SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : **DONNA M. MILLS** **PART** **58**

Justice

MARIANNE BIHARI,

Plaintiff,

-against-

KMART CORPORATION and 77 DEERHURST CORP. d/b/a SERVCO INDUSTRIES,

Defendants.

INDEX NO. 110858/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits...	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES ___✓___ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 9-26-13

Donna M. Mills J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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Index No. 110858/10

DONNA MILLS, J. :

Plaintiff Marianne Bihari, commenced this negligence action to recover for personal injuries she allegedly sustained on December 19, 2009, when she claims that she slipped and fell on a wet floor inside a Kmart store located in New York County. Asserting a storm in progress defense and lack of notice, defendants Kmart Corporation and 77 Deerhurst Corp. d/b/a Servo Industries ("Defendants") move for summary judgment dismissing the plaintiff's complaint.

In this personal injury action, plaintiff claims that on December 19, 2009, she entered the Kmart store located on 34th Street in New York County, where she maintains that while shopping on the top level of the store, she noticed there was water on the floor in the aisle. As she proceeded up the aisle, plaintiff further alleges that her foot slipped causing her to fall, and resulting in a torn hamstring. There is no dispute between the parties that it was snowing on the date of the occurrence.

Defendants produced Tony Battista a field manager on behalf of defendant Servco, who was not in the store at the time of the occurrence, nor at any time when it was snowing on the date of the occurrence. He testified as to the procedure to be

followed on snowy days. Kmart also produced for deposition, Michael Jennings one of its Loss Prevention Agents. His testimony was relevant only as to the physical description of the premises, and where in the store that he found the plaintiff after her alleged fall.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

To impose liability upon a defendant in a slip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it (see Penn v. Fleet Bank,

12 A.D.3d 584 [2nd Dept 2004]; Christopher v. New York City Tr. Auth., 300 A.D.2d 336 [2nd Dept 2002]; see also Gordon v. American Museum of Natural History, 67 N.Y.2d 836 [1986]). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected (see Gordon v. American Museum of Natural History, supra; Larsen v. Congregation B'Nai Jeshurun of Staten Is., 29 A.D.3d 643 [2nd Dept 2006]). A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (see Raghu v New York City Hous. Auth., 72 AD3d 480 [2010]).

"To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Assn., Inc., 57 AD3d 598, 598-599 [2008]). Merely submitting testimony of general inspection or cleaning practices, and providing no evidence "regarding any particularized or specific inspection or stair-cleaning procedure in the area of the plaintiff's fall on the date of the accident" (id. at 599), is "insufficient to satisfy the defendant's initial burden on the issue of lack of constructive notice" (Klerman v Fine Fare Supermarket, 96 AD3d 907, 908 [2012]). Only after a defendant has satisfied this threshold burden, will the sufficiency of the plaintiff's opposition be examined (see Joachim v 1824 Church Ave., Inc., 12 AD3d 409, 410 [2004]).

Defendants, in support of its motion for summary judgment, proffered the

testimony set forth in the depositions of the plaintiff and its witnesses Michael Jennings and Tony Battista. In light of the fact that, on or near the time of the occurrence a storm may have been in progress, the deposition testimony relied on by the defendants fail to establish the specific inspection procedure in the area of the plaintiff's fall on the date of the accident. Additionally, no evidence was presented regarding when the subject area was last mopped or cleaned.

Finally, defendants' argue, as an alternative ground for summary judgment, the "storm in progress" doctrine. It is well settled that a landowner's obligation to take reasonable measures to correct storm-created snow and ice conditions does not commence until after the storm has ceased (see Parker v. Rust Plant Servs., 9 A.D.3d 671, 672, 780 N.Y.S.2d 230 [2004]; Campagnano v. Highgate Manor of Rensselaer, 299 A.D.2d 714, 715, 749 N.Y.S.2d 595 [2002]; Lyons v. Cold Brook Cr. Realty Corp., 268 A.D.2d 659, 659, 700 N.Y.S.2d 603 [2000]). This defense evolved in this state in recognition of "the realities of problems caused by winter weather" (Fusco v. Stewart's Ice Cream Co., 203 A.D.2d 667, 668, 610 N.Y.S.2d 642 [1994]), that is, as "a common sense rule arising from the fact that snow and ice conditions are unpredictable, natural hazards against which no one can insure and which in their nature cannot immediately be alleviated" (Valentine v. State of New York, 197 Misc. 972, 975, 95 N.Y.S.2d 827 [1950], affd. 277 App. Div. 1069, 100 N.Y.S.2d 567 [1950]; see Kelly v. Manhattan Railway Co., 112 N.Y. 443, 452–453, 20 N.E. 383 [1889]).

Over time, the defense has been extended to apply to dangerous conditions occurring inside a building entrance caused by winter storms (see Zonitch v. Plaza at Latham, 255 A.D.2d 808, 808–809, 680 N.Y.S.2d 304 [1998]; see also 227 Hussein v.

New York City Tr. Auth., 266 A.D.2d 146, 146–147, 699 N.Y.S.2d 27 [1999]) and is not limited to snow, but applies as well to conditions caused by sleet and/or freezing rain (see e.g. Fusco v. Stewart's Ice Cream Co., supra at 667, 610 N.Y.S.2d 642). While many related principles of law have emerged to recognize the challenges a property owner faces during a rainstorm, the prevailing view is to adhere to traditional rules governing landowner liability in slip and fall situations.

Here, while the parties agree that there was inclement weather on the subject date, and plaintiff contends that the floor where she fell inside the store was wet, the record does not indicate when the storm subsided, thus precluding any findings concerning whether the slippery condition that plaintiff claims caused her to fall, occurred during an ongoing storm or a reasonable time thereafter.

In this Court's view, defendants' evidence failed to satisfy its initial burden of demonstrating that the alleged hazardous condition didn't exist for a sufficient period of time to charge them with constructive notice thereof. Inasmuch as the record leaves unresolved questions of fact, this Court must deny defendants' motion for summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

DATED: 9-26-13

ENTER:

Donna M Mills

J.S.C.