

Weisberg v Costco Wholesale Corp.

2010 NY Slip Op 30235(U)

February 2, 2010

Supreme Court, New York County

Docket Number: 100357/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 100357/2008
WEISBERG, BERNICE
VS.
COSTCO WHOLESALE CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/25/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-3
4-5
6-7

Cross-Motion: Yes No

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

M.B. -- Pre-trial conf. is scheduled for 2/22/10 at 2 PM.

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/2/10

J.S.
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION 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 : PART 55**

**BERNICE WEISBERG and HERBERT
WEISBERG,**

Plaintiffs,

-against-

**COSTCO WHOLESALE CORPORATION,
COSTCO WHOLESALE MEMBERSHIP, INC.,
and COSTCO COMPANIES, INC.,
Defendants.**

INDEX NUMBER 100357/2008

DECISION & ORDER

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Defendant Costco Wholesale Corporation (Costco) moves for summary judgment dismissing the complaint.

Plaintiff Bernice Weisberg (Plaintiff) was allegedly injured on December 8, 2007 when she tripped and fell while shopping at Costco's store at 32-50 Vernon Boulevard, Long Island City, New York. Her husband asserts a claim for loss of consortium.

The bill of particulars claims that Plaintiff, who was 77 years old at the time of the incident, tripped over a "rolling supply cart" left "unattended and in a location where customers traversed." In her examination before trial (EBT), on November 4, 2008, she testified that, immediately after picking a bunch of bananas, she turned from the display rack and fell over a "flatbed," also referred to as a flatbed type of cart and a flatbed cart, which was parked right at her feet. Exhibit D, Notice of Motion. She described the flatbed as about six feet long, six feet wide, three or four inches from the ground, and empty. Her husband and daughter, who accompanied her to Costco, were in other parts of the store at the time and she saw no one else in the vicinity of the banana display before she fell. Her husband testified at his EBT, on November

3] 4, 2008, that when he arrived at the site of the incident his wife was lying on the floor where she had fallen and an empty flatbed was nearby. Exhibit E, Notice of Motion. Their daughter testified to the same effect on December 19, 2008. Exhibit G, Notice of Motion.

Costco produced Michael Lane, an assistant general manager at the Long Island City location who was on duty at the time of the incident, for an EBT on December 19, 2008. Exhibit F, Notice of Motion. He explained that the produce section was not organized in aisles, as a conventional supermarket might be, but, rather, displayed product on top of a stack of wooden pallets, four-or-so feet high, set in an open space. He stated that he approached Ms. Weisberg on the ground soon after she fell. She was clearly injured and her husband and daughter were with her. She told him that she tripped over a flatbed cart when shopping for bananas. Mr. Lane observed a flatbed cart about five feet away from where she lay. He identified photographs taken by Costco of that flatbed cart and estimated its dimensions as three and a half to four feet long, 28 inches wide at its narrowest with a handle at one end about three feet off the ground. He said an employee, Aldo Lorencia, told him that he was placing empty boxes from the banana display on a flatbed cart when a woman asked him for bananas. Mr. Lorencia gave them to her, turned away and heard her fall. He told Mr. Lane that Plaintiff tripped over his flatbed which he then moved out of the way to where Mr. Lane saw it. Mr. Lane, in turn, filled out an internal, confidential incident report the same day, naming Mr. Lorencia as a witness and recounting the events as he did in his EBT one year later.

“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 Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a

* 4]

prima facie 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 questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

Citing *Cupo v Karfunkel*, 1 AD3d 48, 52 (2d Dept 2003), Costco argues that it is entitled to summary judgment, because a court may “grant[] summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious *and, as a matter of law, was not inherently dangerous* (original emphasis).” Here, the injured plaintiff testified that the flatbed cart was as large as six feet square; Costco’s witness described it as three and a half to four feet long by 28 inches wide with a handle sticking up about three feet from the ground. Costco’s photographs of the flatbed cart at issue, taken not too long after the incident according to Mr. Lane, show it painted red-orange and piled high with several feet of empty cardboard boxes. Exhibit H, Notice of Motion. According to Costco, when the Appellate Division, Second Department, faced the identical fact pattern, it affirmed the summary judgment granted by the trial court to Costco on the ground that the nearly-identical cart was open and obvious and not inherently dangerous. *Stern v Costco Wholesale*, 63 AD3d 1139, 1140 (2d Dept 2009). The court in *Stern* noted that

“plaintiff allegedly was injured when she tripped and fell over a flatbed shopping cart in one of the aisles of the defendant’s store. The cart was painted bright orange, was approximately four feet long and two to three feet wide, had a six-inch-high bed with a handle at one end, and was available for use by both customers and employees.”

Here, Costco argues that it “had no notice of the flatbed shopping cart being present in the produce area of its store prior to Mrs. Weisberg’s fall . . . [and] it is quite a stretch to believe that a Costco employee could have noticed it and moved it especially since plaintiff testified that there were no Costco employees in the aisle prior to or at the time of her fall” (Memorandum of Law, 6 [original emphasis]).

Costco’s argument fails to take into account the deposition testimony of its own witness. According to Mr. Lane’s version of his conversation with Mr. Lorencia, Costco created the condition. As demonstrated by *Stern (supra)*, however, that does not settle the issue of liability. Such a large, vividly-painted object cannot be easily ignored under ordinary circumstances. Plaintiff’s account of tripping as she turned away from the banana display corresponds with Mr. Lorencia’s impression, conveyed by Mr. Lane, that she fell immediately upon taking the bananas from him. Under these circumstances, the flatbed cart must have been right at her feet and possibly not as observable as it would have been if it were in her path as she walked through the store. *Stern* does not give the relative locations of the flatbed cart and its plaintiff. A large cart in plain sight may not be inherently dangerous, but that determination may change once it is placed at a shopper’s feet as she picked over bananas. *Mauriello v Port Authority of N.Y. & N.J.*, (8 AD3d 200 [1st Dept 2004]) held that

“[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff’s attention is otherwise distracted (citation omitted).”

Thus, “the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question.” *Tagle v Jakob*, 97 NY2d 165, 169 (2001). Both plaintiffs and their daughter testified to seeing the flatbed cart empty right after the incident.

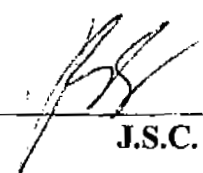
Costco produced photographs, purportedly of the flatbed cart at issue soon after the incident, showing it stacked with empty cardboard boxes approximately four to six feet high. Costco has met its prima facie burden of demonstrating that the condition which caused Plaintiff's fall was open and obvious, but Plaintiff has presented evidence showing that there are questions of fact regarding whether the cart was an open and obvious condition under the circumstances of this accident. Accordingly, it is

ORDERED that Costco's motion for summary judgment dismissing the complaint is denied; and it further is

ORDERED that counsel appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on February 22, 2010 at 2 PM.

DATED: February 2, 2010

ENTER:



J.S.C.

JANE S. SOLOVSKY

FILED
FEB 03 2010
NEW YORK
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