SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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ANTHONY TESORIERO,

Plaintiff, Decision and order

- against - Index No. 27448/05

PICK QUICK FOODS, INC., d/b/a KEY FOOD & KEY FOOD STORES CO-OPERATIVE, INC.,

Defendants, May 17, 2007

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PRESENT: HON. LEON RUCHELSMAN

The Defendant Key Food moves pursuant to CPLR §3212 for summary judgement dismissing the complaint filed by Plaintiff. The plaintiff oppose the motion and papers were submitted by all parties. After reviewing the arguments of all parties this court now makes the following determination.

Background

On January 15, 2004 the plaintiff slipped and fell while exiting defendant's store located at 7000 New Utrecht Avenue in Kings County. Specifically, the plaintiff alleges he slipped upon an electric mat located right outside the store and that he had slipped on a patch of black ice. Shortly thereafter, plaintiff filed a lawsuit against defendants sounding in negligence. This summary judgement motion followed wherein the defendant asserts that they cannot be held liable for injuries which occurred since there was no prior notice of a dangerous condition. The plaintiff counters that there is a material issue

of fact whether defendant was negligent, hence summary judgement must be denied and that issue must be resolved by a jury.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit. It is well settled that an owner will only be liable for an accident involving snow and ice if it either created the condition or had actual or constructive notice of the condition (Zabbia v. Westwood LLC, 18 AD3d 542, 795 NYS2d 319 [2d Dept., 2005]). First it must be noted that the condition which caused the injuries was the 'black ice' on the mat, not the placement of the mat itself. Further, there has been no evidence presented that the black ice was created by the defendant in any manner whatsoever such as placing shoveled snow to the side and permitting it to melt and re-freeze (see, Grillo v. Brooklyn Hospital, 280 AD2d 452, 720 NYS2d 519 [2d Dept., 2001]). Therefore, there is no evidence as a matter of law that defendant created the condition.

However, the plaintiff has raised issues of fact whether defendant had constructive notice of the icy condition.

Specifically, the evidence demonstrates that the temperature for the preceding day was near freezing and that it had been snowing for a number of hours before the incident. Thus, there is sufficient evidence that defendant should have been aware of an icy condition. In Faber v. Emerling, 31 AD3d 1120, 818 NYS2d 372 [4th Dept., 2006], the court held that the plaintiff had demonstrated questions of fact concerning constructive notice when prior temperatures were near freezing and snow had recently fallen. Thus, the plaintiff has presented non speculative issues of fact concerning the requisite notice requirements.

Therefore, based on the foregoing summary judgement dismissing the complaint is hereby denied.

So ordered.

ENTER:

DATED: May 17, 2007
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC