

<b>Branch v J.C. Penny Corp., Inc.</b>
2020 NY Slip Op 34322(U)
November 19, 2020
Supreme Court, Queens County
Docket Number: 716006/2018
Judge: Robert J. McDonald
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SHORT FORM ORDER

**FILED**

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

**11/19/2020  
05:44 PM**

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

**COUNTY CLERK  
QUEENS COUNTY**

- - - - - x

Dolores Branch,

Index No.: 716006/2018

Plaintiff,

Motion Date: 11/05/2020

- against -

Motion Seq.: 2

J.C. Penny Corporation, Inc., J.C.  
Penny Company, Inc., The Macerich  
Company, and Green Acres Mall, LLC,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants granting summary judgment to MACERICH PROPERTY MANAGEMENT COMPANY, LLC s/h/a THE MACERICH COMPANY and VALLEY STREAM GREEN ACRES LLC s/h/a GREEN ACRES MALL, LLC (moving defendants), and dismissing plaintiff's complaint in its entirety:

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Memo. of Law.....	EF 31-44
Affirmation in Opposition-Exhibits.....	EF 51-53
Affirmation in Reply.....	EF 55

This is an action for personal injuries allegedly sustained by Plaintiff, Dolores Branch, as a result of a trip and fall that occurred on July 8, 2016 near the front entrance to a J.C. Penny store located at Green Acres Mall.

Plaintiff commenced this action by filing a summons and complaint on August 27, 2018. Issue was joined by moving defendants serving a verified answer on November 28, 2018. On December 14, 2018, defendant J.C. Penny Inc. Corpotation, erroneously and additionally sued as J.C. Penny Company, Inc., appeared and served its verified answer. On June 25, 2020, plaintiff voluntarily discontinued all claims against J.C. Penny

Defendants.

Moving defendants now move for summary judgment in their favor.

In support, moving defendants submit copies of the pleadings, an affidavit of Patrick Francis, who is the Security Manager for Allied Universal which provides security services to Green Acres Mall where the incident in question took place, a surveillance video of the incident, and the incident report.

The incident report states that the Security Supervisor, when he arrived on the scene, noticed a soda spill which was subsequently cleaned up by the housekeepers.

The video submitted to the Court which is verified as a true, authentic, and complete copy by Mr. Francis, depicts the incident.<sup>1</sup> At 17:27, a young boy in a red shirt is seen bending over to pick up a bottle off of the floor. The boy brings the bottle to his mouth to take a drink and then reaches back down to clean what he had spilled on the floor. There is no further activity in the subject area until 21:36, which is approximately four minutes later. At that time the plaintiff slips and falls down. In the time between the boy spilling his drink and the plaintiff's fall, no customers nor any employees of moving defendants walk through the exact area of the incident.

Based on the submitted evidence, moving defendants contend that summary judgment is warranted as defendants did not create the alleged dangerous condition and lacked notice of any alleged defective condition of the incident area.

In opposition, plaintiff contends that the motion is both premature and that there are triable questions of fact.

An affidavit of the plaintiff is submitted in opposition. Plaintiff states that on July 8, 2016 at approximately 4:51pm, she slipped and fell near the front entrance of the J.C. Penny store located at Green Acres Mall. After she fell to the ground she realized that she had slipped on a clear liquid which she believed to be water.

In further opposition, plaintiff's counsel contends that the affidavit of Allied Universal authenticating the video is insufficient due to Mr. Francis not being present at the incident

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<sup>1</sup>The video submitted to the Court totals fifty-two (52) minutes and sixteen (16) seconds.

site or even the mall on the date of the incident. Additionally, it is argued that the moving papers fail to include any evidence of defendant's general cleaning and inspection practices or evidence of the exact time in which they were scheduled to inspect the area. Counsel contends that the only way to determine whether the slippery condition was present long enough to permit discovery and cleaning is through discovery practice since defendants and/or Allied Universal, a non-party, are in exclusive possession, custody, and/or control of certain information which is crucial and necessary to the proper prosecution of plaintiff's action. Lastly, counsel contends that the incident report states that it was "soda" that was spilled and not "water" as plaintiff states in her affidavit.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall case involving the property 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 (see Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razaq, Inc., 60 AD3d 715 [2d Dept. 2009]). 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 [1986]).

Here, the moving defendants have established a prima facie showing that they did not create the alleged hazardous condition, nor did they have constructive notice of the alleged hazardous condition, since it only existed for only four (4) minutes and nine (9) seconds before plaintiff slipped and fell. The video submitted in support is also properly authenticated. Plaintiff has failed to show the existence of material issues of fact by producing evidentiary proof in admissible form. Additionally, the motion is not premature due to plaintiff's failure to state what would be addressed in depositions that are not visible via the video of the incident. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered

during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]).

Accordingly, it is hereby

ORDERED, that Defendants MACERICH PROPERTY MANAGEMENT COMPANY, LLC s/h/a THE MACERICH COMPANY and VALLEY STREAM GREEN ACRES LLC s/h/a GREEN ACRES MALL, LLC's motion for summary judgment is granted, and the complaint of plaintiff Dolores Branch is dismissed. The Clerk of the Court shall enter judgment accordingly.

Dated: November 19, 2020  
Long Island City, N.Y.



ROBERT J. MCDONALD  
J.S.C

**FILED**

**11/19/2020  
05:45 PM**

**COUNTY CLERK  
QUEENS COUNTY**