

Blonstein v Banana Republic, LLC
2009 NY Slip Op 31145(U)
May 20, 2009
Supreme Court, New York County
Docket Number: 109515/07
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 109515/2007
BLONSTEIN, ELLEN
vs.
BANANA REPUBLIC, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

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 denied in accord with the
concerned memorandum.*

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Marilyn Shafer
MARILYN SHAFER
J.S.C.

Dated: 9/21/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 8

----- X
ELLEN BLONSTEIN

Plaintiff,

Index. No.
109515/07

- against -

BANANA REPUBLIC, LLC AND THE
GAP, INC.,

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141B).

MARILYN SHAFER, J.

Defendants Banana Republic, LLC and The Gap, LLC, move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff Ellen Blonstein's complaint that she sustained personal injuries as a result of a slip and fall on a flight of wet stairs within the Banana Republic store located at 626 Fifth Ave, New York, New York.

BACKGROUND AND FACTUAL ALLEGATIONS

On January 15, 2007, plaintiff was shopping at the Banana Republic store. According to the weather report submitted by the plaintiff, it was raining intermittently all day. Plaintiff Exhibit 1. Plaintiff said the store was crowded with holiday shoppers, since it was Martin Luther King day. Plaintiff Affidavit, at 2. Plaintiff browsed on the first floor and then took the staircase located in the middle of the store to shop on the second floor. Plaintiff testified that on her way up the

white stone stairs, she noticed that the steps she traveled were wet and dirty, presumably from the tracked-in water of shoes.

Id. Plaintiff did not notice any mats or runners on the stairs or at the bottom of the stairs, or any barricades or warnings about the stairs. She did not report this condition to the staff.

Plaintiff browsed on the second floor for approximately ten to fifteen minutes and then descended the same staircase. She noticed the same wet and dirty condition of the stairs and surmised that no one had cleaned the steps. *Id.* In her deposition, plaintiff also describes some of the steps as being "jagged." Defendants Exhibit D, at 37. Plaintiff then claims that she slipped on the second to last step and fell to the ground. She was not holding the handrail. Plaintiff states that customers were the first people to assist her, not the staff at the store. As a result of the fall, plaintiff was taken to the hospital, where she received stitches in her leg. She also reports permanent numbness in her left leg as a result of the deep laceration. Plaintiff Affidavit, at 1. She missed a week of work and also retains a scar on her leg. Plaintiff first wrote a letter to defendants requesting compensation for her injuries. Plaintiff Exhibit 3. When defendants did not respond, she commenced this action.

In plaintiff's complaint, she alleges that defendants were

negligent by allowing and causing a dangerous condition of wet and dirty stairs to exist, and that defendants had actual and constructive notice of this condition. Defendants Exhibit A. In her reply affidavit she argues that she did not see defendants mop the stairs while she was shopping. She also says defendants should have known the steps would have been wet due to the accumulation of wetness from the shoppers' shoes, coats and umbrellas. Plaintiff Affidavit, at 2. Plaintiff also argues that summary judgment should be precluded because, according to plaintiff, the photos of the steps shown to plaintiff during her deposition are not the same steps where plaintiff sustained her injuries. Plaintiff Affirmation, at 7.

Defendants attach a copy of an affidavit of Ms. Peguy Romain (Romain), a former employee of the defendants, who was working near the steps at the store, on the date and time of plaintiff's fall. Defendants Exhibit F. Romain testifies that she witnessed plaintiff fall, and that her fall was not the result of wet steps, but was the result of plaintiff's carelessness. Romain indicates that plaintiff was looking around at the merchandise while she was shopping and did not pay attention to the last step, causing her to fall. Romain also observed no water or debris on the steps prior to the incident, and states that and no customers had complained to her about the steps. *Id.* Defendants also attach a photograph of the steps, demonstrating that they

were in good condition, contained non-slip strips, and also had a handrail attached. *Id.*

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law."

Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material issues of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Grasso* at 544, citing to *Marine Midland Bank, N.A., v Dino and Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990).

In a slip and fall case, the plaintiff must present evidence that defendant either created the defective condition which caused the accident, or that defendant had actual or constructive notice of it. *Mullin v 100 Church LLC*, 12 AD3d 263, 264 (1st Dept

2004). "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." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). In the present case, plaintiff does not provide any evidence that defendants created a defective condition, or that defendants had actual notice of it, so the only outstanding issue is whether defendants can be charged with constructive notice.

Plaintiff argues that defendants can be charged with constructive notice of the condition because it was raining intermittently all day and a "reasonable inference could be drawn that the water accumulated gradually by the dripping from the wet shoes and umbrellas, and that the process took a sufficient time." Plaintiff Affirmation, at 6. Plaintiff says that she did not see anyone clean the steps between the time she ascended and the time she descended. Plaintiff cites to *Padula v Big V Supermarkets, Inc.* (173 AD2d 1094 [3d Dept 1991]), in which the court awarded damages to an injured customer and her spouse when she slipped and fell on a wet floor in the front section of a supermarket. The court stated, "[p]laintiffs therefore presented a prima facie case showing that the slip and fall was a natural and probable consequence of the condition present on the floor." *Id.* at 1097.

Defendants maintain that, according to Romain, who was working near the stairs at the time of the incident, the stairs were not wet. Defendants Exhibit F. Defendants also argue that even if the stairs were wet and dirty, they can not be subject to constructive notice. No employee had noticed the wet and dirty stairs. Even if an employee had noticed that the steps were wet and dirty, the condition did not exist for a sufficient length of time to permit the employees to remedy it. Defendants cite to *Gonzalez-Jarrin v New York City Dept. Of Educ.* (50 AD3d 334, 335 [1st Dept 2008]), in which the court concluded that the plaintiffs failed to raise a triable issue of fact as to notice when, at the time of the plaintiff's accident, it had been raining or snowing for several hours, they placed a mat on the vestibule floor, "and that they had neither actual nor constructive notice of the particular wet condition that allegedly caused plaintiff to slip. Defendants were under no obligation to cover the entire floor with mats and to continuously mop up all tracked-in water [internal citations and quotations omitted]."

The court concludes that plaintiff has not raised a triable issue of fact with regard to constructive notice. Plaintiff's use of *Padula v Big V Supermarkets, Inc.*, 173 AD2d 1094, *supra*, is misplaced in this action. In *Padula*, the site of the incident was close to the front door of the store, in a heavily trafficked area where customers entered from a slushy parking lot with wet

shopping carts, on the busiest day of the week. In the present case, plaintiff did not slip due to a defective condition near the entry way of the store, which would more likely tend to retain water and debris. According to her own testimony, plaintiff did not see any other stairs in the store. Defendant Exhibit D at 67. She tripped on stairs that were located in the middle of the floor, at least twenty or thirty steps from the entrance. *Id.* at 33.

Wet sidewalks or steps within a store are generally not considered inherently dangerous conditions. As the court concluded in *Naulo v New York City Board of Education* 20 Misc 3d 1129[A], *3 [2008], "[g]eneral awareness that rain may accumulate on the stairs is not legally sufficient to charge the Board with constructive notice," citing to *Bogart v Woolworth, Co.*, 24 NY2d 936 [1969]. See *Patrick v Cho's Fruit and Vegetables*, 248 AD2d 692, 692 (2nd Dept 1998), ("[t]he mere fact that the sidewalk was wet was not sufficient to establish a dangerous condition"). Even the dissent in *Padula* opined that, "[i]t has long been recognized that a store owner cannot prevent water and snow from being brought into its store during inclement weather, and an owner is not responsible for injuries caused thereby unless it is shown that the owner failed to use reasonable care to remedy conditions which had become dangerous." *Padula v Big V Supermarkets, Inc.* 173 AD2d at 1098.

Plaintiff's testimony that she didn't think the stairs had been cleaned from when she ascended to when she descended, is too vague and speculative to satisfy plaintiff's burden. See e.g. *Mandel v 370 Lexington Avenue, LLC*, 32 AD3d 302, 393 (1st Dept 2006). "In the absence of proof as to how long a condition existed, no inference can be drawn that defendants had constructive notice of a dangerously wet floor." *Garcia v Delgado Travel Agency Inc.*, 4 AD3d 204, 204 (1st Dept 2004). Defendants were not required to continuously mop up all tracked-in water. *Id.*

Plaintiff's argument that the photo she was shown during her deposition is not a photo of the stairs in question is without import. It is the plaintiff's burden to show where the accident took place, not defendants'. Thus, if anyone were required to show a picture of the steps, it would be plaintiff. Further, no party ever says whether there is more than one set of interior stairs in the store. Since the stairs were undisputedly located in the middle of the store, their color is irrelevant.

Accordingly, defendants have established prima facie their right to summary judgment as a matter of law by demonstrating that at the time of plaintiff's accident they had neither actual nor constructive notice of the purported wet and dirty stairs which allegedly caused plaintiff to slip.

Defendants other arguments need not be addressed.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/20/09

ENTER: MARILYN SHAFER
J.S.C.

UNFILED JUDGMENT

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