

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 25-00542

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

MARY GARNER, PLAINTIFF,

V

MEMORANDUM AND ORDER

BENCHMARK ABBOTT ROAD PLAZA ASSOCIATES, LLC,
DEFENDANT-RESPONDENT,
AND KDJB FOODS, INC., DOING BUSINESS AS
LACKAWANNA SAVE-A-LOT, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF
COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (JENNIFER L. RODGERS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered January 22, 2025. The order, insofar as appealed from, granted that part of the motion of defendant Benchmark Abbott Road Plaza Associates, LLC seeking summary judgment dismissing the cross-claim against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she allegedly slipped and fell on a watery substance on the floor of a grocery store owned and operated by defendant KDJB Foods Inc., doing business as Lackawanna Save-A-Lot (KDJB). The second amended complaint names as defendants KDJB and Benchmark Abbott Road Plaza Associates, LLC (Benchmark), which owned the property and leased it to KDJB, and the two defendants asserted cross-claims against each other for indemnification and contribution. Following discovery, Benchmark moved for summary judgment dismissing the second amended complaint and cross-claim against it. Supreme Court granted the motion, which plaintiff did not oppose. KDJB appeals from the order insofar as it dismissed the cross-claim against Benchmark. We affirm.

We agree with KDJB that certain documents submitted by Benchmark in support of the motion were not properly authenticated (*see Byrd v Target*, 228 AD3d 1242, 1245 [4th Dept 2024]; *Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]; *see generally Szymanski v Robinson*, 234 AD2d 992, 992 [4th Dept 1996]) and did not meet the requirements for self-authentication under CPLR 4540-a because they were not

produced by KDJB during discovery (see CPLR 4540-a). Nevertheless, based on the deposition testimony also submitted by Benchmark in support of the motion, we conclude that Benchmark met its initial burden to establish "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Specifically, Benchmark submitted deposition testimony from plaintiff, who testified that she slipped on water near a cooler in the dairy section of the store and that the water in question came from the cooler. Benchmark also submitted deposition testimony from one of its representatives as well as a representative of KDJB, both of whom agreed that Benchmark, as an out-of-possession landlord, was not responsible for conditions inside the store, which is where the water upon which plaintiff slipped was located. We reject KDJB's contention that the deposition testimony of its representative raised an issue of fact whether the offending water came from a leak in the roof, which Benchmark was obligated to maintain and repair under the lease. Although KDJB's representative testified that he recalled roof leaks at the store that needed to be repaired by Benchmark, he added that the leaks were not in the area where plaintiff fell. The mere fact that there had been leaks in the roof in other parts of the store does not raise a triable issue of fact whether the water upon which plaintiff slipped came from a roof leak.

Under the circumstances, we conclude that Benchmark met its burden of establishing as a matter of law that it was not responsible for the dangerous condition inside the store that allegedly caused plaintiff's injuries, thus shifting the burden to KDJB to "produce evidentiary proof in admissible form sufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Inasmuch as KDJB proffered no evidence of its own in opposition to the motion, the court properly granted that part of Benchmark's motion seeking to dismiss the cross-claim.