

Hoffman v Dean C. Ltd Partnership
2022 NY Slip Op 35254(U)
November 16, 2022
Supreme Court, Orange County
Docket Number: Index No. EF009717-2019
Judge: James L. Hyer
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To commence the 30 day statutory time period for appeals as of right (CPLR 5512[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

-----X
KIMBERLY HOFFMAN,

Plaintiff,

-against-

DEAN C. LTD PARTNERSHIP, COLLEY CAPITAL
LLC, THE COLLEY GROUP, and D.W. COLLEY,
INC.,

Defendants.

-----X
HYER, J.S.C

DECISION & ORDER

Index No. EF009717-2019

Sequence Nos. 1-2
Motion Date: 9/15/2022

The following papers, numbered 1 to 23, were considered in connection with Defendants' Notice of Motion, dated June 2, 2022, seeking summary judgment and dismissing the complaint, and Plaintiff's Notice of Cross Motion, dated August 5, 2022, seeking sanctions based on the spoliation of evidence.

PAPERS

NUMBERED

Notice of Motion (seq. #1)/Affirmation In Support/Exhs. A-I/ Memorandum of Law/Statement of Material Facts	1-13
Notice of Cross Motion (seq. #2)/Affirmation in Support/Exhs. 1-5/ Response to Statement of Material Facts	14-21
Affirmation in Opposition to Cross Motion and in Further Support of Motion	22
Reply Affirmation in Support of Cross Motion	23

On June 8, 2018, at approximately 10:00 p.m., Plaintiff allegedly sustained injuries when she slipped and fell on a wet floor inside the McDonald's premises owned by Defendants. Upon entering the restaurant by the bathrooms (Exh. D at 59-60), Plaintiff did not see any employees cleaning or mopping, any cleaning equipment, or any yellow caution signs in the passageway

inside the store in which she travelled (Exh. D at 60-61). She also saw no yellow caution signs by the counter or any employees cleaning or mopping (Exh. D at 61). After using the bathroom, Plaintiff walked the passageway up to the front counter and placed her order (Exh. D at 63-64). Plaintiff had no trouble walking from the bathroom to the counter area (Exh. D at 65). She saw no spills on the floor and she did not experience any slippery substance as she walked (Exh. D at 65). No one was mopping or cleaning then (Exh. D at 64). She spoke to the night manager, Jessica, for 5 or 10 minutes and then began to leave out the same door through which she entered (Exh. D at 64-66). She was carrying her food and drink (Exh. D at 68). As she walked towards the back door, Plaintiff saw no caution signs near the counter (Exh. D at 70). She took about 10 or 15 steps into the passageway and then fell (Exh. D at 70). She was looking straight ahead (Exh. D at 70). She did not see an employee mopping in that passageway, or mop carts, or a mop, or caution signs at the time (Exh. D at 70-71, 78). Plaintiff did not see any water on the floor prior to falling (Exh. D at 71-72), but concluded it was water because “[i]t was just wet” (Exh. D at 71). There was no odor, and she did not feel anything sticky (Exh. D at 72). Plaintiff fell on her back and was injured (Exh. D at 72-73). Only after she fell did Plaintiff see an employee mopping the area where she fell (Exh. D at 75), and she saw by the exit, behind the table by the garbage can, a yellow bucket (Exh. D at 75). The bucket was by the last table by the exit at the end of the walkway (Exh. D at 75-76). After she fell, she did not see a cart with a mop and bucket (Exh. D at 76), she did not see an employee in the passageway with a mop (Exh. D at 76-78), and she did not see any yellow caution signs (Exh. D at 77-78).

When viewing the video of the incident, Plaintiff admitted that she recalled seeing the blue cart depicted, but she said “[i]t just looked like a cart to me” (Exh. D at 81). She did not recall what was on it (Exh. D at 81). At the time, she saw a woman standing there, but she did not see

her mopping (Exh. D at 82). Plaintiff did not recall where she fell in relation to the woman (Exh. D at 84). Prior to Plaintiff's fall, no employee said anything to her (Exh. D at 140-141).

Jessica Tiram, the swing manager, was trained to put up cones (Exh. E at 28-29, 37), and trained others who mopped to do the same – to put up two cones before they started mopping (Exh. E at 30, 32). In 2018, Tiram believed the restaurant had 4 cones (Exh. E at 34). She trained the staff to put three cones in the subject passageway when they were mopping (Exh. E at 35-36). According to Tiram, on that night, there was a cone at the entrance and a second cone near where Plaintiff fell by the door – it just was not visible in the video (Exh. E at 55-56, 94-95). Tiram saw two cones when she responded to Plaintiff after the fall (Exh. E at 87-88, 90-91, 94-95).

Saroeun Lukach worked as a grill cook and would mop the floor when asked (Exh. F at 8-10). Lukach was told how to mop the floor and was never instructed to use safety cones (Exh. F at 10-11, 13). She also was not provided with videos or written materials about how to mop the floor (Exh. F at 11). About 30 minutes before Plaintiff's fall, Julio, the manager, told Lukach to use warning signs or cones when mopping (Exh. F at 14). "He told me to put the sign on the floor and then start mopping after putting the sign" (Exh. F at 15). Julio told Lukach to use two signs – "[o]ne in the front and one in the back" (Exh. F at 15). Lukach decided the specific locations of the signs (Exh. F at 15-17). Lukach mopped the floor before Plaintiff fell (Exh. F at 17). Lukach did not move the signs after placing them and before Plaintiff fell (Exh. F at 18). Lukach did not remember Plaintiff's fall (Exh. F at 26).

Plaintiff commenced this action on December 11, 2019. After issue was joined and discovery exchanged, Defendants now move for summary judgment dismissing the complaint. Defendants contend that the mopping of the floor was open and obvious and not inherently

dangerous. Defendants argue further that even if a duty to warn was owed, Defendants satisfied that duty by placing two yellow warning signs, indicating to use caution due to a wet floor.

Plaintiff maintains that Defendant created a dangerous condition by improperly mopping the floor and failed to give proper warning of the dangerous condition. Plaintiff also cross moves for spoliation sanctions with respect to Defendants' destruction of video footage and failure to disclose certain documents.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... 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 issue of fact." However, once a movant makes a sufficient 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 v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019], quoting *Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]). Accordingly, "[t]he court may not weigh the credibility of the

affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned” (*Bank of New York Mellon v Gordon*, 171 AD3d at 201, quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “[W]here credibility determinations are required, summary judgment must be denied” (*Bank of New York Mellon v Gordon*, 171 AD3d at 201-202, quoting *People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012], *aff’d* 21 NY3d 439 [2013]).

It is well-settled that a property owner has a duty to maintain its property “in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241 [1976], quoting *Smith v Arbaugh’s Rest.*, 469 F2d 97, 100 [DC Cir 1972]). Whether a dangerous condition exists “depends on the particular facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

This duty to keep premises reasonably safe “may also include the duty to warn of a dangerous condition” (*Cupo v Karfunkel*, 1 AD3d 48, 51 [2003]; accord *Rivero v Spillane Enter. Corp.*, 95 AD3d 984 [2d Dept 2012]). However, a property owner “has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous” (*Mullen v Helen Keller Servs. for the Blind*, 135 AD3d 837, 838 [2d Dept 2016]; see also *Rivero v Spillane Enter. Corp.*, 95 AD3d 984; *Atehortua v Lewin*, 90 AD3d 794 [2d Dept 2011], *lv. denied* 18 NY3d 811 [2012]).

On this record, Defendants established a prima facie case that the wet floor and the mopping thereof was open and obvious. According to the video of Plaintiff’s fall, there was a caution sign at the start of the subject passageway near the front counter, which Plaintiff walked past. Plaintiff then walked past the blue mop cart to her left, which is also visible in the video, and

straight towards the employee who was mopping. As the wet floor was open and obvious, it was not inherently dangerous and consequently, Defendants had no duty to warn (*see Rivero v Spillane Enter. Corp.*, 95 AD3d 984). Further, a caution sign was placed right near Plaintiff at the front counter, and she admittedly failed to look where she was walking as she entered the passageway, backing up into the cone's vicinity and bypassing the cone while walking with her back to it (Hoffman Affidavit at ¶5). Plaintiff's statements that she did not see the sign and thought nothing of the mop cart, or the mopping employee, are self-serving and do not raise a triable issue of fact. Plaintiff's statements that the signs were improperly placed or that the mop cart should have been yellow are unsubstantiated and speculative (Hoffman Affidavit at ¶¶5-6) (*see Elbadwi ex rel. Green v Saugerties Cent. School Dist.*, 141 AD3d 805, 809 [3d Dept 2016] [plaintiff offered nothing more than unsubstantiated assertion that defendant was required to remove all snow and ice]; *see also Reiss v Ulster County Agric. Socy.*, 78 AD3d 679, 679-680 [2d Dept 2010] [wet area upon which plaintiff slipped and fell was readily observable by reasonable use of plaintiff's senses; plaintiff's contention that presence of hay created dangerous condition was speculative]). In short, Plaintiff did not raise a triable issue of fact because it was Plaintiff's own actions which caused her to fall – specifically, Plaintiff's failure to see that which was directly in front of her due to her own inattentiveness to where she was walking, especially because she walked backwards not looking behind her where the sign was sitting, as well as her failure to see, or appreciate, the yellow caution sign, the mop cart, and the employee holding a mop by the exit (*see Elbadwi ex rel. Green*, 141 AD3d at 809 [the fact remains that plaintiff's accident was, by her own admission, the result of her inattentiveness]; *Sirianni v Town of Oyster Bay*, 156 AD3d 739, 740 [2d Dept 2017] [muddy condition of field, caused by rain, was an open and obvious condition readily observable by those employing the reasonable use of their senses]).

Accordingly, it is hereby

ORDERED that Defendants motion for summary judgment (seq. #1) is granted and the complaint is dismissed; and it is further

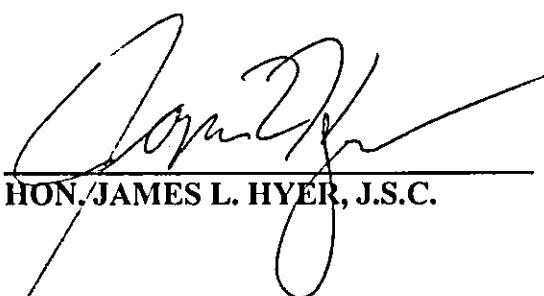
ORDERED that for the reasons stated herein, Plaintiff's cross motion is denied as moot; and it is further

ORDERED that any issue not directly addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Goshen, New York
November 16, 2022

ENTER,



HON. JAMES L. HYER, J.S.C.

To: Counsel of Record via NYSCEF