

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

	Justice
ROBERT FRITZLO and CONNIE FRITZLO,	TRIAL/IAS, PART 16 NASSAU COUNTY
Plaintiff(s), -against-	MOTION DATE: 4/11/02 INDEX No.:15328/00 MOTION SEQUENCE NO:1
B.S.H.CORP. d/b/a BAY SHORE HESS and AMERADA HESS CORPORATION,	CAL. NO.:2001H6097
Defendant(s).	
The following papers read on this motion Notice of Motion/ Order to Show Cau Answering Affidavits	1-4

Upon the foregoing papers, it is ordered that this motion by by defendant B.S. H. Corporation d/b/a Bay Shore Hess for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against it is denied

This is an action to recover money damages for personal injuries which arise out of a slip and fall on premises leased to defendant B.S.H. Corporation and operated as a Hess gasoline Plaintiff Robert Fritzlo alleges that on December 5, station. 1999 at 2:00 p.m., as he stepped onto the cashier's island at the Hess station in Bayshore, New York he slipped and fell. He felt sand or grit under his shoe, and afterwards, when his wife drove him to the hospital, a gritty substance was present on his clothing and in his car. The following day, when plaintiff returned with his wife to take photographs, he first saw the substance on the cashier's island. However, his wife saw the substance the day of the accident, as she returned to the station to report the accident after taking her husband to the hospital. At that time a station employee gave her the name and telephone number of a manager named Bob. She called Bob to report the accident and left a message with his wife.

Defendant B.S.H. moves for summary judgment alleging that it did not have actual or constructive notice of the sandy condition

and that it did not create the condition. B.S.H. avers that it never uses sand at the gasoline station, and thus could not have created the condition. Defendant also avers that the complaint must be dismissed because plaintiff failed to identify the substance upon which he fell.

"It is well settled that a plaintiff in a slip and fall case must establish that the defendant either created the defective condition or had actual or constructive notice of it" (Nedd v Associated Hosp. Servs. of N. Y., 236 AD2d 455, 455-456; Stasiak v. Sears, Roebuck & Co., 281 AD2d 533, 534). "Where the moving party has established that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion or speculation" (Babino v. City of New York, 234 AD2d 241). The plaintiff's burden, in a case such as this based upon circumstantial evidence, is to make "a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred" (Babino v. City of New York, supra at p 241-242).

Initially, the court rejects defendant's contention that the plaintiff failed to identify the cause of his accident warranting summary judgment in its favor (see, Novoni v. La Parma Corp., 278 AD2d 393). Although plaintiff did not see the substance which caused his fall, he felt it under his shoes, and identified it as a gritty or sandy substance. Thus plaintiff adequately identified the cause of his fall through a sense other than sight. In addition, the presence of a gritty or sandy substance on his clothing and in his vehicle after the accident supports his sense impression that it was the cause of his fall.

Turning to the plaintiff's burden of proof, plaintiff submitted admissible evidence which supports his contention that defendant created the defective condition. Plaintiff offers the affidavit of Robert (Bob) Baldwin, the former week day manager of the Bay Shore Hess gasoline station, who states that he received a phone call the night of the accident from Joe Piraino who was working at the station that day. Piraino advised that he had given Baldwin's number to a woman who's husband had slipped and fallen on sand in front of the cashier's window at the station. following morning when Baldwin arrived at the gas station he observed Speedy Dry "in and around the area of the cashier's island" where the man had fallen. He described Speedy Dry as "a gritty, sandy-like substance that is spread to absorb gasoline and oil spills at the station." Baldwin immediately directed the maintenance man to sweep the area, and notified the owner of the station.

The foregoing evidence is sufficient to raise a question of fact, and summary judgment is denied. Plaintiff felt a gritty substance under his feet when he slipped, it was on his clothing, and his wife observed it later in the day. Defendant's manager offered a sworn statement that there was "Speedy Dry," a sandy substance used by the station, where plaintiff fell. The trier of fact need not speculate to draw a reasonable inference that defendant created the defective condition. There is no impediment to such inference, as plaintiff's bill of particulars sufficiently covers the material identified as "Speedy Dry" and the time between plaintiff's fall when he felt the gritty substance and his wife's visual confirmation of the substance on the same day, coupled with Baldwin's confirmation the following day is not so attenuated to preclude an inference that the same substance was observed by all three and created by defendant. Defendant's reliance on Van Skyock v. Burlington Northern-Santa Fe Co., is misplaced, as there the plaintiff's expert had no basis to conclude that a boxcar "was in the same condition on the date that he inspected it as it was on the date that Van Skyock was injured" (Van Skyock v. Burlington Northern-Santa Fe Co., 265 AD2d 545, 546). In the matter before the court the condition of the cashier's island at the Hess station was identified on the date of the accident.

In addition, plaintiff offers a bill from a contractor of defendant for "sanding of lot" in January of 2000. Robert Baldwin also confirmed that he had sent a written notice of the accident to Victor Ceriello, the president of B.S.H. and called him to advise of the accident. Ceriello testified at deposition that the premises were never sanded and that he did not have any report of plaintiff's accident until after suit was commenced. Under the circumstances Ceriello's credibility has been put in question. As plaintiff has offered admissible evidence that defendant created the dangerous condition, and as the prima facie case established by the testimony of Victor Ceriello has been called into question, summary judgment is denied.

MAY 3 0 2002

Dated:

Ullw/ J.s.c.

ENTERED

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JUN 04 2002

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