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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART19

Present: HON. WILLIAM R. LaMARCA
Justice

PABLO PEREZ,
Plaintiff,
-against-
WALGREEN CO.,
Defendant.

Motion Sequence # 001
Submitted June 29, 2007
INDEX NO: 5464/05
XXX

WALGREEN EASTERN CO., INC. incorrectly sued above as WALGREEN CO.,
Third-Party Plaintiff,
-against-
EDY'S GRAND ICE CREAM, DREYER'S GRAND ICE CREAM, SENATOR FROZEN PRODUCT INC. and LIBERTY MUTUAL GROUP,
Third-Party Defendants.

The following papers were read on this motion:

Notice of Motion.....1
EDY's Affirmation in Partial Opposition.....2
Plaintiff's Affirmation in Opposition.....3
Reply Affirmation.....4

Requested Relief

Counsel for defendant/third-party plaintiff, WALGREEN EASTERN CO. s/h/a WALGREEN CO. (hereinafter referred to as "WALGREENS"), moves for an order, pursuant to CPLR § 3212, granting it summary judgment and dismissing plaintiff's complaint or, in the alternative, for summary judgment of the third-party action seeking

common law indemnity against third-party defendants, EDY'S GRAND ICE CREAM, DREYER'S GRAND ICE CREAM, SENATOR FROZEN PRODUCT INC. and LIBERTY MUTUAL GROUP (hereinafter referred to as "EDY'S"). Counsel for EDY'S join in the application dismissing plaintiff's complaint and opposes the motion for summary judgment on the third-party action. Plaintiff, PABLO PEREZ, opposes the motion, which is determined as follows:

This is an action to recover damages for personal injuries sustained by plaintiff, PABLO PEREZ, on July 19, 2002 at approximately 7:00 P.M., when he allegedly slipped and fell on melted ice cream on the floor of the frozen food/dairy area of the WALGREENS store located at 89 Henry Street, Freeport, New York. The negligence action was commenced against WALGREENS on April 7, 2005, with the filing of the summons and verified complaint. After issue was joined, by service of an answer on May 9, 2005, and discovery proceeded, WALGREENS commenced a third-party action against EDY'S claiming indemnity and contribution.

According to the testimony of the plaintiff at his deposition, plaintiff contends that, on the evening of the accident, he drove his car with his wife to the WALGREENS store to get something from the pharmacy. He testified that, after entering the store, he walked past the cashiers toward the rear of the store and then made a left turn toward the pharmacy area. He stated that as he entered the dairy aisle, he did not see any WALGREENS employees, but instead saw two (2) employees of EDY'S removing containers of ice cream from boxes that lay on the floor and placing them inside the freezer. He claims that two (2) seconds after noticing the EDY'S workers, he stepped along the aisle, slipped and fell backwards, landing in front of the EDY'S workers. He

testified that he had been in the store about twenty (20) seconds when the accident occurred, that he never saw the ice cream on the floor before he fell, and only discovered that he slipped on melted vanilla ice cream after noticing it on his hands and clothes. Plaintiff testified that he was helped to his feet by an EDY'S worker who asked if he was "OK", and then handed a paper towel by a WALGREENS employee to clean up, who asked if he needed medical assistance. Plaintiff responded that he did not but informed the WALGREENS employee that he "slipped and fell on ice cream". Plaintiff stated that he and his wife proceeded to the movies, where he began to experience "a lot of pain", and later returned to WALGREENS to make out an accident report, and then proceeded to the South Nassau Hospital in Oceanside for treatment of his injuries to his right knee and leg and shoulders.

Plaintiff's common-law spouse, Rosie Rodriguez, testified at her deposition, that she entered the store with her husband but separated inside the store. She stated that she did not witness the accident but her post-accident observations are consistent with the plaintiff–that he slipped and fell in the ice cream freezer aisle, that she saw two (2) men wearing EDY'S uniforms removing ice cream containers from boxes and stocking them in the refrigerator and that she saw melted vanilla ice cream on the white tiled floor where plaintiff had fallen. Like her husband, she stated that she had no idea how long the ice cream had been on the floor and that she never complained about ice cream on the floor to the WALGREENS store.

As a witness for EDY'S, Amauris Luna testified at his deposition that, in July 2002, he was the driver for EDY'S delivering its products to various commercial customers throughout Nassau County. Although he did not recall the accident and did not recall being

at the subject store on July 19, 2002, he stated that the Freeport WALGREENS was on his route and he was the only driver for EDY'S in the region at that time. Mr. Luna explained the procedure for delivery of EDY'S ice cream as follows: after determining the store's needs, he would make room in the freezer for the new product and then bring the boxes of ice cream into the freezer aisle using a hand truck or WALGREENS u-boat dolly, open the packages using a box-cutter and then proceed with "packing out" the product into the freezers. He testified that it was EDY'S responsibility to clean up anything that he or his helper may have spilled during the "packing out" process and that he and his helper would use a WALGREENS mop to clean up spills, ice cream or condensation as soon as they happened, "on the spot". He stated that after they were done, he would clean up, take the u-boat dolly back where it was found, make sure the invoices were signed and say good bye to the manager to notify him he and his helper were leaving.

