| **Romero v Wo Yee Hing Realty Corp.** |
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| 2023 NY Slip Op 31815(U) |
| May 25, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 159295/2019 |
| Judge: Verna L. Saunders |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. VERNA L. SAUNDERS, JSC** **PART 36**

*Justice*

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**INDEX NO.** 159295/2019

TERESA ROMERO,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

WO YEE HING REALTY CORP. and REAL EVERGREEN INTERNATIONAL INC.,

Defendants.

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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

In this personal injury action, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff fails to establish a *prima facie* case for negligence. Plaintiff opposes the motion. After oral argument and a review of the motion papers, the relevant statutes and case law, the motion is resolved as follows.

Plaintiff commenced this action against defendants by summons and complaint, alleging that, on or about June 10, 2019, at approximately 11:00 A.M., while shopping at defendants' retail jewelry store (World's Largest Jewelry Exchange), located at 55 West 47th Street, in New York, New York ("premises" or "the store"), she was injured when she slipped and fell at the premises. In her bill of particulars, plaintiff indicated that the occurrence took place "while exiting the aforesaid premises, and more particularly in the enclosed vestibule between the inner door and the outer exit door when she was caused to slip and fall due to a recurrent hazardous condition of excessive . . . water on the floor of the [d]efendants' vestibule without proper, secured adequate mats." (NYSCEF Doc. No. 8 ¶ 3, *bill of particulars*). The bill of particulars was later amended to state that "while inside [d]efendant's store walking past the exit/entrance door within a gap between two rectangular weather floor mats [she] was caused to slip and fall due to a recurrent hazardous condition of excessive water on the floor between two mats on [d]efendants' premises without proper, adequate continuous floor mats" (NYSCEF Doc. Nos. 1, *summons and complaint;* and 19 ¶ 3, *amended bill of particulars*).

Note of issue was filed on March 26, 2021, representing that all discovery in the case was complete (NYSCEF Doc. No. 13, *note of issue*).

Defendants argue that there is no evidence that they created the condition or had actual or constructive notice of the same. In support of their motion for summary judgment, defendants submit, *inter alia*, plaintiff's deposition testimony (NYSCEF Doc. No. 20); the deposition testimony of Jose Guzman ("Guzman"), a security guard at the premises (NYSCEF Doc. No. 21); and the affidavit of Paula Henao ("Henao"), an employee of Ever Bright Realty Corp ("Ever Bright"), which purportedly managed the premises (NYSCEF Doc. No. 22).

At her deposition, plaintiff testified, in relevant part, that it was raining earlier in the morning on the date of her accident. When testifying as to the fall, plaintiff affirmed that she was inside the store, walking from one booth to another, and had been in the store for approximately an hour, when her right foot slipped, causing her to fall to the ground. Plaintiff further testified that, ten seconds before her accident, she was looking at the floor but did not see any water or wetness on the floor prior to her fall. After the incident, she noticed what appeared to be wet footprints or water tracked in by people coming into the store. Plaintiff took no pictures of the water on the floor. (NYSCEF Doc. No. 20).

Guzman, the security doorman at the premises, testified, among other things, that he was employed with Central Management, which provided building management for the store. Guzman testified that the task of inspecting the condition of the floor of the premises was the responsibility of "maintenance" provided by Central Management. He further testified that, for part of the day, he was in the lobby of the premises, but then, for the other part of the day, he was stationed in the basement. Guzman could not recall when the floors were last inspected prior to the accident. However, he inspected the area of the fall after the incident and testified that he did not observe any wet footprints or wetness on the floor. Guzman also testified that no one had fallen on that date prior to this incident and that mats were placed at the entrance of the store on rainy days, including on the date of the incident. (NYSCEF Doc. No. 21, *Guzman's deposition testimony*).

Henao, an employee of Ever Bright, affirms in her affidavit that Ever Bright retained the maintenance company, Yung Brothers, to perform routine maintenance at the store. Henao affirms that Gerardo Rivera ("Rivera") and Angel Lazcano ("Lazcano") were the two-day shift employees at the premises on June 10, 2019, and that "[d]uring their shift, the maintenance workers continually inspected and walked through the interior of the exchange and promptly cleaned any spills/liquids including but not limited to any water on the floor." Annexed to her affidavit, Henao submits the incident report and logbook entries for the incident (NYSCEF Doc. No. 22, *Henao's affidavit and exhibits*).

Defendants argue that plaintiff does not know what caused her fall since she has provided three different versions regarding how the incident occurred. The complaint should also be dismissed, argue defendants, on the ground that the proof proffered establishes that the alleged condition was not apparent or visible and, thus, plaintiff cannot establish actual or constructive notice. They further assert that "there is no evidence to support any conclusion that defendants were negligent in the operation, control, maintenance, ownership, and/or management of the subject premises." According to defendants, there is no testimony that they created the alleged condition, especially since plaintiff testified that she believed the wet footprints were created by people tracking water onto the floor. Also, defendants received no complaints about water on the floor prior to the accident and the testimony of Guzman establishes that the maintenance workers constantly inspected the premises and placed mats by the doors if there were wet conditions. Relying on the affidavit of Henao, defendants argue that, on the date of the accident, the maintenance workers constantly inspected the interior of the premises and cleaned any wet conditions. Therefore, defendants contend that plaintiff is not able to quantify the length of time the water was on the floor prior to her fall to show defendants had notice of the condition (NYSCEF Doc. No. 15, *Lange's affirmation*).

In opposition to the motion, plaintiff argues that issues of fact remain that preclude summary judgment. Although defendants rely on the testimony of Guzman and the affidavit of Henao, the scope of each of their respective employers is unclear, insofar as Guzman and Henao both affirm that

their employers were responsible for maintenance. Furthermore, there is no testimony from anyone whose duties included performing inspections and maintenance of the floor within the premises, nor are there any contracts showing that defendants contracted with any company to perform maintenance nor what that maintenance included. There is also an issue of fact as to constructive notice insofar as questions remain with respect to whether defendants knew or should have known that water was being tracked into the premises. (NYSCEF Doc. No. 27, *Bonchonsky's affidavit*).

In reply, defendants argue, *inter alia*, that the court need not consider whether defendants' affirmation from Henao is sufficient and whether defendants submitted sufficient maintenance records since plaintiff fails to specify what caused her fall and that there are no issues of fact to be tried as plaintiff does not know what caused her to fall (NYSCEF Doc. No. 30, *reply affirmation*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

In an action for negligence, a plaintiff must prove that the defendant owed him or her a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. (See *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (see *Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

"Generally, constructive notice is found when the alleged dangerous condition is visible, apparent, and exists on defendant's premises for a sufficient period to afford the defendant an opportunity to discover and remedy it" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]; see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984].) "A defendant establishes that it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell" (*see Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020], citing *Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545[1st Dept 2019]; *Vargas v Cadwalader Wickersham & Taft, LLP*, 147 AD3d 551, 552 [1st Dept 2017].)

In the case at bar, defendants have met their *prima facie* burden of establishing that they lacked actual notice of a dangerous condition. Additionally, defendants have established that the alleged dangerous condition was not visible or apparent. Plaintiff admits that, despite looking down at the floor ten (10) seconds before her accident, she did not see the wet footprint on the floor prior to her fall. (NYSCEF Doc. No. 20 at 28-29, 33-34). It was not until after she was on the floor that plaintiff noticed, what she claims was a wet footprint left behind from people walking into the store. (NYSCEF Doc. No. 20 at 30-31, 33). Thus, "plaintiff's own testimony established that the water on which she slipped was not visible and apparent and therefore could not provide constructive notice." (See *Gunzburg v Quality Bldg. Servs. Corp.*, 137 AD3d 424, 424 [1st Dept 2016]; *See Demelio v*

*Wal-Mart Stores E., LP,* 2023 WL 2480192, 2023 US Dist LEXIS 42032 *[SDNY Mar. 13, 2023, No. 21-cv-1900 (AEK)]); Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 572 [1st Dept 2014]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]; *Sanabia v NY City Tr. Auth.*, 294 AD2d 138 [1st Dept 2002]; *Hussein v NY City Tr. Auth.*, 266 AD2d 146, 147 [1st Dept 1999].) Guzman's testimony that he inspected the floor after plaintiff's fall and observed no water on it, corroborates defendants' position that the alleged condition was not visible or apparent. Therefore, any conclusion that the water condition existed for a sufficient length of time to permit defendants to discover and remedy it prior to plaintiff's accident would be pure speculation. (See *Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 [1986]; *Lara v Kadir*, 201 AD3d 590, 591 [1st Dept 2022]; (*Keenan v Christie's Inc.*, 189 AD3d 622 [1st Dept 2020]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510 [1st Dept 2004]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [2000].)

Plaintiff fails to raise an issue of fact with respect to notice, insofar as she fails to proffer any proof demonstrating that defendants had actual notice of the wet condition or "that the damp condition was of such an appearance that defendant should have noticed it." (*Hussein v NY City Tr. Auth.*, 266 AD2d 146, 147 [1st Dept 1999].) Furthermore, plaintiff offers no evidence relevant to the question of how long the wet condition existed prior to the accident. (*Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004].) To the extent plaintiff contends defendants should have been aware of said condition, this court notes that "[t]he fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation" and "defendants were under no obligation to cover the entire floor with mats and to continuously mop up all tracked-in water." (*Garcia v Delgado Travel Agency, Inc.*, 4 AD3d 204, 204[1st Dept 2004]; see *Diaz-Martinez v King of Glory Tabernacle*, 170 AD3d 567, 568 [1st Dept 2019].) As to her specific argument with respect to discrepancies between the testimony of Guzman and the affidavit of Henao regarding the entity responsible for the maintenance of the premises, this does not raise a material issue of fact with respect to whether the water on the floor was visible and apparent at the time of the accident and how long the condition existed. "In the absence of proof as to how long a condition existed, no inference can be drawn that defendants had constructive notice of a dangerously wet floor." (*Garcia v Delgado Travel Agency, Inc.*, 4 AD3d at 204; *Wallace v Doral Tuscany Hotel*, 302 AD2d 255, 256-257 [1st Dept 2003].) All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that defendants' motion, pursuant to CPLR 3212, seeking dismissal of the complaint against them is hereby granted and the complaint is hereby dismissed; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice entry, upon defendants.

This constitutes the decision and order of this court.

**May 25, 2023**

**HON. VERNA L. SAUNDERS, JSC**

| CHECK ONE: | | | | | | | |
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| | X | CASE DISPOSED | | NON-FINAL DISPOSITION | | | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | OTHER |