

<b>Napolitano v U&amp;A Riverhead Realty, LLC</b>
2024 NY Slip Op 35169(U)
August 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 612222/2020
Judge: Kathy G. Bergmann
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SHORT FORM ORDER

INDEX No. 612222/2020  
CAL. No. 202301665OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. KATHY G. BERGMANN  
Justice of the Supreme Court

MOTION DATE 3/6/24  
ADJ. DATE 5/7/24  
Mot. Seq. # 001 MD

<p>CONSTANCE NAPOLITANO,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>U&amp;A RIVERHEAD REALTY, LLC, TSAA MANAGEMENT CORP. and MOTIVA ENTERPRISES, LLC,</p> <p style="text-align: right;">Defendants.</p>	<p>PALERMO LAW, P.L.L.C. Attorney for Plaintiff 1300 Veterans Memorial Highway, Suite 320 Hauppauge, New York 11788</p> <p>PILLINGER MILLER &amp; TARALLO Attorney for Defendants U&amp;A Riverhead Realty and TSAA Management Corp. 555 Taxter Road, 5<sup>th</sup> Floor Elmsford, New York 10523</p>
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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants U&A Riverhead Realty, LLC and TSAA Management Corp., filed on February 12, 2024; Answering Affidavits and supporting papers \_\_; Replying Affidavits and supporting papers \_\_\_\_; Other \_\_; it is

**ORDERED** that defendants’ motion for summary judgment dismissing the complaint is denied.

Plaintiff Constance Napolitano commenced this action to recover damages for personal injuries allegedly sustained as a result of a slip-and-fall that occurred on November 4, 2019, at a gas station located at 7 Peconic Avenue, Riverhead. The subject property is owned by defendant U&A Riverhead Realty, LLC, and operated by defendant TSAA Management Corp. Plaintiff alleges that defendants were negligent in failing to maintain the premises in a reasonably safe condition. The Court notes that the parties executed a stipulation, dated August 10, 2021, discontinuing this action against defendant Motiva Enterprises, LLC.

Defendants now move for summary judgment on the grounds that plaintiff could not identify what caused her fall, that the alleged dangerous condition was trivial and not actionable as a matter of law, and that plaintiff’s testimony regarding her accident was incredible. In support of their motion, defendants submit, among other things, the pleadings, photographs, and transcripts of the deposition

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testimony of plaintiff, her husband Richard Napolitano, and Ahmer Ilahi, member of defendant U&A Riverhead Realty, LLC, and vice president of defendant TSAA Management Corp. Defendants also submit an affidavit of Ahmer Ilahi. Plaintiff submits no papers in opposition.

Plaintiff testified that on November 4, 2019, she stopped at defendant TSAA Management Corp.'s gas station to put air in the tires of the vehicle she was operating after receiving a low air pressure alert. After filling the tires, she began to walk around her vehicle to visually inspect the tires. Plaintiff avers that as she was walking along the passenger side of her vehicle, she felt her right foot come into contact with a greasy spot on the ground, which caused her foot to slide out from under her, and caused her to fall to the ground. She testified that as she sat on the ground, she observed a circular, wet, greasy liquid spot on the ground, which she estimated to be about eight inches in diameter. Eventually, an employee for the gas station approached her and assisted her up from the ground and into her vehicle. She testified that after the fall she called her husband who arrived at the gas station and thereafter drove her to a local hospital. Before leaving the gas station together, plaintiff pointed out the greasy spot to her husband, identifying it as what caused her fall, which her husband then photographed with his cellular phone.

Ahmer Ilahi, member of defendant U&A Riverhead Realty, LLC, and vice president of defendant TSAA Management Corp., testified that he did not witness plaintiff's alleged accident. He states that when he arrived at the gas station on the date of the alleged accident, he witnessed plaintiff on the ground next to her vehicle and asked her if she needed assistance. Plaintiff indicated to him that she had fallen and pointed to a spot on the ground where the fall occurred. Mr. Ilahi noticed an "old motor oil spill" where plaintiff pointed to. He testified that the spot was irregular in shape, about the size of the palm of his hand, and had been there for a while. When asked what he considered "a while," he testified that he was not an expert in motor oil and could not give a time period for which the spot had been on the ground. By his written affidavit, Mr. Ilahi avers that he photographed the spot indicated by the plaintiff and that he "stepped onto the alleged stain to confirm it was dry and not slippery based upon plaintiff advising that she had slipped. This allowed [him] to confirm, consistent with the photograph, that it was dry and not slippery, and indeed, had the same surface consistency and texture as the balance of the gas station lot."

Plaintiff's husband, Richard Napolitano, testified that he received a telephone call from the plaintiff on November 4, 2019 indicating that she had slipped and fallen at the gas station. Mr. Napolitano arrived at the gas station and found his wife sitting in the back seat of her vehicle. He testified that she indicated to him that she "had slipped on something and flew up in the air and landed on her backside." She pointed to where she had fallen and told him that she had slipped near "that small puddle." When asked about the dimensions of the puddle, Mr. Napolitano testified that "it was about the size of a personal pizza. Maybe a little smaller. It had some depth to it. It was brownish green. It had consistency. It appeared thicker than water certainly. And I took a picture of it." He did not recall whether he had touched the puddle or not. Mr. Napolitano also testified that he had taken a picture of the jeans plaintiff had been wearing on the date of the accident which contained a stain on them from her fall.

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The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316).

In a slip-and-fall case an “owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition” (*Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944, 40 NYS3d 464, 465-66 [2d Dept 2016], quoting *Farrar v Teicholz*, 173 AD2d 674, 676, 570 NYS2d 329 [2d Dept 1991]). A defendant in a slip-and-fall case moving for summary judgment dismissing the complaint against it must make an initial prima facie showing that it did not create the hazardous condition that allegedly caused the fall, and that it did not have actual or constructive notice of its existence (*see Yarosh v Oceana Holding Corp.*, 172 AD3d 1142, 101 NYS3d 72 [2d Dept 2019]). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Lyman v Cablevision of Ossining L.P.*, 215 AD3d 945, 188 NYS3d 576 [2d Dept 2023]; *Nelson v AMF Bowling Ctrs., Inc.*, 206 AD3d 929, 170 NYS3d 595 [2d Dept 2022]; *Buffalino v XSport Fitness*, 202 AD3d 902, 163 NYS3d 208 [2d Dept 2022]). To meet its prima facie burden on the issue of constructive notice, the moving defendant must offer evidence as to when the area at issue was last cleaned or inspected before the accident (*see Malloy v Montefiore Med. Ctr.*, 183 AD3d 811, 122 NYS3d 532 [2d Dept 2020]; *Rodriguez v New York Hous. Auth.*, 169 AD3d 947, 94 NYS3d 318 [2d Dept 2019]; *Quinones v Starret City, Inc.*, 163 AD3d 1020, 81 NYS3d 184 [2d Dept 2018]). “Reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question” (*Quinones v Starret City, Inc.*, 163 AD3d 1020, 1021-1022, 81 NYS3d 184, quoting *Rong Wen Wu v Arniotes*, 149 AD3d 786, 787, 50 NYS3d 563 [2d Dept 2017]; *Eksarko v Associated Supermarket*, 155 AD3d 826, 63 NYS3d 723 [2d Dept 2017]).

Defendants failed to demonstrate their entitlement to summary judgment as a matter of law (*see Ansari v MB Hamptons, LLC*, 137 AD3d 1174, 28 NYS3d 397 [2d Dept 2016]; *Milorava v Lord & Taylor Holdings, LLC*, 133 AD3d 724, 20 NYS3d 398 [2d Dept 2015]; *Lorenzo v 7201 Owners Corp.*, 133 AD3d 641, 20 NYS3d 123 [2d Dept 2015]). “A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff’s case” (*Lorenzo v 7201 Owners Corp.*, 133 AD3d 641, 641, 20 NYS3d 123, citing *Walinchus v Lubek*, 124

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AD3d 631, 1 NYS3d 255 [2d Dept 2015]). Defendants failed to eliminate issues of fact as to whether they had constructive notice of the alleged dangerous condition on the property at the time of the alleged accident. Ahmer Ilahi testified that he was not present at the subject property at the time of plaintiff's accident, referred only to general maintenance and cleaning practices, and provided no evidence of specific cleaning or inspection of the area in question on the day of the alleged accident. Since defendants did not submit evidence regarding any specific inspection or cleaning of the area on the date of the accident, they failed to establish that they did not have constructive notice of the alleged dangerous condition (*see Ansari v MB Hamptons, LLC*, 137 AD3d 1174, 28 NYS3d 397; *Milorava v Lord & Taylor Holdings, LLC*, 133 Ad3d 724, 20 NYS3d 398).

A defendant can demonstrate its prima facie entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of the fall without engaging in speculation (*see Croshier v New Horizons Resources, Inc.*, 185 AD3d 780, 127 NYS3d 537 [2d Dept 2020]; *Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]). A plaintiff's inability to identify the cause of the fall is fatal to the cause of action, as a finding that a defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see Padilla v CVS Pharm.*, 175 AD3d 584, 107 NYS3d 428 [2d Dept 2019]; *Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 103 NYS3d 128; *Eisenstein v Block 5298, Inc.*, 164 AD3d 1304, 83 NYS3d 6 [2d Dept 2018]).

Defendants' submissions failed to establish their entitlement to judgment as a matter of law on the ground that plaintiff could not identify the cause of her fall (*see Burrus v Douglaston Realty Mgt. Corp.*, 175 AD3d 461, 106 NYS3d 329 [2d Dept 2019]; *Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 103 NYS3d 128). In support of their motion, defendants submitted the deposition transcripts of the testimony of the plaintiff, her husband Richard Napolitano, and Ahmer Ilahi. Plaintiff testified that her right foot come into contact with a greasy spot on the ground, which caused her foot to slide out from under her, and caused her to fall to the ground. She further testified that she observed a circular, wet, greasy liquid spot on the ground. She also testified that she pointed out the greasy spot to her husband, identifying it as what caused her fall.

A defendant seeking to dismiss a complaint on the basis of the trivial defect doctrine "must make a prima facie showing that (1) the defect is, under the circumstances, physically insignificant, and (2) that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 996, 103 NYS3d 128; *see Richards v Starbucks Corp.*, 192 AD3d 1152, 141 NYS3d 346 [2d Dept 2021]; *Acevedo v City of Yonkers*, 185 AD3d 762, 125 NYS3d 302 [2d Dept 2020]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978, 665 NYS2d 615 [1997], quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274 [1952]; *see Richards v Starbucks Corp.*, 192 AD3d 1152, 141 NYS3d 346). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615). Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable

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(see *Aguayo v New York City Hous. Auth.*, 71 AD3d 926, 897 NYS2d 239 [2d Dept 2010]; *Fisher v JRMR Realty Corp.*, 63 AD3d 677, 880 NYS2d 187 [2d Dept 2009]; *Outlaw v Citibank, N.A.*, 35 AD3d 564, 826 NYS2d 642 [2d Dept 2006]).

Defendants failed to make a prima facie showing that the alleged defect was trivial as a matter of law and, thus, not actionable (see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802 [2015]; *Nicotra v Giunta's Meat Farms, Inc.*, 214 AD3d 665, 182 NYS3d 911 [2d Dept 2023]; *Green v Price Chopper, Inc.*, 164 AD3d 478, 82 NYS3d 500 [2d Dept 2018]). As discussed previously, the evidence submitted in support of the motion included the plaintiff's description of the greasy ground surface which caused her to fall, as well as the testimony of her husband Richard Napolitano, which described the brownish green puddle that was about the size of a personal pizza.

Finally, as to the argument that plaintiff's testimony lacks credibility and should be disregarded, "the court's function on a motion for summary judgment is not to resolve issues of fact or to determine credibility, but merely to determine whether such issues exist" (*Moonilal v Roman Catholic Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593, 206 NYS3d 686 [2d Dept 2024]; see *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: Aug 13, 2024

Kathy G. Bergmann  
J.S.C.  
**HON. KATHY G. BERGMANN**

           FINAL DISPOSITION        X   NON-FINAL DISPOSITION