

Harte v Zabar's & Co., Inc.

2008 NY Slip Op 31199(U)

April 16, 2008

Supreme Court, New York County

Docket Number: 0113546/2006

Judge: Richard B. Lowe

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PRESENT: How Joan A. Miller
Justice

PART 11

Index Number : 113546/2006

HARTE, ANNETTE

vs

ZABAR'S & CO. INC.

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE 1-24-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Summary Judgment

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 is decided in accordance with the annexed Memorandum Decision and Order denying Summary Judgment and transferring this action to the Civil Court of the City of New York pursuant to CPLR 325 (d).

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

FILED
APR 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 16, 2008

[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: I.A.S. PART 11

Ind. No. 113546/06

-----X
ANNETTE HARTE,

Plaintiff,

-against-

ZABAR'S & CO., INC.,

Defendant.
-----X

FILED
APR 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN A. MADDEN, J.:
-----X

In this personal injury action, defendant Zabar's Co., Inc. ("Zabar's"), moves for summary judgment dismissing the complaint against it. Plaintiff, Annette Harte ("Harte"), opposes the motion, which is denied for the reasons set forth below.

Background

Harte alleges that she was injured on November 17, 2005, while shopping at Zabar's, a grocery store located at 2245 Broadway, New York, New York, when a delivery man pushing a hand truck struck her from behind.

According to Harte, the incident occurred as she was removing a shopping cart from a row of carts near the customer entrance of Zabar's. Harte testified at her deposition that a delivery man pushing a hand truck loaded with cartons struck her from behind, and that as she turned around she saw the delivery man continue into the store. Harte reported the incident to the store manager, David Tait ("Tait"), and the two of them searched the store for the deliveryman, but were unable

to locate him.

On the date of the accident, Tait filled out an accident report stating that, at the time of the accident, "[Harte] was standing at the cheese department when she claims she was struck in the back of her lower left leg by a man pushing a hand cart with boxes. She thinks it was a delivery man. We went around the store trying to locate and determine who struck her and she could not identify the person" (emphasis in original).

In this action, Harte asserts that Zabar's owes her a duty to maintain a safe premises, that Zabar's failed to do so, and that this failure proximately caused her injuries. Harte alleges injuries to her left leg and ankle, including bruising, swelling, and continuing pain.

Zabar's moves for summary judgment dismissing the complaint on the grounds that Harte's evidence is insufficient to establish a prima facie case of negligence. Specifically, Zabar's argues that Harte has failed to identify the person who allegedly struck her and/or adequately describe the type of hand truck he was pushing, and that Harte has offered conflicting statements as to the location of the accident.

According to the deposition testimony of Mr. Tait, Harte told him on the day of the accident that she was struck in front of the cheese department, and that on the basis of her statement he wrote this location on the accident report. In contrast, Harte

testified at her deposition that the accident took place near the inside the entrance to the store. While Harte originally testified that the accident occurred three feet from the entrance door, she later corrected the transcript to reflect that it occurred six inches from the door. At her deposition, Harte testified that Tait filled out the accident report and denied seeing the report before her deposition.

Harte opposes the motion on the grounds that she has offered sufficient evidence to create triable issues of fact as to whether defendant created a dangerous condition, and whether that condition was a substantial factor in causing her injuries. In support of her opposition, Harte submits her affidavit in which she states that a "delivery man came in through the same door that I did and struck me in the left foot, ankle and calf with the front of the cart that he was using to deliver merchandise to Defendant's store." (Harte affidavit, ¶ 7). Harte also points to Tait's deposition testimony that deliveries are regularly made through the customer entrance. Harte denies that she ever told Tait that the accident took place in front of the cheese counter, and states that she has consistently identified the location of the accident as "immediately inside Defendant's store." (Id. ¶ 13).

Discussion

On a motion for summary judgment, the proponent "must make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Wingrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in an admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"The owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (2nd Dep't 2000); see also Trujillo v Riverbay Corp., 153 AD2d 793, 794 (1st Dept 1989); Henderson v. Waldbaums, 149 AD2d 461, 462 (2nd Dep't 1989).

Here, Zabar's has met its burden of showing no actual or constructive notice as there is no evidence in the record from which an inference could be drawn, such as prior accidents, that Zabar's had such notice. In contrast, Zabar's has not met its burden of demonstrating that it did not cause or create the condition that proximately caused Harte's injuries. Specifically, Tait's testimony that despite a separate delivery entrance,

Zabar's regularly routed deliveries through the customer entrance raises factual issues as to whether Zabar's delivery practice constituted a dangerous condition. In view of Harte's testimony that she was struck by a delivery man pushing a hand truck loaded with boxes near the customer entrance, a jury could find that Zabar's delivery practice created a dangerous condition on Zabar's premises that proximately caused Harte's injuries. See e.g., Henderson v. Waldbaums, 149 AD2d at 462 (holding that it is within jury's province to find that defendant's practice of accepting deliveries through the front door created a strong likelihood of injury to defendant's customers); Di Franco v. Golub Corp., 241 AD2d 901, 902 (3rd Dept, 1997) (triable issues of fact exist where plaintiff was allegedly struck from behind in defendant's supermarket by an employee pushing a line of carts).

Next, contrary to Zabar's position, under the circumstances here, Harte's failure to identify the person who hit her with the hand truck is not fatal to her claim. Klapa v. O&Y Liberty Plaza Co., 218 AD2d 635 (1st Dept. 1995) ("To carry the burden of proving a prima facie case, the plaintiff must generally show that defendant's negligence was a substantial cause of the events which produced the injury...Plaintiff need not demonstrate, however, the precise manner in which the accident happened, or the extent of injuries, was foreseeable."), quoting Derdiarian v. Felix Contracting Co., 51 NY2d 308, 315 (1981).

Zabar's argument that summary judgment is warranted based on alleged inconsistencies in Harte's version of the event, including where it happened, is also without merit. In support of this argument, Zabar's relies on case law holding that a plaintiff's affidavit submitted in opposition to a summary judgment motion is insufficient to raise a triable issue of fact when it directly conflicts with plaintiff's deposition testimony. Naposki v. Au Bar, 271 AD2d 371 (1st Dept, 2000); Joe v. Orbit Indus. Ltd., 269 AD2d 121 (1st Dept, 2000). However, this rule is irrelevant here. Although the accident report written by Tait identifies the accident location as the "cheese counter," Harte's deposition testimony is consistent with not only her affidavit submitted in opposition to the motion, but also her complaint and Bill of Particulars which identify the location of the accident as "immediately inside Defendant's store."

At her deposition, Harte estimated that she was struck with the hand truck "about three, four feet [from the entrance]." While she later amended the testimony to indicate the distance was six inches, the evidence offered by Harte is consistent insofar as she maintains that the accident occurred near the entrance door, and cannot be disregarded because it conflicts with Tait's testimony and an accident report completed by him, which Harte maintains she never saw prior to this litigation.

Finally, given the nature of Harte's injuries, and it

appearing that the Civil Court of the City of New York has jurisdiction over the parties to this action, pursuant to CPLR 325(d) and Rule 202.13(a) of the Uniform Civil Rules of the Supreme Court and the County Court, as directed below, this action is appropriately transferred to the Civil Court of the City of New York.

Conclusion

In view of the above it is

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

ORDERED that this action shall continue upon transfer to the Civil Court of the City of New York, County of New York; and it is further

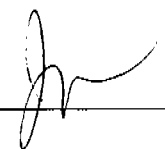
ORDERED that this action, bearing Calendar No. 07L04124 be, and it hereby is, stricken from the Calendar of this Court and transferred to the Civil Court of the City of New York, County of New York; and it is further

ORDERED that the Clerk of the Supreme Court, New York County shall transfer to the Clerk of the Civil Court of the City of New York all papers in this action now in his possession, upon payment of his proper fees, if any, and the Clerk of the Civil Court of the City of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the Clerk of the County of New York, shall place

this action on the appropriate calendar of the said Civil Court for jury causes, for the appropriate term of 2008, without the payment of any additional fees; and it is further

ORDERED that the above-entitled action be, and is hereby, transferred to said Court, to be heard, tried, and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

DATED: April 16, 2008



J.S.C.

FILED
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