SHORT FORM ORDER

INDEX No. 622294/2018
CAL. No. 202200132OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 5/31/22
ADJ. DATE 7/12/22
Mot. Seq. # 001 MG; CASEDISP

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BESSIE WILLIAMS,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET COMPANY LLC, AND STOP & SHOP,

Defendants.

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BISOGNO & MEYERSON, LLP
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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, filed April 28, 2022; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, filed July 6, 2022; Replying Affidavits and supporting papers by defendant, filed July 11, 2022; Other ___; it is

ORDERED that the motion by defendant The Stop & Shop Supermarket Company LLC for summary judgment dismissing the complaint against them is granted.

Plaintiff commenced this action to recover damages for personal injuries sustained as a result of an alleged slip and fall occurring on August 12, 2018, at a supermarket in Holbrook operated by the defendant The Stop & Shop Supermarket Company LLC s/h/a The Stop & Shop Supermarket Company LLC, and Stop & Shop. Plaintiff alleges, inter alia, that while shopping at defendant's supermarket she slipped in a puddle of water and fell to the ground, and that defendant had both actual and constructive notice of this alleged hazardous condition.

Defendant now moves for summary judgment dismissing the complaint, arguing, among other things, that it neither created the alleged hazardous condition nor had constructive or actual notice of it. In support of the motion, defendant submits, inter alia, the pleadings, the deposition transcripts of plaintiff and Stop & Shop manager Matthew Mirabito, an affidavit of former Stop & Shop porter Steven Kwiatkowski, and a "Clean Sweep Map and Clean Sweep Report."

Plaintiff testified that on August 12, 2018, at about two o'clock in the afternoon she went shopping at the Stop & Shop in Holbrook with her neighbor, Star. Plaintiff stated that when she arrived at the store, the roads and sidewalks were wet because it had rained earlier in the day. Plaintiff testified that after shopping she checked out at the customer service register, and while walking between register 14 and 15 she slipped in a puddle of water on the floor and fell to the ground. Plaintiff stated that she did not see the water prior to her fall, but felt wetness when she landed on the ground. Plaintiff stated that a manager named Mike came to her aid, and helped her sit up. Plaintiff testified she did not see water leaking in the area where she fell, and that she did not know how the puddle of water came to be in that location, or how long it had been there prior to her fall. Plaintiff testified that she did not notify the defendant about the puddle prior to her fall, and that she did not know of anyone else notifying the defendant about the puddle either.

Steven Kwiatkowski stated in his affidavit that on August 12, 2018, he was employed at defendant's supermarket in Holbrook as a porter, and conducted "clean sweep" inspections of the supermarket that day. Mr. Kwiatkowski stated that a "clean sweep" inspection is an hourly inspection where an employee looks for, and remedies, hazardous conditions occurring in the store. Mr. Kwiatkowski stated that on that day during his shift he walked the entire store once per hour with a maintenance cart, looking for any obstacles, spills or hazards on the floor, and cleaned them up as required. Mr. Kwiatkowski stated that there were barcoded checkpoints throughout the store, which he would scan with a handheld scanner, and enter into the scanner that he inspected the location and what, if any, hazards were found, and whether they were remedied. Mr. Kwiatkowski stated he reviewed the log he created from August 12, 2018, and that he began such an inspection of the store's front end at 2:02 p.m., and according to his log a debris hazard was identified and remedied at "Entrance 1" at 2:03 p.m., and that he did not witness plaintiff's fall.

Matthew Mirabito, witness for defendant Stop & Shop, testified that on August 12, 2018, he was working at the Holbrook Stop & Shop supermarket as a non-perishable manager, but he did not observe plaintiff fall, nor was he aware of her fall until preparing for his deposition. Mr. Mirabito identified plaintiff's deposition Exhibit 1 as a map of the store used for the "clean sweep" program. Mr. Mirabito testified that the "clean sweep" program required that, once an hour, an associate would take a handheld computer scanner, along with a cart of cleaning supplies, and follow the map around the store looking for, and remedying, any hazards found such as spills, obstacles, or debris along the way. Mr. Mirabito testified that the associate doing the "clean sweep" would note in the handheld scanner all the locations inspected, the type of hazard found, if any, and whether identified hazards were remedied. Mr. Mirabito stated that the information from the scanner was logged in a report. Mr Mirabito stated that these "clean sweeps" took, on average, thirty to forty minutes to complete, and explained the hourly entries on the log produced as a deposition exhibit. Mr. Mirabito testified that based on the "clean sweep" log from August 12, 2018, employee Steven Kwiatkowski inspected the area where plaintiff allegedly fell at about 2:02 p.m., and did not note any hazard present in that area.

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.***, *supra*). 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.***, *supra*). 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.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In a trip-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 moving for summary judgment dismissing the complaint against them in a trip-and-fall case must make an initial prima facie showing that it did not create the hazard that allegedly caused the fall, and that it did not have actual or constructive notice of the hazard (*see* ***Yarosh v Oceana Holding Corp.***, 172 AD3d 1142, 1143, 101 NYS3d 72, 73 [2d Dept 2019]). A defendant is deemed to have constructive notice of a hazard or defect if it is visible and apparent, and existed long enough prior to the incident to allow defendant's employees an opportunity to discover and remedy the hazard (*see* ***Gordon v American Museum of Nat. History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). A defendant may not defeat an allegation of constructive notice through evidence of general cleaning and inspection practices, but evidence of specific inspection and maintenance activities surrounding the time of the accident may meet their burden (*see* ***Anderson v United Parcel Serv., Inc.***, 194 AD3d 675, 677, 148 NYS3d 230 [2d Dept 2021][internal citations omitted]; ***Velocci v Stop and Shop***, 188 AD3d 436, 439, 133 NYS3d 569, 572 [1st Dept 2020]).

Defendant's submission establishes its prima facie entitlement to summary judgment. Mr. Mirabito's testimony, and the affidavit of Mr. Kwiatkowski, are sufficient to establish defendant did not create or have constructive notice of a hazardous condition (*see* ***Yarosh v Oceana Holding Corp.***, *supra;* ***Arslan v Richmond N. Bellmore Realty, LLC***, 79 AD3d 950, 951, 913 NYS2d 328 [2d Dept 2010]). Their testimony establishes that specific cleaning and inspection practices took place at the location of plaintiff's alleged fall thirty minutes prior to its happening, and that no hazards were observed in that area. Defendant's evidence shows that the water puddle did not exist for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it, and plaintiff's testimony that she did not see the puddle before slipping on it is evidence that the condition was not visible and apparent (*see* ***Velocci v Stop and Shop***, *supra*; ***Hartley v Waldbaum, Inc.***, 69 AD3d 902, 903, 893 NYS2d 272, 273 [2d Dept 2010]; ***Dane v Taco Bell Corp.***, 297 AD2d 274, 274-75, 746 NYS2d 45, 46 [2d Dept 2002]). Plaintiff's deposition testimony that she did not observe the puddle of water, or know how long it was there, prior to slipping on it, that she did not see defendant create the puddle, and that neither she nor anyone else she knew of provided notice to defendant of the puddle's existence prior to her slipping on it establishes defendant did not have actual notice of the alleged hazard (*see* ***Dane v Taco Bell Corp.***, *supra*). The burden now shifts to plaintiff to produce evidence in admissible form sufficient to raise an issue of material fact requiring a trial (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In opposition, plaintiff's submission fails to raise material issues of fact as to whether defendants created, or had actual or constructive notice of, the alleged hazard (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff argues, among other things, that the thirty minutes between defendant's last inspection and her accident was a sufficient amount of time to create an issue of fact as to whether defendant had constructive notice of the water puddle, and that defendant failed in general to meet their prima facie burden. In support of this argument plaintiff submits, among other things, an attorney affirmation and accident report. The Court finds that plaintiff's submission is insufficient to raise a triable issue as to whether defendant had notice of the alleged dangerous condition on the floor (*see* ***Arslan v Richmond N. Bellmore Realty, LLC*** *supra*).

Accordingly, defendant's motion is granted.

Dated: August 31, 2022

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION