extensive period of time and plaintiff had spoken with her co-worker’s about this condition and Stop & Shop was closed on several occasions due to this flooding. Plaintiff has submitted her affidavit and the affidavits of several of her relatives to support this claim. Plaintiff claims that her evidence shows the water accumulation was a recurring condition that establishes defendants’ constructive notice of the dangerous condition.

Courts have recognized that a " 'defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition " Freund v Ross-Rodney Hous. Corp., 292 AD2d 341, 342, (2d Dept 2002.) However, plaintiff has failed to submit sufficient evidence that there was a drainage problem that defendants could have remedied. In fact, her unsupported allegations regarding the drainage and flooding problems are speculative and insufficient to defeat this motion. Hartley v. Waldbaum, Inc., 2010 NY Slip Op 648 (N.Y. App. Div. 2d Dep't 2010) Moreover, the defendants are not obligated to provide a remedy to the problem of water that naturally accumulates in stormy weather. Moreover, even if the defendants were aware that the accumulation of water by the curb during a steady rain was a recurring condition, the evidence relied upon by the plaintiff to raise a triable issue of fact as to whether there was a known recurrence was not sufficiently time or site-specific to support a claim of constructive notice.

Perlongo v. Park City 3 & 4 Apts., Inc., 31 AD2d 409 (2d Dep't 2006.) Furthermore, the Court notes that each affidavit is remarkably similar in its allegations and other than plaintiff's affidavit, there is no indication that the water accumulation was actually observed by the affiant. Accordingly plaintiff has failed to demonstrate that defendants had actual notice of the existence of a recurring condition.

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 evidence lacks any clear reference to the period of time the water existed and whether it was there for a sufficient period of time to establish constructive notice. The fact that it was raining does nothing to suggest water was dangerously accumulating around the curb for such an extensive period of time as to permit an inference that the defendants had constructive notice of the condition. *See*, Kershner v Pathmark Stores, Inc. 280 AD2d 583 (2d. Dept 2001.) 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. 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, plaintiff has not met her burden and the branch of defendants' motion for summary judgment on the ground that they did not create or have notice of the condition that allegedly caused plaintiff to slip and fall is granted.

Based on the above, the motion by defendants for an order granting summary judgment in their favor pursuant to CPLR § 3212 and dismissing the complaint is granted.

**Dated: March 10, 2010**

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