PUBLISH

SHORT FORM ORDER

INDEX No. 12-35430
CAL. No. 14-01372OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-13-15
ADJ. DATE 3-3-15
Mot. Seq. # 002 - MG; CASEDISP

ELIZABETH LAVINIO, as mother and Natural Guardian of JOANI LAVINIO, an infant under the age of 18 years, and ELIZABETH LAVINIO, Individually,	CHRISTOPHER P. DI GIULIO, P.C. Attorney for Plaintiffs 21 West 38th Street, 8th Floor New York, New York 10018
Plaintiffs,	SIMMONS JANNACE DELUCA, LLP Attorney for Defendant
- against -	43 Corporate Drive Hauppauge, New York 11788-2048
K MART CORPORATION,	
Defendant.	

Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 20 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other memorandum of law 18 - 19 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This action was commenced to recover damages for personal injuries allegedly sustained by the infant plaintiff Joani Lavinio (Joani) on July 4, 2012 when she slipped and fell while re-entering the K Mart store located in Bridgehampton, New York (the store). In their complaint, the plaintiffs allege that the defendant "failed to maintain in a safe manner an area of the floor in the public area" of said store. In addition, the complaint sets forth a derivative cause of action on behalf of Joani's mother, the plaintiff Elizabeth Lavinio (Lavinio). In their bill of particulars, the plaintiffs allege, among other things, that Joani was caused to fall "due to water that was allowed to spill, accumulate, and remain on the floor" of the store.

It is undisputed that Joani and Lavinio entered the store in the evening on July 4, 2012, that Joani left to return to the plaintiffs' vehicle to retrieve a personal item, and then she fell after re-entering the store through the exit doors at the front of the building. The parties dispute almost everything that happened thereafter.

The defendant now moves for summary judgment on the grounds that there was no defective condition present at the time of Joani's accident, and that it did not create the alleged defective condition or have actual or constructive notice thereof. In support of its motion, the defendant submits, among other things, the pleadings, the depositions of the parties, certain photographs, the defendant's customer incident report, and affidavits from two of its employees. At her deposition, Joani testified that she and her mother arrived at the store intending to download pictures from her mother's I-pad at the "photo station" located in the store, that her mother forgot the USB cable needed to do so, and that she returned to their vehicle to retrieve the cable. She indicated that she re-entered through the exit doors of the store, that she was not wearing her eyeglasses at the time, and that she did not remember where she was looking at the time. She stated that she re-entered the store walking at a normal rate, that she fell halfway from the exit doors to the photo station, and that she did not look or see any water on the floor, even after her fall and "somebody pointed it out to my mom," as she was "too busy dealing with my knee." Joani further testified that she did not know how the water got on the floor, that she did not see anything on the floor when she walked in the same area upon originally entering the store, and that she did not remember if her clothes were wet after she fell. She stated that "there was water on the floor so I assumed I fell and slipped on water ..."

At her deposition, Lavinio testified that she and Joani originally entered the store through the exit doors, that she walked thorough the area where Joani fell and did not see anything on the floor, and that she was briefly at the photo station when she heard Joani scream. She indicated that she ran to Joani, who said she did not know what had happened, that a customer, Lorraine Dodge, pointed out that there was water on the floor, and that she observed the water to measure approximately less than two feet long by eight inches wide. She stated that two of the defendant's employees came over to Joani, that she believed one was the "floor manager" at the store, and that she overheard the two employees say that a customer had earlier spilled water "and that all of it must not have gotten cleaned up." Lavinio further testified that she did not remember anyone cleaning the area of Joani's fall after the accident, and that she did not know of any complaints made to the defendant regarding the water at that location.

Dorothea Larson (Larson) was deposed on February 20, 2014 and testified that she was the soft-lines manager and assistant manager on duty at the store on the evening of this incident. She stated that her duties included responding to customer accidents, that the in-house janitorial staff cleans the floors of the store on a regular schedule, and that any of the defendant's employees can address a spill at the store. She indicated that the management of the store is notified of any spills that occur, that management checks to ensure that the spill has been cleaned up, and that the store does not keep a record of the spills that occur. Larson further testified that she was notified at approximately 8:00 p.m. about Joani's accident by Karen Brown (Brown), the front-end supervisor on duty that night, that she arrived at the scene within three minutes, and that Brown later told her that Brown had seen Joani run into the store and fall. She stated that she had to go to the "other end of the store" to obtain the form necessary to complete the incident report, and that, at some point while she was away from the scene, Joani was

moved from the location where she fell because she was "in the middle of the exit area." She indicated that she filled out the incident report from information provided by Lavinio, that the form requires managers to take photographs of the accident scene, and that she did not do so because she would have had to put batteries in the camera "and I was more concerned with [Joani] at the time ..." Larson further testified that the defendant's employees Karen Henry, Nickiete Edwards and "Dorotta" were in the "vicinity" when this incident happened, and that Dorotta had told her that Joani had fallen because Joani's "flip-flops fold[ed] over in the front when [Joani] had come running in" to the store. She stated that she did not remember if Brown wrote down anything that she saw regarding this incident, that if Brown had written anything it would have been put in with the incident report, and that she did not remember if Dorotta wrote down anything that she saw that evening. She indicated that she did not overhear any conversations regarding the "prior spill" at the location of Joani's accident, that there was not a prior spill there, and that she did not know the last time the area had been cleaned. Larson further testified that she was at the subject location approximately 45 minutes earlier and did not see anything in that area of the floor, that within five minutes of this incident she inspected the area from the exit doors to the location where Joani fell and "did not see any issue of any water at the time."

In her affidavit dated February 13, 2013, Nickiete Edwards swears that she was employed at the store as a checkout services associate on the evening of this incident. She states that her duties included inspecting the checkout counter area which includes the area where Joani allegedly fell, that while on duty she inspects the floor every five to ten minutes, and that she inspected the floor that evening approximately ten minutes before said fall. She indicates that her inspection did not reveal any "liquid or debris" on the floor, and that she is not aware of any complaints regarding the area made prior to Joani's fall.

In her affidavit, Karen Henry swears that she was employed at the store as a checkout services associate on the evening of this incident, and that her duties included inspecting the checkout counter area which includes the area where Joani allegedly fell. She states that she observed Joani running by the checkout area at approximately 8:50 p.m., and that she did not see Joani fall. She indicates that she approached Joani after she fell and observed Joani wiping tears from her face onto the floor around her, and that Joani's right flip-flop was bent. Henry further testified that she inspected the area 15 to 20 minutes before this incident, that she did not see any "liquid or debris" on the floor, and that she is not aware of any complaints regarding the area made prior to Joani's fall.

In order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Meyer v Pathmark Stores***, 290 AD2d 423, 736 NYS2d 83 [2d Dept 2002]; ***Pollio v Nelson Cleaning Co.***, 269 AD2d 512, 704 NYS2d 494 [2d Dept 2000]). 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 the defendant's employees to discover and remedy it" (***Gordon v American Museum of Natural History,*** 67 NY2d 836, 501 NYS2d 646 [1986]). However, the party moving for summary judgment in a slip and fall action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Musachio v Smithtown Cent. School Dist.***, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]).

The Court finds that the defendant has established its prima facie entitlement to summary judgment as a matter of law. The defendant's submission reveals that, assuming for the sake of argument that water caused Joani to fall, the plaintiffs do not know the source of the water present that evening, nor whether it was there "for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it" (citations omitted). There is no evidence that the defendant received any complaints that the water was present that evening, that the defendant had constructive notice of the water's presence, or that the defendant created the allegedly defective condition. The only evidence bearing upon the issue of actual and constructive notice herein is the testimony of Lavinio that she overheard two employees discussing a "prior spill." While hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***Rodriguez v Sixth President***, 4 AD3d 406, 771 NYS2d 368 [2d Dept 2004]).

The defendant having established its entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). In opposition to the defendant's motion, the plaintiffs submit, among other things, the affirmation of their attorney, the affidavit of nonparty witness, Lorraine Dodge (Dodge), and their affidavits. In her affidavit, Dodge swears that she was an eyewitness to Joani's accident, that she saw Joani enter the store wearing flip-flops and walking at a normal pace, and that she saw Joani fall. She states that she approached Joani and saw water on the floor where Joani had slipped and fell, that Joani's flip-flops had left a "skid mark" on the floor where she had fallen, and that almost immediately a woman, who she later learned was Joani's mother, arrived to help Joani. She indicates that she advised Joani's mother not to move Joani, that no one from the store came to help Joani after she fell, although there were a number of cashiers in the vicinity, and that she left the store approximately five minutes after this incident. Dodge further swears that she did not see anyone from the store try to help Joani while she was at the store, and that an ambulance did not arrive, neither was Joani moved, while she was there.

