SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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JAMES KEANE,

Plaintiff,

- v -

TARGET CORPORATION and TARGET STORES,

Defendants.

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INDEX NO. 160766/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY.

In this premises liability action, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes.

Factual and Procedural Background

Many of the facts in this case are undisputed (Doc Nos. 46, 60). On June 23, 2018, plaintiff was injured when he fell after slipping on spilled liquid detergent in an aisle of a department store located at 2900 Veterans Road West on Staten Island (the store) (Doc No. 1), and operated by defendant Target Corporation (Doc No. 5).[1] Plaintiff then commenced this action against Target, alleging that he was injured due to its negligent ownership, control, management, and/or maintenance of the store aisle (Doc No. 1). Target joined issue by its answer dated December 6, 2019, denying all substantive allegations of wrongdoing and asserting various affirmative defenses

[1] In their answer, defendants asserted that defendant Target Stores was a "fictitious entity" and incorrectly sued herein, and that defendant Target Corporation is the only entity involved in this case (Doc No. 5). For purposes of this decision, defendants will be collectively referred to as Target.

(Doc No. 5). It now moves for an order granting summary judgment dismissing the complaint (Doc No. 45-47).

Deposition Testimony of Plaintiff

At his deposition, plaintiff testified that, on the day of the alleged incident, he fell after slipping on liquid detergent that had spilled onto the floor of an aisle inside the store (Doc No. 52). He was looking straight ahead and never saw the spill before slipping (Doc No. 52). He was unsure how the spill occurred, saw no wet floor signs or barricades blocking off the area, and did not hear any announcements overhead about a spill (Doc No. 52). Prior to slipping, he saw no Target employees nearby, however, he was later taken to an office by a female employee and filled out an incident report form (Doc No. 52). He then left the store (Doc No. 52).

Deposition Testimony of Nicole Sasso

Nicole Sasso, a former Target employee who worked at the store, testified that she had no recollection of plaintiff's accident or what happened afterwards (Doc No. 53). However, she was familiar with the process for handling spills, and stated that it varied based on the size of the spill (Doc No. 53). Small spills were immediately cleaned up by sales associates or covered with a cone until they could be cleaned, whereas larger spills required an employee to wait nearby until a member of the cleaning team was available (Doc No. 53). She was unsure if the store had an inspection schedule but stated that employees would typically walk through the aisles of their designated area "[a] lot," which she approximated as roughly "three times every ten minutes" (Doc No. 53). She also stated that all of Target's employees wore red shirts to distinguish them as employees (Doc No. 53).

Deposition Testimony of Victoria Carbonara

Victoria Carbonara, another former Target employee who managed the store, testified that she was notified of the accident by Sasso and filled out the incident report with plaintiff (Doc No. 54). She stated that, in her role as store manager, she might only walk through an aisle of the store once per hour (Doc No. 54). She also confirmed Sasso's testimony that employees wore red shirts or tops (Doc No. 54).

Affidavit of Andrew Snyder of Defendants

In his affidavit, Andrew Snyder, a Target employee, averred that the store maintained a video surveillance system that continuously monitored areas of the store and stored the recordings on a secure server (Doc No. 56). After plaintiff's accident, a different employee searched the system, discovered that video of plaintiff's accident had been recorded, and downloaded it (Doc No. 56).

Video Surveillance Footage

The video surveillance footage showed the aisle where plaintiff fell from 7:00 p.m. to approximately 7:45 p.m. (Doc No. 48). A different customer caused the spill at roughly 7:34 p.m., and plaintiff fell around nine minutes later after slipping on it (Doc No. 48). In the time between the spill and plaintiff's fall, multiple customers walked by and through the spill (Doc No. 48). However, as the video does not show any individuals wearing a red shirt resembling a Target employee uniform, it appears there were no Target employees in the area for the entire 45-minute period (Doc No. 48).

Legal Analysis and Conclusions

Target contends that it is entitled to summary dismissal of the complaint because it has made a prima facie showing that it neither created the spill, nor had actual or constructive notice of it.

