Braswell v Union Sq. Hospitality Group
2016 NY Slip Op 31594(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 150353/15
Judge: Sherry Klein Heitler
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK3

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AMANDA BRASWELL,

Plaintiff,

-against-

UNION SQUARE HOSPITALITY GROUP and
SHAKE SHACK COLUMBUS, LLC,

Defendants.

---x

Index No. 150353/15
Motion Sequence 001

DECISION AND ORDER

HON. SHERRY KLEIN HEITLER

In this slip and fall personal injury action, defendants Union Square Hospitality Group and Shake Shack Columbus, LLC ("Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety. Defendants argue that they did not create or have notice of the condition that is alleged to have caused plaintiff Amanda Braswell's ("Plaintiff") injuries, namely a slippery floor inside a Shake Shack restaurant caused by water. Defendants also argue that they exercised reasonable care under the circumstances by following set cleaning protocols and by carefully monitoring the dining area. Plaintiff cross-moves for partial summary judgment on the issue of liability on the ground that Defendants created and had actual knowledge of the slippery floor condition at their restaurant two months prior to the accident. For the reasons set forth below, both the motion and cross-motion are denied.

The accident in question occurred on the evening of March 29, 2014 when Plaintiff and her husband visited the Shake Shack restaurant located at 366 Columbus Avenue in Manhattan. It had been an overcast rainy day. [1] After placing her order at the register Plaintiff was given a buzzer device that would vibrate when her order was ready. She walked over to the seating area near the

[1] The certified weather report for March 29, 2014 shows that Central Park received 1.81 inches of rainfall that day (Defendants' exhibit G).

condiment table where she waited for approximately 7-8 minutes before her buzzer went off. Upon walking back to the counter to retrieve her food she slipped and fell.

Ms. Braswell initially testified[2] that she did not notice any water on the floor prior to her fall. She also stated that she observed a restaurant employee mopping the floor in her general vicinity about 30-45 seconds before she fell (Braswell Deposition pp. 26-29):

Q. Do you know what you slipped on?

A. Water.

Q. Did you see the water before the accident?

A. Not before the accident, no, sir.

Q. At any time while you were in Shake Shack, did you notice any water on the floor?

A. Yes, sir.

Q. Where did you notice it?

A. In that area.

Q. You noticed it before?

A. Yes, sir.

Q. When did you notice it for the first time before the accident?

A. Right before I fell.

Q. How much time went by from the time you noticed it to the time of the accident.

A. Maybe thirty, forty-five seconds. . . . There was a gentleman standing there mopping.

Q. Did you see what he was mopping?

A. No, sir.

Q. Did you see any cups or drinks spilled on the floor?

A. No, sir.

Q. After you fell, did you see exactly what you fell on, was it water, was it soap?

A. It was water. . . .

Q. How far was he from you when he fell?

A. Maybe a foot or so. . . .

[2] Ms. Braswell was deposed on February 4, 2016. Her deposition transcript is submitted as Defendants' exhibit E (Braswell Deposition).

Q. At the same time you fell, he was mopping?

A. Yes, sir.

Q. Right next to you?

A. Yes, sir.

Q. Did he say anything to you after the accident?

A. Not a thing. . . .

Q. Was there any signs out, do not walk here, anything like that, wet floor?

A. No, sir.

Q. When the buzzer rang, did you walk straight, did you walk to the left, did you walk to the right?

A. I walked straight.

Q. Was there an area where you were able to walk around the area where he was mopping before the accident?

A. No, sir.

Q. Why is that?

A. Because it's kind of a small area there to get to the front counter.

Mr. Jason Daniels, the general manager for the restaurant, was deposed on behalf of the Defendants.[3] Among other things he testified that the restaurant employed twenty to thirty team members for the kitchen and dining areas. Of these team members, two to three people per shift were responsible for maintenance which entailed sweeping and mopping on an as needed basis. They also followed a cleaning schedule which required them to perform certain cleaning tasks pursuant to a checklist, including sweeping and mopping, every 15 minutes (Daniels Deposition pp. 24, 38-41). In respect of Plaintiff's claim that the floor was inherently slippery, Mr. Daniels testified that the floor had recently been changed from concrete to tiles. After noticing that the tile had less grip than the concrete he notified his supervisors (Daniels Deposition pp. 56-61):

Q. Have you – prior to March of 2014 from the time the floor changed from concrete to the tile shown, did you ever experience that it was more slippery?

A. On the tile?

[3] Mr. Daniels was also deposed on February 4, 2016. A copy of his deposition transcript is submitted as Defendants' exhibit F (Daniels Deposition).

Q. Yes.

A. Yes.

Q. What were you experiencing?

A. It's just a different material so it's more slippery on the tile than it is on concrete.

Q. So the concrete floor that was there before you changed, for whatever reason, you changed had more grip to it?

A. Correct.

Q. Did you ever complain to anyone about that?

A. Yes.

Q. Who?

A. I spoke to either Matt or someone at the home office about, you know, the danger of having a slippery fall.

Q. Was that a complaint you made right after they changed the floor at your restaurant?

A. We were definitely aware of it, yes. . . .

Q. In those first couple of months when it was changed did you notice that it was much more slippery?

A. Yes.

Q. That is when you made complaints to the home office?

A. Correct.

Q. What complaints did you make to them, that it was more slippery?

A. Yes.

Q. Did you tell them it was dangerous?

A. Yes.

Q. Did you tell them it was unsafe?

A. Yes.

Q. Did you tell them that you wanted to find a way to try to remedy it?

A. Yes.

Q. What did they say to you when you said that?

A. Um, they just let me know that they would take care of it and handle it and we explored a bunch of different ways to –

Q. What did you explore?

A. Changing the floor cleaner, I believe there was talk of adding a tread to the tile so that there would be more grip. You know, making sure that our cleaning practices were done more often to avoid any moisture on the floor.

Q. Were you finding that, for example, days that there had been precipitation outside that the floors were more slippery?

A. Yes. . . .

Q. Were people falling?

A. People were slipping, yes. . . .

Q. What else did you try besides treads or talk about besides treads?

A. A different floor cleaner.

Q. What was it about the floor cleaner that you were experiencing, was it some kind of residue that was left over that was making it more slippery?

A. Yeah, I believe that it would leave a film on the floor that could make it more slippery but even without the floor cleaner the floors themselves were just slippery in general.

The Defendants' national quality assurance team inspected the restaurant shortly after the tile was installed, during which Mr. Daniels once again notified his supervisors of the slippery condition (*id.* at 63-65):

Q. By the way, when you say national, where is that?

A. We have a corporate office in Union Square. . . .

Q. Did anyone ever come down to the location because of the complaints you were making as to the slipperiness?

A. Not just because of the floor, no but we would have people there from quality assurance and just to check out everything in the restaurant and at that time we put out whatever issues we had.

Q. That is something you brought up?

A. Correct.

Q. Did they come down right after the renovations of the floor was done?

A. Yes.

Q. You made those complaints about it being slippery?

A. Yes.

Q. What did they do in regards to that, did they do any testing on the floor?

A. Yes.

Q. What did they do?

A. I'm not sure. You would have to speak to them. I don't know what testing they did.

Q. How do you know they did testing on the floor?

A. They told me that they did.

Q. They told you that they did, well, in what conversation did they tell you they did that?

A. The next time I would see them they would say oh, you know we're testing different ideas on the floors for what can make them less slippery.

In support of her cross-motion Plaintiff submits an affidavit by Scott Silberman, P.E. As part of his analysis he reviewed the testimony of both Ms. Braswell and Mr. Daniels and on December 22, 2015 he inspected the area where Plaintiff fell.[4] Based upon his investigation he opined, in part, as follows (Silberman Affidavit ¶¶ 10, 12, 13):

> . . . Shake Shack failed to provide Plaintiff with a safe place to traverse within Defendants' restaurant based upon the weather conditions thereat, as well as the actions of its employee in mopping the area
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> * * * *
>
> . . . the slippery condition is an ongoing and a recurring dangerous condition where good and accepted practices in providing a safe establishment requires that mats, runners or other devices be provided to allow patrons walking on the dangerous, slippery, wet tile floor to avoid slipping and falling.
>
> * * * *
>
> It is also my belief based on knowledge and experience in premises safety, that there was an ultimate failure by the Defendant in light of the fact that one of its employees was in the vicinity of the accident utilizing and pushing a mop on the floor, in an attempt to abate the known slipping hazard, instead spreading water and moisture on the floor tile creating a larger dangerous condition of a known slippery surface. They additionally failed to provide any adequate means of warning for those traversing the tile floor of the defective condition at the premises such as warning signs, cones, or barricades.

Mr. Silberman concluded that Plaintiff's accident was caused by Defendant's negligent and careless maintenance of its premises which "presented a departure from good and accepted safe operations . . . ." and which was the proximate cause of Plaintiff's fall (*id.* at ¶ 14).

On this motion Defendants argue that their employees did not create or have actual or constructive notice of the specific water condition that is alleged to have caused Ms. Braswell's injuries. Defendants further argue they have no obligation to constantly monitor tracked in water

[4] Mr. Silberman's affidavit, sworn to June 1, 2016, is submitted as Plaintiff's exhibit D (Silberman Affidavit).

when it is raining and they took reasonable precautions to protect its customers under the circumstances. Plaintiff responds that Defendants had actual notice because their own witness testified in detail regarding the recurring slippery condition and repeatedly asked his supervisors to remedy it. Plaintiff also argues that Defendants' employees exacerbated the condition by spreading the water around the floor by mop without putting up any caution signs, treads, or mats.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]), they must take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the

entrance which [they invite] the public to use." *Miller v Gimbel Bros., Inc.* 262 NY 107, 108 (1933); *see also Hackbarth v McDonalds Corp.*, 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006).

"'A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof.'" *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 (1st Dept 2010) (quoting *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *see also Atashi v Fred-Doug*, 117 LLC, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . . ."); *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) ("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.")

According to Defendants there is nothing in the record to show that the wet condition complained of existed for such a period of time before Ms. Braswell's fall sufficient to put them on constructive notice thereof. *See, e.g., Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 255 (1st Dept 2005); *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 (1st Dept 2004). In *Berger*, plaintiff noticed a few wet spots while ascending a stairway into the defendant's restaurant on a rainy day. Thereafter two other customers used the stairs without incident. While descending the same

stairwell five minutes after first arriving the plaintiff slipped and fell. After falling he observed a wet patch on the landing. In dismissing the complaint, the court held that "[g]iven the total lack of evidence on the issue of the length of time the defect was present, as well as plaintiff's admission that two other customers used the stairs in the few minutes prior to the accident . . . a finding that defendants had constructive notice of the wet spot upon which plaintiff fell would rest entirely on speculation." *Id.* at 512.

In *Gibbs*, the plaintiff was injured after she slipped and fell on a wet floor in a hallway located at Madison Square Garden while working as an extra on a commercial film shoot. She testified that it was raining when she arrived and noticed a lot of water on the floor which she assumed had been dragged into the building on other people's shoes and umbrellas. In granting the defendant's motion for summary judgment the court held that although the water on the floor was "visible and apparent" and probably was tracked in by other persons immediately preceding the plaintiff, there was no proof as to how long it had been on the floor and thus no inference of constructive notice could be shown. *Id.* at 255.

The problem with Defendants' reliance on such cases is that they address only one aspect of the constructive notice issue. According to Mr. Daniels' testimony, Defendants were actively seeking a solution to a recurring slippery condition which they actually knew to be dangerous in the two months prior to Plaintiff's accident. As such, Defendants may be charged with constructive notice of each and every specific re-occurrence of such condition. *Simoni v 2095 Cruger Assocs.*, 285 AD2d 431, 432 (1st Dept 2001); *Milano v Staten Is. Univ. Hosp.*, 73 AD3d 1141, 1142 (2d Dept 2010). Moreover, Mr. Daniels was not present at the restaurant on the date of Plaintiff's accident and his knowledge thereof is limited to what he was told by the store manager on duty that day, Ms. Sarah Craun.[5] He was only able to testify regarding the restaurant's general cleaning

[5] Ms. Craun is no longer employed by Defendants and was not deposed in this action.

protocols and not the specific maintenance, cleaning, and preventative measures that were actually performed on the date of the accident. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 (2d Dept 2008). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice." *Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855, 856 (2d Dept 2013); *accord Hawthorne-King v New York City Hous. Auth.*, 128 AD3d 539, 540 (1st Dept 2015). In this regard, Defendants have not met their *prima facie* burden on the issue of constructive notice.

The cases relied on by Defendants to show that the smoothness or slippery nature of their replacement floor cannot by itself serve as a basis for liability under New York Law are distinguishable from the case at bar (*see Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445 [1st Dept 2014]; *Wasserstrom v New York City Transit Auth.*, 267 AD2d 36, 37 [1st Dept 1999]). In both *Kalish* and *Wasserstrom*, the theory of liability was premised solely on the plaintiffs' own testimony that the floors upon which they fell were smooth and slippery. Neither plaintiff was able to show that the defendant created or had actual notice of the slippery condition and there were no prior complaints in either case about either condition. By contrast, in this case Defendants' own store manager repeatedly complained about the restaurant's floors to his superiors. He conceded that the restaurant's new floor tiles were more than just inherently slippery, but "dangerous" and "unsafe". The tiles thus presented an ongoing and recurring problem of which Defendants were fully aware. The Defendants' own national quality assurance team saw the need to find the means by which to remedy it. This goes beyond the inherently slippery qualities of the floors discussed in *Kalish* and *Wasserstrom*.

It is well known that floors can become slippery during a rainstorm, and settled New York law holds that a landowner need not constantly monitor a floor's condition while it is raining. *See Gibbs*, 17 AD3d at 255 (defendant "did not have an obligation to provide a constant remedy to the problem of water being tracked into a building in rainy weather"); *Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 736-737 (1st Dept 2005) (landowners are not "required to cover all of [their] floors with mats, nor to continuously mop up all moisture resulting from tracked-in, melting snow"); *Hussein v New York City Transit Auth.*, 266 AD2d 146, 146 (1st Dept 1999) (landowners are not "required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm").[6] Still, businesses are not relieved of their duty to take reasonable precautions when faced with such rainy weather conditions. *See Miller v Gimbel Bros., Inc.*, 262 NY 107, 108 (1933). Reasonable care does not require a business to completely cover its floor with mats to prevent injuries from tracked in water (*see Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 465 [1st Dept 2009]), but it does require some preventative measures (*see Santiago v JP Morgan Chase & Co.*, 96 AD3d 642, 644 [1st Dept 2012]).

In *Sook Ja Lee v Yi Mei Bakery Corp.*, 305 AD2d 579 (2d Dept 2003), the defendant bakery established that it took reasonable precautions to remedy the wet condition in its premises caused by a lengthy rainstorm by placing a rubberized mat on the street side of the front door and another one about one foot inside the front door, and by showing that its employees mopped the floor four times

[6] *See also Holland v. United States*, 918 F. Supp. 87, 90 (SDNY 1996) *(quoting Faircloth v United States*, 837 F. Supp. 123, 128-29 [EDNC 1993]) ("Everybody knows that, when people are entering any building when it is raining, they will carry some moisture on their feet, which will render the floor near the door on the inside damp to some extent, and every one knows that a damp floor is likely to be a little more slippery than a dry floor. ****** Everybody knows that the hallways between the outside doors of such buildings and the . . . business counters inside the building during a continued rainstorm are tracked all over by the wet feet of people coming from the wet sidewalks, and are thereby rendered more slippery than they otherwise would be. . . . . It is not the duty of persons in control of such buildings to keep a large force of moppers to mop up the rain as fast as it falls or blows in, or is carried in by wet feet or clothing or umbrellas, for several very good reasons, all so obvious that it is wholly unnecessary to mention them here in detail.")

during the morning of the accident prior to the plaintiff's fall. And in *Ruck v Levittown Norse Assoc., LLC*, 27 AD3d 444, 444-45 (2d Dept 2006), plaintiff fell on a rainy day in a puddle of water just after entering the defendant's store. The court determined that the store acted reasonably, where, in addition to the carpets that were always present in the vestibule, it placed several warning devices throughout the store to advise customers about the wet floor and had mopped the floor 10 minutes before the accident.

The Daniels testimony evinces Defendants' awareness that their floor was inherently slippery and could become even more dangerous when coated with rain water. These unique conditions obligated Defendants to do more than just monitor the floor and mop up water puddles as they gathered in front of the counters. For example, they could have considered installing cones, mats, or treads in high foot traffic areas. Yet, as Ms. Braswell testified, no mats or cones were laid out, and the floor was apparently mopped in such a manner as to force her to walk across a wet area in order to get to the food counter. For these reasons the court declines to find that Defendants' floor monitoring activities on the date of the accident were reasonable as a matter of law.

In sum, summary judgment in Defendants' favor might have been appropriate were this simply a case of rainwater tracked inside the Defendants' restaurant. But the evidence here shows that Defendants were repeatedly notified by their own store manager of a recurring condition starting two months prior to the date of Plaintiff's accident. On the date of the accident, despite the considerable rainfall, no warning signs were posted and no additional mats or runners were laid out to protect customers from the known increased risk of falling. These two pieces of evidence, taken together, raise a material issue of fact whether Defendants are responsible for Plaintiff's injuries, and Defendants' application for summary judgment is therefore denied.

Plaintiff's cross-motion for summary judgment is also denied. Despite Mr. Daniel's testimony about his efforts to notify Defendants of what he perceived to be a dangerous floor

condition, he is not an expert on these issues and, when all of the facts are presented, a jury could nevertheless determine that the floor was properly maintained. Taking into consideration Plaintiff's testimony that it was only 30 to 45 seconds between the time she noticed nothing out of the ordinary to the time she first noticed the restaurant employee mopping, a jury could also determine that the measures Defendants took were reasonable under the circumstances. In addition, whether or not Plaintiff's expert had access to the restaurant's floor only after Defendants had taken remedial measures, the fact remains that he did not inspect the floor in any detail, did not take measurements like a friction coefficient, and did not offer an opinion whether Defendants violated applicable industry standards.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that Plaintiff's cross-motion for partial summary judgment is denied in its entirety; and it is further

ORDERED that all parties shall appear in Part 30, Room 412, 60 Centre Street, New York, NY, on September 26, 2016 at 9:30AM for a pre-trial conference.

This constitutes the decision and order of the court.

DATED: 8-11-16

SHERRY KLEIN HEITLER, J.S.C.