

Elhorin v Western Beef, Inc.

2014 NY Slip Op 32494(U)

September 29, 2014

Sup Ct, New York County

Docket Number: 100145/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS

PART 58

YISREAL ELHORIN,

Justice
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NYS SUPREME COURT - CIVIL

INDEX No. 100145/12

Plaintiff,

MOTION DATE _____

MOTION SEQ. No. 002

-against-

WESTERN BEEF, INC., et al.,

FILED
SEP 30 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION CAL No. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 9/29/14



J.S.C.
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X

YISREAL ELHORIN,

Plaintiff,

Index No.

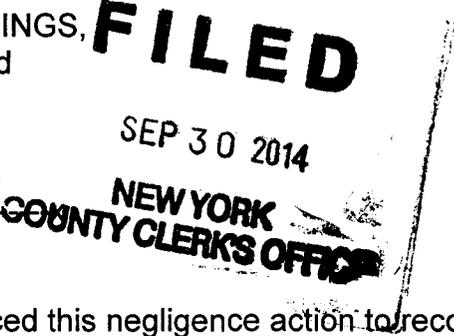
-against-

100145/12

WESTERN BEEF, INC., CACTUS HOLDINGS,
INC., CACTUS PROPERTIES 1, LLC and
CACTUS PROPERTIES NO. 1, LLC,

Defendants.

DONNA MILLS, J. :



Plaintiff Yisrael Elhorin, commenced this negligence action to recover for personal injuries he allegedly sustained on June 12, 2010 when he claims that he slipped and fell as a result of a piece of cardboard on the floor in the noodle aisle at the Western Beef supermarket located at 220-230 South Fulton Street, Mount Vernon, New York. Defendants, Western Beef Inc., et al., now move for summary judgment dismissing plaintiff's complaint asserting defenses, that it did not have actual notice of the alleged condition nor had any prior constructive notice of said condition which plaintiff alleges caused him to fall.

In moving for summary judgment defendants point to plaintiff's deposition testimony wherein he stated that it was only after he had slipped that he observed the cardboard on the floor. Defendants also rely on Troy Miller ("Miller"), who testified on behalf of defendants and also furnished an affidavit in support of the instant motion. At the time of the subject occurrence, Miller, an assistant store manager, was in another aisle at time of the incident and did not witness the incident. His duties as assistant

store manager, among other tasks, included overseeing day to day operations included, conducting regular inspections of the entire store to make sure that there are no dangerous conditions present, such as liquid or debris on the floor. Mr. Miller averred that on the day of the incident, he had conducted his routine floor inspection approximately thirty to forty minutes prior to plaintiff's incident, and that there was no cardboard, liquid, or debris of any type on the floor at that time. Mr. Miller further stated that he spoke to the plaintiff after the incident, filled out an incident report and took photographs of the subject cardboard.

Defendants employee Angel Perez ("Perez") has also furnished an affidavit in support of the instant motion. At the day and time of the subject occurrence, Perez was an assistant store manger. His duties included regularly inspecting the store for liquid, spills and debris of any type. Perez maintains that prior to plaintiff's fall, he had just passed the incident area approximately twenty to twenty-five minutes earlier on his walk of the store, and at no time before the incident had he either seen or been informed that there was any cardboard or debris of any type on the floor in the subject area.

In opposition, plaintiff testified at his examination before trial that a manager who came to the scene after he fell, told him that he had told a worker to remove the piece of cardboard from the floor. Plaintiff contends, therefore, that this manager's statement is an admission of actual knowledge of the cardboard being present prior to plaintiff's incident. However, defendants argue that the foregoing is inadmissible hearsay because said unknown employee did not have authority of his or her employer to make such a statement.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court

must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

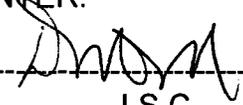
Liability in a slip and fall case requires proof of a dangerous condition and the defendant's actual or constructive knowledge of that condition prior to the fall (*see, e.g., Fasolino v Charming Stores*, 77 NY2d 847 [1991]). Hearsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted (*see, Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1st Dept 1999]; *Koren v Weihs*, 201 AD2d 268, 269 [1st Dept 1994]). A store manager's statement is admissible on the issue of whether a defendant store had actual knowledge of an allegedly hazardous condition (*Carpenter v D'Agostino Supermarkets*, 270 AD2d 51 [1st Dept

2000]). Here, plaintiff testified that a manager told him that prior to his incident he had told a worker to remove the piece of cardboard from the floor, evidencing actual knowledge prior to the accident. A manager has the authority to bind its employer by an admission made as agent on behalf of the employer (*see, e.g., Bransfield v Grand Union Co.*, 24 AD2d 586, *affd* 17 NY2d 474; *Loschiavo v Port Auth. of N.Y. & N.J.*, 86 AD2d 624, *affd* 58 NY2d 1040; *Kasper v Buffalo Bills of W. N.Y.*, 42 AD2d 87, 92). The alleged statements of the store manager, although hearsay, fall within the principal/agent admission exception and are, therefore, competent evidence on the issue of whether defendant supermarket had actual notice. Assuming that defendant met its burden of proof on the motion, plaintiff submitted sufficient admissible evidence which demonstrated the existence of triable issues of fact.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

DATED: 9/29/14

ENTER:


 J.S.C.

DONNA M. MILLS, J.S.C.

FILED
 SEP 30 2014
 NEW YORK
 COUNTY CLERKS OFFICE