SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

DIANE COLANTUONO,

INDEX NO.:010471/09

Plaintiff,

MOTION DATE:6-1-10
SUBMIT DATE:8-10-10
SEQ. NUMBER - 001

-against-

KING KULLEN GROCERY CO., INC.
d/b/a KING KULLEN,

MOTION DATE: 7-15-10
SUBMIT DATE: 8-10-10
SEQ. NUMBER - 002

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 6-1-10..... 1
Notice of Cross Motion, dated 7-15-10.....2
Affirmation in Opposition, dated 8-2-10.....3
Reply Affirmation, dated 8-6-10.....4

The motion of plaintiff for summary judgment and the motion of defendant for summary judgment both pursuant to CPLR §3212 are both denied.

Plaintiff slipped and fell at the defendant supermarket. A store video has been submitted which shows that she slipped on an area near the front entrance between where floor mats had been placed on a rainy day. She contends that the place where she fell was wet with a "brownish" water and that defendant was negligent in allowing the place mats to be

situated so that there was a gap between them and a fall earlier in the day should have alerted Defendant's employees to the danger.

Defendant contends that it was the practice of the store manager to make regular inspections. However in his deposition testimony, the store manager states "I usually every half-hour to 45 minutes of walking through the - - called the circle." The follow up question assumes that the manager inspected a "half-hour" before 6:30 and the response is that the mats were close together. Defendant also focuses on the fact that plaintiff was wearing "flip flops" shoes and speculates that the shoes caused the fall, but the video of the fall does not support that view. Moreover, the video which begins nearly an hour before the fall does not show any employee of the store making any inspections. Although the floor was concededly wet it is not possible to reach that conclusion based on the video alone.

In this motion, defendant contends that there was no dangerous condition present but if there was, it did not have either constructive or actual notice thereof in a time sufficient to effect remediation.

Both motions are supported by deposition testimony of plaintiff, defendant's manager, photographs, the video and pleadings.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out merit less claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82

AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (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 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be

evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition

testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

The plaintiff's contention that as a matter of law the defendant is liable because of negligent placement of the floor mats and signs has not been accepted in New York Courts. *Taraabocchia v. 245 Park Avenue Co., 285 AD2d 388 (2d Dept. 2001)* and such proof does not relieve the plaintiff from showing that defendant created the condition or had actual or constructive notice thereof. *Weiss v. Gerard Owners Corp., 22 AD3d 406 (2d Dept. 2005*). It has recently been held that a landowner should be held liable for having created a dangerous or defective condition if a reasonable person in the owner's position would have known or would have reason to know of the danger created, *Walsh v. Super Value, Inc., AD 3rd 904 NYS 2d 121, (2d Dept. 2010).*

Moreover, the law does not impose, as plaintiff suggests an obligation on a landowner to take continuous remedial action to remove moisture. *Thomas v. Boston Properties, 2010WL 3220048 (1st Dept. 2010). Toner v. National Railroad Passenger Corp., 71AD3rd 454 (1st Dept. 2010), Rogers v. Rockefeller Group Intl. 38 AD3d 747, 749 (2d Dept. 2007).*

That there was a prior accident or accidents several hours earlier in the day is insufficient to fix liability on defendant. There has been inadequate evidence or facts submitted to demonstrate similarities in condition between the earlier accident and this accident.

Based on the foregoing, plaintiff has not, for summary judgement purposes made prima facie showing of entitlement to summary judgment as a matter of law. However, even if a prima facie showing of entitlement has been made defendant has raised an issue of fact that

there was neither actual nor constructive notice.

Defendant's cross motion is likewise denied for failure to make a prima facie showing of entitlement to relief. Although the evidence submitted by defendant is enough to satisfy defendant's burden in opposing the motion by plaintiff for summary judgment, it is not sufficient to satisfy defendant's heavy burden of proof necessary to obtain summary judgment on its own behalf.

Defendant raises the issues and argues that it did not create the condition and did not have any notice thereof. In order for a defendant to successfully move for summary judgment in a slip and fall case where the foregoing principles are applicable the defendant "has the initial burden of making a *prima facie* showing that it neither the hazardous condition nor had actual or constructive notice." *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2d Dept. 2004; *Valdez v. Aramark Servs.*, 23 AD3d 639, (2d Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer,* 258 AD2d 634, 635 (2d Dept. 1999). 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 a defendant's employees to discover and remedy it. "*Gordon v. American Museum of Natural History,* 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of the regular inspection of the area in question and "any remedial action just prior to the incident." *Hagin v. Sears,* 61 AD3d 1264, 1266 (3d Dept. 2009).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured

plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Stony Brook, Inc.*, 34 AD3d 732, 733 (2d Dept. 2006); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598, 598-99 (2d Dept. 2008). In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2d Dept. 2006), the Court held that defendant did not make a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

It has been held that a defendant's burden on a summary judgment motion cannot be satisfied merely by pointing out gaps in a plaintiff's case. *Totten v. Cumberland Farms, Inc.*, 57 AD3d 653 (2d Dept. 2008); *See also Musachio v. Smithtown Central S.D.*, 68 AD3d 959 (2d Dept. 2009); *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824 (2d dept. 2007); *cf Cerkowski v. Price Chopper Operating Co.*, 68 AD3d 1382 (3d Dept. 2009).

It is only after the moving defendant has satisfied the threshold burden of proving a *prima facie* case that the Court will examine the sufficiency of the plaintiff's opposition. *Fox v. Kamal Corp.*, 271 AD2d 485 (2d Dept. 2000).

Defendant has not made a *prima facie* showing that it did not have either actual or constructive notice of the condition.

The evidence submitted by defendant's manager although relevant in opposing plaintiff's motion, does not establish with sufficient certainty when or if the area was last inspected. The testimony of the manager with respect to his inspection of the area is not sufficiently detailed, precise or unambiguous to permit the conclusion that he did make an appropriate inspection. Moreover if he did inspect one half hour before the accident the court is not prepared to assume that, given the conditions that day and the prior incident, a half hour was enough as a matter

of law to satisfy the defendant's burden under summary judgement principles. *Pomahac v. Frizec Hahn, 65 AD 3d 462 (1st Dept. 2009).*

In any event it has been held under comparable circumstances that a Defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged which constructive notice. *Milano v. Staten Island University Hospital, 73 AD 3rd 1141 (2nd Dept. 2010).*

Hence plaintiff has raised an issue of fact as to whether and when there was a proper inspection and whether defendant was on constructive notice of the dangerous condition.

Based on the foregoing, the motions are denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 24, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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