Anagnostopoulos v Sears, Roebuck & Co., Inc.
2007 NY Slip Op 31292(U)
May 14, 2007
Supreme Court, Suffolk County
Docket Number: 0004847/2004
Judge: Robert W. Doyle
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[* 1]

SHORT FORM ORDER

INDEX No. 04-4847
CAL. No. 07-00130-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 2-13-07
ADJ. DATE 3-13-07
Mot. Seq. # 001 - MG

---X
MARIE ANAGNOSTOPOULOS and SIMON ANAGNOSTOPOULOS,

Plaintiffs,

- against -

SEARS, ROEBUCK & CO., INC. and CONTROL BUILDING SERVICES, INC.,

Defendants.
---X

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ______; Answering Affidavits and supporting papers 11 - 17 ; Replying Affidavits and supporting papers 18 - 19 ; Other __________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment by defendant Control Building Services, Inc. is granted.

This is an action to recover damages, personal and derivative, for injuries allegedly sustained by plaintiff Marie Anagnostopoulos on January 1, 2003 when she slipped on a wet floor in a Sears, Roebuck, and Co., Inc. ("Sears") store located on Jericho Turnpike in Huntington, N.Y. Plaintiff alleges defendant was negligent in maintaining the floor, thereby creating a dangerous and defective condition, and in failing to warn of the dangerous condition by placing cones or warning signs around the area.

Defendant Control Building Services, Inc. ("Control") now moves for summary judgment on the grounds it did not cause, create or negligently permit the existence of the condition which caused the plaintiff to fall, and that it did not have actual or constructive notice of the condition that caused the fall. Defendant also argues it did not have a duty to maintain the location where the fall occurred. In support,

defendant submits, *inter alia*, the pleadings, the deposition testimony of plaintiff, and of Clara Figueroa, a security associate for Sears and of Osvaldo Oliveros, area manager for defendant Control's operations department..

It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see,* ***Turcotte v Fell***, 68 NYS2d 432, 510 NYS2d 49 [1986]). To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]).

Plaintiff testified that when she entered the Sears store between 11:30 a.m. and 12:30 p.m. on January 1, 2003, it was "snowing, raining heavily"and that her fall occurred approximately seventy-five feet into the store in the women's apparel section. Plaintiff testified she slipped in a puddle of water on the floor approximately one foot in diameter and fell to the floor. She testified that she did not know where the water came from or how it got there. At no time did she see anyone in either a janitorial or maintenance type uniform performing any cleaning activities in the store such as mopping, cleaning, dusting, etc.

Clara Figueroa, a safety coordinator for Sears, testified that the floors are cleaned by Control either during the overnight hours or in the early morning hours. Sears opened on the day of plaintiff's accident at 9:30 a.m. When the store opens to the public, Figueroa testified, there are no Control employees working on the selling floor. To the extent there may be any Control employees in the building when the store opens, Figueroa noted, those employees would in a separate area either cleaning their equipment or putting it away. Figueroa testified that once the store opens to the public, Control employees generally do not undertake any services or responsibilities with respect to maintaining or inspecting the floors unless paged or called by a Sears employee to report to the selling area.

Osvaldo Oliveros, an area manager in the operations department of Control testified that the general business of Control is janitorial services, including general cleaning of floors, windows, and bathrooms. Control employees perform their services from 6:00 a.m. to 9:30 a.m.; before the store opens to the public. Once Sears opens to the public, Control usually keeps a supervisor "in the back" who will organize the equipment, get supplies from the closet and get the equipment ready for the next day. To his knowledge, Oliveros testified, Sears does not call the supervisor on premises during shopping hours to attend to maintenance issues.

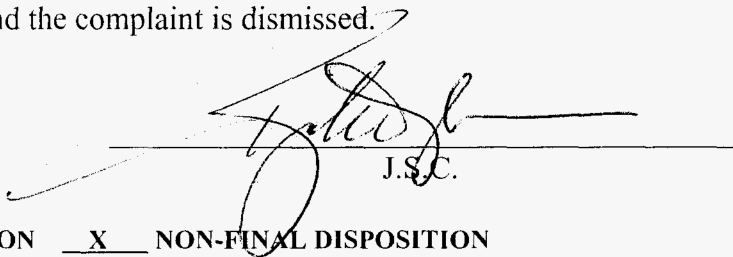
Control has established their entitlement to summary judgment. The evidence demonstrates that Control's duty to maintain the store terminated once the store opened to the public. Plaintiff's accident occurred at least two hours after Control completed its responsibilities with respect to maintenance of the

floors. Once the store opened to the public, there was no duty owed to plaintiff by Control. There is no evidence that Control was ever called to the selling floor prior to plaintiff's accident or that Control created the allegedly dangerous condition or had actual or constructive notice of its existence.

In opposition, plaintiffs have failed to raise a triable issue of fact as to whether Control created the dangerous condition or that it had actual or constructive knowledge of the situation. Plaintiff's contentions that Control should have posted a "wet floor" sign at the entrance is based on mere speculation, which is insufficient to defeat summary judgment (*see*, ***Leggio v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2002]). There is no evidence regarding the weather conditions when Control either arrived at the store or when they left, or whether the water plaintiff fell upon was tracked in from outside.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: MAY 14 2007



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION