

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>MICHELLE AND ROBERT WINTERS, h/w</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiffs</b>	:	
	:	
<b>V.</b>	:	
	:	
<b>MARINA DISTRICT DEVELOPMENT CO.,</b>	:	<b>NO. 05-5937</b>
<b>LLC.</b>	:	
<b>Defendant</b>	:	

**MEMORANDUM AND ORDER**

M. FAITH ANGELL  
UNITED STATES MAGISTRATE JUDGE

May 18, 2007

Presently before this court is the Defendant’s Motion for Summary Judgment on the issue of liability.

In its Motion for Summary Judgment, Defendant Marina District Development Co. (“Marina”) argues that Plaintiff, Michelle Winters<sup>1</sup>, cannot sustain her action for negligence because Plaintiff cannot prove that Marina had actual or constructive notice of the allegedly hazardous condition that caused Plaintiff’s injuries while Plaintiff was a business invitee of Defendant’s casino, the Borgata. Marina contends that because Plaintiff cannot prove that Defendant breached a duty of care owed, there is no genuine issue of material fact and Marina is entitled to judgment as a matter of law. *See Memorandum of Law in Support of Defendant’s Motion for Summary Judgment.*<sup>2</sup>

Plaintiff responds that Marina is not entitled to summary judgment. Plaintiff asserts that competent evidence has been presented such that a reasonable jury could find that a dangerous condition existed for a sufficient period of time that Marina should have

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<sup>1</sup> There are two Plaintiffs suing the Defendant in this case – Michelle Winters and her husband. Since Mrs. Winters was the person who was actually involved in the slip and fall, she will be the only Plaintiff referred to in this discussion.

<sup>2</sup> Hereinafter “Defendant’s Memo.”

discovered the hazardous condition had they exercised the ordinary care that was owed to Plaintiff. Plaintiff argues that, in viewing the evidence in the light most favorable to the non-moving party, there is a genuine issue as to a material fact – whether Marina had constructive notice – and summary judgment should be denied. *See Memorandum of Law in Support of Plaintiffs’ Answer in Opposition to Defendant’s Motion for Summary Judgment.*<sup>3</sup>

Upon consideration of Defendant’s Motion, Plaintiff’s Answer, all attached exhibits, the record, and the applicable caselaw, and as discussed more fully below, Defendant’s Motion for Summary Judgment will be denied.

### **I. FACTUAL BACKGROUND**

I begin by presenting the facts, drawing all reasonable inferences in favor of Plaintiff, the non-moving party. *See e.g., Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

On August 27, 2004, Plaintiff Michelle Winters, was a patron – a business invitee – at the Borgata casino, which is owned and operated by the Defendant, Marina. *Defendant’s Motion for Summary Judgment*<sup>4</sup> at ¶3; *Defendant’s Memo* at p. 11; *Plaintiffs’ Answer* at Exhibit A (Affidavit of Dolores Lamb). Plaintiff was meeting her mother, Dolores Lamb, who was seated at a slot machine, waiting for her daughter to join her. *Plaintiffs’ Answer* at Exhibit A. When Plaintiff arrived, she attempted to sit down at the slot machine directly to the right of where her mother was seated. *Defendant’s Memo*: Exhibit B (deposition transcript of Michelle Winters) at p. 68. Plaintiff’s foot slipped on a metal plate that runs on the floor from the slot machine to the slot seat.

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<sup>3</sup> Hereinafter “Plaintiffs’ Memo.”

<sup>4</sup> Hereinafter “Defendant’s Motion.”

After her fall, both Plaintiff and her mother noticed a liquid substance present on the metal plate. *Id.* at pp. 68-69. Plaintiff alleges that she sustained injuries as a result of the fall. *Defendant's Memo* at Exhibit A (Plaintiffs' Complaint).

## **II. MOTION FOR SUMMARY JUDGMENT**

In its Motion for Summary Judgment, Marina makes the following argument concerning Plaintiff's negligence claim:

1. Plaintiffs are unable to present any evidence as to either the source of the liquid, or how long it was on the foot rest portion of the chair, prior to the alleged fall.
2. Plaintiffs are also unable to demonstrate that Marina had actual or constructive notice of the clear liquid, nor can plaintiffs prove that Marina had a hand in creating the alleged harmful condition.
3. Since there is no evidence as to the source of the liquid, how long it was on the foot rest, nor any proof of notice to Marina prior to plaintiff's fall, Marina is entitled to summary judgment as a matter of law.

*Defendant's Motion* at ¶¶9-11.

## **III. DISCUSSION**

### **A. Legal Standard**

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

"An issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Moyer v. Borough of North Wales*, CA No. 00-1092, 2001 WL 73428 at \*1 (E.D.Pa. January 25, 2001)(citing *Anderson v. Liberty, Inc.*, 477

U.S. 242, 248, 106 S.Ct. 2505). “A factual dispute is ‘material’ if it might affect the outcome of the case under governing law.” *Id.*

“When the non-moving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the non-moving party’s evidence is insufficient to carry its burden of persuasion at trial.” *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 329 (3d Cir. 1995). “A non-moving party creates a genuine issue of material fact when it provides evidence ‘such that a reasonable jury could return a verdict for the non-moving party.’” *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1996)).

On summary judgment, it is not the court’s role to weigh the disputed evidence and decide which is more probative. “When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party’s favor.” *Wishkin*, 476 F.3d at 184.

## **B. Analysis**

In order to make out a claim for negligence, a plaintiff must prove four elements: (1) the existence of a duty or obligation recognized by law; (2) a breach of the duty; (3) causal connection between the breach of duty and the resulting injury; and (4) actual loss or damage. *Fulton v. U.S.*, 198 Fed.Appx. 210, 213 (3d Cir. 2006). The only element of Plaintiff’s negligence claim that is at issue in Defendant’s Motion is whether Marina breached a duty owed to Plaintiff. Specifically, whether Plaintiff can prove by a

preponderance of the evidence that Marina had actual or constructive notice of the allegedly dangerous condition that caused Plaintiff's injuries.

“It is well settled that a business owner owes a duty to an invitee ‘to maintain its premises in a reasonably safe condition for the contemplated uses thereof and the purposes for which the invitation was extended.’” *David by Berkeley v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230, 236 (3d Cir. 1984)(citing *Morris v. Gimbel Brothers, Inc.*, 394 F.2d 143, 145 (3d Cir. 1968). A business “invitee” is defined as a person, such as the Plaintiff, who enters the business owner’s property for a purpose either directly or indirectly related to business dealings with the owner. *Estate of Swift v. Northeastern Hospital of Philadelphia*, 456 Pa. Super. 330, 335, 690 A.2d 719, 723 (Pa. Super. 1997). “An invitee is entitled to expect that the [business owner] will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.” *Restatement (Second) of Torts* §343 (1965), comment d.

There is no evidence, and Plaintiff does not contend, that Marina actually knew of the liquid on the metal plate at the slot machine where Plaintiff attempted to sit. Accordingly, this Court must determine whether Plaintiff has presented sufficient evidence such that a reasonable jury could conclude that Marina had constructive notice that the condition of the floor was dangerous as a result of the presence of the liquid on the metal plate. This burden is met by demonstrating that the dangerous condition had existed for such a length of time that the Defendant, in the exercise of ordinary care, should have been aware of the condition. *David by Berkeley*, 740 F.2d at 236.

In support of its Motion for Summary Judgment, Marina points out that Plaintiff testified that “she was both unaware of the source of the liquid and how long the liquid had been on the foot rest prior to plaintiff’s fall.” *Defendant’s Motion* at ¶6. Mrs. Lamb, who witnessed Plaintiff slip and fall, testified that she “did not see the liquid before plaintiff’s fall, and that she did not know the source of the liquid.” *Id.* at ¶7. She also testified that “she did not know if anyone had complained to any Borgata personnel, prior to plaintiff’s fall, about the presence of the liquid.” *Id.* at ¶8. Marina argues that “there is simply no evidence to suggest that the liquid had been there for a sufficient period of time to be discovered.” *Defendant’s Memo* at pp. 12-13. It is Marina’s contention that Plaintiff has failed to show that Defendant had any notice of the condition and, hence, no duty to either warn Plaintiff of the condition, or to remedy the condition. *Id.* at p. 12.

Alternatively, Plaintiff argues that the “evidence of record demonstrates that the hazardous condition was present for a sufficient period of time to allow the defendant to discover it.” *Plaintiffs’ Memo* at p. 6.

The evidence contains records from the Borgata casino, in the form of a computer screen-shot print-out, which tracks a patron’s use of a particular machine based on that player inserting their Borgata Card into that machine. These records demonstrate that Mrs. Lamb was using the slot machine for approximately one hour to an hour and sixteen minutes before the accident occurred. *Plaintiffs’ Answer* at pp. 3, 6; *Plaintiffs’ Answer* at Exhibit A; *Plaintiffs’ Memo* at p. 6; *see also Plaintiffs’ Answer* at Exhibit 1 (Borgata screen-shots). Mrs. Lamb testified that during the time she was seated at that machine, she played the slot machine in front of her, as well as the machines to the immediate left and right of her. *Plaintiffs’ Answer* at Exhibit A. She testified that during this time, she

did not spill any liquids, no one else sat in the seat or played the slot machine to her immediate right, no one spilled any liquids at the machine to her immediate right, and no Borgata personnel made any inspection of the area. *Id.*

Plaintiff suggests that this evidence reasonably infers that the liquid spill, which was not caused by Michelle Winters or Dolores Lamb, was present for at least one hour before Plaintiff's accident occurred. *Plaintiffs' Memat* p. 6.

Plaintiff also highlights the testimony of Wayne Goble, the Borgata's environmental service manager. *Id.* at pp. 3-4. Mr. Goble explained that Borgata maintenance employees called "attendants" are assigned to clean specific areas of the casino. In describing what constitutes these attendants' cleaning duties, Mr. Goble stated "if there is a drink spill in between the machine they'll wipe that up." *Id.* (*citing Plaintiffs' Answer: Exhibit D* (deposition transcript of Wayne Goble) at p. 31).

Attendants "would be responsible for cleaning up any spillage that may be on any of the carpeting, in the slot base, on the stools, anything out of the slot trays. Once in a while people will spill drinks in the tray itself." *Id.* (*citing Plaintiffs' Answer: Exhibit D* at pp. 20-21). Mr. Goble testified that attendants are responsible for cleaning up when customers spilled drinks or portions of drinks on the slot sled bases. *Id.* (*citing Plaintiffs' Answer: Exhibit D* at pp. 36-37).

Mr. Goble went on to explain that attendants conduct continuous rounds through their assigned areas, inspecting each machine and the floor, and cleaning where necessary. *Id.* (*citing Plaintiffs' Answer: Exhibit D* at pp. 25, 30). Mr. Goble stated that this inspection is done continuously and that an entire assigned area can be inspected in roughly twenty-five to thirty minutes. *Id.* (*citing Plaintiffs' Answer: Exhibit D* at p. 31).

Viewing the evidence in the light most favorable to the Plaintiff, the record suggests that Marina knew that drinks they served to patrons were spilled on the casino floor at the slot areas in the course of the day-to-day business. They had attendants who were responsible for inspecting those areas and cleaning such spills on a routine basis, with each area being inspected every 25-30 minutes. Since Mrs. Lamb testified that she did not spill any liquid, and she didn't see anyone else sit down at the machine to her immediate right or spill any liquid there, it would be reasonable to infer that the liquid was on that metal plate before Mrs. Lamb sat down, and in the time that the Borgata's records show that Mrs. Lamb was sitting at the particular slot machine, the cleaning crew would have had at least two opportunities to discover the spilled liquid on the metal plate between the slot machine and the slot stool before Plaintiff's fall.

Accordingly, there is sufficient evidence that a reasonable jury could find that the Defendant had constructive notice and, in the ordinary exercise of reasonable care, should have discovered the spilled liquid on the metal plate which constituted a hazardous condition and caused Plaintiff to fall and injure herself.

#### **IV. CONCLUSION**

Consistent with the above discussion, since there is a genuine issue as to a material fact, summary judgment is inappropriate and Defendant's Motion must be denied.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>MICHELLE AND ROBERT WINTERS, h/w</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>Petitioner</b>	<b>:</b>	
	<b>:</b>	
<b>V.</b>	<b>:</b>	
	<b>:</b>	
<b>MARINA DISTRICT DEVELOPMENT CO., LLC.</b>	<b>:</b>	<b>NO. 05-5937</b>
	<b>:</b>	
<b>Defendant</b>	<b>:</b>	

**ORDER**

AND NOW, this 18<sup>th</sup> day of May, 2007, upon consideration of Defendant's Motion for Summary Judgment, Plaintiffs' Answer, and consistent with the above discussion, it is hereby **ORDERED** that:

1. Defendant Marina District Development Co., LLC.'s Motion for Summary Judgment [Docket Entry #25] is **DENIED**.

BY THE COURT:

S/M. FAITH ANGELL  

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M. FAITH ANGELL  
UNITED STATES MAGISTRATE JUDGE