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

EMILY JANE GOODMAN

PART 17

Index Number : 110469/2007

RODRIGUEZ, PATRICIA

VS

JAN

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	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 per attached

FILED

SEP 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/22/11

_____ J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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PATRICIA RODRIQUEZ,

Plaintiff,

-against-

Index No. 110469/07

JAN CO, INC. et al,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

In this personal injury action, Plaintiff alleges that she slipped and fell on a dirty puddle of water in a single person bathroom, near the sink, in a Burger King restaurant. Plaintiff testified that after she fell, she saw a closed yellow caution sign which was leaning against the wall of the men's bathroom (Defendants' witness testified that the sign was open and was near the dining area, and not the women's bathroom area). Both sides agree that the floor had been mopped 30 minutes earlier, although Defendants maintain that it was dry and that the area mopped was not near the bathroom in question.

Defendants move for summary judgment, maintaining that it had no notice of the puddle. In support of the motion, Defendants cite to the testimony of a security guard supplied by an outside contractor and the restaurant's assistant manager. Both testified that they were unaware of any accumulation of water on the date of the accident. However, as noted by Plaintiff, neither testified as to any regular inspections of the bathrooms. In fact, the assistant manager testified that there were no set schedules for cleaning of floors and bathrooms (Islam Tr at 43-44) but that floors in the store would be cleaned "as needed."

It is well established that owners must keep premises in a "reasonably safe condition in

view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]). In a slip-and-fall case, the plaintiff has the burden of demonstrating that the defendant either created or had actual or constructive notice of the dangerous condition which caused the injury (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Matias v Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*Barrerra v New York City Tr. Auth.*, – AD3d –, 2009 WL 910758, *1, 2009 NY App Div LEXIS 2583, **1-**2 [1st Dept 2009]).

When a defendant moves for summary judgment in a slip-and-fall case, it has the burden of demonstrating that it neither created nor had notice of the allegedly dangerous condition (*see Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, "defendant met its initial burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"]; *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001] ["Contrary to defendant's suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law"]).

Even where there is no direct evidence that the defendant affirmatively created a dangerous condition, circumstantial evidence may be sufficient to create an issue of fact as to whether the defendant created such a condition (*see Healy v ARP Cable*, 299 AD2d 152, 154 [1st

Dept 2002] ["(I)t is enough that (plaintiff) shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred"] [internal quotation marks and citation omitted]; *see also Stone v KFC of Middletown*, 5 AD3d 106 [1st Dept 2004] ["[d]espite defendants' attempt to distinguish between the injured plaintiff's description of where the accident occurred and where his brother had observed the mopping, the evidence allowed for a reasonable inference that the slip and fall occurred where the mopping was observed, and was causally related"]).

In the instant case, Defendants have failed to meet their prima facie case in establishing a lack of constructive notice (*see Hayes v Riverbend Housing Co., Inc.*, 40 AD3d 500 [1st Dept 2007] [landlord was not liable for breach of the duty to inspect because such inspection would not have revealed the defect; however, there is generally a duty of "reasonable inspections"]). Defendants' argument, that they met that burden, based on the assistant manager's testimony that floors are cleaned "as needed" is not persuasive. Without regularly scheduled inspections, in such a high turn-over restaurant such as Burger King, one would not necessarily know that a condition existed, which needed clean-up. Further, it is not clear what cleaning floors "as needed" entails–i.e., whether this means that nothing is done until a customer complains or whether this means something else. Although Defendants point out that Plaintiff went into the bathroom immediately after another women left the bathroom, and that the women who exited could have dripped water on the floor, that does not alleviate Defendants of their burden on this motion.

Accordingly, it is

ORDERED that the Defendants' motion for summary judgment is denied; and it is

further

ORDERED that the parties shall appear to pick a jury on November 14, 2011, after meeting with the Judge at 10 am in Room 422.

This Constitutes the Decision and Order of the Court.

Dated: August 22, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN