SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LETICIA M. RAMIREZ** **PART** **29**

Justice

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BARBARA BORKIN,

Plaintiff,

- v -

B&H RESTAURANT LLC D/B/A LEYLA,

Defendant.

INDEX NO. 160725/2022

MOTION DATE 05/01/2025, 05/01/2025, 05/16/2025

MOTION SEQ. NO. 001 001 002

DECISION + ORDER ON MOTION

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B&H RESTAURANT LLC D/B/A LEYLA,

Third-Party Plaintiff,

-against-

JANET REICHMAN,

Third-Party Defendant.

Third-Party
Index No. 595877/2024

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 62, 63, 64, 65, 66, 67, 69

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 62, 63, 64, 65, 66, 67, 69

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 68

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

Under motion sequence #1, plaintiff moves pursuant to *CPLR § 3212* for partial summary judgment on the issue of liability against the defendant (hereinafter "Leyla") and pursuant to *CPLR § 3403(a)(4)* to place this action on the trial preference calendar. Under motion sequence #2, third-party defendant (hereinafter "Ms. Reichman") moves pursuant to *CPLR § 3212* for summary judgment, dismissing all claims asserted against her in the third-party complaint. Opposition has been filed by the respective parties, and this Court consolidates the motions for joint disposal in this Decision/Order.

Plaintiff commenced this action on December 15, 2022, to recover for personal injuries allegedly sustained on November 4, 2022, when she slipped and fell upon a slippery and/or dangerous condition existing at 108 E. 74th Street, New York 10023. After issue was joined on August 1, 2023, a preliminary conference was held on March 4, 2024, and a compliance conference on August 21, 2024 (NYSCEF Docs. #8 and 11). On September 6, 2024, Leyla commenced a third-party action against Ms. Reichman, asserting claims for common-law indemnification and contribution (NYSCEF Doc. #12). Ms. Reichman filed her

Answer to the third-party complaint on November 25, 2024 (NYSCEF Doc. #16). Thereafter, a status conference was held on February 5, 2025, and the Note of Issue was filed by plaintiff on March 28, 2025 (NYSCEF Docs. #24 and 25).

A. *Plaintiff's Motion for Summary Judgment*

Plaintiff argues that she is entitled to summary judgment on the issue of liability because Leyla owed her a duty of reasonable care and failed to properly remedy the dangerous condition that caused her fall after Leyla had actual notice of the condition.

In opposition, Leyla argues that issues of material fact remain precluding summary judgment in favor of plaintiff. Specifically, Leyla contends that issues of fact remain as to what was on the floor after the wine glass fell (whether there was wine on the floor and whether any glass remained on the floor after its employees cleaned the area). Leyla further argues that, because the video footage of the area where plaintiff fell does not show any liquid or glass on the floor after it was cleaned up and no photographs were taken of the location of plaintiff's fall, plaintiff's aversion as to what caused her fall are merely speculative. Lastly, Leyla argues that, if plaintiff fell on something other than anything stemming from the shattered glass, Leyla did not create said condition nor had notice of such hazard prior to plaintiff's accident.

In reply, plaintiff argues that she has established, through Leyla's own witness, that it was negligent in failing to properly cleanup the floor when the employees failed to mop the floor to remove small pieces of glass or to touch the floor to determine if any glass or liquid was left. Plaintiff further contends that she has established what caused her accident when Ms. Reichman's affidavit reveals that she saw plaintiff "step on one or more of the glass pieces" before slipping and falling and that plaintiff testified that she found little pieces of glass in her sneaker. Finally, plaintiff argues that, even though she testified she slipped on a "mixture" that included wine from the glass while Ms. Reichman remembered her glass as being empty, this does not present a material issue of fact because plaintiff is not required to prove precisely which component on the defendant's floor caused her accident. Rather, plaintiff contends that she is entitled to summary judgment because she has demonstrated that her accident was proximately caused by the defendant's employee's failure to properly cleanup the hazardous condition that caused her accident after the defendant had notice of it.

Plaintiff appeared for a deposition on July 24, 2024, where she recalled her accident occurred on November 4, 2022, at approximately 9:30pm when she was dining in the restaurant named "Leyla" (NYSCEF Doc. #50, 38:23-39-7; 39:11-19). She was with her friend, Ms. Reichman, when the accident occurred (*Id.* 41:8-11; 17-20). She arrived at the restaurant at 7:30pm and was seated at a table located in the back on the left-hand side of the restaurant (*Id.* 46:4-6; 50:21-51:9). Plaintiff and Ms. Reichman ordered a bottle of white wine, a salad and some mezze platters (*Id.* 51:21-23).

