SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

PRISCILLA LYON AND ADOLPHUS LYON,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 11/24/10

OUTBACK STEAKHOUSE, INC.,
OUTBACK METROPOLIS 1, L.P. and
OUTBACK STEAKHOUSE OF FLORIDA, LLC.,

INDEX NO.: 20054/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Reply Affirmation.....2
Affirmation in Opposition.....3

Motion by the attorneys for the defendants for an order pursuant to **CPLR §3212** granting summary judgment in favor of the defendants against the plaintiffs dismissing the complaint is determined as follows.

On January 20, 2008 at approximately 7:00 p.m., plaintiffs arrived at the Outback Steakhouse located at 2124 Merrick Mall, Merrick, New York to have dinner. They were greeted by the hostess, who instructed them to follow her to their table. Plaintiff Priscilla Lyon walked directly behind the hostess. Plaintiff Adolphus Lyon followed behind his wife. The three walked for approximately 20 feet when plaintiff Priscilla Lyon suddenly slipped. After the incident, plaintiff testified that she smelled a PineSol-like "detergent disinfectant" odor. She does not know where the smell was coming from. She did not see anything on the floor before the incident. Plaintiffs were subsequently seated at a dining table approximately 10-12 feet from where the incident occurred. While seated at the table, plaintiffs observed what they describe as a "shiny," "clear" spot on the floor near where the plaintiff slipped. There were no footprints or other marks through the spot. Plaintiffs sat at the table for approximately 20 minutes before leaving the restaurant. During that time, they discussed the incident with Outback's Manager Erin McMahon. Before leaving the restaurant, the plaintiffs did not get up from their table to examine the spot nor did they observe anyone mop or clean that area even after the manager went over

to inspect the location of the incident. Plaintiffs do not know what the clear, shiny spot consisted of, how it came to be on the floor or how long it had been on the floor prior to the incident. Plaintiffs did not complain nor did they know of anyone who complained to Outback about any substance or condition on the floor prior to plaintiff's incident.

On the day and time of the incident, Erin McMahon was employed by the defendant as the front-of-house manager at the restaurant. In her affidavit submitted in support of the within motion, she stated that she had personal knowledge of and was familiar with store protocols and procedures. As part of her duties, Ms. McMahon testified that she personally inspected the restaurant's floors prior to opening to the public to ensure that they were clean and free of defects. According to her affidavit submitted in support of the within motion, one of her duties was to continuously inspect the floors throughout the day to ensure that they remained clean and free of defects. She testified that Outback does not have any type of floor cleaning materials on the premises; and onsite mops are used only to clean the kitchen floor. In the event there is a spill on the restaurant floor, it is dried up using a cloth towel. Further, she testified that all cleaning and waxing of the restaurant floors are performed after hours by an outside cleaning contractor, Majestic Cleaning, who cleaned and buffed the floors at night. At the time of plaintiff's incident, Outback Manager Erin McMahon was sitting with some regular customers at a table just 2-1/2 feet away from where the incident occurred. Ms. McMahon personally witnessed plaintiff Priscilla Lyon fall against the four foot wall. Just prior thereto, Ms. McMahon observed plaintiff and her husband walking behind the hostess who was showing plaintiffs to their table. According to Ms. McMahon, plaintiff Priscilla Lyon suddenly collapsed or her legs gave out as she was walking. Upon witnessing plaintiff collapse, Ms. McMahon got up and went over to ascertain plaintiff's condition and to determine what had happened.

Immediately following the incident, Ms. McMahon testified she personally inspected the floor in the area of plaintiff's fall and found that it was "clean and dry." She found no substance or other condition on the floor. Nor did the floor emit any type of smell. Ms. McMahon further stated that in accordance with her duties as manager, she inspected that same area several times prior to plaintiff's incident, most recently just minutes before plaintiff's fall and at all times she observed the floor in that area to be clean and dry. At no time before or after the happening of plaintiff's incident did any Outback employee or patron, including the plaintiffs, ever advise Ms. McMahon of a condition of the floor in the area of plaintiff's fall that was slippery or needed to be cleaned.

In order to establish a *prima facie* case of negligence in a premises liability action, a plaintiff must demonstrate that defendant created the condition which caused the

accident or had actual or constructive notice of said condition. *Hartley v Waldbaum, Inc.*, 69 AD3d 902; *Kramer v K-Mart Corp.*, 226 AD2d 590. Actual notice, by definition, requires proof that defendant was aware of the presence of the alleged condition prior to the happening of plaintiff's incident. *See, Cameron v Bohack*, 27 AD2d 362. "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 defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836.

A defendant moving for summary judgment in a slip-and-fall case has the initial burden of showing that it neither created the alleged condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy same. *Valdez v Aramark Services*, 23 AD3d 639. *See also, Alvarez v Prospect Hospital*, 68 NY2d 820.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital, supra*; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. Defendant presented documentary evidence by the testimony of Ms. McMahon that the alleged "spot" at issue was not apparent or visible. Moreover, Ms. McMahon stated that as part of her normal duties as manager, she passed by and inspected the area where the plaintiff's fall occurred several times during the day, most recently just minutes before the plaintiff's fall. During these inspections she personally observed the floor in the area of the fall to be clean and dry. The defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660.

In opposition to the motion, the plaintiffs acknowledge there is no proof of prior actual notice to the defendants. Plaintiffs acknowledge that after arriving in the

restaurant, they followed the hostess to their table. Priscilla Lyon said the lighting was low in the area where she fell. She asserts that there was a shiny, clear, colorless, "glob on the floor" about a shoe size. The glob was elongated in shape rather than circular or rectangular. Plaintiffs contend that a glob of polish which was not buffed into the floor caused Priscilla Lyon to fall. There is no indication how Plaintiffs came to this conclusion. Counsel for plaintiffs assert that there are no records maintained by the defendant of any inspection being conducted at the site of the accident. However, Ms. McMahon, the manger at the restaurant, testified that she was fairly familiar with the inspection procedures regarding the maintenance of the floors.

A motion for summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361); and must be viewed in the light most favorable to the plaintiffs. *Fundamental Portfolio Advisors, Inc. v Tocqueville*, 7 NY3d 96. Nevertheless, a court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated and insufficient to raise triable issues of fact. *Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590. Where there is nothing left to be resolved at trial, the case should be summarily decided *(Andre v Pomeroy, supra* at p. 364). Plaintiffs do not offer documentary evidence to refute the defendants assertion that immediately following the incident, the area where the plaintiff collapsed was inspected by Outback and found to be clean, dry and free of any wax, oils or other condition. Plaintiff, Priscilla Lyon testified that she didn't see any track marks. Plaintiffs' assertion that the clean, shiny spot of unknown origin, free of foot prints or marks on the floor that they allegedly observed in the area of plaintiff's fall, after the incident, must have been the cause of the fall, is conclusory and not based on any evidentiary fact sufficient to defeat the within motion. *Slintak v Price Chopper Supermarkets*, 2011 N.Y. App. Div. LEXIS 1198, 2011 NY Slip Op 1262 (N.Y. App. Div. 2nd Dept. 2011); *Crapanzano v Balkon Realty Co.*, 68 AD3d 1042. The plaintiffs have failed to demonstrate that the defendants created the condition that caused the fall or that the defendants had actual or constructive notice of the condition. Defendants' motion for summary judgment is **granted.**

All proceedings under index no. 20054/08 are terminated.

This constitutes the Order of the Court.

Dated: March 30, 2011

J.S.C.