

<b>Ronayne v Lord &amp; Taylor, LLC</b>
2015 NY Slip Op 30940(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 152037/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
MARGARET MARY RONAYNE,

Plaintiff,

INDEX NO. 152037/13

-against-

LORD & TAYLOR, LLC,

Defendant.

-----X  
JOAN A. MADDEN, J.:

In this personal injury action, defendant Lord & Taylor, LLC, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. Plaintiff Margaret Mary Ronayne opposes the motion and cross-moves for an order granting summary judgment on liability, or alternatively for an order imposing discovery sanctions on defendant.

Plaintiff alleges she was injured on September 27, 2012, when she was at the Lord & Taylor store in Scarsdale, New York. At her deposition, plaintiff testified that she saw a piece of yellow paper or cardboard, “a raised object on the floor,” and “I stepped over to side step it and my feet went right out, right out from under me.” Plaintiff explained she did not walk on the paper or raised object, but “avoided the paper” and “didn’t want to step on it because I didn’t know what it was . . . it could have had something in it because it was raised.” Plaintiff described the paper as the height of an “iPhone4S” and “little bit more than half [the size] of the iPhone.”

In support of its motion for summary judgment dismissing the complaint, Lord & Taylor argues it had no notice of the piece paper or cardboard, and the piece of paper or cardboard was

open, obvious, readily observable and not inherently dangerous. Lord & Taylor asserts that the area where plaintiff fell was cleaned and inspected shortly before the accident, and submits the deposition testimony of its witness, Shannon O'Connell, the Loss Prevention Manager for the store, and a CD of the surveillance videotape for the area of the store where plaintiff fell on the day of the accident. The video runs continuously in real time from about 5:00 a.m. to 11:23 a.m., and shows the cleaning activities and plaintiff's fall. In opposition, plaintiff argues, *inter alia*, that the motion is premature, as Lord & Taylor had a Cleaning Services Agreement with an outside company, Diversified Maintenance Systems, LLC ("Diversified Maintenance") that was responsible for cleaning the store and has not yet been deposed.

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case." Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that a material issue of fact exists which requires a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

A property owner is under a duty to maintain its premises in a reasonably safe condition in view of all circumstances, including among others, the likelihood of avoiding injury to others and the burden of avoiding the risk. See Basso v. Miller, 40 NY2d 233 (1976). To demonstrate a prima facie case of negligence in a slip and fall case, a plaintiff must demonstrate that defendant either created the dangerous condition or had actual or constructive notice of the condition which causes the accident. See Piacquadio v. Recine Realty Corp., 84 NY2d 967

(1994); Acquino v. Kuczinski, Vila & Assoc. PC, 39 AD3d 216 (1<sup>st</sup> Dept 2007). Where as here, the case involves an alleged slip and fall on a foreign substance on the floor, a defendant moving for summary judgment meets its initial burden on the issue of lack of constructive notice by offering “some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell.” Birnbaum v. New York Raching Ass’n, Inc, 57 AD3d 598, 599 (2<sup>nd</sup> Dept 2008); see also Granillo v. Toys “R” Us, Inc, 72 AD3d 1024 (2<sup>nd</sup> Dept 2010); Aviles v. 23331<sup>st</sup> Corp, 66 AD3d 432 (1<sup>st</sup> Dept 2009). This line of legal authorities holds that defendant’s burden on summary judgment is not met by a showing of a “general practice” of inspections and cleaning. See Porco v. Marshalls Department Stores, 30 AD3d 284, 285 (1<sup>st</sup> Dept 2006) (evidence that store is “cleaned daily,” and inspections made “on a regular basis,” is not proof of cleaning and inspections conducted on the date in question). Rather, defendant must submit evidence establishing “frequent inspections for debris and tripping hazards . . . performed by [defendant’s] employees on the date of the accident, but prior to the accident.” Insook Lee v. Port Chester Costco Wholesale, 82 AD3d 842 (2<sup>nd</sup> Dept 2011).

In seeking summary judgment, Lord & Taylor must establish lack of constructive notice of the dangerous condition, which in this case is the piece of yellow paper or cardboard on the floor which plaintiff alleges was responsible for her fall. Lord & Taylor relies on the deposition of its loss prevention manager, Shannon O’Connell, who merely testified that store is inspected and cleaned every day before it opens at 10:00 a.m. Such testimony as to a “general practice” of daily or regular cleaning and inspection, is not proof that the area where plaintiff fell was actually cleaned or inspected on the day of the accident, prior to plaintiff’s fall. See Porco v. Marshalls Department Stores, *supra*; Insook Lee v. Port Chester Costco Wholesale, *supra*. Lord & Taylor

also relies on the surveillance video for September 27, 2012 which shows that before the store opened at 10:00 a.m., the floor of the aisle where plaintiff fell was dry mopped at around 7:16 a.m, and vacuumed at around 8:38 a.m. and 9:12 a.m. The video also shows that plaintiff fell at 10:58 a.m., which was 58 minutes after the store opened, and during that interval no cleaning of the floor took place. Even assuming without deciding that on the day of the accident, the floor where plaintiff fell was clean and free of debris when the store opened at 10:00 a.m., plaintiff's accident did not occur until nearly one hour later. Absent proof that the floor of the aisle where plaintiff fell was cleaned or inspected at some point close in time to the accident, or proof that shortly before the accident, a witness actually observed the floor and did not see any debris or paper, defendant has failed to make a prima facie showing as to the lack of constructive notice. Notably, while the video shows that in the 15 minute period prior to the accident, several Lord & Taylor employees either walked along the same aisle, or were present in or near the area of the aisle, Lord & Taylor has not submitted an affidavit from any of those employees. The video alone is not dispositive on this issue, as the specific portion of the floor where plaintiff fell is obscured by a rack of merchandise along the side of the aisle. Thus, since issues of fact exist as to constructive notice, neither defendant nor plaintiff is entitled to summary judgment.

Moreover, summary judgment must be denied as premature, since no discovery has been conducted with respect to non-party Diversified Maintenance. Defendant has yet to comply with a July 2014 stipulation in which it agreed to provide Diversified's address, and the names and address of the Diversified employees who performed the cleaning services on the date of plaintiff's accident, and to produce a Diversified employee for deposition. At oral argument, defendant's attorney stated that Lord & Taylor no longer has an agreement with Diversified and

for that reason they are unable to comply with the stipulation. Nevertheless, before the next status conference scheduled for June 25, 2015, Lord & Taylor shall attempt to secure the information from Diversified and to obtain its cooperation, so as to comply with the stipulation. In the event Diversified does not cooperate, Lord & Taylor shall provide the information it has secured from Diversified, including its address. Plaintiff may then pursue other avenues available to obtain the discovery it seeks.

Based on the foregoing, defendant's motion and plaintiff's cross-motion for summary judgment are denied, and the branch of plaintiff's cross-motion for discovery sanctions is denied with leave to renew if warranted.

Accordingly, it is

ORDERED that plaintiff's motion and defendant's cross-motion are denied; and it is further

ORDERED the parties are directed to appear for a status conference on June 25, 2015 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: ~~May~~ *J. Maddy*, 2015

ENTER:

*[Signature]*  
HON. JOAN A. MADDEN  
J.S.C.