SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

----------X

NANCY JAIME

Plaintiff,

- v -

YEMSANALI GROCERY INC.,

Defendant.

----------X

INDEX NO. 159318/2020

MOTION DATE 04/21/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

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

Upon the foregoing documents, and after oral argument on November 11, 2023 with Tedd Kessler, Esq. appearing for Plaintiff Nancy Jamie ("Plaintiff") and Gregory Jakubow appearing for Defendant Yemsanali Grocery Inc. ("Defendant"), Defendant's motion for an Order granting summary judgment in favor of Defendant and against Plaintiff, and dismissing Plaintiff's claims in their entirety, is granted.

I. Background

On November 2, 2020 Plaintiff commenced the underlying action by filing a Verified Complaint (NYSCEF Doc. 1) to recover for personal injuries allegedly sustained on November 6, 2018 when Plaintiff slipped and fell at Defendant's store at 881 10th Avenue, New York, New York 10019 (the "Premises") during a rain storm.

On April 17, 2023, Defendant filed the instant motion seeking an Order granting summary judgment in favor of Defendant and against Plaintiff, and dismissing Plaintiff's Complaint (NYSCEF Doc. 1) on the ground that Plaintiff did not have actual or constructive notice of an alleged dangerous or defective condition at the Premises (NYSCEF Doc. 47). In opposition to

Defendant's motion, Plaintiff contends that summary judgment may not be granted because (1) the lack of mats on the floor of the Premises raises genuine issues of material fact regarding Defendant's negligence; and (2) Plaintiff's claims "that rain water tracked into the store all day created a reoccurring condition of which defendant had constructive notice" (NYSCEF Doc. 60 at ¶¶ 28-29).

II. Discussion

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (*see e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

It is well settled that "[u]nder the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended" (*Lewis v 311 Realty, LLC*, 201 AD3d 591, 591-92 [1st Dept 2022]). Further, "there is no liability for a plaintiff's injuries resulting from a fall on accumulated snow, rain, ice, sleet or hail until after the storm has ended, so as to allow the defendants a reasonable period of time to clean the area" (*Solazzo v New York City Tr.*

Auth., 21 AD3d 735, 737 [1st Dept 2005]; *see also Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345-46 [1st Dept 2002] holding that it is not until "the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation" that the landowner's duty resumes).

Moreover, the First Department has held that a defendant is "not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in melting snow" (*Kovelsky v City Univ.*, 221 AD2d 234, 234-235 [1st Dept 1995]). Further "Defendants should not be given the impossible burden of covering all areas that may be touched by rain or snow during a continuously stormy period. This is especially true where…most of the water on the floor was deposited there by persons entering from the street" (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 737 [1st Dept 2005]). Additionally, it is well established that where a plaintiff concedes that there was a storm in progress at the time of a slip and fall accident, the burden shifts to the plaintiff "to demonstrate the existence of a triable issue of fact as to whether [the defendant] created or exacerbated the hazardous condition" (*Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017).

Here, Plaintiff stated in her deposition that it was raining on the day of the accident (NYSCEF Doc. 55 at 25) and that the floor of the Premises was wet with rain water (*Id.* at 39). When asked at her deposition where the rain water came from, Plaintiff testified "[m]aybe people walking in the store. I don't know" (*Id.*). Further, Plaintiff testified that it was raining at the time of her accident (*Id.* at 77). Plaintiff's counsel contends that "[o]n the day of the accident it had been raining all day," and argues that "the continuation of the rain and the tracking in of water all day and every time it rains, created a recurring condition" (NYSCEF Doc. 60 at ¶¶ 19-20). As it is undisputed that it was raining throughout the day of Plaintiff's injury and that the water

accumulating on the floor that caused Plaintiff's injury was due to the ongoing rain outside, Defendant has satisfied its *prima facie* burden of demonstrating the applicability of the Storm in Progress Doctrine, and the burden shifts to Plaintiff to show a triable issue of fact as to whether Defendant created or exacerbated the condition (*see Micheler v Gush*, 256 AD2d 1051 [1st Dept 1998] holding that the storm in progress defense applied where Plaintiff slipped due to ongoing "drizzling rain" coupled with falling temperatures).

In light of the foregoing, finding no allegation or evidence in the record that Defendant created or exacerbated the wet floor condition, the Court finds that Defendant had no duty to remedy any dangerous condition caused by the ongoing storm. As such, Defendant's motion for summary judgment is granted and Plaintiff's Complaint is dismissed.

Accordingly, it is herby,

ORDERED that Defendant Yemsanali Grocery Inc.'s motion for an Order granting summary judgment in favor of Defendant and against Plaintiff Nancy Jamie, and dismissing Plaintiff's claims in their entirety is granted; and it is further

ORDERED that within ten days of entry, counsel for Defendant Yemsanali Grocery Inc. shall serve a copy of this Decision and order on Plaintiff at her last known address; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/29/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	x	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	x	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE