

Pressley v Wendy's Intl.

2007 NY Slip Op 31795(U)

June 22, 2007

Supreme Court, New York County

Docket Number: 0102252/2006

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. CAROL EDMEAD

PRESENT -
Index Number : 102252/2006

PART 35

PRESSLEY, JULIA

vs
WENDY'S INTERNATIONAL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/16/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

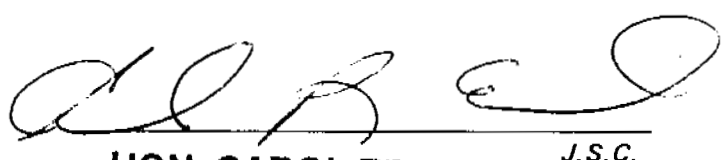
ORDERED, that the motion of defendant Wendy's International, Inc. d/b/a

Wendy's Old Fashioned Hamburger, for an order, pursuant to CPLR § 3212, dismissing all causes of action against it, as a matter of law, upon the grounds that the plaintiff failed to establish a *prima facie* case against the defendant is denied. And it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon the plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/22/07


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST

DEFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
JULIA PRESSLEY,

Plaintiff,

Index No. 102252/06

-against-

WENDY'S INTERNATIONAL, INC. d/b/a
WENDY'S OLD FASHIONED HAMBURGER,

Defendant.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

DECISION/ORDER
FILED
JUN 25 2007

COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff Julia Pressley ("plaintiff") alleges that on June 8, 2009, approximately 12:30 p.m., while in the restaurant owned by the defendant Wendy's International, Inc. d/b/a Wendy's Old Fashioned Hamburger ("defendant"), located at 259 West 34th Street, New York, New York ("restaurant"), she slipped, fell and was injured because of a spilled drink on the premises. In her complaint, the plaintiff asserts that the fall and subsequent injuries were due solely to the defendant's negligence in its ownership, operation, maintenance, and control of its restaurant.

The defendant now moves for summary judgment pursuant to CPLR § 3212, dismissing the plaintiff's complaint upon the ground that the plaintiff has failed to establish a *prima facie* case against the defendant. Specifically, the defendant alleges that the plaintiff is unable to establish that the defendant failed to clean the spilled drink within a reasonable time.

According to the defendant, the plaintiff testified that she slipped while leaving the customer line to approach the restaurant's cashier. Further, the plaintiff was on line

for approximately two minutes and did not notice any wet substance on the floor before her accident.

The defendant also proffers the deposition testimony of Floyd Horsford, who was the assistant manager for the defendant's restaurant on the date of the accident and had served the defendant in that capacity for 23 years in various locations, including the previous 4 years at the restaurant in question. Mr. Horsford testified that a restaurant employee, Patricia Flood, was assigned to, *inter alia*, clean up spills in the area of restaurant where the accident occurred. The procedure for handling spills was for Mr. Horsford or Ms. Flood to first place yellow, four-foot tall cones bearing the word "caution" at the location of the spill. The next step was to get a mop, which could take a minute or two, and mop immediately.

Mr. Horsford testified that he was initially notified of the spill, on the day in question, by a customer who informed him that a drink had accidentally spilled. Mr. Horsford then stated that he observed that the yellow caution cones had already been placed at the location of the spill. He testified that he knew Ms. Flood had put them there.

Further, Mr. Horsford testified that he first became aware of the accident when he heard Ms. Flood scream "be careful." He claims that he observed Ms. Flood and an unknown customer holding the plaintiff up and preventing her from falling. He also testified that Ms. Flood was holding a mop in one hand and the plaintiff in the other, just two to three feet from the front of the customer line. He immediately ran to assist the plaintiff and observed one cone knocked over and one upright cone located one to one-and-a-half steps from the plaintiff.

Additionally, Mr. Horsford testified that the restaurant's manager, Ary Pierria, was present at the time of the accident. Mr. Pierria completed an accident report which reflects that, "Customer did not see wet cone and fell over. She did not hit floor. Another customer hold [sic] her. Customer never hit floor."

The defendant argues that the imposition of liability in this case requires evidence that the defendant either created the dangerous condition that caused the accident, or that the defendant had actual or constructive notice of that condition and failed to remedy it within a reasonable time. Ms. Flood allegedly followed the proper procedure by first placing cones down and then getting a mop to clean the spill, which can take a minute or two. Defendant argues that such action was both expeditious and reasonable. Further, since the deposition testimony established that a customer spilled a soda moments before the plaintiff's accident, "caution" cones were immediately placed in the area, and an employee was already next to the plaintiff mopping the spill at the time of the accident, no liability can attach to the defendant as a matter of law.

In opposition, the plaintiff contends that there are questions of fact as to whether the steps taken by the defendant to clean the spill and protect the plaintiff from the condition were proper. The plaintiff points out that Mr. Horsford also testified that the restaurant served up to 1,500 customers per day. He further stated that the restaurant sold 32, 20, 16 and 12-ounce drinks with lids on them and that it was common for customers to spill their drinks on the floor.