In her affidavit, Lavinio swears to essentially the same facts as set forth in her deposition testimony, that she "personally saw water on the floor in the location where [Joani] fell," and that she was not paying attention to the floor before Joani's accident. She states that Joani was not moved after she fell, and that she "overheard two female employees of Kmart saying to each other that" there had been a previous spill where Joani fell and that the store employees who addressed the spill "must not have cleaned up all of the water" from that spill.

In her affidavit, Joani swears that she was not running before she fell, that she did not move after she fell, and that she did not wipe her tears on the floor despite the fact that the pain of her fall caused her to cry. She states that "[t]he only reason that I slipped and fell, was because there was water on the floor" where she fell.

In his affirmation in opposition to the motion, counsel for the plaintiffs contends that there are triable issues of fact "with respect to defendant's contention that there was no water on the floor," and regarding the defendant's contentions that the plaintiffs do not know the cause of the accident and that it did not have actual or constructive notice of the allegedly defective condition. While, in fact, there are triable issues of fact regarding the defendant's first two contentions, those issues are not determinative of the defendant's motion for summary judgment. As set forth above, in order to establish a prima facie case of negligence, the plaintiffs must demonstrate that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition. The plaintiffs do not submit any evidence to raise a triable issue whether the defendant created the allegedly defective condition. Counsel for the plaintiff contends that the statement overheard by Lavinio regarding the alleged "prior spill" raises triable issues regarding the defendant's actual or constructive notice of the allegedly defective condition. Specifically, counsel for the plaintiff contends that said hearsay evidence may be considered in opposition to the motion as long as it is not the only proof submitted, that the statements are not hearsay but demonstrate that there are triable issues as to whether the defendant had actual or constructive notice or, in the alternative, that the statements are admissible under the "spontaneous declaration" exception to the hearsay rule.

The plaintiffs do not submit any evidence regarding the issue of actual or constructive notice other than the alleged statements by "two female employees." Thus, it is determined that said statements are hearsay which fails to warrant denial of the defendant's motion (***Mallen v Farmingdale Lanes, LLC***, *supra*; ***Rodriguez v Sixth President***, *supra*). In addition, the alleged post-accident statements are hearsay which cannot be used by the plaintiff to raise a triable issue of fact as to the defendant's actual or constructive notice as the plaintiffs have failed to identify said alleged declarants, let alone their authority to speak on behalf of the defendant (*see* ***Berzon v D'Agostino Supermarkets, Inc.***, 15 AD3d 600, 792 NYS2d 94 [2d Dept 2005]; ***Cohn v Mayfair Supermarkets***, 305 AD2d 528, 759 NYS2d 131 [2d Dept 2003]; ***Masotti v Waldbaums Supermarket***, 227 AD2d 532, 642 NYS2d 950 [2d Dept 1996]; *but see* ***Stern v Waldbaum, Inc.***, 234 AD2d 534, 651 NYS2d 187 [2d Dept 1996]). Moreover, counsel's contention that said statements constitute spontaneous declarations is without merit as the plaintiffs have failed to submit any evidence that the declarants were under the stress of excitement caused by Joani's fall (***Tyrrell v Wal-Mart Stores***, 97 NY2d 650, 737 NYS2d 43 [2001]; ***Gonzalez v City of New York***, 109 AD3d 510, 970 NYS2d 286 [2d Dept 2013]).

It is determined that the plaintiffs have failed to raise a triable issue of fact requiring a trial of this action. Inasmuch as the first cause of action which seeks damages on behalf of the infant plaintiff must be dismissed, the second cause of action, which is a derivative cause of action on behalf of the plaintiff's mother, must also be dismissed (*see* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]). Accordingly, the defendant's motion for summary judgment dismissing the complaint is granted.

Dated: June 4, 2015

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION