Knight v Gristedes 511

2010 NY Slip Op 30843(U)

April 2, 2010

Supreme Court, New York County

Docket Number: 101209/2007

Judge: Judith J. Gische

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SCANNED ON 4/14/2010

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

HON. JUDITH J. GISCHE

PRESENT: J.S.C. Justice PART 10

e 4-13-10

Index Number : 101209/2007

KNIGHT, LEONIA

vs.

GRISTEDES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

APR 13 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: APR 02 2010

HON. JUDITH J. GISCHE J.S.C.

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: IAS PART 10

---x

Leonia Knight,

Plaintiff,

-against-

Gristedes 511,

Defendant.

---x

DECISION/ ORDER
Index No.: 101209/07
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m (3212) w/DS affirm, CR affid, exhs	1
Pltfs' opp w/JEB affirm, exhs	2
Defs' reply w/DS affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, Leonia Knight ("Knight"), to recover monetary damages for the personal injuries she allegedly sustained as a result of defendant's negligence. Defendant, Gristedes 511 ("Gristedes"), a supermarket located at 504 Columbus Avenue, New York, New York, answered the complaint and now moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint. Since issue has been joined and defendant's motion was brought timely after plaintiff filed the note of issue, the motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff claims that she slipped and fell on mashed grapes in the produce aisle at defendant's supermarket on January 12, 2006 at approximately 7 p.m. Defendant contends that the plaintiff cannot make a prima facie showing because there is no evidence establishing that Gristedes created or had notice of the condition.

According to Gristedes, the grapes are ordinarily displayed in enclosed boxes or bags in the produce aisle. Gristedes argues that any grapes on the floor would have been dropped there by customers when they removed bags of grapes from the display. Gristedes argues that Christopher Rivera ("Rivera"), the produce clerk, usually sweeps the produce aisle floor once or twice an hour and that plaintiff has no proof how long the grapes were on the supermarket floor before she fell. Gristedes also contends that although Rivera had observed grapes on the produce aisle floor on other occasions, prior to the date of the accident, no complaints had been made to him or anyone else at Gristedes about the dangerous condition alleged.

Discovery has been completed. Plaintiff served a Verified Bill of Particulars dated November 10, 2008, and Gristedes provided a response to plaintiff's discovery demands on December 11, 2008. Plaintiff and Rivera (on behalf of Gristedes) were each deposed on April 27, 2009.

Plaintiff testified at her deposition that she "slipped and fell on some grapes that were in the aisle" and that they were smashed in the middle of the floor. Plaintiff stated that there were "about six or seven or more" loose grapes on the floor and she did not know how long the grapes were on the floor before she fell. She stated that she landed on both of her knees, twisted when she fell, and injured her knees and back. Plaintiff

testified that another customer helped her up and called over the manager and that the manager "picked up those grapes and told me he was sorry . . . he said there was nothing he could do."

Rivera testified at his deposition that he started working as a produce clerk for Gristedes in September of 2005. Rivera stated that on the date of the accident, there were a total of four produce clerks and one produce manager. He stated that the responsibilities of the produce clerks entailed sweeping and mopping the produce aisle and that only one clerk would work during each shift. Rivera testified that he would inspect the floor in the produce aisle "maybe once or twice an hour" to make sure there were no dangerous or slippery conditions; but that it is not Gristedes' ordinary custom and practice to prepare inspection reports or to keep records of when the floors are cleaned. Rivera also stated that he is not sure if he was working in the store on the date of the accident, but that he would have been the only produce clerk working the night shift, between 4 p.m. and 9 p.m. Rivera also testified that prior to the date of the accident, on average, the grapes would spill out of the bags onto the floor "maybe every hour" during his evening shifts.

Discussion

Summary Judgment -- Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a

prima facie showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

Negligence

It is black letter law that a landowner or possessor has a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the possessor of land had actual or constructive notice of the hazardous condition which precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*.

On this motion for summary judgment, Gristedes has the burden of proving its defenses. Thus, Gristedes must prove that it did not create the dangerous condition

alleged nor did it have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (*see* Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 [1984] *aff'd* 64 N.Y.2d 670 [1984]; *see*, Mercer v. City of New York, 223 A.D.2d 688, 689 [1996] *aff'd* 88 N.Y.2d 955 [1996]). Gristedes has not established lack of notice. According to Rivera, grapes would occasionally spill onto the floor. During his evening shifts he made a point of making sure no crushed grapes were on the supermarket floor. He did this at least once an hour. This is constructive, if not actual, notice of a dangerous condition.

Even if it did not have notice of a dangerous condition, there are disputed triable issues of material fact whether Gristedes exercised reasonable care in how it maintained the produce aisle. Although Gristedes is not an insurer of plaintiff's safety while at the premises, a property owner or possessor may be liable if it has failed to properly maintain the premises for its anticipated use (Schmerz v. Salon, 26 A.D.2d 691 *aff'd* 19 N.Y.2d 846 [1966]). The grapes were in bags in boxes and they spilled out when picked up by customers. Given their size and nature, there are triable issues of fact whether Gristedes used reasonable care in maintaining that particular produce.

As the moving party, Gristedes has a greater burden to produce evidentiary facts than its adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]). Here, not only has Gristedes failed to met its burden of proof, but there are triable issues of fact requiring the denial of

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Gristedes' motion (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 NY2d 223 [1978]). The determination of whether Gristedes was negligent is for the trier of fact to decide (Ugarriza v. Schmieder, *supra*).

Since the note of issue was filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision and order on the Clerk in Trial Support so that the case may be scheduled for trial.

Defendant has not proved that, as a matter of law, the dangerous condition alleged by plaintiff did not exist on the date of the accident. Therefore, defendant has not proved it is entitled to summary judgment. Even were the court to find that defendant did put forth evidence sufficient to shift the burden to plaintiff on this motion, plaintiff has raised material issues of fact that have to be decided at trial.

Conclusion

Defendant's motion for summary judgment is denied as it has not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 2, 2010

FILED
APR 13 2010
NEW YORK COUNTY CLERK'S OFFICE

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.