Plaintiff recalls that around 9:30pm, Ms. Reichman moved her hand, hitting her wine glass and causing it to fall and shatter (*Id.* 52:8-15; 52:23-25). Plaintiff recalls that Ms. Reichman's glass was half full when it fell (*Id.* 52:16-22). After the glass shattered, the restaurant staff swept the glass with a broom and cleaned the table with a rag (*Id.* 53:2-12). As the staff cleaned, plaintiff pointed to the area where she saw glass (*Id.* 53:16-20). After the cleaning was completed, plaintiff and Ms. Reichman remained at the table talking and finishing their dinner for half an hour to forty-five minutes (*Id.* 55:4-9 54:23-55:3). Thereafter, plaintiff paid the check, got her jacket, and got up to go. (*Id.* 57:19-24). As she started walking, she took one step, and her right foot came out from under her, causing her to slip and fall to the floor (*Id.* 59:8-17). When plaintiff fell, she felt the floor tacky and very slippery, as she braced herself with her right hand (*Id.* 58:6-14; 60:16-20). When asked to explain what she meant by "tacky," plaintiff stated that this meant the floor was "sticky and it was slippery" (*Id.* 60:23-61:2). When asked if she knew what substance she slipped on, plaintiff stated that she assumed it was a "mixture with food", but she did not see what

caused her fall because the restaurant had dim lighting (*Id.* 60:12-15; 61:3-8). Plaintiff later found pieces of glass in her sneaker (*Id.* 65:25-66:9).

On March 27, 2025, Nusret Can Pekcetin's deposition was taken. Mr. Pekcetin was the waiter serving plaintiff's table at Leyla on the date of the accident (NYSCEF Doc. #35, 11:12-15; 15:12-18; 23:17-24:16). Mr. Pekcetin stated that during the cleanup process, he double and triple checked the floor and asked plaintiff and Ms. Reichman if they saw any remnants on the floor (*Id.*). When asked if plaintiff and Ms. Reichman assisted in pointing out the shattered glass on the floor, Mr. Pekcetin stated that they tried to, but that there was nothing left after he had cleaned up the area (*Id.* 25:17-23).

During his deposition, Mr. Pekcetin was shown three videos of the restaurant from the date of plaintiff's accident (*Id.* 31:18-51:9). Mr. Pekcetin stated that video No. 2 depicted the table where plaintiff and Ms. Reichman dined (*Id.* 33:16-21). Mr. Pekcetin identified the video as demonstrating the moment Ms. Reichman's glass fell to the floor and when he comes over to the table to perform the cleanup with two other staff members (*Id.* 34:12-25; 36:17-37:6; 38:21). According to Mr. Pekcetin's deposition, the video depicts the staff members using a broom and a dustpan to clean up the floor (*Id.* 39:12-40:6). The video further depicts the moment when either plaintiff or Ms. Reichman point to floor to direct the staff where glass or remnants remain (*Id.* 41:2-9). After the cleanup is completed, Mr. Pekcetin agrees that the video does not depict anyone checking the condition of the floor with their hands (*Id.* 50:14-20). Mr. Pekcetin was then shown video No. 3 which depicts plaintiff's fall (*Id.* 51:14-16). Mr. Pekcetin agrees that the video shows that plaintiff's accident occurred when plaintiff's foot slid along the area where the cleanup was performed (*Id.* 51:17-52:14).

Upon examination by Ms. Reichman's attorney, Mr. Pekcetin stated that, after the cleanup, the video did not depict anyone having any difficulty walking in the area where the glass fell (*Id.* 65:7-239). Mr. Pekcetin also stated that he agrees it would have been good practice to put his hand down to the floor after the cleanup to ensure nothing remained on the floor (*Id.* 59:4-10).

The parties have submitted a 79-minute video depicting plaintiff's dining experience at Leyla (NYSCEF Doc. #55). A review of the video demonstrates that plaintiff's and Ms. Reichman's dining experience commenced at approximately 8:43pm with plaintiff's accident occurring at approximately 10:02pm. The video revealed plaintiff and Ms. Reichman ordered food and a bottle of white wine. At approximately 9:29pm, Ms. Reichman knocked her glass over, causing it to fall and shatter on the floor. This occurred when Ms. Reichman reached over with her right hand to grab food from plaintiff's dish. A careful review of the video reveals that Ms. Reichman's glass was empty when it fell. Specifically, at 9:28:53pm, the video demonstrates Ms. Reichman drinking from her glass, tilting it back and appearing to empty it. Eighteen seconds later at 9:29:11pm, the video demonstrates Ms. Reichman reaching for food from plaintiff's dish and thereafter hitting her glass at 9:29:15pm as her arm returns to her side of the table.

