SHORT FORM ORDER

INDEX No. 01-26841
CAL. No. 06-00534-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-14-06
ADJ. DATE 9-20-06
Mot. Seq. #002 - MG; CASEDISP

RONALD MALENDA, as Administrator of the Estate of JACQUE A. MALENDA, deceased, Plaintiff, - against - THE GREAT ATLANTIC & PACIFIC TEA CO., INC., Defendant.	SANDERS, SANDERS, BLOCK, WOYCIK, VIENER & GROSSMAN, P.C. Attorneys for Plaintiff 100 Herricks Road Mineola, New York 11501 SOBEL & KELLY, P.C. Attorneys for Defendant 464 New York Avenue, Suite 100 Huntington, New York 11743

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 16; Replying Affidavits and supporting papers 17 - 18; Other defendant's affirmation and plaintiff's memorandum of law, pg. 12; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), for an order pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiff's complaint is granted.

Plaintiff, Jacque Malenda, commenced this action to recover damages for personal injuries she allegedly sustained on May 10, 1999, as a result of a slip and fall while shopping at the defendant's store, located at 59 Outwater Lane, Garfield, State of New Jersey. Plaintiff slipped and fell on strawberries that were on the floor of the produce department of the subject store. Plaintiff passed away after the commencement of the action, and Ronald Malenda, as the administrator of the estate of Jacque A. Malenda, has been substituted as the plaintiff.

Defendant now moves for summary judgment on the basis that the defendant did not create nor have notice of the hazardous condition existing in its produce department. Defendant also contends that even if the condition did exist, it did not have a reasonable amount of time to take corrective action prior to plaintiff's fall. In support, defendant submits the pleadings, copies of the deposition transcripts of plaintiff, plaintiff's decedent and defendant, and the affidavit of Keith Kloza.

Plaintiff opposes defendant's motion on the grounds that there is evidence that the dangerous condition existed for more than a reasonable time to allow the defendant's employees to discover it and

remedy the situation. Plaintiff also asserts that the defendant's employees had actual notice of the defective condition because the defendant's employees constantly monitor the floors of the produce department.

At her examination before trial Mrs. Malenda testified to the effect that on the date of her accident she was at the defendant's store with her husband shopping for her mother-in-law. Mrs. Malenda stated that prior to her accident she had never been to the defendant's store or in the produce department. She then testified that while she and her husband were on the checkout line she remembered she wanted to buy tomatoes and left the checkout line and went to the produce department. Mrs. Malenda testified that as she was returning to the checkout line she slipped and fell in between the two center islands of the produce department. Mrs. Malenda stated that after her fall she realized she had fallen on about five smashed strawberries that were on the floor of the produce department. She then observed smashed and loose strawberries on the floor as well as the two center islands, one containing strawberries, grapes and cherries and the other containing pineapples and other produce. Mrs. Malenda testified that the strawberries were not in containers but were loose on the island. She also testified that while she was lying on the floor she noticed track marks from a cart running through the smashed strawberries. Mrs. Malenda stated that the track marks were two separate straight lines that were red strawberry color and more than five feet in length. Mrs. Malenda testified that after her fall another shopper immediately came to her aid and approximately five minutes later, her husband and the defendant's store manager arrived simultaneously. She then stated that the store manager filled out an accident report and asked her if she needed medical assistance, to which she responded yes. She also testified that she did not notice any other A&P employees in the store besides the cashiers before she fell. Mrs. Malenda further testified that during the entire 1 hour and 45 minutes that she was in the store, she did not hear the loudspeaker or any announcements being made over the loudspeaker.

Mr. Malenda at his examination before trial testified, in pertinent part, that upon entering the store he and his wife passed the produce department where he noticed produce, strawberries and fruit wrappers on the floor. He testified that he did not see any of the defendant's employees in the produce area nor did he inform any of the defendant's employees that there were strawberries and fruit wrappers on the floor in the produce aisle. Mr. Malenda then explained that while he was paying for the groceries his wife returned to the produce aisle to pick up a few tomatoes which she had forgotten. Mr. Malenda testified that he learned of his wife's accident when he heard his name being paged to come to the produce department over the loudspeaker. He stated that upon his arrival in the produce department, which was about 25 to 30 feet from the register, he found his wife lying on the floor between the vegetable and fruit islands and a customer was comforting her. Mr. Malenda then stated that his wife told him that she had slipped and fell on "these strawberries lying on the floor, I guess." He stated there were a few red squashed strawberries on the floor around his wife. He also stated he saw a skid mark that "must have been where she hit her feet, slipped on them." Mr. Malenda further testified that he did not move his wife because the manager of the store had called the ambulance.

Richard Michalik testified on behalf of the defendant A&P at its examination before trial to the effect that and on the date of the subject accident, he was the co-manager of the defendant's Garfield, New Jersey store. Mr. Michalik stated that his duties as co-manager require him to oversee the store operations, including ensuring that safety standards are maintained. He stated that he attended a two to five weeks co-manager training program where he received training in all of the store's departments as

well as instruction in maintaining safety in the store and each department. He also stated all departments have safety guidelines and a huge emphasis is placed on maintaining safe procedures in the produce department because the items are perishable and can easily fall off the shelves. Mr. Michalik also testified that there were no written procedures on cleaning the floors or maintaining the bins of the produce department, instead instructions were provided orally. Mr. Michalik explained that the employees in the produce department are required to immediately clean up any spills that are on the floor, prevent stacking the produce too high because they fall onto the floor easily and to rotate the produce in order to maintain their freshness. He stated that the employees are required to walk into the produce department every 15 to 20 minutes to make sure the floors are clean and the produce is neat. He also stated that he monitored the produce department every 30 minutes and always walked through the entire store to ensure it was in order.

Mr. Michalik continued that at the time of Mrs. Malenda's accident, Keith Kloza was the produce department manager and was responsible for maintaining its cleanliness, safety and produce freshness. Mr. Michalik described the produce department as being located on the left side of the store's entrance. He stated there were three to four center islands, approximately 15 feet long and 10 feet wide perpendicular to the back wall of produce with one island containing strawberries that were stacked in containers in the bins of the island. Mr. Michalik explained that the produce department is self-service and there are mats located down the middle of the islands, in front of the bins, and on the left and right side of the islands, extending approximately three to three and half feet. He testified that the floors of the produce department are composed of non-slip tile-like material.

Mr. Michalik then stated that while he was at the front end of the store, near the cash registers, his name was paged over the loudspeaker regarding an accident in the produce department. Although he does not specifically recall Mrs. Malenda's accident, he did remember seeing her lying on the floor of the produce department with a couple of strawberries around her. He stated there was one smashed strawberry on the floor in front of her and it looked as though a footprint was in it. He also explained that the floor by the smashed strawberry was red. Mr. Michalik testified that the customer informed him that she had slipped and fallen on strawberries, landing on her left knee, hand and wrist. He stated that he observed a strawberry on the bottom of her sneakers and strawberry stains on her clothing. Mr. Michalik testified that he wrote a customer incident report and phoned the incident into the company for filing. Mr. Michalik stated that he does not recall receiving any prior complaints regarding the floors of the produce department. Mr. Michalik further testified that although other accidents had occurred in the store, none of the previous accidents occurred within the produce department.

By his personal affidavit, Keith Kloza asserts that he was and is currently the produce manager at the subject store. Mr. Kloza indicated that he had finished working for the day and was in the store shopping at approximately 5:30 pm when he observed a female customer on the floor. He stated that he went to seek help for the customer. Mr. Kloza then indicated that he observed strawberries on the floor where the customer was lying on the floor. Mr. Kloza further stated that he had been in the produce department for approximately 20 minutes before the customer's accident and had not seen any strawberries on the floor.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (***Doize v***

Holiday Inn Ronkonkoma, 6 AD3d 573, 774 NYS2d 792 [2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). However, a defendant in moving for summary judgment bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Altieri v Golub Corporation***, 292 AD2d 734, 741 NYS2d 126 [2002]), and the burden will only shift to the plaintiff after the defendant has demonstrated that it neither created the defective condition nor had actual or constructive notice of the defective condition (***Altieri v Golub***, *supra*; ***Portanova v Trump Taj Mahal Associates***, 270 AD2d 757, 704 NYS2d 380 [2000]). But, where a plaintiff fails to submit any evidence that the condition alleged to have caused the injury was actually defective or dangerous, summary judgment must be granted in defendant's favor (***Przbyszewski v Wonder Works Construction, Inc.***, 303 AD2d 482, 755 NYS2d 435 [2003]).

In order for a plaintiff to impose liability upon a defendant in a negligence action predicated upon a slip and fall, there must be evidence that establishes that the defendant either created the defective condition that caused the fall or had actual or constructive notice of the defective condition (***Moss v JNK Capital Ltd.***, 85 NY2d 1005, 631 NYS2d 280 [1995]; ***Lowrey v Cumberland Farms, Inc.***, 162 AD2d 777, 557 NYS2d 689 [1990]). Constructive notice may be inferred where it is shown that the dangerous condition existed for a sufficient length of time to permit the defendant to discover and remedy the condition; it may not, however, be inferred where the evidence is speculative regarding the length of time that the substance was on the floor (***Dardzinski v A&P***, 242 AD2d 362, 661 NYS2d 284 [1997]; ***Bernard v Waldbaums, Inc.***, 232 AD2d 596, 648 NYS2d 700 [1996]; ***Davis v Supermarkets Gen. Corp.***, 205 AD2d 730, 613 NYS2d 701 [1994]; ***Cafiero v Inserra Supermarkets***, 195 AD2d 681, 599 NYS2d 342 [1993]). Moreover, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Kennedy v Wegmans Food Markets,*** Inc., 90 NY2d 923, 664 NYS2d 259 [1997]; ***Bernard v Waldbaum, Inc.***, *supra*).

