State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 16, 2024 CV-23-1027

CRYSTAL MARTINEZ,
Appellant,
v MEMORANDUM AND ORDER

WALMART INC. et al.,
Respondents.

Calendar Date: March 26, 2024

Before: Clark, J.P., Aarons, Reynolds Fitzgerald, McShan and Mackey, JJ.

Burke, Scolamiero & Hurd, LLP, Albany (*Monique B. McBride* of counsel), for appellant.

O'Connor, O'Connor, Bresee & First PC, Albany (*Michael P. Cavanagh* of counsel), for respondents.

Clark, J.P.

Appeal from an order of the Supreme Court (Martin D. Auffredou, J.), entered May 10, 2023 in Fulton County, which, among other things, granted defendants' motion for summary judgment dismissing the complaint.

On December 27, 2019, plaintiff suffered multiple fractures to her left ankle when she slipped and fell as she entered a store owned by defendants in the City of Amsterdam, Montgomery County. Plaintiff commenced the instant action alleging that her fall was caused by defendants' negligence in failing to maintain the premises in a reasonably safe condition. Following joinder of issue, defendants moved for summary judgment dismissing the complaint, arguing that plaintiff could not identify the alleged defect that

caused her injury or establish that defendants had notice of such condition. Plaintiff opposed and cross-moved for summary judgment on the issue of liability. Following oral argument, Supreme Court found that defendants established prima facie entitlement to judgment as a matter of law and that plaintiff failed to establish the existence of a material question of fact. Consequently, the court denied plaintiff's cross-motion, granted defendants' motion and dismissed the complaint. Plaintiff appeals.

In a slip and fall case, a defendant may "demonstrate entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Mulligan v R&D Props. of N.Y. Inc.*, 162 AD3d 1301, 1301 [3d Dept 2018] [internal quotation marks and citation omitted]; *accord Benjamin v Court Jester Athletic Club, Ltd.*, 217 AD3d 1206, 1206 [3d Dept 2023]). Defendants' submissions, consisting primarily of plaintiff's deposition testimony and two surveillance videos, sufficed to meet this initial burden. Plaintiff, an employee of a vendor operating inside the store, testified that nonslip mats were present at the entrance of the store when she arrived at work because it was a rainy day and that she traversed the area a few times without incident. She admitted that, just before her fall, she stepped outside the store and the soles of her shoes got wet from rainwater on the ground. Plaintiff denied seeing any water on the floor inside the store or on the mats before or after her fall – and the surveillance videos reveal no such condition – but she believed that she slipped due to wet conditions as her clothes were wet after falling. The surveillance videos show that, as plaintiff re-entered the store, she stepped across the corner of the nearest mat and, in an apparent attempt to walk around a customer, stepped onto the unmatted portion of the floor and fell, landing on the opposite end of the mat. Presented with this evidence, defendants met their burden of establishing that plaintiff could not identify the cause of her fall, as her theory that her fall could have been caused by excessive moisture transferred to her shoes from the mat amounted to mere speculation (*see Mulligan v R&D Props. of N.Y. Inc.*, 162 AD3d at 1302; *Pascucci v MPM Real Estate, LLC*, 128 AD3d 1206, 1207 [3d Dept 2015]; *compare Bovee v Posniewski Enters., Inc.*, 206 AD3d 1112, 1113-1114 [3d Dept 2022]; *Steele v Samaritan Found., Inc.*, 176 AD3d 998, 1000 [2d Dept 2019]).

As defendants met their initial burden to establish prima facie entitlement to summary judgment, the burden shifted to plaintiff to demonstrate the existence of a material question of fact that would necessitate a trial (*see Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019]; *Briggs v PF HV Mgt., Inc.*, 199 AD3d 1106, 1107 [3d Dept 2021]). In opposing the motion, plaintiff relied on the deposition transcripts of two

of defendants' employees.[1] Both employees testified that all of defendants' employees share in ensuring that nonslip mats are placed at the store's entrances when the weather is rainy. Such proof was insufficient to raise any question of fact as to the cause of plaintiff's fall (*see Farrell v Ted's Fish Fry, Inc.*, 196 AD3d 893, 895 [3d Dept 2021]; *Van Duser v Mount St. Mary Coll.*, 176 AD3d 1532, 1533 [3d Dept 2019]; *Kuchman v Olympia & York, USA*, 238 AD2d 381, 382 [2d Dept 1997]). Consequently, Supreme Court properly granted summary judgment to defendants and dismissed the complaint.

Plaintiff's remaining contentions have been rendered academic by such conclusion.

Aarons, Reynolds Fitzgerald, McShan and Mackey, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

[1] Plaintiff's contention that summary judgment should have been denied due to defendants' failure to include the transcripts of its own employees lacks merit, as they were not required to do so (*compare* CPLR 3212 [b]; *Encarnacion v State of New York*, 203 AD3d 1416, 1417 [3d Dept 2022]).