

Kaplan v D'Agostino Supermarkets, Inc.

2007 NY Slip Op 32462(U)

August 1, 2007

Supreme Court, New York County

Docket Number: 0112553/2005

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

Justice

PART 12

Index Number : 112553/2005

KAPLAN, LAURA

vs

D'AGOSTINO SUPERMARKETS

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

112553/05

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG 09 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/1/07

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MS002
E 8-8-07

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
LAURA KAPLAN,

Plaintiff,

- against -

D'AGOSTINO SUPERMARKETS, INC.,

Defendant

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 112553/05
Motion Seq. No. 002

FILED

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COUNTY CLERK'S OFFICE

In this action, plaintiff Laura Kaplan seeks to recover damages for personal injuries she sustained on June 20, 2004 inside a D'Agostino Supermarket, when she slipped and fell while walking through the produce aisle. After falling, plaintiff noticed that a grape was stuck to the bottom of her shoe.

Defendant D'Agostino Supermarkets, Inc. now moves for an order granting summary judgment dismissing plaintiff's Complaint, and staying the trial of this matter until the within motion is decided, on the grounds that plaintiff has failed to submit any admissible evidence that defendant caused or had actual or constructive notice of the alleged dangerous condition (i.e., the grape).

Specifically, defendant argues that plaintiff has failed to demonstrate how and when the grape in question got on the supermarket floor, or to submit any evidence showing that defendant knew of the existence of the grape prior to plaintiff's accident.

Defendant's stock clerk, Geron Goodhope, testified at a deposition that there was a procedure in place for cleaning the floors every 15-30 minutes. Plaintiff, however, notes that the witness could not specifically recall the last time the floor was cleaned in the produce aisle prior to the accident, and argues that there is an issue of fact as to whether or not the grape had been on the floor for a sufficient length of time to permit defendant's employees to discover and remedy the situation.¹

It is well settled that "[t]o 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 defendant's employees to discover and remedy it' (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837-838;...)." *Walker v. Golub Corp.*, 276 A.D.2d 955, 956 (3rd Dep't 2000).

In the instant case, defendant has made a prima facie showing that it had no notice of the grape in the aisle. See, *O'Callaghan v. Great Atlantic & Pacific Tea Co.*, 294 A.D.2d 416 (2nd Dep't 2002).

In response, plaintiff has "submitted no proof, only speculation, that the hazard upon which she allegedly slipped and

¹ Plaintiff apparently concedes that there is no evidence in this case that defendant either created or had actual notice of the condition.

fell remained on the floor for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it (citations omitted)". O'Callaghan v. Great Atlantic & Pacific Tea Co., supra at 417. See also, Van Winkle v. Price Chopper Operating Co., Inc., 239 A.D.2d 692 (3rd Dep't 1997); Rotunno v. Pathmark, 220 A.D.2d 570 (2nd Dep't 1995). In fact, the evidence is "just as consistent with a finding that someone dropped the [grape] and crushed [it] while pushing a shopping cart through the aisle shortly before the plaintiff fell." Rojas v. Supermarkets General Corp., 238 A.D.2d 393 (2nd Dep't 1997), lv. to app. denied, 91 N.Y.2d 814 (1998).

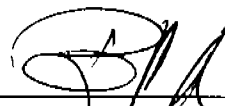
Accordingly, based on the papers submitted and the oral argument held on the record on June 20, 2007, this motion is granted.

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: August / , 2007

FILED



BARBARA R. KAPNICK
J.S.C.

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