With respect to the accident, Mr. Horsford testified that after hearing Ms. Flood yell "be careful," he came around the counter to assist the plaintiff, who was on the wet floor. He stayed on the floor, bracing the plaintiff for 45 minutes. He did not know how

long the soda was on the floor before the plaintiff fell. Mr. Horsford also testified that he did not know how much time elapsed from the time he was informed of the spill to when he heard Ms. Flood scream “be careful.” The last time he saw Ms. Flood before she screamed was when she was walking back with the mop. He did not know the amount of time between when he saw Ms. Flood walking with the mop and when he heard her scream. He also did not see Ms. Flood put down the cones.¹

The plaintiff testified at deposition that she was on line for approximately two minutes before she fell. She stated, “[y]ou have to get in line, and there was people in front of me, but they was going up, they was next, and then when I was looking up at the menu, and she said – when she went to say – I went to step off, and I went down.” She testified that a male employee said she had fallen on soda and “was about to get someone to clean it up.” The plaintiff identified this male employee as the same person that had braced her.

Additionally, the plaintiff testified that she did not see anyone spill any liquid substance in the restaurant prior to her accident. Nor did she observe anyone cleaning or mopping. She further testified that there were no oral warnings given before she hit the floor and that she never saw any warning cones where she fell.

Plaintiff argues that, under the circumstances, there is a question of fact as to the reasonableness of the defendant’s procedures regarding spilled drinks. Given that the restaurant in question served a large volume of customers, that it sold sodas ranging in size from 12 to 32 ounces, and that spills were common, the defendant’s procedure of first placing cones down and then going to get the mop is unreasonable. The plaintiff

¹ Mr. Horsford testified that there were digital surveillance cameras in the restaurant that were operational and covered the area of the accident. However, the recorded incident was neither viewed nor preserved for future viewing.

contends that even a 12 ounce soda would cover a significant area of the floor when spilled and that larger sodas would cover an even greater expanse. Mr. Horsford testified that there was no employee standing at the spill site to warn customers. The plaintiff asserts that a more reasonable procedure would be to have a mop readily available to mop first, as well as stationing an employee at the spill to warn customers while the mop is being retrieved.

Alternatively, the plaintiff argues that even if the defendant's procedures are considered reasonable, there are questions of fact as to whether the procedures were followed within a reasonable time. Plaintiff claims she never saw any warning cones and received no warnings prior to her fall. During the two minutes that she was on line, she claims she saw no cleaning activity and no spills. Mr. Horsford acknowledged at his deposition that he was aware of the spill before the accident and that Ms. Flood was aware of the spill and had gone to get a mop. Mr. Horsford does not know how much time elapsed from the time he became aware of the spill until plaintiff fell and conceded that no employee was stationed at the spill site to warn customers. Further, there is evidence that at least two minutes elapsed between the spill and plaintiff's fall.

In reply, the defendant contends that the plaintiff has failed to show how long the soda was on the floor prior to the plaintiff's accident. It is undisputed that the plaintiff was in the restaurant for approximately two minutes prior to her accident. Thus, her observations are limited to a two-minute window. Defendant argues that since the plaintiff concedes that it is unknown how long the soda was on the floor prior to the plaintiff's accident, it is impossible for the plaintiff to determine whether the defendant

failed to remedy the condition within a reasonable time. Therefore, the defendant is entitled to judgment as a matter of law.

Additionally, the defendant contends that Mr. Horsford's testimony establishes that a customer spilled a soda moments before the plaintiff's accident, and at the very moment of the accident, yellow "caution" cones had already been placed and a restaurant employee was already mopping at the site of the accident. Therefore, no liability can attach to the defendant.

Furthermore, the defendant argues that the plaintiff's counsel's affirmation in opposition is pure speculation and conjecture. Specifically, the defendant contends that the plaintiff's counsel attempted to calculate the ratio between the size of the drinking cup and the surface area that would be covered by a spill without knowing the size of the soda that actually spilled. The defendant claims this argument is frivolous and that "[A] frivolous issue will not preclude summary relief."

The defendant also contends that plaintiff's counsel's proffer of an allegedly sounder spill procedure is purely speculative. The plaintiff's counsel has submitted no evidence that such a procedure would have prevented the accident, and thus has acted as his own expert as to proper restaurant policies and procedures while unqualified to do so. Furthermore, the defendant's employee, Mr. Horsford, testified that the restaurant's spill procedure was fully and properly followed and remains unchanged since the accident. Thus, the plaintiff has failed to provide sufficient evidence to establish a *bona fide* question of fact.

Finally, the defendant notes that the plaintiff failed to submit any evidence in opposition to the instant motion, such as the plaintiff's deposition transcript. The

defendant argues that since CPLR § 3212(b) requires that a motion for summary judgment be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions, plaintiff's counsel's affirmation is insufficient to defeat the defendant's motion for summary judgment.

Analysis

The imposition of liability on a defendant property owner in a slip-and-fall case requires the plaintiff to adduce evidence proving the defendant had actual or constructive notice of the dangerous condition which caused the accident and that the condition existed for a sufficient length of time prior to the accident to permit the defendant to remedy it (*see Blackwood v New York City Tr. Auth.*, 36 A.D.3d 522, 523 [1st Dept 2007]; *Pacheco v Fifteen Twenty Seven Assocs., L.P.*, 275 A.D.2d 282, 283-84 [1st Dept 2000]; *Adams v Alexander's Dept. Stores of Brooklyn, Inc.*, 226 A.D.2d 130, 131 [1st Dept 1996]; *Lewis v Metro. Tr. Auth.*, 99 A.D.2d 246, 249 [1st Dept 1984]).

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court to direct judgment in his or her favor as a matter of law (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v Natl. Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980]; *Silverman v Perl binder*, 307 AD2d 230, 762 NY2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]).

Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, 49 NY2d at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]). “Failure to make such [a] showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 552-53, 76 NYS2d 386 [1st Dept 2003]). Like the proponent of the motion, the opposing party must set forth evidentiary proof in admissible form in support of his or her claim that material issues of fact exist

(*Zuckerman*, 49 NY2d at 562). The opponent “must assemble and lay bare its affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

The record presented by the defendant herein is replete with issues of fact as to (1) when the accident occurred in relation to the time of the spill and whether this was a sufficient length of time for the defendant to remedy it; and (2) whether the defendant’s employees had begun the remedial operation at the time of the accident.

First, the plaintiff testified that she did not see any spilled drinks in the two-minute window prior to the accident. Mr. Horsford did not know how long the soda was on the floor prior to the plaintiff’s accident, nor the length of time that passed between when he first became aware of the spill and the plaintiff’s accident. The initial burden is on the defendant, as the moving party, to show that this interval of time did not constitute a reasonable period of time to clean the spill (*see Zuckerman v New York*, 49 NY2d at 560).

Second, the deposition testimonies of the plaintiff and Mr. Horsford conflict as to whether caution cones had been placed and whether any of the defendant’s employees had begun cleaning the spill at the time of the plaintiff’s accident. Thus, the defendant has failed to meet its burden of showing that there are no issues of material fact to be tried (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The defendant’s reliance on *Stasiak v. Sears, Roebuck, and Co.* (281 AD2d 533 [2d Dept 2001]) is misplaced. In *Stasiak*, the plaintiff slipped and fell in a puddle of

paint which had spilled outside the door of the defendant's store. Upon learning of the spill, the defendant's employees placed several warning cones at the site of the spill and gave oral warnings of its existence to the public. It was uncontested that the accident occurred "not more than 90 seconds after the spill and during the time in which defendant's employees had begun the remedial efforts" (*Id.* at 533). Unlike the defendant in *Stasiak*, which was granted summary judgment, the defendant herein failed to demonstrate that it did not have sufficient time to remedy the hazard before the accident.

The defendant's reliance on constructive notice cases² is also misplaced. The cases to which the defendant cites each involve a corporate defendant that made a *prima facie* showing that it did not create or have actual or constructive notice of the dangerous condition that led the plaintiff to slip and fall. Each defendant was entitled to summary judgment because when the burden of proof shifted to the plaintiff, the plaintiff failed to show that the defendant had constructive knowledge of the condition by proving that the condition existed for a sufficient length of time prior to the accident to allow the defendant to remedy it.

The defendant herein had *actual* knowledge of the dangerous condition prior to the plaintiff's accident. Since the defendant failed to establish a *prima facie* entitlement to summary judgment by showing an absence of material issue of fact, the burden of proof as to whether there was sufficient time for the defendant to remedy the condition never shifted to the plaintiff (*see Zuckerman*, 49 NY2d at 562). Moreover, the defendant's failure to make such a showing renders ineffectual its arguments regarding

² *Izrailova v. Rego Realty, LLC*, 309 AD2d 902 [2d Dept 2003]; *Chemont v Pathmark Supermarkets, Inc.*, 279 AD2d 545 [2d Dept 2001]; *Seneglia v FPL Foods*, 273 AD2d 221 [2d Dept 2000].

the sufficiency of plaintiff's counsel's opposition papers (*see Winegrad*, 64 NY2d at 853). Accordingly, the defendant's application for summary judgment is denied.

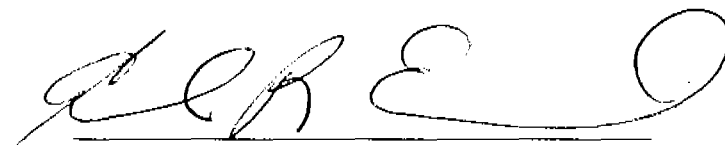
Conclusion

For the foregoing reasons, it is hereby

ORDERED, that the motion of defendant Wendy's International, Inc. d/b/a Wendy's Old Fashioned Hamburger, for an order, pursuant to CPLR § 3212, dismissing all causes of action against it, as a matter of law, upon the grounds that the plaintiff failed to establish a *prima facie* case against the defendant is denied. Defendant shall serve a copy of this order with notice of entry upon the plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 22, 2007



Hon. Carol Robinson Edmead, J.S.C.

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK