SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 157375/2015

CHERYL KENNEDY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

30W26 LAND, L.P., HILL COUNTRY NEW YORK, LLC and HILL COUNTRY BARBECUE MARKET,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this personal injury action commenced by plaintiff Cheryl Kennedy, defendants Hill Country New York, LLC and Hill Country Barbecue Market move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims against them. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action, commenced on July 21, 2015, arises from an incident on June 13, 2013 in which plaintiff, Cheryl Kennedy, was injured when she allegedly slipped and fell on liquid at a restaurant called the Hill Country Barbecue Market ("the restaurant") located at 30 West 26th Street, New York, New York. Doc. 1. Defendant Hill Country New York, LLC owned and

operated the restaurant. Doc. 1.[1] Plaintiff claims that her accident occurred due to the negligence of the defendants in failing to ensure that the floor of the restaurant was dry, clean and safe. Docs. 1, 13.

On the day of the alleged incident, plaintiff was dining at the restaurant with friends and family. Doc. 35, at 30-33. Waiters did not serve food at the restaurant; rather, patrons had to go to a food counter, order their food, and bring it back to their tables, although servers did bring water to the tables. Doc. 35 at 38. At some point, plaintiff left her table with her daughter, Courtney Haas, intending to use a downstairs restroom. Doc. 35 at 43. Since the line for the downstairs restroom was too long, plaintiff and Ms. Haas turned around and walked past their table towards another restroom on the floor where their table was located. Doc. 35 at 43-44. As they walked past their table, plaintiff slipped and fell. Doc. 35 at 44-45.

After plaintiff fell, she felt "water on [her] body" and, when she looked at the floor, she saw "muddy dirt" which appeared to have been scattered by footprints. Doc. 35 at 50-51, 53, 57. She did not know where the water came from or how long it was on the floor before she fell. Doc. 45 at 51. She did not see any water on the floor when she was seated or at any other time before she fell. Doc. 35 at 35-36, 39, 59. Nor did she see any spills in the area where plaintiff fell before the incident. Doc. 36 at 25-26.

Ms. Haas, who was in plaintiff's party, testified that she saw a puddle on the floor behind their table after plaintiff fell. Doc. 36 at 31. She did not see the puddle, which she believed was

[1] All claims against defendant 30W26 Land, L.P. were discontinued by stipulation filed April 20, 2016. Doc. 18.

water, before the fall and did not know how long it was there. Doc. 36 at 31-32. She did not see anyone slip or trip in that area prior to the fall. Doc. 36 at 33.

Derek Haas, Ms. Haas' husband, who was also in plaintiff's party, recalled that, prior to plaintiff's fall, he did not see any liquid on the floor in the area where plaintiff fell. Doc. 37 at 13-14, 19. Nor did he recall anyone spilling something at or near his table before plaintiff fell. Doc. 37 at 14. He did not know whether he walked in the area where plaintiff fell before the incident occurred and did not see anyone else slip or fall in that area. Doc. 37 at 18-19. After the incident, Mr. Haas saw a puddle of water about a foot long in the area where plaintiff fell. Doc. 37 at 19-20. He did not know how the puddle formed or how long it was there, but noticed that there were footprints around it. Doc. 37 at 19-20.

Elizabeth Fallon, a server at the restaurant, testified that she saw plaintiff fall from about 6-8 feet away. Doc. 38 at 12, 27, 33. Plaintiff fell as she was returning from the rear restroom in the main dining room of the restaurant. Doc. 38 at 32-33. After plaintiff fell, Fallon asked her if she was okay and looked under the table and on the floor to see what may have caused the fall. Doc. 38 at 26-28. When she saw nothing, she went to find Dave Kaplan, the restaurant manager, who came to plaintiff's table. Doc. 38 at 26-29.

Fallon said that the servers and the bussers were all responsible for checking the floor for spills or food debris and were always doing so as they moved about the restaurant. Doc. 38 at 28, 34, 46. She did not see any anyone dry or clean the area where plaintiff fell after the incident. Doc. 38 at 30. Fallon never saw any dirty puddles of water anywhere in the area between the rear restroom and the location of plaintiff's fall, and recalled that she checked that area "[p]robably five to ten minutes prior" to the incident. Doc. 38 at 34-35. There were no

complaints about the floor being wet or slippery that day prior to plaintiff's fall and she saw no other individual slip or fall prior to the incident. Doc. 38 at 55.

Kaplan heard, but did not see, plaintiff fall. Doc. 39 at 46-47. He immediately went to the spot where she fell, asked plaintiff if she needed medical attention, and she responded in the negative. Doc. 39 at 20, 47. Although plaintiff claimed that the floor was wet, Kaplan looked at the floor and saw that it was not. Doc. 39 at 23-24, 30-31.

Although Kaplan said that the bussers and servers had a duty to constantly monitor and inspect the floor of the restaurant, he did not know when the floor in the area where plaintiff fell was last checked to see whether there was water there and no documents would have been created to reflect this information. Doc. 39 at 41-42, 45, 60. On the day of the incident, Kaplan saw nobody slip and fall other than plaintiff. Doc. 39 at 28.

Defendants now move for summary judgment dismissing the complaint pursuant to CPLR 3212. They argue that they did not create the allegedly dangerous condition and that they lacked actual or constructive notice of it. They particularly rely on Fallon's testimony that she inspected the area in question 5-10 minutes before the incident and saw no liquid on the floor.

Plaintiff opposes the motion on the ground that defendants failed to establish when the area was last inspected or cleaned prior to the incident. She claims that the evidence submitted by defendants merely establishes their general cleaning practices, which is insufficient to entitle them to summary judgment dismissing the complaint.

In reply, defendants reiterate their argument that they did not create or have notice of the allegedly dangerous condition which caused plaintiff's fall.

LEGAL CONCLUSIONS:

> To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. 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 dangerous condition (assuming that the condition existed), 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 the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof.

Ceron v Yeshiva Univ., 126 AD3d 630, 631-632 (1st Dept 2015) (citations omitted).

The existence of a slippery substance on a floor, such as a puddle of water, does not alone 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, a plaintiff must show that the substance which caused the fall "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 constructive notice of a defect when the defective condition was visible and apparent and existed for a sufficient length of time prior to the accident such that defendant could have discovered and remedied it. *Hill v Lambert Houses Revelopment Co.*, 105 AD3d 642 (1st 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].)

Defendants established their prima facie entitlement to summary judgment by providing: 1) the deposition testimony of Fallon, who testified that it was the duty of all bussers and servers to inspect the floor of the restaurant for any dangerous conditions; that she inspected the area in question 5-10 minutes before the incident; that she saw no liquid on the floor prior to the incident; and that she saw nobody else slip in the area before plaintiff did; and 2) the deposition testimony of Kaplan, who also said that the floor was dry in the area where plaintiff fell; that it was the duty of the bussers and servers to constantly inspect the area; and that he saw nobody slip and fall in the area in question that day except plaintiff. Thus, there is no evidence that defendants created the alleged puddle or had notice of the same prior to the accident. *See Mehta v Stop & Shop Supermarket Co., LLC,* 129 AD3d 1037 (2d Dept 2015); *Ceron v Yeshiva Univ.*, 126 AD3d 630 (1st Dept 2015); *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 (1st Dept 2010).

In opposition, "plaintiff fails to raise a triable issue of fact as to whether [defendants] had notice of the allegedly dangerous condition. The plaintiff's contention that she slipped and fell on what appeared to be dirty water did not raise a triable issue of fact as to whether that condition existed for a sufficient period of time in order for [defendants] to have identified the condition and remedied it." *Mehta v Stop & Shop Supermarket Co., LLC,* 129 AD3d at 1039. The Court notes that the footprints allegedly seen by Mr. Haas also fail to prove that the water had been there for some time prior to the incident, since they could have been made at or near the

same time as the fall. Further, defendants are entitled to summary judgment since it is undisputed that "there is no testimony regarding how the liquid condition was created." Doc. 29 at par. 76. *See Ceron v Yeshiva Univ.*, 126 AD3d at 632.

In opposing the motion, plaintiff relies, inter alia, on *Bonilla v 191 Realty Assoc., L.P.*, 125 AD3d 470 (1st Dept 2015) and *Jahn v SH Entertainment, LLC*, 117 AD3d 473 (1st Dept 2014). However, those cases are distinguishable. Specifically, in *Bonilla*, and *Jahn*, defendant failed to demonstrate that it lacked notice of the allegedly hazardous condition, since it offered no specific evidence that its cleaning routines were followed on the date of the alleged incident, or when the area where plaintiff allegedly fell was last cleaned and inspected. Here, however, Fallon specifically testified that she inspected the area in question 5-10 minutes before the incident and observed no liquid on the floor in that area. Additionally, in *Jahn*, unlike here, a nonparty affidavit submitted in opposition to defendant's motion for summary judgment provided some evidence that defendant's employees may have created the allegedly dangerous condition. Thus, these cases do not support plaintiff's argument that she has created an issue of fact warranting the denial of the instant motion.[2]

Therefore, in light of the foregoing, it is hereby:

[2] Although plaintiff's counsel represents that Fallon "admitted that she [was] unable to recall *anything* from the incident date other than observing [plaintiff] slip and fall" (Pltf. Aff. in Opp. at par. 13), this contention is disingenuous at best. Fallon actually testified that she did not recall anything from that day "other than [plaintiff's] fall and checking the water, or checking the floor all the way from the restroom up until where [plaintiff] fell", not to mention her representation that she saw nobody else fall in the area in question. Additionally, given Fallon's testimony regarding her inspection of the area of the fall 5-10 minutes before the incident, plaintiff's argument that she did not provide specific details about checking the floor (Pltf. Aff. in Opp. at par. 15) is also clearly without merit.

ORDERED that the motion by defendants Hill Country New York, LLC and Hill Country Barbecue Market for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that defendants are to serve a copy of this order upon plaintiff and upon the Clerk of the Court, with notice of entry, within 20 days of the date of entry of this order; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

3/18/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE