STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

STEPHANIE CAROTA,

Plaintiff,

v.

HESS CORPORATION,

Defendant.

DECISION AND ORDER

Index No. 60319
RJI No. 56-1-2014-0630

Stanclift Ludemann Silvestri & McMorris PC, Glens Falls (*John M. Silvestri* of counsel), for plaintiff.

Ahmuty, Demers & McManus, Albertson (*Patrick J. Pickett* of counsel), for defendant.

ROBERT J. MULLER, J.S.C.

This is a trip and fall personal injury claim in which plaintiff alleges she sustained injuries at approximately 6:45 A.M. on November 13, 2012 when she fell at defendant's filling station located at 81 Main Street in the Town of Queensbury, Warren County. Plaintiff claims her accident occurred because defendant negligently failed to properly maintain its premises and defendant now argues in this CPLR 3212 summary judgment motion there was a storm in progress and it was not given notice of a dangerous condition.

On a motion for summary judgment the movant must establish, by admissible proof, its entitlement to judgment as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has met this initial burden, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Applying these principles to the instant case, defendant has not met its

initial burden of demonstrating the absence of any triable issue of fact. To succeed on their motion for summary judgment, defendant bore the initial burden of demonstrating that they kept their premises in a reasonably safe condition and that they neither created the dangerous condition nor had actual or constructive notice of such condition (*see Salerno v North Colonie Cent. School Dist.*, 52 AD3d 1145, 1146 [2008]; *Reid v Schalmont School Dist.*, 50 AD3d 1323, 1324 [2008]).

To this end defendants have submitted, *inter alia*, the pleadings, the deposition testimony of plaintiff, the deposition testimony of one of defendant's employees and certified meteorological records that were gathered at a location in reasonably close proximity to the situs and that encompassed the time of these events.

Plaintiff's testimony describes a morning during which she completed her all-night shift as a visiting nurse at a patient's home that had begun the evening prior. On her way home she stopped to purchase fuel at defendant's Main Street location between 6:30 and 6:45 A.M., parking to the far side of pump number eight which is closest to the store. Not long in distance, under one-half mile before she reached the filing station, she observed some light drizzle on the pavement and when stepping out of the vehicle she took note of two small wet spots on the ground directly in front of the pumps. She proceeded to place the fuel hose into the vehicle's left quarter panel and then walked without incident some distance to an interior of the premises where the cashier was located, returning by the same path. While holding the fuel nozzle with her right hand and stepping over the outstretched hose with her right foot she fell forward and landed on her right side. The complaint alleges plaintiff slipped on a puddle of water and gas/oil and fell. Candidly plaintiff admits that the conditions on the premises encountered on this

morning were not, in her mind, unusual for a filling station.

The certified meteorological records indicate a heavy rain beginning at 1:28 A.M. after which a light rain was recorded from 1:43 A.M. to 8:27 A.M. The two closest times surrounding this incident at 6:22 A.M. and 6:53 A.M. record a continuing light rain which is substantially consistent with plaintiff's testimony.

The employee on duty during these events testified that while working inside the station she saw someone stumble between their vehicle and the pump. In addition to having been trained before her hire regarding safety precautions, spills, how to clean up spills, and other pump care this employee checked the pumping area, as required, when her shift began at 5:00 A.M. and did not see anything out of the ordinary. All employees are required to perform an inspection of these areas on an hourly basis and two other employees, whose shifts started between 6:00 A.M. and 7:00 A.M., may also have each inspected the subject area at the beginning of their shifts. With that said, evidence that such inspections may have occurred is only presented as inadmissible hearsay which cannot be relied upon. There is no indication that either the deposed employee – or the second employee whose shift began at 6:00 A.M. – made the required hourly inspection.

These submissions are insufficient to provide prima facie evidence that defendant kept the premises in a reasonably safe condition and did not have actual notice of any dangerous condition (*see Roberts v United Health Servs. Hosps., Inc.*, 128 AD3d 1210, 1211-1212 [2015]; *Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 1263-1264 [2010]; *Godfrey v Town of Hurley*, 68 AD3d 1527, 1528 [2009]; *Hagin v Sears, Roebuck & Co.*, 61 AD3d 1264, 1265 [2009]; *compare Reid v Schalmont School Dist.*, 50 AD3d at 1324; *Walker v Golub Corp.*, 276 AD2d 955, 956 [2000];

Tkach v Golub Corp., 265 AD2d 632, 633 [1999]; *Van Winkle v Price Chopper Operating Co.*, 239 AD2d 692, 693 [1997]; *Maiorano v Price Chopper Operating Co.*, 221 AD2d 698, 699 [1995]).

When viewing all of the evidence in the light most favorable to plaintiff, defendant has not established its entitlement to judgment as a matter of law. This initial burden having been missed, the nonmoving party is not required to demonstrate by admissible evidence the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Plaintiff is accorded the benefit of every reasonable inference supported by the record (*see Winne v Town of Duanesburg*, 86 AD3d 779, 780-781 [2011]; *Rought v Price Chopper Operating Co., Inc.*, 73 AD3d 1414, 1414 [2010]) and this record presents with questions of fact as to whether defendant's employees had undertaken their required hourly inspections. This makes it impossible for the Court to conclude that there was no notice of the water and gas/oil collection in the vicinity of pump number eight at any time after the last inspection at 5 A.M. (*see Stevenson v Saratoga Performing Arts Ctr., Inc.*, 115 AD3d 1086, 115 AD3d 1086, 1088 [2014]).

Based upon the foregoing, defendant's motion for summary judgment is denied.

Therefore, having considered the Affirmation of Patrick J. Pickett, Esq. with exhibits attached thereto, dated November 13, 2015, submitted in support of the motion; Affirmation of John M. Silvestri, Esq., dated December 9, 2015, submitted in opposition to the motion; Affidavit of Stephanie Carota, sworn to December 8, 2015, submitted in opposition to the motion; Memorandum of Law of John M. Silvestri, Esq. with appendices attached thereto, dated December 9, 2015, submitted in opposition to the motion; and Reply Affirmation of Patrick J.

Pickett, Esq., dated December 15, 2015, it is hereby

ORDERED that defendant's motion for summary judgment is denied in its entirety.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated November 13, 2015 and the submissions enumerated above. Counsel for plaintiff is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon defendant in accordance with CPLR 5513.

Dated: January 26, 2016
Lake George, New York

ROBERT J. MULLER, J.S.C.

ENTER: