SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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DANIEL BECKER and DEBORAH BECKER,

Plaintiffs,

- v -

HOP KEE RESTAURANT CORP. and EAST OCEAN LLC,

Defendants.

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INDEX NO. 152967/2018

MOTION DATE 04/14/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 223, 224, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, and 244

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

This personal injury action arises out of plaintiff Daniel Becker ("Daniel") allegedly slipping and falling on a wet floor inside of Hop Kee Restaurant, operated by defendant 21 Mott Street Restaurant Corp., sued hereunder as Hop Kee Restaurant Corp. ("21 Mott"). Plaintiffs now seek summary judgment on liability against 21 Mott. Defendant East Ocean LLC, who owns the building located at 21 Mot Street, New York, New York, is not a subject of the motion. Plaintiffs' motion is granted in accordance with the following memorandum decision.

Background

The accident took place on October 29, 2017. There was heavy rain in New York City that day, with a total of approximately three inches of rain falling throughout the day according to the National Oceanic and Atmospheric Administration ("NOAA") (NOAA Local Climatological Data, NYSCEF Doc. No. 215 at 5). Shortly before the restaurant opened that day, one of the waiters, identified as Mr. Chen, placed a "Wet Floor" sign against a pillar near

the restaurant's entrance at around 10:30 AM, where it remained throughout the day (Lee EBT tr., NYSCEF Doc. No. 211 at 73-74, 107-110). Peter Lee, 21 Mott's general manager, testified that the restaurant was cleaned at opening and closing (*id.* at 30-31). There was no regular cleaning schedule, and the wait staff was responsible for cleaning the floors during the day (Won EBT tr., NYSCEF Doc. No. 209 at 39-40, 86-87). On the day of the accident, according to 21 Mott's manager Sai Tun Won, none of the staff made any effort to clean the wet floor in spite of the sign and the continual rain throughout the day (*id.* at 40; *see also* Lee EBT tr, NYSCEF Doc. No. 211 at 107-110).

At around 3:00 PM, Daniel and the rest of his dinner party began arriving at the restaurant (Becker 7/27/20 EBT tr, NYSCEF Doc. No. 203 at 38). It was raining heavily at the time, with almost half an inch of rain accumulating between the time plaintiff arrived and the time of the accident (*id.* at 40; Wilson EBT tr, NYSCEF Doc. No. 208 at 25; NOAA Local Climatological Data, NYSCEF Doc. No. 215 at 5). Ron Wilson, one of the other guests, testified that on several occasions during the time the group was in the restaurant, he and others sitting at the table informed the restaurant staff that the floors were wet and needed to be cleaned, and that he had slipped multiple times while walking around the restaurant (Wilson EBT tr, NYSCEF Doc. No. 208 at 31-40, 54-59, 78, 160-163; restaurant camera footage, NYSCEF Doc. No. 202 at 17:04-17:06). Upon leaving the bathroom on two occasions during the time the party was in the restaurant, Wilson wiped his feet on a mat by the front door because the floor was wet and slippery (Wilson EBT tr, NYSCEF Doc. No. 208 at 50-51, 53-54). On the video footage submitted by plaintiff, Wilson can be seen slipping and almost falling on his way to the bathroom, and then speaking to a waiter about the condition of the floor upon exiting (restaurant camera footage, NYSCEF Doc. No. 202 at 16:06-16:08, 17:58-17:59). He demonstrated this

condition to one of the waiters, a Mr. Yong, and alerted him that the floors in and around the bathroom were wet and slippery (*id.* at 17:06-17:07; Wilson EBT tr, NYSCEF Doc. No. 208 at 54-58, 77-79). At no point in any of the video footage submitted by plaintiff do any of the restaurant staff take any measures to clean the floor.

Daniel used the bathroom at approximately 6:54 PM (Becker 7/27/20 EBT tr, NYSCEF Doc. No. 203 at 76-78). After using the bathroom, he pulled open the bathroom door to leave and slipped and fell on the floor, injuring his nose and arms (*id.* at 140-146, 159-160; NYSCEF Doc. No. 201 at 18:56). He testified that the floor of the men's room and outside of it had been wet all afternoon (Becker 7/28/20 EBT tr, NYSCEF Doc. No. 204 at 76-78; Wilson EBT tr, NYSCEF Doc. No. 208 at 78-79, 160-162).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all

reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

"It is settled that a plaintiff in a slip and fall case must demonstrate that defendant had either actual or constructive notice of the hazardous condition" (*Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [1st Dept 2004], citing *Gordon v Amer. Museum of Natural History*, 67 NY2d 836, 837 [1986] [additional citations omitted]). Actual notice exists when the defendant has been alerted to the condition that caused the injury (*Dunn v 6-8 St. Nicholas Realty Corp.*, 204 AD3d 466, 466 [1st Dept 2022]). To establish a claim for constructive notice, a plaintiff must show that the defect was "visible and apparent" and "exist[ed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon*, 67 NY2d at 837). Plaintiff must "provid[e] evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed" by defendants (*David v New York City Hous. Auth.*, 284 AD2d 169, 171 [1st Dept 2001] [internal quotations marks and citations omitted]). "Evidence of a general awareness of debris and spills in [the area] does not require a finding that defendant is deemed to have notice of the condition that caused plaintiff to fall" (*Torres v New York City Hous. Auth.*, 85 AD3d 469, 469 [1st Dept 2011] [internal citations omitted]).

Here, plaintiff has established prima facie entitlement to summary judgment based on both actual and constructive notice. As to actual notice, Wilson testified that he alerted restaurant staff as to the slippery condition of the floors in and around the bathroom and was seen on video almost falling in sight of the waiters. Moreover, 21 Mott's employees were aware

of the danger of the rain as Mr. Chen placed a wet floor sign near the main entrance of the restaurant because of the rain throughout the day. As the record reflects, 21 Mott's employees did not undertake any measures to clean the wet floors throughout the day (*Dunn*, 204 AD3d at 466 ["Plaintiff also testified that he made numerous complaints about the leak to multiple hotel employees but the leak was never properly remedied"]). As to constructive notice, the floor was wet from at least 4:00 PM to just before 7:00 PM when Daniel fell, and 21 Mott lacked any inspection or cleaning schedule. In addition, 21 Mott was aware that the bathroom floor was often slippery from customer use, and had hung a warning sign to that effect years prior (Won EBT tr, NYSCEF Doc. No. 209 at 88; Lee EBT tr, NYSCEF Doc. No. 211 at 51-61). Given the lack of a regular cleaning schedule during the day, the record establishes a prima facie case that the restaurant was aware of this recurring defect but routinely left it unaddressed during business hours (*e.g. Velocci v Stop and Shop*, 188 AD3d 436, 439 [1st Dept 2020]).

In opposition, 21 Mott fails to raise a triable issue of fact. As a general matter, the opponent of a motion for summary judgment must marshal and lay bare its own evidence to withstand the motion (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007]). One may not oppose summary judgment simply by pointing to holes in the moving party's proof (*see Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]). 21 Mott's opposition attaches no documentary or other evidence, save for two screenshots taken from the video footage submitted by plaintiffs. Indeed, the majority of the opposition consists of semantic quibbles as to the exact words Wilson and Daniel did or did not use in describing the condition of the floors in the restaurant. 21 Mott does not provide, for example, an affidavit from the identified waiter to whom Wilson complained (*Dunn*, 204 AD3d at 467 ["Although plaintiff testified that he complained to multiple hotel employees when the leak continued

unabated, the hotel did not produce testimony or affidavits by any of those employees"]).[1] 21 Mott does not rebut the testimony described above regarding the condition of the floor and the lack of any cleaning efforts, scheduled or impromptu, other than asserting without relevant authority that the complaints made were not sufficiently specific to place 21 Mott on notice of a dangerous condition in or around the bathroom. The court finds Wilson's testimony to be sufficiently specific.

Waiters v Northern Trust Co. of New York (29 AD3d 325, 327 [1st Dept 2006]), cited by 21 Mott, is not to the contrary. The court in *Waiters* held that there was no actual or constructive notice of a slippery floor because plaintiff failed to oppose summary judgment with other than hearsay proof that he or anyone else had complained of the condition (*id.* at 327). Moreover, because he was hired to remediate such a condition, he had no claim arising from injury caused by the condition (*id.*at 327-28). Here, Daniel was not an employee of 21 Mott, and there is non-hearsay evidence in the record regarding complaints made to 21 Mott's employees regarding the floor. The other cases cited by 21 Mott suffer from similar flaws (*see Kruimer v National Cleaning Contrs*, 256 AD2d 1 [1st Dept 1998] [summary judgment for defendant because plaintiff submitted only conclusory expert affidavit as to inherently slippery condition of floor material]; *Duffy v Universal Maintenance Corp.*, 227 AD2d 238, 239 [1st Dept 1996] [same, as well as plaintiff's submission of unsworn statements from co-workers]).

Accordingly, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent of granting partial summary judgment on liability in favor of plaintiffs and against defendant 21 Mott

[1] While it appears that Mr. Yong is no longer employed by 21 Mott, 21 Mott does not disclose any effort to procure his testimony.

Street Restaurant Corp., sued hereunder as Hop Kee Restaurant Corp., on the first and second causes of action as follows; and it is further

ORDERED that the said defendant is found liable to plaintiff on the first and second causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the claims against defendant East Ocean LLC and the damages to be assessed against defendant 21 Mott Street Restaurant Corp., sued hereunder as Hop Kee Restaurant Corp.; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be assigned for trial.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

11/22/2024
DATE

LOUIS L. NOCK, J.S.C.

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