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

PRESENT : DONNA M. MILLS PART 58
Justice

LYDIA AYALA,

Plaintiff,

-v-

HILLSTONE RESTAURANT GROUP, INC., et al.,
Defendants.

INDEX NO. 115960/10

MOTION DATE_____

MOTION SEQ. NO. 002

MOTION CAL NO._____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 8/2/12

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

LYDIA AYALA,

Plaintiff,

- against -

HILLSTONE RESTAURANT GROUP, INC., BP/CGCENTER I LLC, BP/CGCENTER II LLC and CHRISTOPHER FLORCZAK,

Defendants.

INDEX NO. 115960/10

DECISION/ORDER

DONNA MILLS, J.:

The plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on liquid in the Hillstone Restaurant at E. 53rd Street on March 20, 2010 between 7:00 and 8:00 p.m. Defendant Christopher Florczak, a manager at the restaurant on the day in question, moves for the action to be dismissed against him personally since he was an employee of the restaurant. Defendants Hillstone Restaurant Group, Inc., et al. ("Hillstone"), move for summary judgment on the ground that it neither created the allegedly dangerous condition, nor had actual or constructive notice of the condition.

Robert Harding, the manager on duty at the date and time of plaintiff's alleged accident, testified at a deposition on behalf of defendants. He testified that it is every employees job to clean up if a spill occurs, and that on the date of the alleged accident no one reported plaintiff's accident. As far as cleaning procedures, Mr. Harding further

testified that in the event of a spill, whoever becomes aware of it informs a colleague and stays nearby the spill or breakage, while the colleague gets material to clean it up. He also testified that managers walk around the dining room throughout the entire lunch and dinner service to make sure everything is clean, light bulbs are working and the floors are fine. Specifically, with regard to the restroom area, Mr. Harding also testified that restroom checks are done every 15 minutes, which also involves checking the area outside of the restrooms where plaintiff allegedly fell.

Plaintiff testified at her deposition that she was caused to fall as a result of spilled liquid, on a wood floor in a dimly lit hallway. Moreover, plaintiff testified that just prior to her slip that she believes a Hillstone employee walked past where her accident occurred. In addition, in her affidavit in opposition to this motion for summary judgment, she claims that she had observed Hillstone staff on the day of the accident and on other occasions carry dripping wet buckets of ice to the bar and wet buckets for carrying dirty dishes across the area where she fell.

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, Gordon v. Waldbaum, Inc., 231 A.D.2d 673, 674, 647 N.Y.S.2d 996; Colt v. Great Atl. & Pac. Tea Co., 209 A.D.2d 294, 295, 618 N.Y.S.2d 721; Padula v. Big V Supermarkets, 173 A.D.2d 1094, 570 N.Y.S.2d 850). In opposition, in order "[t]o 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" (Bradish v. Tank Tech Corp., 216 A.D.2d 505, 506, 628 N.Y.S.2d 807;

Gaeta v. City of New York, 213 A.D.2d 509, 624 N.Y.S.2d 47).

In the instant case, the defendant sufficiently established the absence of notice as a matter of law (see, McClarren v. Price Chopper Supermarkets, 226 A.D.2d 982, 640 N.Y.S.2d 702; Maiorano v. Price Chopper Operating Co., 221 A.D.2d 698, 633 N.Y.S.2d 413). Here, defendant met its initial burden by providing the affidavit and deposition testimony of the manager on duty the day of the accident, which established that it was defendants' policy that all employees have a responsibility to clean up a spill if one occurs. Mr. Harding testified that it was protocol for a a manager to generate an accident report for a reported accident, and that this accident was unreported. He further testified that in the event of a spill, a staff member who becomes aware of it, is instructed to inform a colleague and stay nearby the spill while the colleague gets material to clean it up. The staff member is instructed to warn people away until the spill is cleaned. His sworn statements also established that managers walk around the dining room throughout the entire lunch and dinner service to make sure everything is clean, and the floors are fine. As such, the burden shifted to plaintiff to provide evidence demonstrating a triable issue of fact (see Raczes v. Horne, 68 A.D.3d 1521, 1522, 892 N.Y.S.2d 258 [2009]; Cerkowski v. Price Chopper Operating Co., Inc., 68 A.D.3d 1382, 1384, 891 N.Y.S.2d 192 [2009]).

In opposition, plaintiff does not present any evidence raising a genuine issue of fact as to actual or constructive notice. Plaintiff testified that just prior to her slip and fal she believed a restaurant employee by the name of Leena walked past where she fell, and proceeded into the restroom. Plaintiff stated in her deposition that after her fall she noticed a small puddle of liquid with footprints going through it. Plaintiff also testified at

her deposition that she did not see the puddle of liquid on the floor before her fall, did not know why the liquid was on the floor, and did not know how long it had been there. Moreover, although she stated that three people came to her aid after her fall, she did not know if anyone witnessed the accident. Additionally, the plaintiff did not fill out an accident report, nor did she speak to a manager at the restaurant regarding her fall.

Contrary to the plaintiff's contentions, the record contains only speculation that the defendant either created the puddle of liquid (see, Xenakis v. Waldbaum, Inc., 237 A.D.2d 433, 655 N.Y.S.2d 960) or had actual or constructive notice of the condition (see, Kaufman v. Man--Dell Food Stores, 203 A.D.2d 532, 611 N.Y.S.2d 230; Lowe v. Olympia & York Cos. [USA], 238 A.D.2d 317, 656 N.Y.S.2d 930). Even if this Court were to assume that the liquid was visible, despite plaintiff's inability to recall seeing water, there is no evidence from which a jury could reasonably conclude that such condition existed for a sufficient period of time to allow defendants to have discovered and remedied it (O'Rourke v Williamson, Picket, Gross, 260 AD2d 260, 261). Plaintiff's testimony at her deposition that the water she fell on had "footprints" does not provide sufficient evidence that the water existed for a requisite period of time to establish constructive notice.

On such a state of the record, it was incumbent upon plaintiff to show that defendants had either actual or constructive notice of the alleged dangerous condition. Asking anything more of a moving defendant in such circumstances on the issue of notice would skew the burden of proof, which is always on the plaintiff. (Eddy v Tops Friendly Mkts., 91 AD2d 1203, affd 59 NY2d 692; see Benware v Big V Supermarkets, 177 AD2d 846 [3d Dept 1991]).

It is well settled that, without evidence that the defendant created the dangerous condition or had actual notice of it, and absent a showing of evidentiary facts from which a jury can infer constructive notice from the amount of time that the dangerous condition existed, the complaint must be dismissed (see, Fasolino v Charming Stores, 77 NY2d 847, 848; see also, Cafiero v Inserra Supermarkets, 195 AD2d 681, affd 82 NY2d 787;

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants 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: 8/2/12

ENTER:

J.S.C.