10

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
Civil No. 18-1851-L2

LORNA HYLAND
Plaintiff

vs.

BARNES & NOBLE BOOKSELLERS, INC.
Defendant

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Lorna Hyland fell on a tile floor and broke her wrist (among other injuries) in a store operated by defendant Barnes & Noble Booksellers, Inc. She filed this action to recover damages. The case is before me on defendant's motion for summary judgment. While summary judgment is rare in negligence cases, this is one in which plaintiff has not shown an ability to prove a material element of her claim. Accordingly, I am compelled to grant the motion.

BACKGROUND

On July 8, 2015, plaintiff was a customer in defendant's store at 98 Middlesex Turnpike in Burlington. Not long before the store was closing, plaintiff approached the "cashwrap area" of the store (where the cash registers and check out are located) to purchase a book. Both of plaintiff's hands were full. She was wearing flip-flop style sandals with no strap or other supporting mechanism around the heel. The main part of the store from which plaintiff was proceeding was carpeted, but the cashwrap area had ceramic tile flooring.

As plaintiff turned left from the display area of the store toward the cashwrap area, she lost her balance and fell. A video of a number of others walking in and over the cashwrap area, and around the vicinity, does not depict anyone else slipping, falling, or having any difficulty

traversing the area. The video does not depict any discoloration or foreign substance on the floor in the area where plaintiff fell,[1] It does not show plaintiff (or any others) making any observations of the area after she fell to determine if there was a foreign substance on the floor or any other cause of her fall, or cleaning up anything that might have rendered the area slippery.

Plaintiff has not submitted an affidavit in response to defendant's motion, but instead relies on her interrogatory answers and the transcript of her deposition. Plaintiff asserts in her interrogatory answers that when she stepped into the cashwrap area she "stepped on something slick and my feet flew out from under me." Plaintiff's deposition testimony was in accord: "I step on something slick. My feet fly out from under me."

Plaintiff does not affirmatively contend that there was a foreign substance (liquid or otherwise) on the tile, nor does she assert that she examined the area to determine what may have been slick in the area. Plaintiff states that she "saw a man with a bucket and mop walking past the area," but "did not see caution signs posted of a wet floor."[2] When asked during her deposition about where in the store she observed the man, plaintiff was unable to provide a description or to place the man in the cashwrap area:

> Q. Where was he located in the store, based on where you were?
>
> A. I don't remember precisely, but I saw him in the area because I remember taking that in.
>
> Q. And just generally in the area? Was he on the carpet side or tile side where you fell? Do you recall that?
>
> A. I am not thinking of a good description for you, but I did see the fellow.

---

[1] Given the resolution of the video, there is certainly a dispute – or perhaps defendant would concede – that the video would not necessarily depict a clear liquid or water on the floor.

[2] Defendant has no record of any maintenance being done in the store on that date, including in the area of plaintiff's fall.

Plaintiff does not say that she saw the man with a bucket and mop working or mopping in the cashwrap area (and the video does not depict any such work, although the portion provided in the summary judgment record is for a limited duration) or in any other area of the store accessible to patrons.

DISCUSSION

Summary Judgment is proper when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). The moving party has the burden to prove the lack of a triable issue. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714-716 (1991); Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). Once the moving party has established the lack of a triable issue, the nonmoving party must submit "facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e).[3] See Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp., 469 Mass. 800, 804 (2014).

To prevail on a commercial slip and fall claim, a customer/plaintiff must prove that the landowner or one control of property failed to exercise reasonable care to guard against reasonably foreseeable risks of harm to customers or patrons invited onto or lawfully on the property. Papadopoulos v. Target Corp., 457 Mass. 368, 378 (2010). The plaintiff must show that the landowner created the risk, or knew or reasonably should have known of the risk, before the landowner may be found liable for having failed to take preventative measures. Bowers v. P. Wile's, Inc., 475 Mass. 34, 37-41 (2016); Whittaker v. Saraceno, 418 Mass. 196, 199 (1994).

---

[3] Plaintiff has not disputed the facts in defendant's statement of undisputed material facts, see Superior Court Rule 9A(b)(5)(iii)(A) ("each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted"), nor has she sought relief under Mass. R. Civ. P. 56(f) in order to obtain additional information or evidence to bolster her claim.

Plaintiff has failed to demonstrate that it was reasonably foreseeable to defendant that there was a fall risk in the area of plaintiff's fall. First, the plaintiff has failed to bring forward facts to suggest that there was any foreign substance on the floor of the cashwrap area. She has testified that she stepped on something slick. She has not indicated she stepped on any foreign substance, that she felt the area and it was slick or wet, or that she did anything other than assume that there was something on the floor because she fell. Of course, crediting plaintiff's testimony that there was something slick, it is not clear whether her contention is that there was a foreign substance on the ceramic tile floor making it slick, or that the floor itself was slick without the addition of a foreign substance. In the latter regard, however, plaintiff has not brought forward any evidence to suggest that the flooring in the cashwrap area did not meet code, was itself unreasonably slippery, or without more presented a fall risk.

Perhaps more importantly, plaintiff has failed to bring forward evidence to suggest that defendant created the "slick" condition, or knew or reasonably should have known that the condition of the floor at the time in the area where plaintiff fell was slippery, slick, or otherwise presented a fall risk. Plaintiff has not shown how long any such condition existed or that there had been any other falls in the area. The only thing plaintiff asserts in this regard is that she saw a person walking with a mop and pail in "the area," although she does not know exactly where. From this she argues that ""[t]he logical inference . . . is that there was something present on the floor that caused the Plaintiff to slip and fall." This is hardly the logical inference. Plaintiff offered no testimony to suggest that any maintenance was done in the cashwrap area, that anyone had been mopping in that area, or that the floor was actually wet. Plaintiff has not indicated where within the store she saw the man, or when she observed this man walking in relation to her fall. Far from a "logical inference," plaintiff asks the court to allow the case to proceed to trial

based on speculation, surmise and conjecture, none of which are permitted in this context. See, e.g., Gomez v. Stop & Shop Supermarket Co., 670 F.3d 395, 397-398 (1st Cir. 2012).

ORDER

Defendant Barnes & Noble Booksellers, Inc.'s Motion for Summary Judgment (Docket #9) is **ALLOWED**.

Dated: December 16, 2019

Peter B. Krupp
Justice of the Superior Court