Henry v Shake Shack 152 E 86, LLC
2020 NY Slip Op 32500(U)
July 29, 2020
Supreme Court, New York County
Docket Number: 155066/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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INDEX NO. 155066/2018

NADIA HENRY,

MOTION DATE 06/23/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHAKE SHACK 152 E 86, LLC and SHAKE SHACK ENTERPRISES, LLC,

DECISION AND ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 (Motion 001)

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for personal injuries, arising from a slip-and-fall accident at a Shake Shack restaurant in Manhattan, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

The plaintiff alleges that, on November 29, 2016, she slipped and fell on a wet, tiled floor at a Shake Shack restaurant, thus sustaining injuries. Specifically, she alleges that she had been standing on a rubber mat placed on the floor while waiting on line at a counter to order her food, but that, as soon as she received her order, turned away from the counter, and walked from the mat to the tiled floor, she slipped on the wet floor and fell.

After completion of discovery, the defendants moved for summary judgment, submitting the pleadings, the parties' responses to requests for discovery and inspection, a photograph of the accident scene, the deposition transcripts of both the plaintiff and a store manager who was on duty at the time of the accident, and an affidavit of the store's general manager. They also

submit a time-stamped video recording of the accident, seen from three points of view, and weather records certified by the National Oceanic and Atmospheric Administration (NOAA). The defendants contend that that their submissions establish that they neither created the wet condition, nor had actual or constructive notice thereof for a sufficient period of time, because any alleged dangerous condition arose within seconds or minutes prior to the accident due to customers who continuously had been tracking in water on an extremely rainy day. Alternatively, the defendants seem to suggest that the portion of the floor on which the plaintiff fell was not dangerous or hazardous because any wet condition had been mopped up immediately prior to her fall. The plaintiff, relying on the same evidentiary submissions, counters that the defendants failed to establish their prima facie entitlement to judgment as a matter of law because they only attested to general cleaning and mopping practices, and did not submit evidence as to when the relevant portion of the floor had last been inspected or mopped.

The certified NOAA precipitation records for November 29, 2016 reveal that 2.2 inches of rain fell in Manhattan on that date. Crucially, the defendants' general manager, Sarah Rambert, asserts in her affidavit that

> "the weather was extremely bad with high winds and heavy rain on November 29, 2016. I recall that multiple Shake Shack employees attended to the floors throughout the day in an effort to keep them as dry as possible. Specifically, every five to seven minutes an employee would do a walkthrough of the restaurant and use a dry mop to mop up any water that was tracked inside of the restaurant by customers. I also recall that the caution wet floor signs, floor mats, and umbrella bag stand were all out. I also recall that *Davon Smalls, another manager of the restaurant, was actively mopping the floors with a dry mop a few feet away from where plaintiff slipped and fell just moments prior to the plaintiff falling*. I received no complaints regarding puddles or accumulated water inside of the restaurant on the day of the subject accident"

(emphasis added). Rambert also explains the video recording process at the restaurant, and asserts that she located at 55-second video clip depicting the subject accident, covering the period from 1:11:04 p.m. to 1:11:59 p.m. on November 29, 2016. As Rambert describes the video, which she authenticated, the plaintiff was standing on a rubber mat that had been placed near the order counter and, while holding an umbrella and a Shake Shack bag, turned around,

stepped from the mat and onto the tiled floor, and slipped on the floor. She asserts that, within seconds of the accident, store manager Devon Smalls, with a dry mop in hand, can be seen coming to the plaintiff's aid, and helps her up from the floor. As Rambert describes the scene, there was a yellow A-frame "caution" sign placed only a few feet away from the precise accident site. She also averred that the floor of the entryway was covered with rubber anti-slip mats.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id*.).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It

must affirmatively demonstrate the merit of its defense (see *Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

To sustain a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner or other responsible entity either created the allegedly dangerous condition or had actual or constructive notice of it (see *Early v Hilton Hotels Corp*., 73 AD3d 559, 560-561 [1st Dept 2010]). "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" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]). "[W]here the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident" (*Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016] [citations omitted]).

Generally, a defendant moving for summary judgment on the ground that it did not have constructive notice of a dangerous condition must show that it recently inspected the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident (*see Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505-1506 [4th Dept 2015]; *Mike v 91 Payson Owners Corp*., 114 AD3d 420, 420 [1st Dept 2014]). Proof of recent inspections is not required only where it is demonstrated that such inspections would not have disclosed the dangerous condition or defect (*see Branham v Loews Orpheum Cinemas, Inc*., 31 AD3d 319, 326 (1st Dept 2006], citing *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc*., 15 AD3d 857 [4th Dept 2005]).

Contrary to the plaintiff's contention, Rambert's affidavit and Smalls's deposition testimony not only established that the defendants' general routine for mopping up water on the floor of the restaurant during periods of inclement weather was reasonable, but, along with the video recording, also demonstrate that the routine was indeed followed on the day of the accident (*see DeCongelio v Metro Fund, LLC,* 183 AD3d 449, 450 [1st Dept 2020]; *Kelly v Roza 14W LLC,* 153 AD3d 1187, 1188 [1st Dept 2017]; *cf. Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537 [1st Dept 2015], *affd* 27 NY3d 1055 [2016] [no proof that general routine was followed]).

Nonetheless, the video recording, as described by Rambert, reveals the existence of a triable issue of fact as to whether the defendants "caused or exacerbated the hazardous condition" by their negligent attempts at remediation (*Guzman v Broadway 922 Enters., LLC*, 130 AD3d at 432; *see Kruzhkov v Eglise St. Jean Baptiste*, 169 AD3d 430, 431 [1st Dept 2019]). The videos depict Smalls mopping water only a few feet away from the precise location of the accident in the seconds prior to the plaintiff's fall. They also show him responding to the plaintiff within two or three seconds after she fell, and depict him mopping up water or moisture on the precise spot of the accident only seconds after he assisted the plaintiff from the floor to her feet. The videos also depict the spot on the floor where the plaintiff fell as shiny and wet in the seconds before she fell. A reasonable finder of fact could infer from the affidavit, deposition testimony, and videos that Smalls's mopping efforts in the seconds or minutes prior to the accident caused the portion of the tiled floor abutting the rubber mat near the ordering counter to become wetter and more slippery than it had been prior to his efforts. Thus, the defendants' submissions fail to establish their prima facie entitlement to judgment as a matter of law.

Accordingly, it is

ORDERED that that defendants' motion for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the court.

7/29/2020
DATE

JOHN J. KELLEY, J.S.C.

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