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SHORT FORM ORDER

INDEX No. 12-11299
CAL. No. 15-02127OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-17-16
ADJ. DATE 9-27-16
Mot. Seq. #001 - MD

MARGARET COMPARATO and JOSEPH COMPARATO,

Plaintiffs,

- against -

SCOTTO BROTHERS RESTAURANTS, INC d/b/a WATERMILL CATERERS,

Defendant.

CONWAY & GOREN
Attorney for Plaintiff
58 South Service Road, Suite 350
Melville, New York 11747

LAW OFFICES OF JOHN J. GUADAGNO, PC
Attorney for Defendant
136 East Main Street
East Islip, New York 11730

Upon the following papers numbered 1 to 41 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-35; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 36-38; Replying Affidavits and supporting papers 39-41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Scotto Brothers Restaurants, Inc. for summary judgment dismissing the complaint against it is denied.

This action was commenced by plaintiff to recover damages for personal injuries she allegedly sustained on December 7, 2011 when she slipped and fell on a slippery substance on the dance floor area at the Watermill Inn, which is owned by defendant Scotto Brothers Restaurants, Inc. Plaintiff's husband, Joseph Comparato, brought a derivative claim for loss of services and companionship. By her bill of particulars, plaintiff alleges that defendant was negligent in causing or permitting a spilled liquid to remain on the dance floor surface, creating a slippery condition which caused her to slip and fall.

Defendant now moves for summary judgment dismissing the complaint on the ground that it neither created nor had notice of the slippery condition that allegedly caused plaintiff to slip and fall. In

support of the motion, defendant submits copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony and the transcript of deposition testimony of nonparty witness Dr. David Rivadeneira.

Plaintiff testified that on the date of the incident, she was attending a work-related holiday party at the Watermill Inn. She testified that the dining room where the party was held had a wooden dance floor in the center and that a band was playing music. Plaintiff testified that the table that she was seated at was on a carpeted area at the perimeter of the dance floor, and that she observed a busboy spill a tray of drinks at the center of the dance floor, and clean it up with a napkin. According to plaintiff, she was made aware of another spill incident from a woman who told her that she spilled a drink on the dance floor. Plaintiff testified that she did not know if the spill was wiped up, and that she did not check the area for herself. She testified that she walked across the dance floor to go to the ladies room, went back to her table, and then proceeded to the center of the dance floor to dance. She testified that she was dancing "free-style" for approximately 15 minutes, and that when she stepped her foot backwards, her feet slipped from underneath her in a forward direction causing her to fall onto her buttocks. She testified that she did not observe any liquid on the dance floor prior to the accident, but that when she fell, both hands hit the floor at each side of her body, and that they felt wet, as did her pants.

Sean Marzian testified that he works at the Watermill Inn as the director of operations. He testified that his duties include scheduling staff, conducting daily operations, and touring clients, among other things. He testified that the establishment, located at 711 Smithtown Bypass, is a catering facility with five dining rooms, cocktail rooms, an outdoor patio and two kitchens. He testified that he did not work on the evening of the subject incident, but he reviewed the schedule which indicated that maitre d', Richard Nazario, was working that evening. He testified that Mr. Nazario was in charge of supervising the wait staff assigned to the subject event, and that it was held in the Vanderbilt Suite and included a buffet style dinner with a chocolate fountain station. He testified that the Vanderbilt Suite has a wooden dance floor, and that the remainder of the room is carpeted. Marzian testified that drinks are prohibited from being brought on to the dance floor, and that the maitre d' and the wait staff are responsible for enforcing this rule. He testified that the wait staff is charged with cleaning spills that may occur, and that two mops are stored near the bar area, a dry mop for spills and a wet mop for soiled items. Marzian testified that it is the custom and practice of Watermill Caterers to create written incident reports upon being informed of any injuries suffered by a patron, and that management staff is responsible for creating such report. He testified that he was unaware of the incident and unaware if a report was created.

Richard Nazario testified that he works for Watermill Caterers at the Watermill Inn as a banquet manager and was working on the date of the subject incident. He testified that he is in charge of "running the party" and that his custom and practice is to hold a pre-event meeting with the staff which began at 4:30 p.m. He testified that he sets the room up, meets with the chef to review the menu, checks the uniforms of the staff and goes over safety issues. Nazario testified that the subject party served a buffet style dinner, and that the entire wait staff was charged with cleaning up spills. He testified the waiters roam the entire dining room and the bus persons are assigned to specific areas. Nazario testified that he utilizes a "red alert" policy for spillage, which entails a staff member standing over the spill until another staff member brings paper towels or a broom to clean it, and that it is cleaned within seconds.

He testified that patrons are prohibited from bringing drinks on to the dance floor, and that the staff is not permitted to walk across the dance floor with glasses. He testified that the staff is trained for three days and the rule is repeated at the pre-event meetings. Nazario further testified that he, the captain of the party, and the wait staff are charged with enforcing this rule and that he instructs the DJ or band member to announce such rule to the patrons. Nazario testified that he was not aware of the subject incident and that no incident report was created. He testified further that he was"roaming the floor" for "90 percent of the evening."

