

D'Angelo v Price Chopper, Inc.

2004 NY Slip Op 30133(U)

November 10, 2004

Supreme Court, Broome County

Docket Number: 0005612/0021

Judge: Jeffrey A. Tait

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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Tioga County Supreme Court, in the Village of Owego, New York on the 6th day of August, 2004

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

EMELIA D'ANGELO,

Plaintiff,

vs.

PRICE CHOPPER, INC. and
BRIAN POTTER,

Defendants.

DECISION AND ORDER

Index No. 2002-0561
RJI No. 2004-0512-M

APPEARANCES:

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HON. JEFFREY A. TAIT, JSC

This matter is before the Court on defendant Price Chopper, Inc.'s ("Price Chopper")¹ motion for summary judgment dismissing plaintiff Emelia D'Angelo's ("D'Angelo") complaint upon the ground that it has no merit. D'Angelo opposes the motion, asserting that there are questions of fact that require determination by a jury.

D'Angelo alleges that defendant Brian Potter ("Potter") removed her wallet from her purse while she was shopping in Price Chopper's Endicott, New York store. D'Angelo then followed Potter out of the store and confronted and struggled with him in an attempt to retrieve her wallet, allegedly resulting in serious injury to her knees. D'Angelo commenced this action for personal injuries, alleging that her injuries were caused by Price Chopper's negligence, as it knew that Potter had previously stolen seafood from it and a wallet from another of its customers, knew of the probable likelihood that Potter's conduct would result in a confrontation that could endanger the safety of its customers, and failed to provide adequate security to ensure the safety of its customers.

Price Chopper contends that there is no proof that it was negligent and that any injuries that D'Angelo sustained resulted from her own independent actions of not notifying store personnel when her wallet was stolen, following Potter (who was 6' 4" tall) outside the store alone, confronting him, grabbing his jacket and struggling with him, and refusing to release him even after Potter claimed to have a knife and a syringe.

In support of its motion, Price Chopper submits the affidavit of its attorney ("Abelove

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The parties are in the process of circulating a stipulation to substitute Price Chopper Operating Co., Inc. for Price Chopper, Inc.

affidavit”) and of its Loss Prevention Manager (“Stone affidavit”), with exhibits. In opposition, D’Angelo submits her affidavit and the affidavit of her attorney (“Guyette affidavit”). In reply, Price Chopper submits the reply affidavit of its attorney (“Abelove reply affidavit”), its Loss Prevention Manager (“Stone reply affidavit”), its Endicott Store Manager (“McAfee reply affidavit”), and its Endicott Store Co-Manager (“Jerauld reply affidavit”). At oral argument of the motion, both parties were given the opportunity to submit memoranda in response to cases cited by the Court. Both parties submitted such memoranda.

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam’s Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

The law is clear that landowners owe those on their property a duty of reasonable care under the circumstances to maintain the property in a safe condition (*see Maheshwari v. City of*

New York, 2 NY3d 288, 294 [2004]). However, although landowners have a duty to minimize foreseeable dangers, including the criminal acts of third parties, they are not the insurers of a visitor's safety (*see id.*). Thus, the Court must look to the foreseeability of the danger causing the injury. In cases involving injuries sustained on another's property, foreseeability and the scope of the landowner's duty are defined by past experience and the likelihood of conduct on the part of third persons that is likely to endanger the safety of the visitor (*see id.*).

Here, D'Angelo asserts that Price Chopper had prior notice that Potter had committed illegal activities on its premises and failed to take proper steps to protect the safety of its patrons, including D'Angelo. Specifically, D'Angelo asserts that Price Chopper knew that Potter had previously stolen \$3,000.00 to \$5,000.00 worth of seafood from the same store where D'Angelo was injured and that Potter had stolen a wallet from a Price Chopper patron three weeks prior. D'Angelo contends that the safety precautions required of Price Chopper in light of that knowledge is a question of fact requiring a trial (*see Karp v. Saks Fifth Avenue*, 225 AD2d 1014, 1016 [3d Dept 1996] [noting that, "what safety precautions may reasonably be required of a landowner is almost always a question of fact for the jury"]).

Price Chopper submits the Stone affidavit, which states that the seafood theft, which occurred from the back freezer area (and not in the customer shopping area) the night prior to the D'Angelo incident, was still being investigated when the D'Angelo incident occurred. The Stone affidavit points out that Potter was being sought for stealing product from the back of the store and that he had no way of knowing that Potter would take D'Angelo's purse from her cart or that she would chase Potter out of the store to physically confront him. Further, the Stone reply affidavit confirms that he learned that Potter did take a purse from a customer in the Cortland Price Chopper, but states that Potter did not take any item from any customer in the

Endicott Price Chopper prior to this incident. The McAfee and Jerauld reply affidavits confirm that they had no knowledge of any prior incidents between Potter and customers in the Endicott Price Chopper.

There is no evidence that Price Chopper was aware of repeated incidents of crimes against persons or property in its Endicott store (*see id.* [granting summary judgment to defendant-store, thereby dismissing complaint of plaintiff-store customer who was attacked and robbed in the defendant-store's parking lot]). The theft of seafood from Price Chopper's back freezer is simply not conduct similar to what is being alleged here. Further, Potter's prior theft of a wallet from another Price Chopper customer occurred in a different Price Chopper store located in a different county three weeks prior to the D'Angelo incident. The record is devoid of evidence of any thefts from customers occurring at Price Chopper's Endicott location.

D'Angelo has failed to show foreseeability of the type of criminal activity involved in this action in Price Chopper's Endicott store, namely, a third party's theft of personal property from a customer, resulting in a confrontation or altercation initiated by and personal injuries to that customer (*see id.*; *see also Maheshwari*, 2 NY3d at 294 [affirming grant of summary judgment to defendant-city dismissing the complaint of plaintiff, who was the victim of an unprovoked assault during a concert in a city park, and noting that defendant took reasonable measures to control the crowds and that the random criminal act was not a predictable result of the gathering of a large group of people]). Further, it is difficult to envision what measures Price Chopper could have undertaken to prevent D'Angelo's injury, other than to have a security officer posted at the precise location where the incident occurred or to somehow prevent Potter from entering any and all Price Chopper locations as a result of him stealing the customer's wallet in the Cortland store, which is clearly an unreasonable burden (*see id.* at 295).

In any event, it is clear that D'Angelo's injuries did not result from any negligence of Price Chopper, but rather were caused by an independent, intervening act (*see id.*). To establish a prima facie case of proximate cause, D'Angelo must show that Price Chopper's negligence was a substantial cause of the events which produced the injury (*see id.*, citing *Derdiarian v. Felix Contr. Corp.*, 51 NY2d 295 [1980]). Here, D'Angelo's independent acts of failing to notify Price Chopper personnel when the theft occurred, but instead following Potter outside the store into the parking lot alone, confronting him, grabbing onto his jacket, and struggling with him in an attempt to retrieve her wallet broke any causal nexus that could be said to have existed on the part of Price Chopper (*see Maheshwari*, 2 NY3d at 295). This confrontation outside the store, struggle, and resulting personal injuries to D'Angelo (as opposed to simply notifying store personnel at the time of the theft and while still safely inside the store) were extraordinary and not foreseeable or preventable by Price Chopper in the normal course of events (*see id.*).

In light of the foregoing, Price Chopper's motion for summary judgment dismissing the case against it is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: November 10, 2004
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion of C. Louis Abelove, Esq. dated April 12, 2004
 - Affidavit of C. Louis Abelove, Esq. sworn to April 21, 2004
 - Affidavit of Kyle Stone sworn to March 1, 2004
- Affidavit of Service of C. Louis Abelove sworn to April 29, 2004
- Affidavit of Service of C. Louis Abelove sworn to April 30, 2004
- Attorney's Affidavit of Kevin F. Guyette, Esq. sworn to May 6, 2004
- Plaintiff's Affidavit of Emelia D'Angelo sworn to May 7, 2004
- Reply Affidavit of C. Louis Abelove sworn to May 26, 2004
- Reply Affidavit of Kyle Stone sworn to May 25, 2004
- Affidavit of Brian McAfee sworn to May 24, 2004
- Reply Affidavit of Terry Jerauld sworn to May 20, 2004