

**Chaaya v The Gap, Inc., LLC**

2008 NY Slip Op 32593(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0100111/2007

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

Index Number : 100111/2007

INDEX NO. 100111/07

CHAAYA, CHEHAD

vs

GAP

MOTION DATE 5/27/08

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. 22

The following papers, numbered 1 to 9 were read on this motion for summary judgment; cross motion for sanctions

Notice of Motion— Affidavits — Exhibits A-H

PAPERS NUMBERED

1-3

Notice of Cross Motion— Affidavits — Exhibits A-E

4-7

Opp. & Reply Affirmation

8

Replying Affirmation to Cross Motion

9

**FILED**  
SEP 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion: X Yes  No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 9/23/08  
New York, New York

  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
CHEHADI CHAAYA,

Plaintiff,

- against -

THE GAP, INC., LLC and BANANA REPUBLIC, LLC.,

Defendants.  
-----X

**Index No. 100111/2007**

**Decision and Order**

**FILED**

SEP 30 2008

COUNTY CLERK'S  
NEW YORK

**HON. MICHAEL D. STALLMAN, J.:**

In this action, plaintiff alleges that, on January 19, 2004, while shopping at a Banana Republic store, another customer caused a clothing bin to fall and strike plaintiff in the head, causing him injury. Pursuant to CPLR 3212, defendants move for summary judgment dismissing the complaint. Plaintiff cross-moves for sanctions against defendants for making the summary judgment motion.

**BACKGROUND**

Plaintiff testified at his examination before trial (EBT) that, on January 19, 2004, he was shopping at the back of a Banana Republic store located at 86th street and 3rd Avenue (Soto Affirm., Ex D [Plaintiff's EBT], at 11, 14). Plaintiff claims that he was looking through bins on the back wall of the store, which bins contained boxers and scarves that were on sale (id. at 14, 16). He stated that, while kneeling down to browse the items in a lower shelf, another customer with a baby in a stomach harness reached up to browse the items in a bin on a higher shelf (id. at 16, 19-20) This customer allegedly caused the bin to fall on plaintiff's head (ibid.). Plaintiff claims that his head was bleeding at the store and that he received seven stitches at a hospital. Plaintiff commenced this action on

\* 3 ]  
January 3, 2007, alleging negligence against defendants.

### DISCUSSION

In order for a movant to prevail on a motion for summary judgment, it must provide sufficient admissible evidence eliminating material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The Court must view the evidence in a light most favorable to the non-moving party (Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 [2d Dept 1990]), according that party the benefit of all reasonable favorable inferences (Gurfein v Hanover Ins. Co., 248 AD2d 227, 229 [1st Dept 1998]). Where a movant has met its burden, the burden then shifts to the non-moving party to demonstrate that there exists a material issue of fact for trial (Zuckerman, 49 NY2d at 562).

Defendants argue that the complaint must be dismissed for lack of actual or constructive notice to defendants of any defect or other problem with the bins that would cause it to fall on a customer. Plaintiff testified that he was in the store for approximately ten minutes before the accident happened (Plaintiff's EBT, at 11). Plaintiff testified that he did not notice any problems with the bins before his accident occurred (id., at 25). Phyllis Maitland, a Customer Experience Manager of The Gap, Inc. who was working at the store where plaintiff's accident occurred, testified that the shelving units that contained the bins were similar in all the Banana Republic stores, differing in size or materials (Soto Affirm., Ex E [Maitland EBT], at 23, 24-25). According to Maitland, managers would walk through the store every ten to fifteen minutes, and they would immediately organize and rearrange any merchandise and/or displays, including the metal bins involved here (Soto Affirm., Ex H [Maitland Aff.] ¶ 3). Store employees were also trained to routinely walk throughout the store in similar intervals (id. ¶ 4). Because plaintiff was browsing in

the back of the store for approximately ten minutes, defendants argue that there was not enough time to allow one of the store employees to do a routine check, which would have established notice of a problem with the bins.

In opposition, plaintiff submits an affidavit from Nicholas Bellizzi, P.E., a licensed professional engineer in New York (Matz Affirm., Ex D [Bellizzi Aff.]). Bellizzi opines that bins were defective because they were built without any mechanism or device to prevent them from being removed from the wall unit (id. ¶ 6). According to Bellizzi, a person's hand at the forward edge of the bin was insufficient to support the weight of the bin with merchandise in it (ibid.). Bellizzi argues that the merchandise bin's design, construction, and installation looked like and operated like a drawer but had no device or mechanism to stop it from being pulled out of its frame or enclosure (id. ¶ 7). Bellizzi concludes that, if the bin at issue had a stop, or limiter, that prevented it from being pulled out completely, the accident would not have occurred (id. ¶ 11).

Defendants argued that Bellizzi's testimony should be ignored since Bellizzi only looked at photographs from another Banana Republic store and never actually inspected the drawers in the store or any other Banana Republic store. Also, defendants argued that Bellizzi's record shows that his expertise is not carpentry but engineering, and therefore he is not really an appropriate expert at all. Defendants counter that the bins were not meant to be drawers; they were meant to be bins. Defendants pointed out that Bellizzi failed to outline any industry standards, codes, rules or ordinances for the shelving unit, and as such, the affidavit is totally insufficient.

Defendants' arguments as to lack of notice are unpersuasive. Bins that are stored on a shelf, left undisturbed, are not in themselves a dangerous condition. Neither does plaintiff contend that a dangerous condition caused the bin to fall onto plaintiff. Rather, plaintiff argues that the

[\* 5 ]

installation of the shelving units and use of the unsecured bins at the Banana Republic store presented a risk of falling bins that could harm customers, which defendants had a duty to make reasonably safe. The risk was created when store employees placed the unsecured bins onto the shelving unit. The cases that defendants cite are therefore inapposite.

Comment d to Section 302 of the Restatement (Second) of Torts is instructive:

“If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being \* \* \*, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable.”

(Restatement [Second] of Torts § 302, Comment *d*). “In such case, the actor's negligence depends upon the extent to which he is required to realize and take into account the tendency of mankind or of the particular person to act improperly \* \* \*, or upon his knowledge of any particular likelihood that the particular person will so act (Restatement [Second] of Torts § 303, Comment *d*. The Restatement also states that “[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person” (Restatement [Second] of Torts § 302A).

Here, Maitland testified that she had never seen a customer remove the bins from the shelves in the four years that she has worked for the defendants’ retail stores (Maitland EBT, at 36-37). However, Maitland was asked at her EBT:

- “Q. If you did see bins moving, being moved out by customers, is that something you would tell them to stop, don’t do that?  
A. Yes.  
Q. Why would you say that?  
A. Because they’re not shelves—they weren’t affixed to the wall.  
Q. Okay. I’m not talking about the shelves, I’m talking about the bins themselves. If you saw somebody moving out a bin why would you tell them not to do this?

- \* 6 ]
- A. Yes.  
Q. Okay. Why is that?  
A. Because they could fall.”

(Maitland EBT, at 61). It is foreseeable that a customer may remove the bin to look through the sale merchandise more easily, when another customer, such as plaintiff, is in the way. Maitland’s testimony confirms that defendants realized there was a risk of harm to a customer from bins that could fall onto the customer when pulled out off the shelf, even where the bin fell onto a customer as a result of the negligence of other customers. Therefore, defendants have not demonstrated that the installation of the shelving unit and use of unsecured bins was not negligent, as a matter of law, insofar as they argue that the unsecured bins did not create an unreasonable risk of harm to customers.

Defendants also argue that the inference of negligence is not fair and reasonable where the accident is one which might naturally occur from causes other than defendant’s negligence, citing Cole v Swagler (308 NY 325 [1955]). If defendants are found negligent in the scenarios discussed above, as set forth in Sections 302 and 302A of the Restatement (Second) of Torts, the negligence of a third party would not be a superseding cause that breaks the causal link between defendants’ conduct and plaintiff’s injuries. Rather, defendants’ conduct, if found to be negligent, would be a concurrent cause of plaintiff’s injuries.

Therefore, defendants have not met their prima facie burden that they are entitled to summary judgment as a matter of law. “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Plaintiff's cross motion for sanctions is denied. Although defendants did not prevail on their summary judgment motion, the arguments that they raised were not frivolous.

**CONCLUSION**

Accordingly it is

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

ORDERED that plaintiff's cross motion for sanctions is denied.

**Dated: September 23, 2008**  
**New York, New York**

**ENTER:**



**J.S.C.**

SEP 30 2008 10:10 AM

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