As its witness for deposition, WALGREEN's produced its store manager, James Bruno, who began working for WALGREENS in 1993 and worked his way up the ranks to become a store manager in 1999. He began working at the Freeport store on July 20, 2002, the day following the accident, and was not a witness to the accident or the alleged conditions relating to the accident. He testified that, as part of his duties, he would "sign in" vendors, review the bill or delivery invoice and check it against the items to be delivered. He would then allow the vendors to stock their product and then clean up any mess or debris that may result from the product stocking process. After the vendor notified Mr. Bruno that all was in order, the manager stated that he would then inspect the area where the vendor had been working, to be sure it was properly cleaned and stocked. If all was in order, the vendor would then leave. Mr. Bruno testified that WALGREENS policy with

respect to floor care was to keep products off the floor, to sweep the floors on a daily basis, and spot mop the floors two (2) times daily and to have the floors professionally cleaned twice weekly. In his affidavit annexed to the moving papers, Mr. Bruno asserts that no WALGREENS employee at the store had ever seen any water or melting ice cream on the floor where plaintiff allegedly slipped, and no one ever complained to WALGREENS prior to the accident about the presence of water and/or melted ice cream or any debris on the floors of the frozen foods/dairy section or any where else in the store. It is WALGREENS position that there are no triable issue of fact that WALGREENS had either actual or constructive notice of the alleged dangerous condition–the melting ice cream--and that the complaint should be dismissed. Counsel for WALGREENS argues that there is no evidence submitted showing that WALGREENS either caused or created the melted ice cream to be present on the floor or that WALGREENS knew, or had reason to know of its presence. WALGREENS suggests that the evidence suggests that the melted ice cream was present because EDY"S workers were stocking ice cream in the freezer aisle. Furthermore, WALGREENS argues that, since there is no evidence to indicate how long the dangerous condition was present, plaintiff fails to establish that WALGREENS had constructive notice of the condition, citing *Berger v ISK Manhattan, Inc.* 10 AD3d 510, 781 NYS2d 648 (1st Dept. 204) and *Love v Home Depot U.S.A.*, Inc. 5 AD3d 636, 774 NYS2d 765 (2nd Dept. 2004).

In opposition to the motion, counsel for plaintiff acknowledges that WALGREENS "may not have had actual notice of the alleged condition", but contends that "since there is no evidence to indicate how long the dangerous condition was present", that raises a question of material fact that should be decided by a jury. Counsel claims that because

plaintiff testified that the ice cream he slipped on was approximately two (2) feet away from the where the EDY'S employees were unloading the cartons of ice cream, that would indicate the passage of time sufficient to establish constructive notice or, at least, to raise a question of fact for the jury. Moreover, he claims there is a question of fact as to whether the boxes of ice cream were placed on the floor or on a u-boat dolly, thereby creating the condition, which is another question of fact for the jury. It is plaintiff's position that WALGREENS should not be able to place the blame on third-party defendant EDY'S for the owner of a retail store has a non-delegable duty to provide members of the public with reasonably safe premises, citing *Salisbulry v Wal-Mart Stores*, 255 AD2d 95, 690 NYS2d 156 (3rd Dept. 1999).

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing

party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

In an action for negligence, the law provides that a defendant is not an insurer, and negligence may not be inferred solely from the happening of an accident, but rather claimant must prove that the defendant breached a duty of care owed to claimant and that the breach of duty proximately caused the claimant's injury. *Valentine v State of New York*, 192 Misc. 2nd 706, 747 NYS2d 282 (Court of Claims, 2002). *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 (2nd Dept. 2002), instructs that, while the owner or possessor of property has a duty to maintain the property in a reasonably safe condition

and may be held liable for injures arising from a "dangerous condition" on the property, liability attaches to the owner or possessor only if the owner possessor created the condition or had actual knowledge or constructive notice of it, and a reasonable time to remedy it. 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 defendant's employees to discover and remedy it". *Gordon v American Museum of Natural History*, 67 NY2d 835, 501 NYS2d 646, 492 NE2d 774 (C.A. 1986).

To be entitled to summary judgment in a case involving a slip and fall on liquid or debris on a supermarket floor, the defendant must set forth *prima facie* evidence that it did not create the alleged slippery condition and that it did not have actual or constructive notice of its existence. *Licatese v Waldbaums*, Inc., 277 AD2d 429, 717 NYS2d 226 (2nd Dept. 2000); *Dwoskin v Burger King Corp.*, 24 AD2d 358, 671 NYS2d 494 (2nd Dept. 1998). The burden then shifts to the plaintiff to come forward with sufficient evidence to raise a triable issue of fact. *Licatese v Waldbaums, Inc.,supra*.

Discussion

After a careful reading of the submissions herein, and giving the non-moving plaintiff the benefit of every favorable inference, it is the judgment of the Court that WALGREENS has made a *prima facie* showing of its entitlement to summary judgment and that plaintiff has failed to raise triable issues of fact sufficient to overcome the motion. In this instance, plaintiff has offered no proof that WALGREENS created a hazardous condition, concealed a defect, or had actual or constructive notice that one existed prior to the incident. The record contains no evidence that a defective condition was "visible and apparent for a

sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005], quoting *Gordon v American Museum of Natural History*, *supra*; see also, *Merger v ISK Manhattan, Inc.*, *supra*; *Love v Home Depot U.S.A. Inc.*, *supra*). Indeed, the record reflects that plaintiff acknowledges that WALREENS' employees did not have actual knowledge of the slippery condition and plaintiffs' claims that a sufficient period of time had passed to give WALGREENS constructive knowledge is far too speculative to raise a question of fact. *Love v Home Depot U.S.A., Inc.*, *supra*.

Conclusion

Accordingly, it is hereby

ORDERED, that WALGREENS motion for an order, pursuant to CPLR § 3212, dismissing the complaint and granting defendant summary judgment is granted. Accordingly, WALGREENS request, in the alternative, for summary judgment of the third-party action seeking common law indemnity against third-party defendants, EDY'S, is denied as moot.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 11, 2007

WILLIAM R. LaMARCA, J.S.C.

ENTERED

SEP 17 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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