

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

ELIZABETH BYNOE,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-15-CV-503
	)	
v.	)	
	)	
CULUSVI, INC.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court on a Motion to Dismiss filed by Defendant CULUSVI, Inc. ("Cost-U-Less") on November 17, 2015.¹ For the reasons stated below, the Court will deny Cost-U-Less' Motion to Dismiss.

I. BACKGROUND

This slip-and-fall case arises from an incident at Cost-U-Less, a grocery store located on St. Croix. Plaintiff Elizabeth Bynoe ("Bynoe") seeks damages from Cost-U-less under a negligence theory. To support her claim of negligence, Bynoe alleges in her complaint that on September 1, 2015, she fell on a greasy substance located near the cash registers as she exited Cost-U-Less. Compl. ¶ 4. Bynoe claims that, while waiting in line, she did not "see anyone drop or spill anything in that area before she fell." *Id.* She avers that "the greasy substance was located in the immediate vicinity of several cashiers," thus creating "actual notice, or at the very least constructive notice, of the spill." *Id.*

¹ Bynoe filed a memorandum in opposition to Cost-U-Less' motion to dismiss on December 1, 2015. Cost-U-Less filed a reply on December 17, 2015.

Bynoe claims that she suffered significant injuries and expenses as a result of the fall. *Id.* at ¶ 8.

II. LEGAL STANDARD

“Under Federal Rule of Civil Procedure 12(b)(6), a party may move to have a claim dismissed ‘for failure to state a claim upon which relief can be granted.’” *Brady v. Cintron*, 55 V.I. 802, 822 (V.I. 2011) (citing FED. R. CIV. P. 12). “The adequacy of a complaint is governed by the general rules of pleading set forth in Rule 8 of the Federal Rules of Civil Procedure.” *Id.* “Federal Rules 8 and 12 are made applicable to the Superior Court by Superior Court Rule 7, which provides that ‘[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Civil Procedure.’” *Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015).

Rule 8 requires that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). However, the rule also requires that the complaint must have “enough factual matter (taken as true) to suggest the required element(s)” of the claim. *Robles v. HOVENSA, LLC*, 49 V.I. 491, 501 (V.I. 2008). These facts must “nudge[] [the plaintiff’s] claims across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A formulaic recitation of a cause of action’s elements will not do.” *Id.* at 555. The facts alleged in the pleadings, and any inferences drawn therefrom, must be viewed in the light most favorable to the plaintiff. See *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 566 (V.I. 2012).

When deciding whether a complaint can survive a 12(b)(6) motion, the Court must perform a three-step analysis. *Brady*, 55 V.I. at 823. The Court must: 1) note the elements

that must be pled to sufficiently state a claim; 2) identify allegations that are not entitled to the assumption of truth because they are no more than mere conclusions; and 3) assume the veracity of well-pleaded factual allegations and then determine whether they could plausibly establish entitlement of relief. *Id.* Allegations that are not entitled to an assumption of truth “can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual enhancement.” *Id.*; *see also Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-50 (V.I. 2011). If there are facts sufficient for the court to “draw a reasonable inference that the defendant is liable based on the elements . . . then the claim is plausible.” *Joseph*, 54 V.I. at 650. The Court will not assume that “labels and conclusions” or “formulaic recitation[s] of the elements of a cause of action” are true. *Twombly*, 550 U.S. at 555 (2007).

III. DISCUSSION

In order to establish a claim of negligence, a plaintiff must “demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the defendant’s negligence caused the plaintiff’s injury.” *Brady*, 55 V.I. at 823; *see also Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (explaining why the traditional elements of negligence—duty, breach, cause and harm—constitute the soundest common law rule for the Virgin Islands).

Cost-U-Less argues that Bynoe’s Complaint fails to allege a plausible negligence claim contending that “Bynoe does not explain how Cost-U-Less had any knowledge whatsoever of this alleged condition,” characterizing Bynoe’s notice argument as a “naked legal conclusion.” Def.’s Mot. Dismiss at 4. Bynoe counters that her complaint validly alleges a claim of

negligence against Cost-U-Less. Focusing heavily on the issue of notice, Bynoe cites several cases from other jurisdictions for the proposition that the presence of store employees near the site of a spill is a significant factor in establishing constructive notice. Pl.'s Mem. Opp'n Mot. Dismiss at 3. Thus, the issue in this case is whether Bynoe has plead a plausible claim for breach of duty of care.

In the Virgin Islands, a possessor of land is subject to liability for physical harm caused to its business invitees by a condition on the land only if it: (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; (3) fails to exercise reasonable care to protect them against the danger. *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 529 (V.I. 2013). The mere existence of a dangerous condition or the happening of an accident on a business premises is not evidence of a breach of duty of care nor does it raise a presumption of negligence. *David v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230, 233 (3d Cir. 1984). In order to show that a landowner breached its duty of care to protect an invitee from a dangerous condition on the property, a plaintiff must show that the landowner had either actual or constructive notice of a dangerous condition. *Machado*, 61 V.I. at 392. In the context of a slip-and-fall case, "[a]ctual notice exists if the store had been warned about the condition of the [dangerous condition] on the floor beforehand." *Felix v. GMS*, 501 F. App'x 131, 135 (3d Cir. 2012). Constructive notice can exist if "the [dangerous] condition persisted over a long enough period of time that the owner should have become aware of it through the exercise of reasonable care." *Machado*, 61 V.I. at 392. "[T]he issue of prior notice

to the store, either actual or constructive, of an unreasonable risk of harm is more difficult to establish than establishing the presence of a foreign substance on the floor." *Felix v. GMS*, 501 F. App'x 131, 134-35 (3d Cir. 2012).

In *Larkin v. Super Fresh Food Mkts., Inc.*, 291 Fed. Appx. 483 (3d Cir. 2008), the United States Court of Appeals for the Third Circuit held that proof of a defect's existence for twenty-three minutes is not by itself enough to establish constructive notice under Pennsylvania law.² In that case, Larkin sued grocer Super Fresh Food Markets ("Super Fresh") after slipping and falling on a mat at the entrance of the store that was "not flush with the ground." *Id.* at 484. A video recording of the store's entrance shows an independent contractor laying the mat on the date of the accident. Twenty-three minutes later, the video shows Larkin approaching the mat and falling. Larkin's affidavit contained no information about the mat, and Larkin never claimed that the video shows the mat at all. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Super Fresh. The Third Circuit affirmed the district court's ruling, noting that because Larkin never argued that Super Fresh had actual notice of the misplaced mat, the case would turn on whether Super Fresh had constructive notice of the defect. On the issue of constructive notice, the Third Circuit held:

Without evidence about when the mat became buckled, a fact-finder could only speculate about whether Super Fresh should have discovered and corrected the problem. Therefore, as a matter of law, Super Fresh did not have constructive notice.

² The Pennsylvania law establishing landowners' duties to protect business invitees from foreseeable harm is identical to the Virgin Islands law on the issue. See, e.g., *Carrender v. Fitterer*, 503 Pa. 178, 185 (Pa. 1983); *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 529 (V.I. 2013).

Id. at 486 (emphasis added). In the Third Circuit, then, plaintiffs must proffer some evidence as to when the defect was created in order to impute constructive notice to the business owner. It is not enough in the Third Circuit to “speculate” about when a defect was created.

Likewise, in *Bowman v. Wal-Mart Stores E., LP*, 2015 U.S. Dist. LEXIS 16436 (E.D. Pa. Feb. 10, 2015), the United States District Court for the Eastern District of Pennsylvania found no constructive notice on the part of a Wal-Mart supermarket where egg yolk was spilled four minutes before the plaintiff slipped on it. In that case, Bowman entered a Wal-Mart supermarket with his brother and was in the store between two and four minutes before the incident. *Id.* at 2-3. He originally entered the supermarket with his brother for a few minutes before turning back to retrieve something from his car. A video recording of the incident shows Bowman and his brother re-entering the Wal-Mart and walking toward the spilled egg yolk. The video recording then illustrated the following:

6:06:15 p.m. — Nothing is on the floor in the area of the incident.

6:10:33 p.m. — A customer removes an egg carton from her shopping cart in the area of the incident. Numerous customers and carts are in the area of the incident at the time, so the video does not show an egg breaking or egg debris falling onto the floor.

6:11:18 p.m. — What appears to be egg yolk appears on the ground in the video for a brief moment, although the area is still largely covered by customers and carts. The video does not show any identifiable Wal-Mart associates or other Wal-Mart staff members walking through the area from the time the spill appears until the incident occurs. The video does show that the area of the spill is in close proximity to the store cash registers, although the view appears to be partially obscured by a product display.

6:13:40 - 6:13:43 p.m. — The video shows Bowman and his brother traversing the area of the spill. Bowman's brother walks through the spill and nothing happens. Bowman appears

to pause and look at the egg yolk, and then he walks around the spill.

6:14:17 - 6:14:19 p.m. — Bowman, walking alone, approaches the area of the spill from the other direction. Bowman walks into the spill, brings his feet together, and falls to the ground.

6:14:39 p.m. — Bowman remains on the ground, and a Wal-Mart employee comes to his assistance.

Id. at 4. There, the court there noted that “[t]he duration of the hazard is one of the most important factors because if a hazard only existed for a very short period of time before causing any injury, then the possessor of the land, even by the exercise of reasonable care, would not discover the hazard, and thus would owe no duty to protect invitees from such a hazard.” *Id.* (citation omitted). The court went on to hold that “Wal-Mart did not have constructive notice of the spill, which was on the floor for approximately four minutes and was partially obscured by customers, carts, and a product display.” *Id.* at 11. The court noted that “[n]o Court has ever held that five minutes is sufficient constructive notice of a dangerous condition; to so hold would be to make the defendant an insurer.” *Id.* at 12 (citation omitted).

Conversely, in *David by Berkeley v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230, 236 (3d Cir. 1984), a case applying Virgin Islands law, constructive notice was shown through a witness’s statement that the spill had been on the supermarket floor for up to two hours before the incident. This differs from the conclusion reached by the Third Circuit in *Larkin*, *supra*, where the time of the creation of the defect could only be gleaned through speculation. Similarly, in *Katz v. John Wanamaker Philadelphia, Inc.*, constructive notice was shown through a witness’ statement that the stairs on which plaintiff slipped were wet and muddy “for about an hour.” 381 Pa. 477, 481 (Pa. 1955).

Going even further, the United States Court of Appeals for the Fourth Circuit recently considered whether, in a “slip-and-fall” context, constructive notice may be established where “approximately nineteen minutes elapsed from the time of the spill to the time of the fall.” *Adams v. Kroger Ltd. P'ship Inc.*, 527 Fed. Appx. 265, 268 (4th Cir. 2013). The court concluded that it could:

Adams argues on appeal that the jury, and not the court, should have determined whether nineteen minutes was a sufficient amount of time to charge Kroger with constructive notice of the dangerous condition. We agree. **In this case, video from a Kroger surveillance camera depicted the spill area for nineteen minutes. In our view, a reasonable jury could have found constructive notice under these circumstances, and the court erred in reaching the opposite conclusion.**

Id. at 269 (emphasis added). In that case, the Fourth Circuit had no issue imputing notice where the genesis and age of the defect was shown through video footage.

Some courts have held that the genesis and age of the defect may be inferred. For example, in *Ryan v. Super Fresh Food Markets, Inc.*, the United States District Court for the Eastern District of Pennsylvania held that constructive notice was established by plaintiff's testimony that she neither saw nor heard a spill during her 15-minute conversation in a supermarket aisle prior to her fall in the same aisle, resulting in an inference that the spill had been on the floor for at least 15 minutes before plaintiff's fall. 2000 U.S. Dist. LEXIS 5713 at *2-3 (E.D. Pa. Apr. 26, 2000).

However, in *Romeo v. Harrah's Atl. City Propco, LLC*, 2016 U.S. Dist. LEXIS 31457, *14 (D.N.J. Mar. 10, 2016), a case involving actual notice, the United States District Court for the District of New Jersey held that the defendant had notice of the dangerous condition despite a spill only being present for four minutes before the plaintiff there slipped. In that case, a

video recording of the premises showed “supervisor Fernando DaSilva walking in the general area of the existing spill, lingering for a moment, and then departing the area” without making efforts to either contain the spill or to warn customers of its existence. *Id.*

At this stage of the proceedings, Bynoe does not have to prove that Cost-U-Less had actual or constructive notice of a dangerous condition on the floor. Rather, Bynoe need only allege sufficient factual matters that, if true, alleges a plausible claim that Cost-U-Less had actual or constructive notice that there was a dangerous condition on the floor. Viewing the allegations in the light most favorable to Bynoe, the Court finds that the complaint alleges a plausible claim of negligence. Bynoe alleges that she was standing in line for approximately ten minutes and did not see anyone drop or spill anything in the area before she fell. Bynoe also alleges that the greasy substance was located in the immediate vicinity of several Cost-U-Less employees near the checkout counter. Thus, assuming Bynoe’s allegations to be true, it is plausible that the greasy substance was on the floor for more than 10 minutes and that Cost-U-Less employees either knew or should have known that there was a dangerous condition on the floor where customers traversed. Rule 8 of the Federal Rules of Civil Procedure does not require that plaintiffs definitively prove all of a cause of action’s elements in a complaint; plaintiffs must only make a “plausible” case for liability. *Robles*, 49 V.I. at 501.

IV. CONCLUSION

For the reasons stated above, the Court finds that Bynoe’s complaint contains sufficient factual matter that alleges a plausible claim for negligence. Accordingly, the Court will deny Cost-U-Less’ motion to dismiss. An appropriate Order follows.

Dated: April 1, 2016

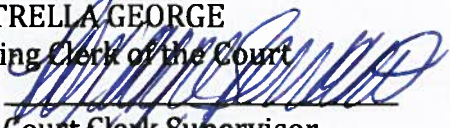


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE

Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 