Here, defendant has made a prima facie showing of entitlement to summary judgment by submitting sufficient evidence to establish that it neither created nor had actual or constructive notice of the alleged defective condition that resulted in the plaintiff's injuries (***Moss v JNK Capital Ltd***, *supra*; ***Scott v First Stop, Inc.***, 3 AD3d 528, 770 NYS2d 733 [2004]; ***Davis v Supermarkets Gen. Corp.***, *supra*). The plaintiff, in opposition, has failed to submit evidence that would raise any triable issue of fact as to whether the defendant had constructive or actual notice of the alleged defective condition of strawberries being on the floor of the produce department. Ms. Malenda stated that she did not see the strawberries before she fell nor did she observe the floor prior to her accident. She testified that she had only been in the produce department approximately four minutes when her accident occurred and prior to that she had not been in the produce department. Despite the fact that Mr. Malenda stated he saw "produce and stuff" on the floor upon entering the store, Mr. Malenda did not inform any of the store's employees about said condition. Thus, actual notice cannot be imputed to the defendant regarding the defective condition existing in the produce department (***Dardzinski v A&P***, *supra*; ***Davis v Supermarkets Gen. Corp.***, *supra*; ***Cafiero v Inserra Supermarkets***, *supra*). Nor has plaintiff established an accurate time line to determine whether or not the defendant had a sufficient amount of time to discover and remedy the hazardous condition of strawberries on the floor (***Moss v JNK Capital Ltd***, *supra*; ***Scott v First Stop, Inc.***, *supra*). Consequently, a general awareness that produce may be on

the floor is not enough to defeat a summary judgment motion (***Gordon v American Museum of Natural History***, *supra*; ***Bernard v Waldbaum, Inc.***, *supra*; ***Lowrey v Cumberland Farms, Inc.***, *supra*).

Furthermore, even where time has elapsed, if there is no evidence that anyone, including the plaintiff, observed the condition prior to the accident and defendant received complaints about it only after the incident occurred, the burden shifts to plaintiff to submit evidentiary proof sufficient to establish defendant's actual or constructive notice of the condition (***Gordon v American Museum of Natural History***, *supra*; ***Dardzinski v A&P***, *supra*; ***Hendricks v 691 Eighth Ave. Corp.***, 226 AD2d 192, 640 NYS2d 525 [1996]; ***Kaufman v Man-Dell Food Stores, Inc.***, 203 AD2d 532, 611 NYS2d 230 [1994]). Mrs. Malenda explained that she did not notice any strawberries on the floor until she had fallen and was lying on the floor and nor did Mr. Malenda or Mrs. Malenda hear any announcements over the loudspeaker during the entire hour to hour and forty five minutes that they were in the defendant's store. Although Mrs. Malenda testified to having seen two separate wheel marks from a cart in a straight line through the smashed strawberries and Mr. Malenda stated there was a skid mark that "must have been where she hit her feet, slipped on them," this is not enough to defeat the summary judgment motion. It does not establish that the strawberries were on the floor of the produce department for a sufficient length of time prior to Mrs. Malenda's accident to suggest that defendant's employees should have had enough time to discover and remedy the hazardous condition (***Berzon v D'Agostino Supermarkets, Inc.***, 15 AD3d 600, 792 NYS2d 94 [2005]; ***Restey v Victory Markets, Inc***, 78 AD2d 534, 431 NYS2d 719 [1980]). Thus, a jury would be relegated to basing its decision on mere speculation, surmise and conjecture, which is insufficient to defeat a motion for summary judgment (***Bowers v Vial***, 78 AD2d 534, 431 NYS2d 719 [1980]). Additionally, defendant's produce manager, Mr. Kloza testified that he had been in the produce aisle for about 20 minutes prior to Mrs. Malenda's accident and did not see any strawberries on the floor. Mr. Michalik also testified that the employees checked every 15 to 20 minutes to ensure that no spills had occurred in the produce department and he, personally checked the produce department every 30 minutes for cleanliness. In addition, Mr. Michalik testified that there were maintenance employees who constantly monitored the entire store to ensure that there were spills throughout the store. Therefore, no proof has been submitted that indicates that defendant affirmatively created the hazardous condition or had actual or constructive notice of the existence of the dangerous condition prior to the happening of plaintiff's accident (***Bowers v Vial***, *supra*; ***Kennedy v Wegmans Food Markets, Inc.***, *supra*; ***Ruggiero v Waldbaums Supermarkets, Inc.***, 242 AD2d 268, 661 NYS2d 37 [1997]).

Accordingly, defendant A&P's motion for summary judgment is granted and plaintiff's complaint is dismissed.

Dated: MAR 2 6 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION