Valenta v Spring St. Natural
2017 NY Slip Op 30589(U)
March 27, 2017
Supreme Court, New York County
Docket Number: 152824/14
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

----------X

SONJA VALENTA,

Plaintiff, Index No. 152824/14

- against - Seq. 001

SPRING STREET NATURAL and PMW, INC., **Decision and Order**

Defendants.

----------X

HON. ROBERT D. KALISH, J.:

Motion by Defendants PMW, Inc. d/b/a Spring Street Natural s/h/a Spring Street Natural and PMW, Inc. for summary judgment pursuant to CPLR 3212 is granted as follows:

This is a personal injury action, in which Plaintiff alleges that she slipped and fell sustaining personal injuries on May 11, 2013 at the Spring Street Natural Restaurant at 62 Spring Street New York, NY due to the negligence of Defendants. Plaintiff alleges that she fell due to grease or water on the floor at the restaurant.

BACKGROUND

Plaintiff Sonja Valenta alleges that, on the day of the accident, she arrived about 10 minutes late for a 1:00 p.m. lunch reservation at the Spring Street Natural Restaurant with her family. (Schmidt Affirm., Ex. F [Valenta EBT] at 22:22-23:10.) Plaintiff described the restaurant as very busy and crowded. (*Id.* at 47:03-25.) She stated that she had entered the restaurant and was looking straight ahead

and walking toward her family's table when she fell. (*Id.* at 49:07-50:15, 54:17-24.) Plaintiff stated that as she approached her family's table, her left foot slipped on a spot of grease, causing her to fall forward and strike the floor on her left side. (*Id.* at 65:10-70:04.) Plaintiff stated that after she fell, she noticed "a thick, slick sheen of grease." (*Id.* at 66:07-24.) Plaintiff stated that the substance she slipped on "certainly wasn't water" and that "it had a translucency about it that looked like it was grease." (*Id.* at 67:21-25.)

At the time of Plaintiff's accident, Ismael Ramirez was employed as the manager of the Spring Street Natural Restaurant. (Schmidt Affirm., Ex. G [Ramirez EBT] at 7:18-8:03.) Mr. Ramirez stated that a porter cleans the restaurant each night, between midnight and 6 or 7 a.m., using a solution of water and vinegar. (*Id.* at 23:17-25:21.) Mr. Ramirez stated that the floors are waxed roughly every six months, and that on the date of the accident, it had been about five months since the last waxing. (*Id.* at 25:22-26:20.)

Mr. Ramirez testified that he came into work at 8:30 a.m. on the date of the accident, turned on the lights, and "ma[de] sure that the floor was dry. (*Id.* at 28:16-30:02.) He stated that he did not notice any problems with floor during his inspection that morning. (*Id.*) Mr. Ramirez further testified that he walked by the subject area roughly ten minutes before Plaintiff's family arrived and did not notice any grease or water on the floor. (*Id.* at 60:08-17.)

At the time of the accident, Marino Ortiz was working as a bus boy stationed in the section where Plaintiff's family was seated. (Schmidt Affirm., Ex. H [Ortiz EBT] at 21:17-23.) Mr. Ortiz testified that he witnessed Plaintiff fall as she was walking towards him when "[h]er foot twisted." (*Id.* at 36:13-42:16.) Mr. Ortiz stated that after the accident he did not see any liquid or foreign substances on the area of the floor where Plaintiff fell, and, except for a few scratches from Plaintiff's shoes, the floor appeared to be otherwise clean. (*Id.* at 50:06-52:22.)

Zaire Schoenholt was a part-owner of the restaurant (along with her brother Rustam Schoenholt), and she stated that she was in the restaurant's basement office when she was informed by Mr. Ramirez that Plaintiff had fallen. (Podolsky Opp. Affirm., Ex. A [Schoenholt EBT] at 7:19-8:14, 11:02-21.) Ms. Schoenholt stated that when she arrived at Plaintiff's table, Mr. Ortiz informed her that he saw Plaintiff fall and that her fall was caused by "a few drops of water, small drops of water." (*Id.* at 19:07-16.) However, Ms. Schoenholt stated that she did not see any water on the floor herself, and that Mr. Ortiz told her that he did not know where the water came from. (*Id.* at 19:17-24.)

Ms. Schoenholt stated that she subsequently emailed her brother, Rustam Schoenholt, and that he prepared an incident report. (*Id.* at 21:22-24:15.) A "Customer Incident Reporting Form" from the date of the accident states that "[t]here were a few drops of water on the floor." (Schmidt Affirm., Ex. E

[Customer Incident Reporting Form]; *see also* Ramirez EBT at 46:16-48:09] [stating that the incident report was filled out by restaurant owner Rustam Schoenholt].)

WRITTEN AND ORAL ARGUMENTS

On the instant motion, Defendants assert that they did not cause or create the allegedly dangerous condition, and that they lacked actual or constructive notice of it. (Schmidt Affirm. ¶¶ 40-51.) In particular, Defendants argue that they have established a prima facie case for summary judgment because they have provided evidence that the area where the accident occurred was inspected on two occasions that day before Plaintiff's accident and that there is no evidence regarding how the subject slippery condition was created. (Oral Argument Tr. at 3:08-4:12.)

Plaintiff opposes the instant motion, arguing that the "testimony indicates that defendants caused and created and had actual notice of the dangerous condition, a liquid, on the floor prior to plaintiff's fall." (Podolsky Opp. Affirm. at 11.) Plaintiff specifically argues that Mr. Ramirez fails to provide personal testimony as to when the subject area was last cleaned or inspected because Mr. Ramirez only "refers to the general practice of cleaning" and "has no personal knowledge of the cleaning of the area as he was not there and did not supervise." (*Id.* at 12.) Further, Plaintiff argues that inconsistencies about whether the floor was dry or wet create material issues of fact precluding summary judgment. (*Id.* at

14-15; Oral Argument Tr. 6:22-7:25.) Plaintiff further argues that "a jury would find actual notice based on the testimony of Zair Schoenholt who said, that after the accident she spoke with the bus boy, Ortiz, who told her, yes, there was water on the floor, yes, that is what the plaintiff slipped on." (Oral Argument Tr. at 16:03-17:12.)

ANALYSIS

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." (*Ryan v Trustees of Columbia Univ. in the City of N.Y.*, Inc., 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

The mere existence of a patch of oil or a slippery foreign substance (i.e. puddle of water) on a floor does not, in and of itself, give rise to a cause of action sounding in negligence. (*Mercer v City of New York*, 223 AD2d 688, 689 [2d Dept 1996], *affd,* 88 NY2d 955 [1996].) Rather, the plaintiff must show that the oil or foreign substance "was present under circumstances sufficient to charge the defendant with responsibility therefor; in other words, to prove either that defendant had knowledge of the alleged dangerous condition, either actual or constructive, or that it caused the condition to be created by its own affirmative act." (*Id.* [internal quotation marks omitted].) "A defendant is deemed to have had constructive notice of a defect when (1) the defect was visible and apparent, and (2) existed long enough for the defendant to have discovered and remedied it before the plaintiff was injured." (*Arevalo v Abitabile*, 2017 NY Slip Op 01526 [2d Dept Mar. 1, 2017].)

"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 hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855 [2d Dept 2013].) "To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the accident."

(*Bruni v Macy's Corp. Services, Inc.*, 134 AD3d 870, 871 [2d Dept 2015].) "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." (*Id.* [internal quotation marks omitted].)

In the instant action, Mr. Ramirez testified that he inspected the subject area when he reported to work that morning at 8:30 a.m., and again about 10 minutes before Plaintiff's family arrived for their 1:00 p.m. reservation. (Ramirez EBT at 28:16-30:02, 60:08-17.) As such, Defendants have established a prima facie case that they lacked actual and constructive notice of the alleged condition. (*Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571–72 [1st Dept 2014] [granting summary judgment in favor of defendant department store where supervisor "testified that she conducted an inspection of the entire second floor, including the area where plaintiff fell, within the hour preceding plaintiff's accident, and saw no wet or dangerous condition"]; *Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 637 [1st Dept 2012] [dismissing action for cafeteria slip and fall where "cafeteria manager testified that she conducted regular inspections that day, saw no liquid on the floor, and was not informed of any spill by her staff, which she would have been, if a spill had occurred"].)

In opposition, Plaintiff failed to raise a material issue of fact on the issue of whether Defendants lacked constructive notice, nor does Plaintiff present evidence

that Defendants had actual notice or caused or created the alleged condition. Plaintiff's conclusory assertions that Mr. Ramirez only "refers to the general practice of cleaning" and "has no personal knowledge of the cleaning of the area as he was not there and did not supervise" are contrary to the facts—Mr. Ramirez testified that he inspected the subject area when he reported to work that morning at 8:30 a.m., and again about 10 minutes before Plaintiff's family arrived for their 1:00 p.m. reservation. (Ramirez EBT at 28:16-30:02, 60:08-17.) Again, this establishes a prima facie case that Defendants lacked constructive notice.

Plaintiff's argument that inconsistencies in testimony concerning whether the floor was wet or dry preclude summary judgment is also unavailing. Assuming arguendo that Plaintiff did slip on a liquid—be it water or grease—Defendants would still have to have created the condition or have had actual or constructive notice of the condition before they could be held liable for Plaintiff's injuries. Again, Mr. Ramirez's testimony—that he inspected the subject area twice that day—establishes prima facie that Defendants lacked constructive notice of the condition. Plaintiff presents no evidence to rebut this prima facie showing that Defendant lacked constructive notice, and Plaintiff presents no evidence that Defendant had actual notice or that Defendant caused or created the subject condition.

Likewise, Ms. Schoenholt's statement that Mr. Ortiz told her that he saw Plaintiff fall and that her fall was caused by "a few drops of water, small drops of water" (*id.* at 19:07-16), does not create an issue of fact regarding whether Defendants had actual notice of the alleged dangerous condition or as to whether Defendants caused or created the condition. On its face, this statement—which is hearsay—means only that Mr. Ortiz witnessed the fall and that he believed that it was caused by water. It does not establish that Mr. Ortiz or any other restaurant employee was aware of water on the floor *before* Plaintiff fell. Thus, there is no material issue of fact regarding whether Defendants had actual or constructive notice of the alleged condition or whether they caused or created the alleged condition.

Accordingly, this action should be summarily dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants PMW, Inc. d/b/a Spring Street Natural s/h/a Spring Street Natural and PMW, Inc.'s motion for summary judgment is GRANTED and the complaint is dismissed as against said Defendants; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendants PMW, Inc. d/b/a Spring Street Natural s/h/a Spring Street Natural and PMW, Inc.

Dated: March 27, 2017
New York, New York

ENTER:

J.S.C.
HON. ROBERT D. KALISH
J.S.C.