Dr. Rivadeneira testified that he worked at St. Catherine's Hospital as a surgeon at the time of the incident, and that his office planned the subject holiday party. He testified that he assisted plaintiff after she fell on the dance floor, but he did not see her fall and is unaware of how it occurred. Dr. Rivadeneira testified that there were between 80 and 90 people at the event and that there was music playing from either a DJ or an iPod, but not a band. He testified that during the evening, he observed several people on the dance floor holding drinks, and that an hour before plaintiff fell, he observed a server drop a tray of glasses as he carried them across the dance floor. He testified that the staff cleared the dance floor of people and immediately cleaned the spillage with mops, among other things. He testified that he observed the dance floor after the staff cleaned it and it looked clean, and that he observed the maitre d' walking the floor for most of the evening.

It is well settled that a party moving for summary judgment 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 (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]). A landowner who holds its property open to the public has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v City of New***

York, 2 NY3d 288, 778 NYS2d 442 [2004]), and may only be liable if it created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). In order to charge a defendant with constructive notice, the alleged dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; ***Perez v New York City Hous. Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]). To prevail on a motion for summary judgment on the issue of constructive notice, a defendant must offer evidence showing when the subject area was last inspected or cleaned relative to the time when the plaintiff fell (***Mei Xiao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS 2d 155 [2d Dept]; ***Farrell v Waldbaum's, Inc.***, 73 AD3d 846, 900 NYS2d 453 [2d Dept 2010]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]).

Here, defendant's submissions establish, prima facie, its entitlement to summary judgment. The testimony demonstrates that the spill that occurred prior to the subject incident was properly cleaned and that it was cleaned at least one hour before plaintiff slipped. The testimony further establishes that the alleged liquid was not visible or apparent and there were no complaints made to any of the staff regarding a slippery condition on the dance floor. A general awareness that patrons might spill their drinks on the floor is insufficient to establish either actual notice or constructive notice of the actual condition that caused plaintiff to fall (***Mauge v Barrow St. Ale House***, 70 AD3d 1016, 895 NYS2d 499 [2d Dept 2010]; ***Gloria v MGM Emerald Enters.***, 298 AD2d 355, 751 NYS2d 213 [2d Dept 2002]). In opposition to the motion, plaintiff submits an affidavit by Lorraine Incarnato, a witness to the subject incident. In her affidavit, Incarnato states that she arrived at the holiday party at 6:30 p.m. and observed a server repeatedly carrying trays of drinks across the dance floor. She states that at approximately 9:00 p.m., she observed the server carrying a large tray of drinks across the dance floor in the vicinity of a chocolate fountain station, and that he bumped into a dancer and spilled the entire tray of drinks on to the dance floor. She states that several glasses broke and the liquid contents spilled on to the dance floor surface. According to Incarnato, no staff member instructed anyone to clear the dance floor and people continued dancing. She avers that she observed the server quickly pick up the spilled glassware and broken pieces of glass from the floor and reload them onto the tray. She states that neither the server nor any other staff member mopped or dried the area of the spill and it remained wet. Incarnato states that fifteen minutes after she observed the spillage, she observed plaintiff dancing and then slip and fall. She avers that the floor was wet with a clear liquid in the same area where the server had spilled the contents of his tray.

The affidavit of Incarnato creates a triable issue of fact as to whether defendant created the alleged slippery condition on the dance floor through the actions of its staff member. The affidavit is in direct conflict with the testimony of Dr. Rivadeneira as to the wiping and cleaning of the spill, and the

time of the spillage, among other things. The function of this court on a motion for summary judgment is not to determine the credibility of the witnesses and resolve issues of fact, but only to identify issues of fact (***Vega v Restani Constr. Corp.,*** 18 NY3d 499, 942 NYS2d 13 [2012]; ***Sillman v Twentieth Century-Fox Film Corp.*** 3 NY2d 395, 165 NYS2d 498 [1957]). It is well settled that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1979]). The court is bound to view the evidence in the light most favorable to the opposing party, the facts alleged and all inferences that may be drawn are to be accepted as true (*see* ***Derise vJaak 773, Inc.,*** 127 AD3d 1011, 7 NYS3d 475 [2d Dept 2015]; ***Giraldo v Twins Ambulette Serv., Inc.***, 96 AD3d 903, 946 NYS2d 87 [2d Dept 2012]). In view of these principles, defendant's motion for summary judgment in its favor is denied.

The court notes that it rejects defendant's argument that the affidavit of Lorraine Incarnato should not be considered on the ground that plaintiff failed to disclose her as a "notice witness." The plaintiff's response to defendant's discovery demand recites Incarnato's name and address, and identifies her as a "witness." The failure to designate her as a "notice witness" or "eyewitness," is not a basis for discarding her affidavit. Moreover, based on the statements made in the affidavit, she is an eyewitness, not a notice witness.

Dated: Feb. 14, 2017

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION