

Karadiakos v Great Atl. & Pac. Tea Co.
2007 NY Slip Op 32389(U)
July 30, 2007
Supreme Court, New York County
Docket Number: 0116980/2005
Judge: Michael D. Stallman
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

PRESENT: HON. MICHAEL D. STALLMAN
Justice

PART: 7

Index Number : 116980/2005
KARADIAKOS, MATINA
vs
GREAT ATLANTIC AND PACIFIC TEA
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/11/07
MOTION SEQ. NO. 001
MOTION CAL. NO. 71

his motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-G
Answering Affidavits — Exhibits A-C
Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

FILED
AUG 02 2007
NEW YORK
COUNTY CLERKS OFFICE

MICHAEL D. STALLMAN
J.S.C.

Dated: 7/30/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
MATINA KARADIAKOS,

Plaintiff,

Index No. 116980/05

- against -

Decision and Order

GREAT ATLANTIC AND PACIFIC TEA COMPANY and
FOOD EMPORIUM SUPERMARKETS,

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

Defendants move for summary judgment dismissing this “slip and fall” personal injury action. Defendants further request that, if summary judgment is denied, plaintiff appear for a further examination before trial, and that her husband, Steven Bamundo, not previously deposed, be ordered to appear for an EBT.

BACKGROUND

On May 9, 2003, at some time approximately between 7:00PM and 10:00PM, plaintiff and her husband entered the Food Emporium located at 810 Eighth Avenue near West 49th Street in Manhattan. During plaintiff’s examination before trial, she said that she was in the store for about fifteen minutes before she slipped on a substance and fell, injuring her knee.

The first store employee to arrive at the scene of the incident was a security guard who then summoned the store’s night manager, Darlin Contreras. Contreras allegedly came over and offered to call an ambulance for Karadiakos, but she refused medical attention at that time. At his deposition, Contreras testified that plaintiff and her husband requested that an accident report to be filled out, but when Contreras called his supervisor to find out the proper protocol, he was told to

not give them anything in writing; Contreras gave them his name, the store number, and a phone number where they could contact his boss.

Following the accident, two separate accident reports were filled out. One report is signed by Karadiakos on June 30, 2003; the other is the defendants' accident report, which apparently states that the incident was reported to the store on May 9, 2003. The defendants' report indicates "Darlin stated that he didn't see what happened but the area appeared to be clean and dry." However, at his deposition, Contreras stated that there was a clear liquid, which he had not seen before, on the floor. See Destefano Affirm., Ex F [Contreras EBT], at 67-71.

I

CPLR 3212 (b) provides that a motion for summary judgment, "shall be granted if...the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party...[T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Defendants argue that, based on plaintiff's EBT testimony, plaintiff cannot prove that defendants had either actual or constructive notice of the allegedly dangerous condition that caused plaintiff to slip and fall. In opposition, plaintiff argues that defendants did not establish a prima facie case for summary judgment by relying solely on plaintiff's EBT testimony. While plaintiff would have the burden of proof at trial, defendants, as the movants for summary judgment, have the burden of proof on this motion. While it has been held that a movant cannot obtain summary judgment merely by pointing to gaps in plaintiff's proof (Torres v Indus. Container, 305 AD2d 136 [1st Dept 2003]); Orcutt v American Linen Supply, 212 AD2d 979 [4th Dept 1995]), it is also well-settled that a defendant is not required "definitively to deny actual or constructive notice," i.e., "to prove a

negative on an issue as to which [it] does not bear the burden of proof.” Strowman v Great Atl. & Pac. Tea, 252 AD2d 384, 385 (1st Dept 1998); Figueroa v Goetz, 5 AD3d 164 (1st Dept 2004).

Summary judgment must be denied. Irrespective of what essentially amounts to an academic dispute over whether defendants set forth a prima facie showing of entitlement to summary judgment, there are triable issues of fact as to whether defendants had actual notice of the clear liquid upon which plaintiff claims she slipped. The accident reports differ as to when the incident occurred, which might bear on how long the alleged condition had existed. Both accident reports, as well as Karadiakos’s testimony, indicate that the incident occurred between 9:00PM and 10:00PM. However Contreras’s testimony indicates that it happened between 7:00PM and 8:00PM. Plaintiff’s accident report indicates that the incident occurred in aisle 8, the defendants’ report indicates aisle 11. Plaintiff’s report indicates that she “slipped on a clear, wet substance,” whereas the defendants’ report indicates that the area “appeared clear” at the time of investigation. Compare Destefano Affirm., Ex E with Zwal Opp. Affirm., Ex A.

Moreover, plaintiff also submits an affidavit from her husband, Steven Bamundo, who claims to have witnessed plaintiff’s fall. See Zwal Opp. Affirm., Ex C [Bamundo Aff.]. Bamundo swears that Contreras told him that Contreras knew about the spill before the incident occurred, and that Contreras had told one of his cashiers to clean the spill up about twenty minutes before Karadiakos fell. Bamundo Aff. ¶ 5.

Contrary to defendants’ argument, plaintiff does not appear to rely only on constructive notice. Rather, an issue of fact is presented as to whether Food Emporium and its staff had actual notice of the allegedly dangerous condition. Grimes v Golub Corp., 188 AD2d 721 (3d Dept 1992); Torri v Big V of Kingston, 147 AD2d 743 (3d Dept 1989). Disputed issues of fact also arise as to

the time when the accident occurred, and where it occurred. Although defendants are correct that a jury verdict should be an informed decision and not one based solely on speculation, the disputed circumstances presented on this motion are exactly the kind that a jury must decide at trial (Moss v JNK Capital Ltd., 211 AD2d 769 [2d Dept 1995]), rather than a judge summarily deciding them via a motion. Not only are legitimate factual disputes presented; only a trial can resolve the inherent credibility issues.

II

Defendants do not dispute that Steven Bamundo was an eyewitness to the incident in question. Moreover, plaintiff is offering Bamundo's account of Contreras's alleged admission to Bamundo at the scene, to prove that defendant had actual notice of the substance's presence and a sufficient time to remove the hazard. The store manager's statement appears to be admissible as an admission.

Under the speaking authority exception to hearsay, an employee's comments can be binding on an employer if the plaintiff submits evidence in admissible form establishing that the employee's statement was made within the scope of the employee's authority to speak for the employer. See Cohn v Mayfair Supermarkets, 305 AD2d 528, 529 (2d Dept 2003).

Here, defendants do not assert that Contreras did not have speaking authority. Moreover, the record indicates that he was a night manager, who is "responsible for the whole store because when the managers are not present, then I [Contreras] am in charge." Zwal Opp. Affirm., Ex B at 13. Although the admissibility of Bamundo's hearsay account at trial is for the trial court, and not for this Court, to determine, the evidence before this Court requires that it be considered on this motion; given the factual question that it raises, it is sufficient to deny summary judgment. Merely because

Bamundo is plaintiff's husband and a partner in the law firm representing her, does not disqualify him as a witness and does not affect admissibility of the alleged admission; rather his relationship to plaintiff is a factor that a jury may consider in evaluating his credibility.

Even though a Note of Issue and a Certificate of Readiness have been filed and discovery has been deemed complete, Bamundo's affidavit has only now come to the attention of the defendants and of the Court. Defendants should have the opportunity to inquire about what Bamundo asserts in his affidavit. This unexpected development requires, in fairness, that the discovery period be reopened, and that trial be stayed pending completion of the further discovery ordered herein. Karadiakos and Contreras shall appear for further depositions regarding the circumstances alleged in Steven Bamundo's affidavit. Steven Bamundo shall appear for a deposition regarding the contents of his affidavit and what transpired at the scene. The depositions shall be completed on or before September 15, 2007. Counsel shall appear for a compliance conference in IAS Part 7 on Thursday, October 4, 2007 at 10:30 AM unless they file a signed stipulation with the Clerk of Part 7, Room 949, 111 Centre Street, agreeing that all the depositions ordered herein have been completed or waived.

CONCLUSION

Upon the foregoing papers it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the trial is stayed pending completion of the additional discovery ordered herein; and it is further

ORDERED that Steven Bamundo shall appear on or before September 15, 2007 for a

deposition as to the circumstances of the alleged notice contained in his affidavit and as to his observations at the time and place of the incident; and it is further

ORDERED that Darlin Contreras shall appear on or before September 15, 2007 for further examination before trial as to the allegations of Bamundo as to the alleged conversation mentioned in his affidavit; and it is further

ORDERED that Matina Karadiakos shall appear on or before September 15, 2007 for further examination before trial with regard to the allegations made in the Bamundo affidavit.

If the parties are unable to agree on the date or dates for all three of the depositions, they shall place a conference call to chambers at (646) 386-3342 without delay.

Dated: July 30, 2007
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLONE
J.S.C.

FILED
AUG 02 2007
NEW YORK
COUNTY CLERK'S OFFICE