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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ANNETTE BROTHERS and CHRISTOPHER SULLIVAN,

INDEX NO. 152462/13

Plaintiffs,

-against-

574 9TH AVE. REST. CORP. d/b/a DAVE'S TAVERN and DAVID SHEERAN,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground of no actual or constructive notice. Plaintiffs oppose the motion cross-move for partial summary judgment on the issue of liability.

Plaintiff Annette Brothers alleges she slipped and fell on wetness on the floor near the door to the ladies' room in defendants' bar, and that her pants were wet when she got up. Her now former husband plaintiff Christopher Sullivan, and two non-party family members/friends, who were all with plaintiff Brothers at the time of the accident, testified that the ladies' room floor was wet and covered with debris, and the dirty mess from water ran 8-10 feet outside the ladies' room door. Defendants deny plaintiff Brothers fell on a wet floor and submit a CD of the surveillance videotape, which according to defendants, shows she slipped on a "star-shaped pieced of paper," probably "a piece of a cocktail napkin." Defendants assert the surveillance video also shows the floor was not wet or covered with debris, and only one "tiny piece of paper"

was on the floor. Defendants also assert that 22 minutes before the accident, the porter ended his shift at 4:00 p.m. and the bar owner, defendant Sheeran, checked and inspected the premises, including the ladies room and the area outside the ladies room, and found it was "clear and clean." Defendants argue that since the evidence shows that the floor was last inspected at 4:00 p.m. and was not wet, and there is no evidence as to how long the alleged wet condition was present prior to plaintiff's accident, they had no notice of the alleged dangerous condition.

To succeed on a motion for summary judgment, the proponent "must made 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 the proponent has made such a 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 establish 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 (1st 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 Racing Ass'n, Inc, 57 AD3d 598, 599 (2nd Dept 2008); see also Granillo v. Toys "R" Us, Inc, 72 AD3d 1024 (2nd Dept 2010); Aviles v. 23331st Corp, 66 AD3d 432 (1st Dept 2009).

Here, neither defendants nor plaintiffs are entitled to summary judgment. Although the surveillance video shows that plaintiff Brothers slipped on a small piece of white paper, that fact alone is not inconsistent with and does not disprove plaintiffs' claim that the floor was also wet. See Derouen v. Savoy Park Owner, LLC, 109 AD3d 706 (1st Dept 2013). The court has viewed the CD of the surveillance video, and it cannot be said as a matter of law that the floor as depicted on the video was not wet. Plaintiffs' testimony and the testimony of two non-party eyewitnesses as to the dirt, debris and wetness on the floor both inside and outside the ladies' room, raise issues of credibility that cannot be resolved on summary judgment. See Ocean v. Hossain, 127 AD3d 402 (1st Dept 2015). "It is not the court's function on a motion for summary judgment to assess credibility." Ferrante v. American Lung Ass'n, 90 NY2d 623, 631 (1997). Moreover, even assuming without deciding that defendants' porter cleaned the ladies' room at 4:00 p.m., plaintiffs allege that on the day of the accident, defendants were participating in a "SantaCon" event,[1] and since defendants had previously participated in such an event, issues of fact exist as to whether they had knowledge it would attract a large crowd to the bar, and should have taken appropriate measures to ensure that the premises were maintained in a safe condition,

[1]Wikipedia describes SantaCon as "an annual mass gathering and pub crawl in which people dressed in Santa Claus costumes or other Christmas characters parade in several cities around the world," which began in San Francisco in 1994 as street theater, and recently in New York City, has been criticized as having evolved into a spectacle of public inebriation. https://en.wikipedia.org/wiki/SantaCon

at a minimum, until 6:00 p.m. when the event concluded.

Thus, since issues of fact exist as to the condition of the floor where plaintiff fell, and whether defendants had actual or constructive notice of the dangerous condition, summary judgment is not warranted.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is denied; and it is further

ORDERED that parties are directed to proceed to mediation forthwith.

DATED: October 21, 2015

ENTER:

HON. JOAN A. MADDEN
J.S.C.