SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 11**
MELISSA PEARL,	
Plaintiff,	**INDEX # 612017/17**
-against-	**Mot. Seq. 2, 3**
	Mot. Date 8.29/9.18.19
SPEEDWAY, LLC,	**Submit Date 9.18.19**
Defendant.	
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The following papers were read on this motion:

	Documents Numbered MS2	MS3
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	21	34
Answering Affidavit	52	55
Reply Affidavit.....		60

Defendant Speedway, LLC (Speedway) moves by notice of motion pursuant to CPLR 3212 for an order granting summary judgment and dismissing plaintiff's complaint. Defendant further moves to compel plaintiff to remit payment for a late cancelled orthopedic examination in the amount of $500.[1]

Plaintiff commenced this action on or about November 6, 2017 alleging that she sustained injuries as a result of a slip and fall that occurred on defendant's premises on August 27, 2016. By her verified bill of particulars, plaintiff alleges that defendant was negligent in, among other things, allowing the pavement and gas pumps to become and remain unsafe, in causing, permitting and /or allowing a foreign substance to remain on the pavement, and in causing, permitting and/or allowing the gas pump hoses to become hazardous and trap-like. By her second supplemental bill of particulars, plaintiff asserts that she was "caused to slip and fall on a slippery liquid foreign substance."

[1] Defendant's initial motion sought additional relief due to a failure to provide discovery. Both parties agree that those matters have been resolved as between them.

> "It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993])."

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; *see also Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

Premises liability will attach where (1) the plaintiff was injured by a defective condition on defendant's premises, (2) the defendant either created the alleged condition or the defendant had actual or constructive notice of the condition, and (3) the defective condition was the proximate cause of the plaintiff's injury. (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1983]).

Accordingly, a defendant moving for summary judgment on the basis of notice must offer a prima facie showing that it neither created the allegedly hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (*Lopez v. Marshalls*, 123 AD3d 981, 981 [2d Dept 2014]). "'A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected.' (*James v. Orion Condo–350 W. 42nd St., LLC*, 138 AD3d 927, quoting *Knack v. Red Lobster 286, N & D Rests., Inc.*, 98 A.D.3d 473, 473). To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the site was last cleaned or inspected prior to the accident (*see James v. Orion Condo–350 W. 42nd St., LLC*, 138 AD3d at 927; *Mehta v. Stop & Shop Supermarket Co., LLC*, 129 AD3d 1037, 1038)." (*Isaacs v. Federated Dep't Stores, Inc.*, 146 AD3d 762, 764 [2d Dept 2017]).

In support of this motion, defendant submits the plaintiff's deposition transcript, the deposition transcript of non-party witness Tab Mitchell, as well as his affidavit, and affidavits of Henri Hirsch and Ercan Kutluhan.

At deposition, plaintiff testified that she had visited the Speedway station about eight times prior to the day of the accident. She never made any complaints and was aware of no complaints about the area adjacent to the gas pumps. On the evening of August 27, 2016, she fell near the gas pump after slipping on a wet oily jelly substance covering an area of 1 foot by 2 feet. She slipped with her right foot and hit the pavement. It looked like a messy dark area that was dirty and mixed with dirt in the cement that looked like it had been sitting there. It did not look new. She did not observe it closely and vaguely saw it before she slipped.

Upon viewing the surveillance video, plaintiff confirmed that after putting the gas nozzle into the gas tank of her vehicle, she walked around to the passenger side and then walked back to open the trunk. After closing the trunk, she walked back around to where the gas hose was and stepped up on the curb. She walked to the driver's door. She could not tell from viewing the video if she stepped back over the gas hose prior to falling.

Non-party Tab Mitchell testified that he is a longtime friend of the plaintiff. He was traveling back to Long Island from Manhattan with her when she stopped for gas. He heard Ms. Pearl scream and then heard the clatter of the hose fall. He identified a grease spot that he believes was the cause of her fall. When he got down to assist the plaintiff, he got grease all over his knees and hands. He described it as "black dirty grease" that was "stick and slimy all at the same time." He further stated that it seemed that there was a spill that somebody tried to clean up but did a "halfway" job. He also said that there was moisture involved.

By affidavit, Mr. Mitchell states that at the time that he got on the ground to assist the plaintiff, he "noticed that the ground surrounding her was oily, slippery and covered with a slick substance." It appeared to be oil spilled on the ground.

Henri Hirsch, an employee of the subject Speedway station submits an affidavit wherein he states that he was working on the evening of the accident and at about 8:45 p.m., he was informed that a customer has twisted her ankle outside and was unable to get up. He went outside and found plaintiff on the ground by pump number 6. He observed no slipping, tripping hazards or debris anywhere in the area of the fall. Nor did he observe any slippery, liquid or foreign substance in the area. In addition, he states that he was present and standing in the exact location where plaintiff fell approximately 20 minutes earlier in order to assist a customer at pump number 6. At that time, he observed the area and ground around pump number 6 and saw no slipping or tripping hazards. No employees were at that pump in the intervening twenty minutes prior to plaintiff's fall and no complaints of conditions in that area were received.

Ercan Kutluhan, general manager of the subject Speedway location states by affidavit that he was not working on the evening of the accident but was called by another employee to notify him that a customer had been injured. He drove to the location and took four photographs of the area around pump number six. At that time, he did not observe any slipping or tripping hazards or debris in the area.

On this record, defendant has failed to establish prima facie, its entitlement to summary judgment. In particular, the testimonies of Ms. Pearl and Mr. Mitchell raise a question of fact as to whether a slipping hazard existed for a sufficient period of time to place the defendant on constructive notice thereof. In particular, Ms. Pearl testified that the substance on which she slipped was mixed with the gravel and did not look "new." Mr. Mitchell testified that it appeared to him that someone had incompletely cleaned a grease spot. It is well known that there can be more than one proximate cause of an accident. (*Nakasato v. 331 W. 51st Corp.*, 124 AD3d 522 [1st Dept 2015]). And any determination that the area was clear of such hazards based upon the statements by Speedway's employees would require credibility determinations that are impermissible on a motion for summary judgment. (*See Katz v. 260 Park Avenue South Condominium Assoc.*, 168 AD3d 615 [1st Dept 2019]).

Finally, defendant supplies no support for its contention that the plaintiff should remit payment for a cancelled medical examination. Plaintiff, on the other hand, submits an affidavit wherein she states that the physician's office told her that she could change the appointment and did not advise of a penalty. She had an urgent family need that necessitated rescheduling the appointment. On this basis, the defendant's motion for the cancellation fee is **denied**. (*Cf. Flynn v. Debonis*, 246 AD2d 852 [3d Dept 1998] [fees allowed after failure to appear for two medical exams]; *Wolford v. Cerrone*, 184 AD2d 833 [3d Dept 1992] [counsel ordered to pay for missed medical exams]).

For the foregoing reasons, it is hereby

ORDERED, that the defendant's motion for summary judgment is denied; and it is further

ORDERED, that the defendant's motion for discovery sanctions is denied.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 8, 2019

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

Attorneys for Plaintiff
Koerner & Associates, LLC
233 Broadway, Ste. 2208
New York, NY 10279
gkoerner@koerner-associates.com

Attorneys for Defendant
Rivkin Radler, LLP
926 RXR Plaza
Uniondale, NY 11556
5163573333