

<b>Costi v Food Emporium</b>
2008 NY Slip Op 31564(U)
June 4, 2008
Supreme Court, New York County
Docket Number: 0104062/2006
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLER  
J.S.C.  
*Justice*

PART 44

*Costi*

INDEX NO. 104 062/06

MOTION DATE 5/21/08

MOTION SEQ. NO. 2

MOTION CAL. NO. \_\_\_\_\_

- v -

*Fodd Emp.*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision.*

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

**FILED**  
JUN 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/4/08

*[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

**HON. MILTON A. TINGLING**  
**J.S.C.**

JOYCE COSTI,

Plaintiff,

Index No. 104062/06

-against-

FOOD EMPORIUM,

Defendant.

**FILED**

JUN 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

DECISION and ORDER

On November 2, 2004, plaintiff was injured when she slipped and fell due to an alleged "wetness" near the salad bar at the Food Emporium. Defendant moves for summary judgment to dismiss plaintiff's complaint on the grounds that 1) plaintiff has failed to establish a prima facie case of negligence on the part of defendant, and 2) that there are no issues of fact to be determined at trial.

"The proponent of a summary judgment motion 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" *Santiago v. Filstein*, 35 A.D.3d 184, 185-186 (1st Dep't 2006), quoting *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *DeRosa v. City of New York*, 30 A.D.3d 323, 325 (1st Dep't 2006). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d

223, 231 (1978); *Grossman v. Amalgamated Housing Corporation*, 298 A.D.2d 224, 226 (1st Dep't 2002).

In order to prevail on its motion for summary judgment dismissing the complaint, defendant is required to establish its entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the condition that allegedly caused plaintiff to fall. *Greenstein v. R & R of G.C., Inc.*, 854 N.Y.S.2d 754 (2008). From the nature of the condition itself, it must be apparent that the condition existed for a sufficient period of time before the defendant can be charged with having constructive notice of the condition. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986); *Mercer v. City of New York*, 88 N.Y.2d 955 (1996).

In *Mercer v. City of New York*, plaintiff sued to recover for injuries sustained when he allegedly slipped on a spot of grease in the Sanitation Department garage. The Court of Appeals found that summary judgment was proper because plaintiff failed to establish evidence that defendant either affirmatively created the condition, or had actual or constructive notice of the grease spot and a sufficient chance to remedy the condition. *Mercer v. City of New York*, 88 N.Y.2d 955 (1996).

In *Zanki v. Cahill*, plaintiff claims to have slipped while walking down a flight of stairs. Plaintiff in that instance admitted during her deposition that she did not see "anything on the stairs," including "any debris or liquid" prior to or after her fall. However, plaintiff did claim that after she fell, she felt an unidentified wet substance on her elbow which touched the floor. Plaintiff in that case further alleged that the property owner was aware of a "recurring and routinely unaddressed" spillage on the stairwell. *Zanki v. Cahill*, 2 A.D.3d 197 (1st Dep't 2003). The Appellate Division found that "even

if it is assumed that plaintiff has sufficiently alleged that defendants had notice of a recurring, and routinely unaddressed, dangerous condition, she did not allege any facts from which it may have been inferred that the alleged recurring condition even existed at the time she fell, much less that such condition proximately caused her mishap.” *Zanki v. Cahill*, 2 A.D.3d 197. The court found that there was no evidence that spilled substances were responsible for the incident, “[c]ritically, plaintiff did not testify that she saw spillage anywhere on the stairwell either immediately before or immediately after her accident” and plaintiff’s testimony that her elbow sleeve was wet where it had touched the ground after her fall was insufficient to “support a reasonable inference” that defendant was responsible, either wholly or in part, for her injuries. *Zanki v. Cahill*, 2 A.D.3d 197. Consequently, the court found that defendant’s summary judgment motion was properly granted. The Court of Appeals affirmed. *Zanki v. Cahill*, 2 N.Y.3d 783 (2004).

The facts in the instant case are clearly analogous to those in *Zanki*. Here, plaintiff likewise did not see any spillage on the floor either immediately before or immediately after her accident. In fact, plaintiff never even looked to see what caused her fall either before or after the incident. Plaintiff testified that after she fell near the salad bar, she put her left hand on the floor and “[i]t was like wet. I don’t know. It was like I felt wet. I brushed it on my pants, I think, or on my jacket. I don’t remember exactly.” (See page 87 of plaintiff’s deposition). When asked if the alleged “wetness” had any odor, plaintiff reiterated that she did not actually see the wetness she claims caused her accident, stating “I didn’t smell it. I didn’t see. I didn’t look.” (See page 88 of plaintiff’s deposition). Defense counsel continued to question plaintiff regarding the cause of the

accident, asking plaintiff what she claimed caused her to fall. Plaintiff responded "I don't know what did, what did happen." (See page 90 of plaintiff's deposition).

Moreover, unlike *Zanki*, this Court has the added benefit of a surveillance tape. The surveillance tape submitted as Exhibit H clearly shows that the spot in front of the salad bar where plaintiff fell was heavily traversed by Food Emporium patrons and employees, mere seconds prior to plaintiff's accident, with no other incident. Further, the surveillance tape shows no obvious signs of debris, liquids, or spillage of any sort on the floor where plaintiff fell which might support a claim of actual or constructive notice.

Plaintiff's claims that her left hand "felt wet" after she fell is insufficient to support a claim that the alleged wetness was the cause of her accident. Plaintiff testified that after she fell, she slid along the floor and felt the wetness with her left hand. However, plaintiff makes no claims that the spot where she touched the floor and felt the alleged wetness is the same exact spot where her foot had been just prior to her fall. Additionally, plaintiff admitted that she never looked at her hand to see what the alleged wetness was, nor did she look at the floor where she fell to see what caused her fall. None of the store employees who assisted plaintiff after her fall saw any wetness in the area of plaintiff's accident. Plaintiff has presented no evidence that spilled substances were responsible for the incident, much less that defendant ought to have had constructive notice of same. The fact that plaintiff's left hand felt wet where it touched the ground after her fall is insufficient to support a reasonable inference that defendant was responsible, either wholly or in part, for her injuries.

Accordingly, defendant's motion for summary judgment is granted. The case is dismissed. The clerk is directed to enter judgment.

6/4/08

**FILED**  
JUN 09 2008  
MAY  
HON. THOMAS A. TROGLER  
J.S.C.  
COUNTY CLERK'S OFFICE  
NEW YORK