

**Bush v Duane Reade Holdings, Inc.**

2012 NY Slip Op 31505(U)

May 31, 2012

Sup Ct, NY County

Docket Number: 109030/10

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY  
Justice

PART 8

Index Number : 109030/2010  
BUSH, ROBERTA  
vs  
DUANE READE HOLDINGS  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. 109030/110  
MOTION DATE 4/20/12  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 17, were read on this motion to/for SJ Motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1-9  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 10-14  
Replying Affidavits \_\_\_\_\_ | No(s). 15-17

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION FILED**

JUN 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE  
Joan M. Kenney J.S.C.  
JOAN M. KENNEY

Dated: 5-31-12

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

-----X

Roberta Bush,  
Plaintiff,

-against-

Duane Reade Holdings, Inc. d/b/a  
Duane Reade, Duane Reade, Inc.  
d/b/a Duane Reade, and Walgreen  
Co. d/b/a Duane Reade,  
Defendants.

-----X

KENNEY, JOAN M., J.

**DECISION AND ORDER**  
Index Number: 109030/10  
Motion Seq. No.: 001

**FILED**

JUN 07 2012

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion  
to dismiss. NEW YORK COUNTY CLERK'S OFFICE

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation, and Exhibits	1-9
Opposition Affirmation, and Exhibits	10-14
Reply Affirmation, Exhibits	15-17

In this personal injury action, defendants, Duane Reade Holdings, Duane Reade, and Walgreen Co., move for an Order, pursuant to CPLR § 3212, dismissing the complaint.

**Factual Background**

On July 23, 2007, plaintiff Roberta Bush slipped and fell when walking into a Duane Reade (the store) at 1 Whitehall in New York City (the accident). According to plaintiff at her examination before trial (EBT), the accident happened at approximately 8:30am as she entered the store from the street. At the time of the accident plaintiff concedes that it was "raining very hard," (Roberta Bush EBT at 30) and had been doing so since she awoke that morning at 6:30am. (Roberta Bush EBT at 29-30).

Plaintiff alleges that she entered defendants' store and slipped and fell to the ground after walking approximately 5ft inside. (Roberta Bush EBT at 38). Plaintiff also alleges that the cause of the accident was "something on the floor," a liquid she believes was water. When asked about floor

mats at the door, plaintiff stated that there were “none that [she was] aware of.” (Roberta Bush EBT at 38).

The current store manager, Jason Freeman (who was not working on the date of the accident), states that as a matter of practice, “if it’s raining outside, we put mats down.” (Freeman EBT at 25). Freeman said the mats are placed right at the front entrance where the accident occurred, and done so as soon as they are aware that it is raining. (Freeman EBT at 25-26).

Plaintiff “concedes...that she [is] unable to set forth exactly how defendants [had] actual notice of the [alleged] dangerous condition,” and “further concedes that she is unaware of the exact amount of time the [alleged] defective condition existed so as to give defendants constructive notice.” (Plaintiff’s Opposition at 5).

#### **Arguments**

Defendants maintain that they did not create and/or had no actual or constructive notice of the alleged dangerous condition, and that plaintiff’s accident occurred while a storm was in progress, thus releasing them from any liability.

Plaintiff argues that defendants have failed to comply with CPLR 3212 by not providing admissible evidence to support their theory that there was a storm in progress.

#### **Discussion**

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing

judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortarello v Carlin*, 260 Ad2d 201 [1<sup>st</sup> Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1<sup>st</sup> Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1<sup>st</sup> Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1<sup>st</sup> Dept. 2007]). In *Baez*, the Court stated that defendant “failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition.” 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 (see *Strowman v. Great Atl. & Pac. Tea Co., Inc.*, 252 A.D.2d 384, 675 N.Y.S.2d 82 [1998]). A personal injury plaintiff may satisfy burden of showing landowner's constructive notice of hazardous condition by evidence that an ongoing and recurring dangerous condition existed in the area of accident (see

*O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1996]).

“A property owner will not be held liable in negligence for a plaintiff’s injuries sustained as the result of [a dangerous] condition occurring during an ongoing storm or for a reasonable time thereafter.” (see *Solazzo v. NYC Trans. Auth.*, 6 N.Y.3d 734, 810 N.Y.S.2d 121 [2005], where plaintiff slipped on stairs after it was raining on and off all day; summary judgment properly granted to defendants). “A general awareness that the stairs and platforms become wet during inclement weather was insufficient to establish constructive notice of the specific condition causing plaintiff’s injury.” (*Solazzo*, 6 N.Y.3d at 735). In *Pena*, “the trial court properly directed a verdict in favor of defendant at the close of plaintiff’s case in [the] action where plaintiff was injured when she fell as she descended a tiled ramp in defendant’s subway station during the course of an ongoing snowstorm, as it is unreasonable to require defendant to keep the floors of its station dry during the course of the inclement weather.” (*Pena v. NYC Trans. Auth.*, 48 A.D.3d 309, 852 N.Y.S.2d 80 [1<sup>st</sup> Dept. 2008]). In *Abraham*, the Court found that a bus company was not on notice of a wet spot, so as to create liability for negligence, when a passenger slipped and fell. The Court stated that the water had accumulated during an ongoing storm, and that “it is well settled that there can be no liability in negligence for injuries sustained in a fall due to a weather-related condition occurring during an ongoing storm.” (*Abraham v. Port Auth. Of NY and NJ*, 29 A.D.3d 345, 815 N.Y.S.2d 38 [1<sup>st</sup> Dept. 2006]).

Here, plaintiff contends that the Court cannot consider defendant’s climatological data for evidence that there was a storm in progress because said evidence is incomplete. While that argument may be valid, it is irrelevant to this Court. Plaintiff herself admits in her deposition testimony (admissible evidence) that it was raining hard and non-stop for, at minimum, 2 hours before and during her accident. (Roberta Bush EBT at 30). As such, there is no factual dispute as to

not there was a storm in progress, and defendants cannot be held liable in negligence for injuries the plaintiff sustained due to a weather related condition based on this theory of defense. Plaintiff simply failed to meet her burden of defeating the instant summary judgment application seeking dismissal of this claim.

Assuming arguendo that the storm in progress rule did not apply, plaintiff still failed to satisfy her burden of showing that defendants either created or had actual or constructive notice of the allegedly dangerous condition on the floor. There are no issues of material fact regarding the notice requirements. Plaintiff did not make an attempt to explain how defendants may have known about the purported dangerous condition that caused her to slip and fall. The failure to rebut movants' claim of lack of actual or constructive notice warrants dismissal of this case. (*Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 856 N.Y.S.2d 573 [1<sup>st</sup> Dept. 2008]). Accordingly, it is

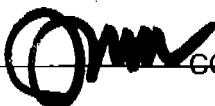
ORDERED, that defendants' summary judgment motion is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.  
Dated: 5-31-12

**FILED**

JUN 07 2012

ENTER:



NEW YORK  
COUNTY CLERK'S OFFICE

Joan M. Kenney, J.S.C.