Plaintiff opposes, arguing that Target failed to demonstrate a lack of constructive notice because it provided no evidence of when the floor was last inspected prior to his accident; he does not argue that it created the allegedly hazardous condition or had actual notice of it.

"[A] defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]). "To constitute constructive notice, a [hazardous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *accord Franco v D'Agostino Supermarkets, Inc.*, 34 AD3d 328, 329 [1st Dept 2006]). A defendant may demonstrate a lack of constructive notice "by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). That evidence may come through witness testimony that the area was inspected shortly before a plaintiff's accident (*see Kennedy v 30W26 Land, L.P.*, 179 AD3d 556, 557 [1st Dept 2020] [finding no constructive notice where employee testified that she did not see puddle on floor when she inspected area five to ten minutes before plaintiff's accident]; *Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571-572 [1st Dept 2014] [similar]), or through a regular

maintenance schedule that was followed prior to the accident (*see Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469, 470 [1st Dept 2008] [finding no constructive notice where witness testified that stairs cleaned twice per day, once in the morning and once at night, and that area free of alleged dangerous condition when witness finished cleaning it night before accident]; *cf. White v MP 40 Realty Mgt. LLC*, 187 AD3d 561, 563 [1st Dept 2020] ["Proof of a regular maintenance schedule (alone) does not suffice for purposes of showing that it was followed" (internal quotation marks and citations omitted)]).

Although Target presents the surveillance video demonstrating that roughly nine minutes elapsed from the time of the spill until plaintiff's accident, it fails to submit any evidence of its maintenance activities. There is no witness testimony averring that the area was inspected shortly before plaintiff fell (*see e.g. Kennedy*, 179 AD3d at 557), and there is no evidence that any regular maintenance schedule was followed (*see e.g. Vilomar*, 50 AD3d at 470). The only evidence that remotely resembles maintenance activities is Carbonara's testimony that, as store manager, she would try to walk through an aisle once per hour and Sasso's testimony that Target employees would walk through their designated aisles "a lot." Thus, there is no evidence of when the aisle was last cleaned or inspected before plaintiff's accident. Therefore, Target fails to make a prima facie showing that it lacked constructive notice, and its motion for summary judgment dismissing the complaint must be denied (*see Belton v Vornado Gun Hill Rd., LLC*, 189 AD3d 531, 531-532 [1st Dept 2020] [finding "general testimony as to when the floor might have been inspected" and what employees "were supposed to look at" insufficient to demonstrate constructive notice]; *Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016] [finding defendant failed to demonstrate lack of constructive notice because it failed to indicate when employees "last cleaned or inspected the accident location before the incident occurred"]).

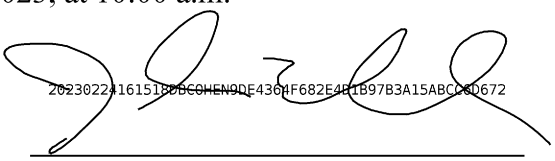
Lastly, Target's contention that the elapsed time between the spill occurring and plaintiff's fall is insufficient, as a matter of law, to find it had constructive notice is unpersuasive; any alleged de minimis period of time prohibiting constructive notice would only amount to "moments before the accident" (*see Nepomuceno v City of New York*, 137 AD3d 646, 647 [1st Dept 2016] [finding no constructive notice where "one minute" elapsed before plaintiff slipped on fruit]; *Espinal v New York City Hous. Auth.*, 215 AD2d 281, 281-282 [1st Dept 1995] ["The lapse of a five-minute interval between the deposit of a banana peel or other debris and the accident is insufficient, as a matter of law, to establish constructive notice"]).

"Given the foregoing determination, there is no need to consider the sufficiency of plaintiff's opposing papers" (*Graham*, 137 AD3d at 547 [citations omitted]).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment dismissing the complaint by defendants Target Corporation and Target Stores is denied; and it is further

ORDERED that the parties shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on March 29, 2023, at 10:00 a.m.



2/24/2023
DATE

DAVID B. COHEN, 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