Groen v Wal-Mart Stores, Inc.
2008 NY Slip Op 30275(U)
January 30, 2008
Supreme Court, Suffolk County
Docket Number: 0015032/2005
Judge: Robert W. Doyle
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.

SHORT FORM ORDER

INDEX No. 05-15032
CAL. No. 07-01267-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 10-16-07
ADJ. DATE 11-27-07
Mot. Seq. # 001 - MD

JEAN MARIE GROEN,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
	:	BRODY, O'CONNOR & O'CONNOR
WAL-MART STORES, INC.,	:	Attorneys for Defendant
	:	7 Bayview Avenue
Defendant.	:	Northport, New York 11768

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 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18; Other 19; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Wal-Mart Stores East, LP i/s/h/a Wal-Mart Stores Inc., for summary judgment dismissing the plaintiff's complaint, is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Jean Marie Groen, when on October 24, 2003, at approximately 8:42 p.m., she slipped and fell in the vestibule of the South Setauket Wal-Mart. It is alleged that a wet and slippery substance existed on the floor which constituted a dangerous and defective condition.

The defendant now moves for summary judgment dismissing the plaintiff's complaint alleging that there is no evidence that it created or was on notice of the purported dangerous condition in its store prior to the accident. In support of its motion, the defendant submits, *inter alia*: the pleadings, the plaintiff's deposition testimony; the affidavit and deposition testimony of Ted Wicks, a Wal-Mart employee; and the affidavit of Helen Stiner, another Wal-Mart employee.

Initially, the defendant points to that portion of the plaintiff's deposition testimony wherein she testified to the effect that she did not see anything on the floor of the vestibule prior to her fall because she was looking straight ahead in the direction she was walking. The plaintiff also testified that after her

fall, she noticed an 8 to10 inch semi-circle puddle of brown liquid on the floor which she believed to be either soda or ice tea. The plaintiff stated that she did not notice any track marks through the puddle and that she did not know whether anyone made complaints about the spill prior to her accident.

In addition, defendant points to the deposition testimony of Ted Wicks, who at the time of the accident was the store manager of the South Setauket Wal-Mart. Mr. Wicks stated that he was working on the night of the plaintiff's accident and was called to the scene by the store's courtesy desk. He testified that there was some soda on the floor of the vestibule which looked like Coke. Mr. Wicks further testified to the effect that upon observing the store's surveillance tape later that night, he saw that a child had spilled a cup of soda as the child was leaving the store, approximately fifteen minutes prior to the plaintiff's fall. He also stated in pertinent part that there were two greeters working at the time of the accident, but that such greeters only have a responsibility for the vestibule if they notice something, otherwise, the greeters did not have any real responsibility for the vestibule. When asked if anyone else had any responsibility regarding the vestibule at that time, Mr. Wicks answered, "Well, maintenance. They would check it periodically." When Mr. Wicks was then asked as to what frequency maintenance would check the vestibule, he responded, "Maybe every 30, 60 minutes. There's not really a lot of reason to check it that often."

The defendant also submits the affidavit of Mr. Wick wherein he states that Wal-Mart has implemented certain policies and procedures with respect to maintenance of its stores in order to reduce or eliminate accidents. He alleges that two specific programs instituted to assist in this goal are "safety sweeps" and "zone defense." He explains that there are three types of "safety sweeps" that an associate must conduct: visual sweeps, dust-mop or broom sweeps, and clean as you go sweeps. Mr. Wicks states that first, all associates must visually "sweep" their areas to find and correct potential hazards. He states that second, a dust mop or broom sweep of high traffic areas is conducted at scheduled times at least three times a day. He alleges that third, every associate is instructed to "clean as you go" and immediately correct any potential hazards. Mr. Wicks further explains that a "zone defense" means that an associate must keep his or her area neat and clean at all times. He alleges that the store is "zoned" continually all day, but also particularly before an associate leaves for lunch, break, or the end of the day. Finally, Mr. Wicks states that in 2003, all associates in Wal-Mart stores were instructed to immediately remove tripping or slipping hazards from any surface where they saw it, whether it was on the floor of the restroom, the selling floor, the surface of the parking lot, or someplace else. In support, Mr. Wicks submits a copy of the defendant's "Customer Safety" policy which is used as a training document.

The defendant also submits the affidavit of Helen Stiner who was working as a people greeter for the store on the night of the accident and was stationed inside the store door. Ms. Stiner alleges that the South Setauket store engages in both "safety sweeps" and "zoning." She claims that the "sweep" requires personnel to traverse and clean every walking surface in the store, and "zoning" requires associates to check their entire area for any items or debris that would pose a hazard to customers or other employees. Ms. Stiner alleges that she keeps a broom and paper towels in her area at all times in order to clean up any hazard immediately. She maintains that at no time prior to the plaintiff's accident did she observe or was she made aware of any liquid or Coke on the floor of the vestibule from anyone. Nor, alleges Ms. Stiner, did she receive any complaints about the general condition of the flooring in the vestibule at any time prior to plaintiff's fall.

The defendant argues that affidavits of Mr. Wicks and Ms. Stiner attest to the fact that Wal-Mart stores continuously undergo safety sweeps and zone defense. Moreover, alleges the defendant, Ms. Stiner, the associate closest to the area of the fall, attests to the fact that she was not on notice of the Coke on the floor prior to the plaintiff's fall. The defendant asserts that it has, thus, made a prima facie showing that it did not create or have notice of the dangerous condition upon its premises and is entitled to summary judgment. It contends that although there is evidence in this case as to the length of time that the Coke allegedly existed on the floor, this fact does not preclude an award of summary judgment. It maintains that as to the soda being on the floor for fifteen minutes, the plaintiff cannot raise a triable issue of fact tending to establish that the defect was visible and apparent and that it existed for a sufficient length of time before the accident to permit its employees to discover and remedy it. The defendant also argues that it is entitled to summary judgment because the condition complained of was open and obvious and not inherently dangerous as a matter of law.

The plaintiff opposes this motion arguing that the defendant has failed to carry its burden of demonstrating that there are no material issues of fact. She further contends that the defendant failed to properly inspect its store and place warning cones in the area where she fell, and also failed to clean the spill of soda, the presence of which is demonstrated to have existed for at least 15 minutes by defendant's in-store video. In opposition, the plaintiff submits a copy of the video tape to the court. The plaintiff's attorney affirms that he has viewed this video and that the spill occurred at about 20:22:35 (or 8:22:35 pm) and plaintiff fell at about 20:39:54 (or 8:39:54 pm), which is more than 17 minute after the cola was spilled. The plaintiff also submits her deposition testimony and points to the portion wherein she testified that there were two door greeters in the area at the time of the accident. In addition, the plaintiff submits the deposition testimony of Mr. Wicks and points to, among other things, Mr. Wicks' testimony that there was about fifteen minutes between the time of the spill and the plaintiff's fall and that there were two greeters working at the time of the accident.

The plaintiff asserts that in this case there is an issue of fact as to whether the defendant had constructive notice of the condition. The plaintiff contends that there is proof herein that the spill is a brown color liquid on a light colored floor at the entrance of defendant's store. She maintains that the video demonstrates that this spill is visible and apparent to defendant's employees and that the spill is visible for about 17 minutes prior to her fall. The plaintiff claims that the presence of defendant's two employees, whose job was to greet customers in the very area where this spill existed, provided defendant with an ample opportunity to see the spill and remedy it. Additionally, the plaintiff argues that there is a question of fact as to whether the defendant adhered to its own policies and procedures in carrying out inspections. She alleges that had Ms. Stiner and her co-employee conducted the "safety sweeps" and "zoning" as defendant's policy requires, this spill would have been seen. The plaintiff insists that Ms. Stiner's affidavit does not address what she did to follow the store's policies. The plaintiff is of the opinion that the lack of proof as to what was done by the store employees to comply with the defendant's store policy coupled with the defendant's failure to demonstrate that the spill was not visible and apparent, mandate that the defendant's motion for summary judgment be denied.

It is well settled that a defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition which caused the plaintiff's fall nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (***Yioves v T.J. Maxx, Inc.***, 29 AD3d 572, 815 NYS2d 119 [2006]). Only

after a moving defendant has satisfied this initial burden will the court examine the sufficiency of the plaintiff's opposition (***Gerbi v Tri-Mac Enterprises of Stony Brook, Inc.***, 34 AD3d 732, 826 NYS2d 101 [2006]). "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 836, 837; 501 NYS2d 646, 647 [1986]; *see also*, ***Britto v Great Atlantic & Pacific Tea Company, Inc.***, 21 AD3d 436, 799 NYS2d 828 [2005]).

Here, the defendant has sufficiently demonstrated that it did not create the soda spill and that it did not have actual notice of it. However, an issue of fact exists as to whether the defendant had constructive notice of the spill (***Backer v Central Parking Systems***, 292 AD2d 408, 739 NYS2d 404 [2002]). The examination before trial testimony and the affidavit of Mr. Wicks, as well as the affidavit of Ms. Stiner, simply address the store's general inspection and clean up policy and fail to establish when the vestibule was last inspected or cleaned prior to the plaintiff's accident (***Gerbi v Tri-Mac Enterprises of Stony Brook, Inc.***, *supra*; ***Yioves v T.J. Maxx, Inc.***, *supra*; ***Steenburg v Great Atlantic & Pacific Tea Company, Inc.***, 235 AD2d 1001, 652 NYS2d 893 [1997]). Moreover, Mr. Wicks' testimony to the effect that maintenance personnel checked the vestibule "maybe" every 30 to 60 minutes and that "[t]here's not really a lot of reason to check it that often," creates an issue of fact as to whether defendant followed its own "Customer Safety" policy. Furthermore, evidence that the soda spill can be seen on the store's video tape at least fifteen minutes prior to the plaintiff's fall, near to where the greeters were standing, raises an issue of fact as to whether the spot existed for a sufficient length of time for the defendant's employees to discover and remedy it (*see*, ***Backer v Central Parking Systems***, *supra*). Lastly, the fact that the soda spill may have been open and obvious does not preclude a finding of liability, but rather raises an issue of fact as to the plaintiff's comparative negligence (*see*, ***Sewitch v LaFrese***, 41 AD3d 695, 839 NYS2d 114 [2007]). Accordingly, the defendant's motion for summary judgment must be denied.

Dated: JAN 30 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION