SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

NORA ADKINS,

Plaintiffs,

TRIAL/IAS PART 10
Index No.: 601615-2018
Motion Date: 11/25/19
Sequence No.: 001
MD
DECISION AND ORDER

- against -

DOHERTY ENTERPRISES INC. D/B/A APPLEBEE'S, APPLE FOOD SERVICE OF SUFFOLK, LLC D/B/A APPLEBEE'S, APPLEBEE'S RESTAURANTS NORTH LLC, D/B/A APPLEBEE'S, RESTAURANTS LLC, D/B/A APPLEBEE'S AND APPLEBEE'S FRANCHISOR LLC D/B/A/APPLEBEE'S,

Defendants.

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits 1
Statement of Material Facts..... 2
Memorandum of Law in Support..... 3
Affirmation in Opposition and Exhibits..... 4
Reply Memorandum of Law in Support..... 5

PRELIMINARY STATEMENT

Defendants, Apple Food Service of Suffolk, LLC D/B/A Applebee's, bring forth this Order pursuant to CPLR §3212, granting summary judgment dismissing Nora Adkins's ("Plaintiff") Complaint in its entirety as against Defendant, Apple Food Service of Suffolk, LLC d/b/a Applebee's; and awarding such other and further relief as may be just, proper and equitable. Opposition and reply to this application has been submitted.

BACKGROUND

This is an action for personal injuries sustained by plaintiff when she tripped and fell on a rubber mat as she entered the vestibule of Applebee's Restaurant at 1710 Hempstead Turnpike, Elmont, New York. The incident occurred at about 6:30 P.M. on February 25, 2015. Plaintiff entered the restaurant alone, took one step onto a snow mat, and on taking her second step, the heel of her shoe was caught on the mat, causing her to fall, fracturing her wrist.

She testified at her deposition that while on the ground, the mat was partially on the carpeted area of the vestibule, and partially extending over the faux wood floor, causing the mat to be slightly raised. Defendant has produced photographs of the lobby with a mat on the carpeted area, but there is no affidavit that the photographs depict the location and condition of the mat on the date of the accident. Plaintiff testified that the mat depicted in the photographs was not the same mat over which she tripped.

Deanna Campbell testified on behalf of Applebee's. She was on duty as Assistant General Manager, and had worked at various Applebee locations for 18 years as of April 10, 2019, the date of her deposition. Cleaning of the vestibule carpet is conducted by an outside contractor, Majestic, after hours.

She was advised by an employee that someone had fallen in the vestibule. She went to the vestibule and observed plaintiff on the carpet, between the inner and outer doors. She did not recall seeing a mat on the carpet, nor does she remember whether plaintiff described the cause of her fall. She prepared an Incident Report after plaintiff left in an ambulance and sent it by email.

On questioning by her attorney, she described a routine which she followed, referred to as a "critical path". It entails, for example, starting at one side of the restaurant and work your way around. She would start from the kitchen, move to the bar, to the host stand, which is included in the vestibule, go through the dining area, the bathrooms, and back to the kitchen. She claims that she did these critical paths throughout her shift, from 4:00 P.M. to around 2:00 A.M. closing, and estimated that she did this between 50 and 75 times per shift. She did not recall when she last was in the vestibule area prior to the incident.

DISCUSSION

" ' 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 alleged dangerous condition

nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.' " (*Ansari v. MB Hamptons, LLC,* 137 A.D.3d 1174, 1174—1175 [2d. Dept. 2016]; quoting *Milorava v. Lord & Taylor Holdings, LLC,* 133 A.D.724, 725 [2d Dept. 2015]). " '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 plaintiff's fall.' " (*Id.*).

" 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish lack of constructive notice.' "(*id.* at 1175, quoting *Milorava,* supra). The Court in *Ansari* concluded that the failure of defendant to submit evidence regarding any specific inspection or cleaning of the area on the date of the accident, constituted a failure to establish the lack of constructive notice. (See also, *Sesena v. Joy Lea Realty, LLC,* 123 A.D.3d 1000 [2d Dept. 2014]).

Stryker v. D'Agostino Supermarkets, Inc., 88 A.D.3d 584 (1st Dept. 2011) involved a trip and fall on a mat located in the vestibule of a supermarket. Plaintiff alleged that she tripped on a raised corner of the mat. Noting that defendants were required to demonstrate that they maintained the property in a reasonably safe condition, and neither created the alleged dangerous condition nor had actual or constructive notice thereof. Contrary to D'Agostino's contention, the supermarket patron's testimony of multiple complaints to the supermarket's manager prior to the accident was sufficient to establish D'Agostino's notice of the hazardous condition that caused the trip and fall. This produced a question of fact sufficient to preclude summary judgment.

In *Winder v. Executive Cleaning Services, LLC,* 91 A.D.3d 865 (2d Dept. 2012), plaintiff tripped and fell on a carpet runner as she entered a cafeteria located in the building where she worked. Plaintiff had not noticed the runner prior to her fall, but when she was on the ground, noted that part of the runner was folded up. While it was possible that the folded condition of the runner was present prior to the accident, it is "just as likely that the folded condition of the runner was caused when the injured plaintiff tripped and was not a pre-existing condition." In the absence of proof that the mat was folded prior to the accident, a jury would be required to speculate as to the cause for the trip and fall. The Court found that defendant was entitled to summary judgment dismissing the complaint.

Trincere v. County of Suffolk, 90 N.Y.2d 976 (1997) involved a trip and fall on a cement slab which was elevated "a little over a half inch above the surrounding paving slabs" at the H. Lee Dennison Building in Hauppauge. The issue was whether a defect consisting of a one-half inch elevation of a cement slab in the plaza area of a municipal building is non-actionable as a matter of law. "There is no rule that municipal liability, in a case involving minor defects in the pavement 'turns upon whether the hole or depression, causing the pedestrian to fall, is four inches – ir any other number of inches in depth' ". "Rather, whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for a jury (*Guerrieri v. Summa,* 193 A.D.2d 647 [citations omitted]).

But the Court stated that not every injury allegedly resulting from an elevated brick or slab need be submitted to a jury. A mechanistic disposition of a case based exclusively on the on the dimension of a sidewalk defect was unacceptable. The lower court, after examining the facts presented, including the dimensions of the defect, irregularity and appearance of the defect, along with the " 'time, place and circumstances' " of the injury, properly concluded that no issue of fact was presented.

In this case, defendant raises the issue that the condition as described by plaintiff, that the mat extended beyond the carpeted area, and was raised above the faux wood flooring, was trivial in nature, and not actionable. *Nagin v. K.E.M. Enterprises, Inc.,* 111 A.D.3d 901 (2d Dept. 2013) involved a claim that a berber mat, inserted into a pre-existing cutout in a marble floor, created a height difference, which caused plaintiff to trip and fall. Defendant submitted photographs of the subject area, as well as transcripts of the plaintiff's deposition testimony. But the Court found that this evidence did not provide any details regarding the height of the carpet mat in relation to the surrounding area.

Defendant's deposition witness did not know the depth of the recessed area in the floor, the thickness of the carpet mat that was installed, or whether the mat was flush with the surrounding floor. Nor did the photographs demonstrate that there was a trivial height differential between the surface of the carpet mat and the surrounding floor. The Court held that defendant failed to establish prima facie that its installation of the carpet did not create the alleged defect. In light of the failure of defendant to meet its prima facie burden, it was

unnecessary to determine whether plaintiff's papers were sufficient to raise a triable issue of fact.

In *Razza v. LP Petroleum Corporation,* 153 A.D.2d 740 (2d Dept. 2017), the Court reiterated the proposition that, in a trip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that plaintiff cannot identify the cause of his or her fall. Plaintiff was exiting the convenience store when her foot went underneath a floor mat, causing her to trip and fall. She assumed that a leaf blower used by a landscaper at the premises caused the mat to lift up immediately prior to her fall, she did not observe anyone in the area using a leaf blower. This was insufficient to raise a question of fact so as to defeat defendant's prima facie showing of entitlement to summary judgment of dismissal.

In the instant case, defendant has not established its prima facie entitlement to summary judgment. The testimony of the witness for defendant included a statement of the general practice of walking throughout the restaurant numerous times during the day. The mat in question according to the plaintiff, was between the outer and inner doors of the restaurant. There is no evidence that defendant inspected, or observed the placement of a mat in the outer vestibule, nor that the defendant remembers seeing it. There are questions of fact that are unresolved, which are raised in this case, as to the condition of the area at the time of the accident.

Accordingly, the defendant's motion for summary judgment dismissing the Complaint is denied.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 7, 2020

ENTER:

Jerome C. Murphy
JEROME C. MURPHY
J.S.C.

ENTERED
FEB 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE