Mayers v Primark US Corp.

2024 NY Slip Op 31193(U)

April 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 523561/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
---X
AVA MAYERS,
Plaintiff,
-against-

PRIMARK US CORP.,

Defendant.
---X

Index No.: 523561/2019
Motion Date: 4-1-24
Mot. Seq. No.: 2

DECISION/ORDER

The following papers, which are e-filed with NYCEF as items 34-57, were read on this motion:

In this action to recover damages for personal injuries, the defendant, Primark US Corp., moves pursuant to CPLR § 3212 for an Order granting summary judgment dismissing plaintiff's complaint, with prejudice, and granting such other, further, and different relief as the Court may deem just and proper.

The plaintiff, Ava Mayers, commenced this action claiming that she sustained injuries on April 26, 2019, when she slipped and fell on water on the first floor of the Primark King's Plaza store, a retail clothing store located at the Kings Plaza Mall, 5100 Kings Plaza, Brooklyn, New York. She claims that her accident was caused by the negligence of the defendant, Primark Us Corp., in failing to maintain the premises in a reasonable safe condition. The accident occurred between 2:00 and 3:10 p.m. as the plaintiff was entering the premises.

At her deposition, the plaintiff testified that after she fell, a person she believed to be a store manager arrived at the scene. This person admitted to her that the floor was wet in the area of her accident. An incident report was prepared which described the accident as a "slip/trip/fall" and stated that the accident occurred at 3:10 p.m. An ambulance was called, and the plaintiff was taken to Mount Sinai Hospital. Plaintiff accident was captured on defendant's video surveillance camera which shows the plaintiff falling to the ground.

Jonathan Bennie, the store manager, was deposed on June 8, 2023. Mr. Bennie was not present at the store on the day of the accident and had no personal knowledge of the circumstances underlying the accident. Natalie Novikov, the assistant store manager, was on duty that day and was the person who prepared the incident report. According to Mr. Bennie, based on his review of the surveillance video, Ms. Novikov arrived at the scene of the accident within a minute of the accident.

Mr. Bennie testified that the defendant used a cleaning vendor, Broadway National, to perform general maintenance. He did not know when a member of the maintenance staff or an employee of the store last inspected the area of the accident prior to the accident but stated that such persons constantly traverse the area. He maintained that the maintenance staff do not typically mop the floors while the store is open for business unless there is a spill and that the floors are generally mopped and cleaned early in the morning around 6:00 a.m. before the store is opened for business. Mr. Bennie did not recall speaking to any of the maintenance employees that were on duty on the day of the accident about when the floors in the area of the accident were last mopped or cleaned.

The defendant also submitted the affidavit of Jamal Belgrave in support of the motion, who works for the defendant as its People and Culture Manager. Mr. Belgrave averred that he arrived at the scene of the accident within a minute of its occurrence and did not see any water on the floor. He also stated that the plaintiff did not tell him that she slipped and fell on water.

In a slip-and-fall case, a defendant moving for summary judgment "has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Parietti v. Wal–Mart Stores, Inc.,* 29 N.Y.3d 1136, 1137, 61 N.Y.S.3d 523, 83 N.E.3d 853; *see Vinokurova v. Edith & Carl Marks Jewish Community House of Bensonhurst, Inc.,* 212 A.D.3d 751, 751–752, 183 N.Y.S.3d 124). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in

question was last cleaned or inspected relative to the time when the plaintiff fell" (*Vinokurova v. Edith & Carl Marks Jewish Community House of Bensonhurst, Inc.*, 212 A.D.3d at 751–752, 183 N.Y.S.3d 124 [internal quotation marks omitted]). "'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice'" (*Butts v. SJF, LLC,* 171 A.D.3d 688, 689, 97 N.Y.S.3d 219, quoting *Herman v. Lifeplex, LLC,* 106 A.D.3d 1050, 1051, 966 N.Y.S.2d 473).

Here, contrary to defendant's contention, triable issues of fact exist as to whether plaintiff's accident was caused by a hazardous condition that exited on the floor on defendant's premises. Plaintiff testified that she observed a puddle of water on the floor in the area of the accident and that one of the persons who arrived at the scene accident admitted seeing this condition. While defendant submitted evidence which is not consistent with plaintiff's testimony, i.e. – the Belgrave affidavit, issues of credibility cannot be resolved on a motion for summary judgment (*Walker v. Ryder Truck Rental & Leasing*, 206 A.D.3d 1036, 1038, 168 N.Y.S.3d 861, 862).

Moreover, the evidence submitted by the defendant failed to demonstrate, prima facie, that it lacked constructive notice of the alleged hazardous condition that plaintiff claims caused her to fall. The only evidence submitted by the defendant as to when the floor was last cleaned and inspected was the deposition testimony of Mr. Bennie. Mr. Bennie provided information only as to the building's general cleaning and inspection practices and did not proffer any evidence demonstrating when the lobby was last cleaned or inspected before the accident (*see Vinokurova v. Edith & Carl Jewish Community House of Bensonhurst, Inc.*, 212 A.D.3d at 752, 183 N.Y.S.3d 124; *Jordan v. Juncalito Abajo Meat Corp.*, 131 A.D.3d at 1013, 16 N.Y.S.3d 278; *Osbourne v. 80–90 Maiden Lane Del, LLC,* 112 A.D.3d 898, 899, 978 N.Y.S.2d 87). Moreover, Mr. Bennie's testimony that the floors are generally mopped and cleaned at 6:00 a.m. did not establish as a matter of law that the defendant lacked constructive notice of the condition that plaintiff alleges caused her accident. Such testimony is not prima facie proof that the condition was not in existence for an unreasonable amount of time prior to plaintiff's accident, which occurred between 8 to 9 hours later.

Since the defendant did not sustain its prima facie burden of establishing its entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Accordingly, it is hereby

ORDRED that the motion is **DENIED.**

This constitutes the decision and order of the Court.

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Dated: April 2, 2024

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020