S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

LORI TOSHEK,

Plaintiff,

-against-

PATHMARK STORES, INC., and EDY'S GRAND ICE CREAM,

Defendants.

Motion Sequence #2
Submitted August 29, 2008

INDEX NO: 018351/06

The following papers were read on this motion:

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

Requested Relief

Counsel for defendant, PATHMARK STORES, INC. (hereinafter referred to as "PATHMARK"), moves for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's complaint, amended complaint and all cross-claims against PATHMARK, or, in the alternative, granting summary judgment on its cross-claim seeking common law indemnity against co-defendants, EDY'S GRAND ICE CREAM, (hereinafter referred to as "EDY'S"). An affidavit of service reflects that counsel for EDY'S was served with the instant motion, on June 23, 2008, but no papers are submitted by EDY'S in

opposition to the motion. Plaintiff, LORI TOSHEK (hereinafter referred to as "TOSHEK"), opposes the motion, which is determined as follows:

Background

This is an action to recover damages for personal injuries sustained by plaintiff, TOSHEK, on August 26, 2006, at approximately 11:20 A.M., when she allegedly slipped and fell on water that had accumulated on the floor of PATHMARK's store located at 492 Atlantic Avenue, Nassau County, New York. Plaintiff alleges that the water had accumulated as a result of unpacked frozen plastic wrapped ice cream containers that had begun to defrost on the floor of the frozen food/dairy aisle of PATHMARK. The negligence action was commenced against PATHMARK, on or about November 9, 2006, by filing of a summons and verified complaint. After issue was joined, by service of an answer dated January 18, 2007, plaintiff served an amended verified complaint, verified on May 14, 2007, adding EDY'S as a co-defendant. EDY'S answered on or about September 17, 2007 and asserted cross claims against PATHMARK. PATHMARK served an amended verified answer, dated November 27, 2007, and asserted cross-claims against co-defendant.

According to the testimony of the plaintiff at her deposition, plaintiff contends that, on the morning of the accident, she was shopping with her boyfriend at PATHMARK. She stated that she was familiar with the store location and entered the frozen food aisle to purchase a single item, "Cool Whip." She testified that there was no one else in the aisle and, when she entered the frozen food aisle, she saw two (2) dollies (or "U-boats") in the aisle and had to walk in between the two (2) dollies in order to get the "Cool Whip" from the

freezer. She stated that, after removing the "Cool Whip," she walked toward the front of the store when she slipped and fell due to a water condition on the floor. She claims that she noticed wet cardboard underneath the dollies and that she saw water tracks and water around the cardboard on the floor. In the Bill of Particulars, served February 28, 2007, plaintiff claims that she suffered serious and permanent injuries to her ankle and knee which rendered her sick and disabled for a considerable time requiring medical aid and attention to the extent that she was unable to attend to her usual duties.

In support of the motion to dismiss, PATHMARK claims that it is entitled to summary judgment because plaintiff will be unable to establish that PATHMARK created the slippery condition on the store's floor or that it had either actual or constructive notice of its existence. The deposition of Mark Williams, the assistant store manager at the time of the incident, reflects that, as a matter of his duties, he would check the entire store and do a walk through. He testified that he was the only assistant store manager and "the next step down" would be department managers. Mr. Williams refrained from guessing how many department managers were there that specific day but testified that there are ten (10) such departments. When a department manager is not present, the department is overseen by full time associates known as "clerks". Mr. Williams testified that he had placed a clerk in the frozen foods department that day. He further stated that he would generally check who is on the maintenance staff each day, and that, generally, there are two (2) employees working maintenance.

To ensure that the store was safe for associates and customers, Mr. Williams stated that he would generally walk the perimeter of the store upon first entering the store (explained as looking down each aisle), checking on conditions, cleanliness and stock. Mr.

Williams testified that, later in the morning, he would generally take a shopping cart and walk up every aisle collecting throw backs and checking on the conditions of the stock. Mr. Williams stated that as part of his duties and responsibilities, he did not generally oversee any deliveries that would come into the store. Instead, a receiver, in this incident Lawrence Hall, would oversee deliveries. According to Mr. Williams' testimony, Mr. Hall's duties as a receiver included counting the product (whether it came through the warehouse or direct service delivery vendor) and making sure PATHMARK was getting the product for which it was billed. Mr. Williams further testified that, generally direct service deliveries, like EDY'S, stocked their own product. On the day of the incident, Mr. Williams' recalls seeing Mark Marra, a PATHMARK employee, in the aisle. Mark Marra was employed as a "full-time frozen food pack out" and his duties included stocking shelves within the frozen food aisle. However, PATHMARK asserts that it was not responsible for "packing out" EDY'S product, the alleged cause of the slippery floor.

Robert Gest, testified on behalf of EDY'S. At the time of the incident, Mr. Gest was a territory sales manager for the company and had worked for EDY'S for fifteen (15) years. He stated that his responsibilities included taking orders and merchandising (or "packing out") product for EDY'S at the supermarket. The procedure consisted of taking the ice cream from the back freezer and placing it on a "U-boat" and bringing it the display case in the aisle. Mr. Gest testified that when he "packs out" the product in the stores, he placed wet floor signs on the floor and put cardboard under the "U-boat" in order to absorb any condensation from the product. Mr. Gest further testified there was only one (1) U-boat in the aisle on the date of the incident and that he placed one (1) caution sign in the area. He stated that prior to "packing out" the product, there was no one (1) specific person that

he had to notify. He testified that when he walked away from the area momentarily he heard the plaintiff yell.

In addition to providing deposition testimony regarding this matter, Mr. Gest also provided a signed statement annexed to the moving papers that contends that, although he did not actually witness the incident, a PATHMARK employee, Mark Marra, told him that he saw "the woman who fell running down the ice cream isle in an unsafe manner while wearing flip flop sandals". According to Mr. Gest's signed statement, Mark Marra was not sure if that was the cause of the incident. Mr. Gest wrote in that statement that the store personnel had photographed the area, picked up the cardboard and moved the u-boat before he was able to return to the aisle. He was not sure if condensation from EDY'S product had anything to do with the fall.

In opposition to the motion, counsel for plaintiff points to the photograph marked at defendant's deposition as "Exhibit A" which allegedly reveals the scene ten (10) minutes after the accident occurred and depicts a messy area. Plaintiff alleges that PATHMARK knew or should have known what the aisle looked like because PATHMARK had knowledge that the ice cream boat perspires and drips when being packed out. (See Defendant's Exhibition "J", Page 24). Furthermore, plaintiff's counsel alleges that, according to defendant's deposition, Mr. Williams stated that immediately after the accident he had noticed that the cardboard on the floor was wet. (See Defendant's "Exhibition J," Page 26). Plaintiff's counsel alleges that given that PATHMARK had knowledge that EDY'S employee would be packing out its merchandise during store hours and, because they were familiar with the process that the EDY'S employee would use, it "would be incumbent upon defendant Pathmark to have the packing out procedure of frozen foods

done safely for the protection of its customers."

The Law

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*. It is well established that "proof of notice, either actual or constructive, is always essential to the recovery by a customer who has fallen because of a foreign substance on the floor of a supermarket or store." *Cameron v H.C., Bohack Co., Inc.*, 27 AD2d 362, 280 NYS2d 483 (2nd Dept. 1967). Absent evidence that a shopkeeper created the alleged dangerous condition, notice is a prerequisite to a customer's recovery for personal injuries resulting from a fall in a store. *Gwoskin v Burger King Corp.*, 671 NYS2d 494 (2nd Dept. 1998), *Anderson v 35 West 23rd Street Condominium*, 240 AD2d 446, 658 NYS2d 651 (2nd Dept. 1997). When nothing in the record indicates that the defendant either created the dangerous condition, or had actual notice of same, the plaintiff must then proceed under a theory of constructive notice. *Rabadi v Atlantic & Pacific Tea Company, Inc.*, 268 AD2d 418, 702 NYS2d 316 (2nd Dept. 2000). In order to constitute constructive notice, the defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident in order to allow the

defendant's employees to discovery and remedy it. *See Paciello v May Department Store Company*, 263 AD2d 533, 694 NYS2d 96 (2nd Dept. 1999), *Gordon v American Museum of Natural History*, 67 NY2d 835, 501 NYS2d 646 (C.A. 1986), and *Rabadi v Atlantic & Pacific Tea Company, Inc, supra*.

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]).

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, although PATHMARK has made a *prima facie* showing that it did not create the alleged slippery condition, there exists a triable issue of fact as to whether PATHMARK had constructive notice of its existence, and whether the condition existed for a sufficient period of time to remedy. Mr. Williams' testimony on behalf of PATHMARK shows that, although EDY'S might have created the hazardous condition, PATHMARK may have had constructive notice that the condition existed prior to the incident. The record demonstrates a triable issue of fact as to whether 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*).

Conclusion

Accordingly, it is hereby

ORDERED, that PATHMARK'S motion for an order, pursuant to CPLR § 3212, dismissing the complaint, the amended complaint and all cross-claims and granting defendant summary judgment is denied, and it is further

ORDERED, that PATHMARK'S request, in the alternative, for summary judgment on its cross-claim seeking common law indemnity against defendants, EDY'S, is denied. The issue of negligence has not yet been determined and therefore the request for common law indemnification is premature. *Barracks v Metro North Commuter R.R.*, 8 Mis3d 1024A, 803 NYS2d 17 (Supreme New York Co. 2005).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 3, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: Mallilo & Grossman, Esqs.
Attorneys for Plaintiff
163-09 Northern Boulevard
Flushing, NY 11358

Sobel & Kelly, PC
Attorneys for Defendant Pathmark Stores, Inc.
464 New York Avenue
Huntington, NY 11743

Strongin Rothman & Abrams, LLP
Attorneys for Defendant Edy's Grand Ice Cream
50 Broadway, Suite 2003
New York, NY 10004

toshek-pathmarkstores&edy's,#2/sumjudg