Sixteen seconds later, at 9:29:27pm, the video shows Mr. Pekcetin coming to the table to speak to plaintiff and Ms. Reichman. Thereafter, at about 9:29:42pm, two staff members came over to the table to clean up the floor. One of them uses a broom and dustpan while the other assists by moving the pieces of glass either by hand or foot. Next, the video demonstrates when plaintiff and Ms. Reichman assist in the cleanup process by pointing to an area where the staff member should sweep. After the cleanup was completed at 9:31:26pm, plaintiff and Ms. Reichman continued dining until 10pm when they paid the check. Between the time the cleanup was completed and plaintiff's accident occurred, the video demonstrates that on 14 different instances someone walks right through the area where the glass shattered without any issues[1]. Lastly, at 10:02:32pm, the video reveals that Ms. Reichman stands and walks over the

[1] See video timestamps at 9:35:37, 9:38:06, 9:38:17, 9:39:32, 9:41:47, 9:52:14, 9:52:40, 9:53:58, 9:55:15, 9:56:58, 9:57:02, 9:59:12, 9:59:20, and 10:00:13.

area where her glass shattered and leaves from it without issues. Plaintiff's accident occurs at exactly 10:02:47pm when she steps with her right foot into the area where the glass shattered.

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (*Winegard v. New York Univ. Med. Ctf.*, 64 N.Y.2d 861 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Absent such prima facie showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1984]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Alvarez*, 68 N.Y2d. at 324).

It is well-settled that "[a] landowner must act as a reasonable [person] in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 386 N.Y.S.2d 564 [1976]. "Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (*Tagle v. Jakob*, 97 N.Y.2d 165, 168, 763 N.E.2d 107, 37 N.Y.S.2d 331 [2001].

Here, the Court finds that plaintiff has failed to make a *prima facie* showing that Leyla failed to maintain its premises in a reasonably safe manner. Specifically, the video demonstrates that Leyla's staff immediately cleaned up the area where Ms. Reichman's glass shattered, and that plaintiff and Ms. Reichman assisted in the cleanup process by pointing to areas where they apparently saw remnants. The video further shows that, after the cleanup process was completed and for the next 30-35 minutes, there were at least 14 different instances where someone passes right across the area where plaintiff later fell, without incident. Therefore, whether Leyla failed—despite its cleanup efforts—to maintain its premises in a reasonably safe manner by failing to do *more* (i.e., mop and/or touch the floor), under these circumstances, is an issue of fact for the jury.

Regarding Ms. Reichman's affidavit (NYSCEF Doc. #56) attesting that she "saw Plaintiff step on one or more … glass pieces," the Court finds it less than credible that Ms. Reichman was able to observe glass on the floor at a distance given that (i) Ms. Reichman did not report any glass on the floor when plaintiff accidentally dropped a lipstick at 9:52:25—which then rolled over the area where plaintiff later slips—before Ms. Reichman picked it up and handed it back to plaintiff. Ms. Reichman also did not report seeing any glass in the area where plaintiff slipped when she assisted the staff with the cleanup approximately twenty-two minutes earlier at 9:30:10 (See video at 9:30:10 demonstrating Ms. Reichman pointing and directing the staff to sweep an area where she sees glass next to plaintiff's chair).

Finally, the Court still finds that—notwithstanding plaintiff's deposition testimony that she found "little pieces of glass in [her] sneaker"—there is an issue of fact as to whether plaintiff's accident was proximately caused by something remaining on the floor after Leyla's cleanup or whether it was proximately caused by the shoes plaintiff was wearing. Specifically, the video demonstrates that (1) the staff swept the exact area where plaintiff's right foot slipped at the following timestamps: 9:29:45, 9:30:22, 9:30:52, 9:30:55, and 9:31:01; (2) after the cleanup, and on at least 14 different instances thereafter, someone walked through the same area or tile where plaintiff slipped without issues; (3) at 9:52:25, plaintiff accidentally dropped a lipstick, which rolled over the area where plaintiff later slips, and Ms. Reichman didn't report seeing anything (glass or otherwise) on the floor then; (4) at 10:02:15, the video shows Mr. Pekcetin leaving from the table and dragging his feet over the area where plaintiff slipped and he did not encounter nor report any issues with the floor; and finally (5) at 10:02:32, the video demonstrates Ms.

Reichman's right foot stepping and turning over on the exact area/tile where plaintiff slipped right before her accident occurs 15 seconds later at 10:02:47.

Lastly, plaintiff testified at her deposition, that she was wearing Converse sneakers that they were "a relatively new pair of sneakers" "with a rigid sole" (See Plaintiff's Deposition NYSCEF Doc. #53 at 47:12-24), Given the circumstances observed on the previously mentioned timestamps where (1) Leyla's employees swept the area where plaintiff fell, (2) both plaintiff and Ms. Reichman assisted in the cleanup by pointing to areas where they saw remnants, and (3) others, including Ms. Reichman, walked on and across the area where plaintiff slipped, there is an issue of fact whether plaintiff's accident was proximately caused due to a condition remaining on the floor after the cleanup and whether plaintiff's sneakers contributed to the slip and fall.

B. *Plaintiff's motion for trial preference*

CPLR 3403(a)(4) states that any action where the plaintiff has reached the age of seventy years is entitled to trial preference. Here, the plaintiff has sufficiently established through her NYS Driver's License that she has reached the age of seventy years (NYSCEF Doc. # 39). Thus, that portion of plaintiff's motion which seeks to place this action on the trial preference calendar must be granted.

C. *Third-Party Defendant's Motion for Summary Judgment*

Next, Ms. Reichman moves pursuant to *CPLR § 3212* for an Order granting her summary judgment dismissing the third-party complaint. She argues that, as a customer of Leyla's, she had no legal duty to clean or maintain the premises and therefore she could not be held liable for plaintiff's accident. Moreover, Ms. Reichman contends that Leyla's cleanup was a superseding intervening cause of plaintiff's accident and therefore the third-party complaint should also be dismissed on this ground.

In opposition, Leyla contends that it is undisputed that Ms. Reichman caused the condition that brought about plaintiff's accident. Leyla further contends that whether Leyla's employee's efforts to clean up the area were reasonable and thorough is a question of fact for the jury which should also preclude summary judgment in favor of Ms. Reichman. Finally, Leyla argues that its cleaning efforts are not a superseding intervening cause that relieves Ms. Reichman of liability because the necessity to clean the area was a natural and foreseeable consequence of the fallen glass.

In reply, Ms. Reichman argues that Leyla's failure to oppose her initial argument based on her lack of duty to clean up the premises constitutes a concession on Leyla's behalf. Additionally, Ms. Reichman argues that Leyla did not effectively oppose her argument that Leyla's efforts to clean up the area were a superseding intervening cause of plaintiff's accident, and, in any case, the caselaw cited by Leyla supports Ms. Reichman's position.

As stated in *Basso v. Miller*, *supra*, a landowner has the duty to maintain its premises in a reasonably safe manner in view of all of the circumstances. "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (*Powers v. 31 E. 31 LLC*, 123 A.D.3d 421, 998 N.Y.S.2d 23 [1st Dept. 2014] quoting *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 462 N.Y.S.2d 831 [1983]). "[L]iability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Powers*, supra, at 123 A.D.3d 423 quoting *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315, 414 N.E.2d 666, 434 N.Y.S2d 166 [1980]).

Here, Ms. Reichman has established her entitlement to summary judgment as a matter of law. Although she created the hazardous condition, the law requires Leyla to maintain its premises in a reasonably safe manner. Therefore, it is incumbent upon Leyla—after having acquired notice of the hazardous condition—to remedy the condition. Moreover, the Court finds that Leyla's actions to remedy the hazardous condition constituted an intervening superseding cause that so attenuated and precludes liability, if any, from reasonably being attributed to Ms. Reichman. Therefore, Ms. Reichman's motion seeking summary judgment dismissing the third-party complaint must be granted.

The Court has considered Leyla's arguments and has found them unpersuasive and the caselaw cited as inapposite to the case at bar (i.e., *Kush v. City of Buffalo,* 59 N.Y.2d 26, 449 N.E.2d 725 [1983] and *Williams v. Tennien*, 294 A.D.2d 841, 741 N.Y.S.2d 365 [4th Dept. 2002].

Accordingly,

ORDERED: Plaintiff's motion pursuant to *CPLR § 3212* under motion sequence #1 which seeks an Order granting plaintiff partial summary judgment on the issue of liability against the defendant/third-party plaintiff is hereby denied; and it is further

ORDERED: Plaintiff's motion pursuant to *CPLR § 3403(a)(4)* which seeks an Order placing this action in the trial preference calendar is granted; and it is further

ORDERED: Third-Party Defendant Janet Reichman's motion pursuant to *CPLR § 3212* under motion sequence #2 for an Order granting her summary judgment, dismissing all claims asserted against her in the third-party complaint, is hereby granted.

This constitutes the Decision and Order of this Court.

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9/ 11/2025
DATE

LETICIA M. RAMIREZ, J.S.C.

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