

**Ashley v Red Lobster Hospitality LLC**

2023 NY Slip Op 34164(U)

November 21, 2023

Supreme Court, New York County

Docket Number: Index No. 160442/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. JOHN J. KELLEY **PART** **56M**

*Justice*

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**INDEX NO.** 160442/2018

DWAYNE ASHLEY,

**MOTION DATE** 11/21/2023

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

RED LOBSTER HOSPITALITY LLC and GOLDEN GATE  
CAPITAL, INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for personal injuries arising from a slip-and-fall accident at a Red Lobster restaurant in Copiague, New York, the defendant Red Lobster Hospitality, LLC (Red Lobster), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Red Lobster.

On May 13, 2018, the plaintiff was at Red Lobster celebrating Mother’s Day with his family. Sometime between 2:00 p.m. and 3:00 p.m. on that date, the plaintiff exited the booth in which he was seated to head to the restroom. The plaintiff walked down a carpeted ramp, and stepped onto a tile floor, which was halfway between his booth and the restroom. The tile floor area was adjacent to a bar and faced the entrance to the kitchen. The plaintiff was looking straight ahead when he stepped onto the tiled area, and felt his foot slide after taking his second step. His foot slid along the tiled area for a distance of about five to ten steps before he fell. The plaintiff attested that he looked down upon initially sliding, upon which he noticed that the

floor was greasy. After his fall, the plaintiff asserted that he observed footprints in the grease, which he believed were generated by the restaurant staff as they walked through the area.

In his complaint, the plaintiff alleged that Red Lobster owned, operated, maintained, and controlled the restaurant. He also alleged that Red Lobster's employees knew of and created the dangerous and defective condition on the floor that caused him to fall. In this regard, the plaintiff further asserted that Red Lobster had actual and constructive notice of the condition that caused the floor to become or remain unmaintained and slippery, and failed to remedy the condition. In his bill of particulars, the plaintiff alleged that Red Lobster had a duty to maintain a clean and safe restaurant environment, and breached that duty by negligently creating a dangerous condition. He further averred in the bill of particulars that he would have been able to avoid his fall had Red Lobster diligently eliminated the slick substance from the tile floor or posted a caution/wet floor sign. Finally, he alleged that, due to Red Lobster's negligence, he suffered several injuries and damages.

In support of its motion, Red Lobster submitted the pleadings, the note of issue, a statement of undisputed facts, the deposition transcripts of the plaintiff and Orialis Batista, who was the supervisor on duty on the day of the incident, photographs of the incident location, and affidavits from Dennis Bautista, who was the server for the area in which the plaintiff was seated, Taniqua Tobias, who was the culinary manager on duty that day, and Aurinelis Infante, who is one of Red Lobster's litigation paralegals. In opposition, the plaintiff submitted the pleadings, his own deposition transcript and that of Batista, photographs of the incident location, and an accident report. He also submitted the guest count and employee attendance log for that day, Red Lobster's sanitation manual, and an affidavit from another of Red Lobster's litigation paralegals, Michelle Carr.

Red Lobster argued that there were no issues of material fact, and that its statement of undisputed material facts should be deemed admitted since the plaintiff failed to respond with a separate counter statement of facts pursuant to 22 NYCRR 202.8-g(c). 22 NYCRR 202.8-g,

however, was amended on July 6, 2022 to make the movant's submission of a statement of undisputed facts optional, unless the court otherwise directs (see 22 NYCRR 202.8-g[a]). This court did not direct the parties to submit statements of undisputed facts or counter statements of fact. Even if the court were to apply the provisions of 22 NYCRR 202.8-g(c), and consider the facts set forth in the defendant's statement to be admitted, that rule does not require the court to deem statements of opinion to be unrebutted (see *Whitesides v Randolph*, 2022 NY Slip Op 30841[U], \*15, 2022 NY Misc LEXIS 1283, \*26 [Sup Ct, N.Y. County, Mar. 11, 2022] [Kelley, J.]). In any event, the plaintiff included a section for his counter statement of facts within his opposition papers, which the court has considered.

Relying on its submissions, Red Lobster argued that it did not create or have actual or constructive notice of the alleged condition at issue, since several employees walked through the accident area shortly before the accident, and did not observe any spills, stickiness, or debris. Specifically, Red Lobster argued that the plaintiff's server, Dennis Bautista, walked through the area no more than three minutes before the accident, while the manager and supervisor walked through the area no more than 10 minutes before the accident, and that none of them noticed or observed the condition that the plaintiff described. Red Lobster also argued that the plaintiff was not aware of what caused the allegedly greasy floor, nor had Red Lobster received any complaints about the area prior to the accident.

In opposition, the plaintiff argued that it could be inferred that Red Lobster's staff created the dangerous condition since its menu is "grease filled," and waiters were bringing dishes in and out of the kitchen that were "swishing" with butter. The plaintiff also contended that it could be inferred that the dangerous condition may have been created from the transportation by Red Lobster employees of trash from the kitchen, over the tile floor, and to the outdoor trash collection area at certain unascertained and unspecified times. Finally, the plaintiff argued that it could be inferred that Red Lobster created and had constructive notice of the dangerous

condition, since it failed to undertake its daily, thorough scrubbing of the floors, as required by its sanitation manual.

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]).

Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]). “The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a movant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in its opponent's case. It must affirmatively demonstrate the merit of its claim or defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

To prevail in this action, the plaintiff ultimately must establish that Red Lobster owed him a duty to provide reasonably safe premises, and that it breached that duty by creating a dangerous condition, or permitting the condition to remain despite having actual or constructive notice of the condition for a period of time sufficient for them to remedy it (*see Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404 [1st Dept 2016]). Constructive notice of a dangerous condition may be established with proof that the condition was visible and apparent for a sufficient period of time so that the defendants had an opportunity to correct it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]). On a motion for summary judgment, since a defendant may not merely show that the plaintiff will be unable to prove the existence of constructive notice, that is, it may not simply point to potential gaps in the plaintiff's proof, it rather has the burden of establishing the absence of constructive notice (*see Fitzgerald v Marriot Intl., Inc.*, 2016 NY Slip Op 30881[U], 2016 NY Misc LEXIS 1814 [Sup Ct, N.Y. County, May 13, 2016]). Nonetheless, once a defendant has made a prima facie showing that it did not create a dangerous condition or have actual or constructive notice thereof, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]; *see Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 [1st Dept 2004]).

A defendant moving for summary judgment on the ground that it did not have constructive notice of a dangerous condition may satisfy its burden in this regard by showing that it recently inspected or observed the area in question, or repeatedly inspected the area for a sufficient period of time leading up to the accident (*see Maynard-Keeler v New York City Housing Auth.*, 161 AD3d 470, 470-471 [1st Dept 2018]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420, 420 [1st Dept 2014]). In other words, defendants must offer "specific evidence as to their activities on

the day of the accident, including evidence indicating the last time the [area] was inspected or maintained before plaintiff fell" (*Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008]).

Here, Red Lobster established, prima facie, that it did not create the alleged dangerous condition, and that it did not have actual or constructive notice of the condition. In opposition, the plaintiff failed to raise a triable issue of fact.

Red Lobster adduced testimony from several of its employees that they walked through the area frequently, inspected or observed the tiled area just minutes before the incident, and did not observe or notice grease on the floor. While the plaintiff infers that the tile floor may have been greasy because of the menu items or because trash may have been transported through that area, these inferences are purely speculative and not established by any facts in the record (*cf. Eisenberg v Lunch Boy, Inc.*, 256 AD2d 93 [1st Dept 1998] [deposition testimony of defendant's manager that persons making daily deliveries of cooking oils, and kitchen employees working with cooking oils, both commonly traversed the customer area of the restaurant, raised triable issue of fact as to constructive notice]). In the absence of any other proof, it is equally probable that the allegedly greasy condition was created only a minute prior to the accident and by persons other than Red Lobster employees, including patrons at the adjacent bar. The plaintiff himself testified that he did not know what caused the greasy or slippery substance to collect on the floor in that area, nor did he see the grease on the floor before he started sliding. In fact, there is no proof that the condition was even visible to the naked eye of a person walking across it, but was visible only to someone who was looking closely at floor level. Moreover, even if the condition had been caused by unknown persons tracking slippery substances across the tile floor, the plaintiff has not shown that Red Lobster had a sufficient opportunity to remedy the condition prior to his fall.

The court notes that, while the plaintiff asserted that Tobias's affidavit contradicted the accident report with respect to whether she was present on the day of the accident, Red Lobster submitted a copy of its scheduling software, showing that Tobias was scheduled to work on the

day of the accident. Moreover, Red Lobster explained that Tobias, as a manager, was not required to clock in and out for her work shift. In any event, regardless of Tobias's presence that day, both Dennis Bautista's affidavit and Orialis Batista's deposition testimony established, prima facie, that the area in question was inspected or observed by Red Lobster personnel just minutes before the accident and was not in a wet, greasy, or otherwise slippery condition at that time.

Finally, the court notes that the plaintiff asserted that no cleaning of the restaurant actually took place on the day of the accident, since Red Lobster admitted that it had no cleaning records for the day in question. Indeed, litigation paralegal Carr attested in June 2022 that Red Lobster did not have cleaning records for the restaurant for May 13, 2018. Orialis Batista, however, testified that the managers who opened and closed the restaurant each day had drafted cleaning records pursuant to a printed form, in which they memorialized their walks through the restaurant, and made sure everything was clean and organized. Orialis Batista further testified that, while she did not know how many times this occurred on each day, she knew that it occurred on every day. Thus, the court concludes that, while Red Lobster may not be in possession of cleaning records specific to the day of the accident, it nonetheless established, prima facie, that its employees cleaned the subject area on the date of the accident, since it described its cleaning schedule and adduced evidence that it adhered to that schedule on the date of the accident (*see Liranzo v Apartment Co., LLC*, 148 AD3d 589, 589 [1st Dept 2017]). In opposition to that showing, the plaintiff failed to raise a triable issue of fact regarding whether Red Lobster had constructive notice of a dangerous condition by failing to clean the restaurant at all on the date of the accident.

Hence, summary judgment must be awarded to Red Lobster dismissing the complaint insofar as asserted against it. Since the court previously dismissed the complaint against Golden Gate Capital, Inc., the only other defendant, the action must be marked disposed.

In light of the foregoing, it is

ORDERED that the motion of the defendant Red Lobster Hospitality, LLC, for summary judgment dismissing the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against Red Lobster Hospitality, LLC; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Red Lobster Hospitality, LLC; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Red Lobster Hospitality, LLC.

This constitutes the Decision and Order of the court.

11/21/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: