Lazar v King Kullen Grocery Co., Inc.
2009 NY Slip Op 33171(U)
December 23, 2009
Supreme Court, Nassau County
Docket Number: 019299/07
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

---x

TRIAL PART: 47

HELENE LAZAR,

INDEX NO.:019299/07

Plaintiff,

MOTION DATE:11-19-09
SUBMIT DATE:12-18-09
SEQ. NUMBER - 001

-against-

KING KULLEN GROCERY CO., INC. & 390 BROADWAY ASSOCIATES, L.P.,

Defendants.

---x

The following papers have been read on this motion:

Notice of Motion, dated 10-28-09..1
Affirmation in Opposition, dated 11-9-09...........................2
Reply Affirmation, dated 12-3-09...3

This motion by defendants for an order pursuant to CPLR §3212 granting summary judgment dismissing the compliant is denied, as to defendant King Kullen Grocery Co., Inc. (King Kullen) and granted as to defendant 390 Broadway Associates, L.P. (390 Broadway). Plaintiff has not opposed the motion of 390 Broadway.

This is an action to recover damages for personal injuries based upon a slip and fall by the plaintiff, on February 17, 2007, at approximately 4:30 P.M., in a parking lot near to a store operated by defendant King Kullen and alleged to be owned by defendant 390 Broadway. According to the bill of particulars and EBT, the fall happened in the parking lot after plaintiff had exited the store on a "substantial" area of "black ice". Plaintiff did not

observe any black ice on entering but did notice it upon exiting.

Defendant's motion is supported solely by an affirmation of defendant's attorney who does not profess to have any personal knowledge and the oral depositions of the plaintiff and a representative of the defendant. Although plaintiff and defendant identified photographs of the accident area, they have not been submitted. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed her affirmation as a vehicle to refer to other competent evidence. Defendant's testimony is notable for the absence of any facts or specifics as to conditions, his actions or the actions of any other employee on the day of the accident. In fact, the witness could not say for certain that he even worked that day and gave no facts with respect to the practices, policies and routines in place for inspecting for or correcting any dangerous conditions.

Defendant does not contend that no dangerous or defective condition existed but rather that if it did so exist, it was not created by defendant or defendant did not have constructive or actual notice thereof.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v.*

Desmond, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (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 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be

evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.,* 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition

testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

In order for a defendant to successfully move for summary judgment in a slip and fall case it "has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice." *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2d Dept. 2004); *Valdez v. Aramark Servs.,* 23 AD3d 639, (2d Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635 (2d Dept. 1999). 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 a defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History,* 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of regular inspection of the area in question and "any remedial action just prior to the incident." *Hagin v. Sears,* 61 AD3d 1264, 1266 (3d Dept. 2009). *See also Birnbaum v. New York Racing Association, Inc.* 57 AD3d 598 (2d Dept. 2008).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Storny Brook, Inc.*, 34 AD3d 732, 733 (2d Dept. 2006); *Birnbaum v. New York Racing Association, Inc., supra*. In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2 Dept. 2006), the Court held that defendant did not make

a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

It is only after the moving defendant has satisfied the threshold burden of proving a *prima facie* case that the Court will examine the sufficiency of the plaintiff's opposition. *Fox v. Kamal Corp.*, 271 AD2d 485 (2d Dept. 2000). Moreover, "merely pointing out gaps in the plaintiff's case" will not satisfy the defendant's burden of proving that it did not have notice and did not create the condition. *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824 (2d Dept. 2007). Here, since defendant has not made a *prima facie* showing of entitlement to relief, the opposition submitted by plaintiff need not be considered. *See Hutchinson v. Medical Data Resources, Inc.*, 56 AD3d 362 (2d Dept. 2008).

King Kullen did not meet its burden of establishing a *prima facie* showing that a dangerous condition did not exist or if so that it did not create the dangerous condition, nor have actual or constructive notice. Defendant's deposition did not provide information demonstrating that there was no dangerous condition or that if it did exist, there was no notice thereof to King Kullen. The cases relied upon by defendant do not compel a different result. *In Murphy v. 136 Northern Blvd. Associates*, 304 AD2d 540 (2d Dept. 2003), the defendant established that it did not create the ice condition and did not have notice thereof and the plaintiff failed to raise a triable issue of fact. *In Lewis v. Bama Hotel Corp.*, 297 AD2d 422 (3d Dept. 2002) it was established that the"black ice" was not present when the parties entered the restaurant. Here, plaintiff stated that she didn't notice black ice as she entered the store, an hour to an hour and a half earlier and there is no evidence that it did not

exist or if so when. *In Carricato v. Jefferson Valley Mall, Ltd.*, 299 AD2d 444 (2d Dept. 2006), the court found that defendant had met its burden on the issues of creation and notice.

In *Dwult v. Walters*, 19 AD3d 535 (2d Dept. 2005), summary judgment was granted to a defendant on evidence that the plaintiff did not notice any ice on arrival and where defendant had shoveled and did not see any ice the day before. In the foregoing cases, the defendant's were not relieved of their initial burden of going forward and that burden should not be satisfied by merely pointing to the plaintiff's failure to make any observations of the condition prior to her fall.

Defendant does not rely on the so called storm in progress rule because there had not been any recent precipitation and in the four preceding 24 hour periods, there was a total of less than one inch. *Cf DeVito v. Harrison House Associates*, 41 AD3d 420 (2d Dept. 2007). On the contrary, here, defendant points out in reply to the absence of recent precipitation to support its contention that there was no black ice. However, this bit of evidence is not enough to establish for summary judgment purposes that there was no black ice.

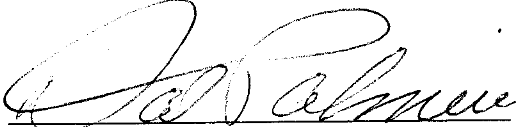
Accordingly, the Court finds that King Kullen, as the movant, has not met its initial burden of establishing that it did not create the condition, or had no notice thereof and its motion for summary judgment therefore is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 23, 20

ENTERED
DEC 28 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE



HON. DANIEL PALMIERI
Acting Supreme Court Justice

[* 8]

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