

Kucevic v D'Agostino Supermarkets, Inc.

2009 NY Slip Op 30119(U)

January 14, 2009

Supreme Court, New York County

Docket Number: 103646/03

Judge: Marilyn Shafer

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.

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

PRESENT: Marilyn Shafer
Justice

PART 8

Reconic, L

INDEX NO. 103571/06

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

D'Agostino

The following papers, numbered 1 to 4 were read on this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1) 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted in accord
with the annexed memorandum.

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

FILED
JAN 22 2009
CLERK'S OFFICE
NEW YORK

Dated: 1/14/09

HON. MARILYN SHAFER, JSC

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 62

-----X
LJATEFA KUCEVIC,

Plaintiff,

-against-

Index No. 103646/03

D'AGOSTINO SUPERMARKETS, INC.,

Defendant.

DECISION AND JUDGMENT

-----X

MARILYN SHAFER, J:

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action, defendant D'Agostino Supermarkets, Inc. ("D'Agostino" or the "supermarket") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Plaintiff, Ljatefa Kucevic ("Kucevic") alleges that on July 9, 2005, while shopping in the defendant supermarket, she slipped and fell on liquid on the floor near the deli counter. As a result, plaintiff commenced this action, alleging in her verified bill of particulars that "she slipped on spilled milk that had been leaking from a milk container that had been previously returned by a customer." (Borden Aff., Ex.C, para. 4)

Defendant now moves for summary judgment on the grounds that it did not create the allegedly dangerous condition or have actual or constructive notice of it. D'Agostino contends that the transient condition that allegedly caused Kucevic to fall was created by another customer shortly before the incident and that upon notice of the condition, D'Agostino immediately removed the leaking container from the customer's cart for return to the milk company.

In support of the motion, defendant cites Kucevic's deposition testimony, wherein she testified that she didn't know what she slipped on or how it got there (Borden Dep., Ex. F, p. 32,

ll. 5-12) and that she went to the manager and told him what happened, and:

A. He asked me, did anybody see you fall? I said, yes, and I pointed to the guy and he called the guy over. He asked him what happened, what was on the floor. The guy told him one of the customers had a container of milk that was leaking. That's what he told the manager.

Q. You hear him say that?

A. Yes, I did

Q. Did you hear him say anything else about the leaking container?

A. No. He just said a customer had some container. It was leaking. And that's what he put in the accident report."

(Borden Aff. Ex. F, p. 32, ll. 13-25; p.33, ll. 2-3)

In addition, in support of the motion, D'Agostino relies on the testimony of David Mojica ("Mojica"), the store employee who helped plaintiff. Mojica testified that when he went over to help plaintiff, he observed milk droppings on the floor and followed the droppings until he discovered the source, a leaky milk container in another customer's wagon which he removed and brought to the front of the store. (Borden Aff., Ex. K, p. 36-37) He also stated that he had not observed the drops prior to plaintiff's incident and he doesn't know of anyone else who observed or complained about the drops prior to plaintiff's fall. (Borden Aff, Ex. N, para. 6)

Moreover, D'Agostino states that the current store manager, Carlos Hidalgo ("Hidalgo") (Borden Aff., Ex. G pp. 28-29); the store manager at the time of the incident, Noel Velez ("Velez") and Mojica all testified that it was D'Agostino's policy to take returned merchandise, including leaking milk containers, out of circulation and return the items to the supplier. Hidalgo, Velez and Mojica claim that if a leaking milk container is returned to the store, it is

never put back on the shelf for resale. (Borden Aff., Ex. N, para. 8; Ex. G, p. 28, ll. 10-21; Ex. M, p. 17, ll. 16-25)

In opposition to summary judgment plaintiff claims that there are questions of fact about whether defendant had notice of the allegedly dangerous condition. Kucevic submits an affidavit in which she states, in accordance with her bill of particulars, that it is her contention that the leaking container of milk was returned by a customer prior to her incident. (Horowitz Aff., Ex. 1, para 3) and that she overheard Mojica tell the manager “that another customer had a leaking container of milk previously returned.” (Horowitz Aff., Ex. 1, para 4) Plaintiff also cites to Hidalgo’s testimony wherein he states that when workers unpack a milk crate, they wipe and clean the cartons, but that they do not “notice and inspect” every single container. (Borden Aff, Ex. G, pp. 16-17)

DISCUSSION

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by an “affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions.” (CPLR 3212[b])

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden

shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York*, supra at 560) Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 N.Y.2d 276 [1978]; *Fried v. Bower & Gardner*, 46 N.Y.2d 765 [1978])

In addition, the First Department has held that to maintain a premises liability action against a grocery store owner, plaintiff is required to show that defendant caused the condition or had actual or constructive notice of it. “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. (*Franco v. D’Agostino Supermarkets, Inc.*, 34 A.D.3d 328 [1st Dept 2006]; see also, *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986])

In this case, D’Agostino has established its prima facie case that it did not have actual or constructive notice of the allegedly dangerous condition by submitting deposition testimony and the affidavit of Mojica and the testimony of former employee Velez to establish that it was store policy and procedure that leaking containers were not put out for sale and that any leaking container returned by a customer was emptied and returned to the supplier for credit. Moreover, both Mojica and Velez testified that it was store policy that any substance on the floor was to be immediately cleaned. Mojica also testified that he investigated and discovered that the milk droppings were emanating from a leaking container in another customer’s cart; that he removed the container and brought it to the front of the store and that he had not observed, and did not

know anyone else who had observed, the drops prior to plaintiff's accident.

In addition, plaintiff herself testified that she didn't know what the wet substance was on the floor; she didn't notice any wet spot or drop before she fell; that she didn't know how long the substance was on the floor. Moreover, she testified that she overheard Mojica tell the manager that one of the customers had a container of milk that was leaking and that Mojica did not say anything else about the leaking container. Accordingly, the deposition testimony, including that of plaintiff, establishes that defendant did not have actual or constructive notice of the allegedly dangerous condition. (See, *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 501 [1st Dept 2008]; *Rudner v. New York Presby. Hosp.*, 42 A.D.3d 357, 358 [1st Dept 2007])

Plaintiff's submission of an affidavit in opposition to summary judgment that indicates that she heard Mojica tell the manager that the milk came from a leaking milk container that had previously been returned by a customer is insufficient to warrant denial of defendant's motion. As the court stated in *Perez v. Bronx South Associates*, 285 A.D.2d 404, 404 (1st Dept 2001):

[w]hile issues of credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony, they are insufficient to raise a triable issue of fact to defeat summary judgment. (See also, *Glick v. Dolleck & Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 ["The court may not weigh credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned."])

(See also, *Smith v. Costco Wholesale Corp.*, 50 A.D.3d at 501)

In *Addolorato v. Waldbaums*, 2008 WL 5175657 at *1 (2nd Dept), a case quite similar to the one at bar, plaintiff fell on a puddle of water near the cash register at the front of the

defendant supermarket. Defendant submitted evidence that it had neither created the puddle nor had actual or constructive notice of it. There the court stated that, “[t]he injured plaintiff’s affidavit submitted in opposition to the motion ‘sought to raise a feigned issue of fact with respect to the issue of notice’ designed to contradict his prior deposition testimony and, in any event, it was insufficient to raise a triable issue of fact. (citations omitted)(See also, *Popovec v. Great Atlantic and Pacific Tea Company, Inc.*, 26 A.D.3d 321 [2nd Dept 2006][plaintiff’s submissions insufficient to defeat summary judgment because they raised a feigned issue of fact with respect to notice which was designed to avoid the consequences of his deposition testimony])

Plaintiff’s reliance on Mojica’s alleged hearsay statement is equally without merit. As the court stated in *Becovic v. Poisson & Hackett*, 49 A.D.3d 435, “[p]laintiff . . . failed to raise an issue of fact regarding notice of the condition since their sole opposition is hearsay.”

Moreover, as the Court of Appeals stated in *Capelin Associates v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 342 (1974):

The burden upon the party opposing a motion for summary judgment is not met merely by repetition or incorporation by reference of the allegations contained in the pleadings or bills of particulars, verified or unverified Some evidentiary facts are required to be put forward.

In this case, plaintiff’s affidavit merely repeats the allegations in her bill of particulars. She has failed to come forward with evidentiary facts sufficient to overcome defendant’s prima facie showing that it did not have actual or constructive notice of the allegedly dangerous condition.

Accordingly, it is ORDERED that defendant's motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 1/19/09

ENTER:

~~MARILYN SHAFER~~
Marilyn Shafer, J.S.C.

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK