SHORT FORM ORDER

INDEX No. 42743-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 13 - SUFFOLK COUNTY

PRESENT:

Hon. MELVYN TANENBAUM
Justice of the Supreme Court

MOTION # 001 - **MD**
R/D: 03/11/2011
S/D: 06/07/2011

MARLENE GIUSTI,

Plaintiff,

- against -

PENNY A. JOHNSON d/b/a 7-ELEVEN, 7-ELEVEN, INC. and PL 247 GREENLAWN LLC,

Defendants.

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Freeport, New York 11520

CONGDON, FLAHERTY, O'CALLAGHAN, et al.
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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001)1 - 15 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 16-21 ; Replying Affidavits and supporting papers 22-23 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she slipped and fell on ice on the sidewalk located at a 7-Eleven Store. It is claimed that the defendant had actual and constructive notice of the condition and negligently failed to maintain the premises in a safe condition.

The defendants now moves for summary judgment dismissing the complaint on the issue of liability as to claims that the premises was not properly maintained, indicating that no icy condition was noted upon inspection of the premises prior to the incident.

The proponent of 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center,supra; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact"

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(CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In support of motion, defendants has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the defendants' answer, and the plaintiff's verified bill of particulars; the affidavits of Jim Dale and Thomas Chodkowski; a copy of the shopping center lease and franchise agreement; papers entitled "Quality Controlled LCD Improvements/Differences/Updates"; a Google map and the unsigned deposition transcripts of Marlene Giusti and Penny Johnson, both dated April 13, 2010. The deposition transcript of Penny Johnson, the moving defendant in this action, is considered as adopted as accurate by her (*see,* Ashif v Won Ok Lee, 57AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Counsel for the plaintiff refers to the plaintiff's deposition testimony in his affirmation. The transcript is deemed adopted as accurate by the plaintiff, and is considered in opposition to the defendants' motion.

To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (Stumacher v Waldbaum, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or it's employees to discover and remedy it (Stumacher v Waldbaum, supra; *see also,* Gordon v American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646 [1986]; Bykofsky v Waldbaum's Supermarkets, Inc., 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (Piacquadio v Recine Realty Corp., 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury. If the defendant's negligence was a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (Spiegel v Fine Paint Co. 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup Ct Nassau County 2006]).

Penny Johnson testified that she is the franchisee for the 7-Eleven Store located at 247 Broadway/ Greenlawn Road, Huntington since 2004. She became aware of the accident of March 19, 2007 when she received a telephone call from Thomas Chodowski, the manager at the location, that the plaintiff had fallen on a small piece of ice on the sidewalk. She testified that it was his responsibility to clear the ice and snow from the sidewalk in front of the store. She stated he was to inspect every hour or less, and apply rock salt or shovel, based upon the weather conditions. She continued that the store is located in a shopping center which has a maintenance company which maintains the parking lot and the sidewalk with regard to snow and ice. However, she stated that Chodowski did not maintain a record concerning the clearing of the sidewalk. The landlord, Phillips, had contracted with an outside company to remove snow and ice from the premises, but she did not know the name of the company. No one else complained about ice on the sidewalk that day before the accident or in the days prior.

Thomas Chodkowski's affidavit asserted that on March 19, 2007, he had been the manager of the 7-Eleven located in Greenlawn for at least two years. He continued that he had a snow plow company set up to come to the premises as soon as three inches or more of snow fell, so that the entire parking lot would be plowed and the sidewalks cleared. If he was not at the premises at the time, he would have telephoned the store to have the crew oversee the plowing and shovel the sidewalk in front of the store. When he was present, he personally went into the parking lot with a shovel to remove any snow that remained and/or had been packed down by the plows. He stated he also thoroughly salted and sanded the parking lot and the sidewalk on the premises during the winter months. He continued that on March 19, 2007, he arrived at the store at 7:00 a.m., looked around to see if there was any snow or ice hazard in either the parking lot or on the sidewalk, and determined that there was none. When he walked on the sidewalk to the front double doors of the store that morning, he did not notice any slippery conditions and had no difficulty navigating. He stated that if a slippery condition, such as a patch of thin ice approximately three feet in diameter, ten inches from the store front, existed at 8:30 a.m. when the plaintiff fell, that he would have observed it and removed it during his inspection. After the accident, he filled out an accident report with the plaintiff and stated that he did not recall her showing him an ice patch on the sidewalk. Nor does he recall speaking with the police that day. Prior to her falling that morning, there were no complaints about any icy or slippery condition at the premises.

Jim Dale averred in his affidavit that he has been employed by 7-Eleven as an area loss prevention manager and was responsible for the franchise located at the 7-Eleven where the plaintiff claims to have fallen. He stated that the 7-Eleven records concerning stores within his territory reveal that on March 19, 2007, the subject store was not operated by 7-Eleven; rather, it was operated in all respects by the independent franchisee, Penny Johnson. He continues that all persons working within the store were employees of Ms. Johnson, who was responsible for hiring and firing those employees, and for making all decisions relating to the day-to-day operations of the store. He further adds that Johnson was responsible for all daily maintenance, repairs, janitorial services, and expenses relating to the subject store and its equipment, including the day-to-day maintenance of the exterior sidewalk.

It is further noted that the shopping center lease, dated June 14, 2005, entered into between PL 247 Greenlawn LLC and 7-Eleven provides in relevant part, that the "[t]enant shall be responsible for maintaining the storefront and the surface of the sidewalk immediately outside of the storefront, including removal of snow and ice from such sidewalk."

Marlene Giusti testified that the incident occurred on March 19, 2007 at about 8:30 a.m. in front of the 7-Eleven store on Broadway/Greenlawn. It was cold and the sun was out, but she thought there had been rain the previous day. She had driven her vehicle to the store and parked facing the store approximately three parking spots to the right of the front door entrance. Upon exiting her vehicle, she walked on the black top parking lot to the front of her vehicle, and stepped up onto the concrete sidewalk and walked toward the store, at an angle to her right on the sidewalk, directly to the front doors of the store. She did not look down while she was walking. After making a purchase in the store, she exited through the front double doors, walking at an angle to her left on the sidewalk towards her car. She testified that she had taken about five steps when both of her feet slipped forward on ice, causing her to fall onto her "rear end" and hands. She described the ice as thin, dark or black, and about three feet in size. She stated that she did not see it before she fell. After she fell, she could see the ice without any problem. Thereafter, a man helped her onto her feet. She stated she was experiencing pain and returned to the store and spoke to Tom, the manager, who had her fill out a report. They then went outside and she showed him where she fell. She stated she did not know how long the ice existed on the sidewalk prior to her slip and fall. She had not complained to anyone about the ice prior to her fall and knew of no one else who slipped on it. In her affidavit submitted in opposition to the defendants'

motion, she averred that while waiting for the police to arrive after she called them, that she took two photographs of the ice on the walkway with her cell phone camera.

Based upon the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment as there are factual issues presented in the moving papers which preclude summary judgment.

Whether or not an icy condition existed prior to the accident is disputed by the parties. Whether or not the manager, Thomas Chodkowski, properly inspected the area and observed the alleged icy condition, or whether he negligently inspected the sidewalk, prior to the accident presents a further factual issue precluding summary judgment.

Plaintiff also raised factual issues in her opposing papers concerning the climatological data, submitting the affidavit of a meteorologist, who opines that counsel for the defendant relied upon records from Farmingdale, nine miles from the accident site, and not from Centerport, which is located only 2 miles from the accident site. The Centerport data, he states, indicates that precipitation fell over the incident location during the morning of March 18, 2007 and was sufficient to cause a light coating of snow to accumulate. On the morning of March 19, 2007, the dry bulb temperature was hovering just below the freezing point. At 8:30 a.m., the sky was clear, the air temperature was 30 degrees, and there was approximately 3.0" of snow and ice, in addition to areas of melt/refreeze ice present on exposed, untreated, and undisturbed surfaces. The temperature did not rise to above freezing until 9:30 a.m., after the accident. Plaintiff's expert continues that the air temperature had actually been below freezing for approximately 9 ½ hours prior to the incident, and therefore, the ice upon which the plaintiff had fallen had been there for at least 7 ½ to 9 ½ hours, or more, before the incident occurred. This raises a factual issue of the existence of an icy condition for a sufficient period of time to give the defendant constructive notice so that it could prevent the dangerous condition that allegedly caused plaintiff to fall.

Dated: August 17, 2011

MELVYN TANENBAUM

J.S.C.