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SHORT FORM ORDER mod

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

ARNOLD SCHNEIR,

Plaintiff,

-against-

FOOD PARADE, INC.,

Defendant.

Motion Sequence #1
Submitted May 10, 2010

INDEX NO: 22177/08

The following apapers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-3
Affs in Opposition.....4-7
Affs in Reply.....8&9
Affs in Sur Reply.....10&11

Upon the foregoing papers, it is ordered that this motion by defendant Food Parade, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff Arnold Schneir's complaint as against defendant is granted in part and denied in part.

Plaintiff Arnold Schneir commenced this action to recover money damages for personal injuries allegedly sustained due to defendant's alleged negligent maintenance of the premises and creation of an allegedly hazardous condition thereupon, and failure

to warn of such hazardous condition. The premises in question were the supermarket owned by Food Parade, Inc. located at 444 Woodbury Road, Plainview, New York. Food Parade, Inc. operated the supermarket under the trade name Shop-Rite. At this location, defendant had created near the store's covered exit a walkway by placing lines of merchandise pallets on either side. The walkway was approximately five to six feet wide, widening to approximately fifteen feet where the line of pallets on the right adjacent to the building ended and only the left line adjacent to the parking lot continued.

At approximately 11:45AM on April 2, 2008 plaintiff, aged 74 at the time, arrived alone at defendant's Shop-Rite where he shopped regularly and entered the store. Plaintiff exited the store at approximately 12:15PM, having purchased only a loaf of rye bread. Some minutes before, defendant's employee Santos Larreynaga moved a pallet of top soil using a pallet jack to the far end of the left line of pallets. To allow room for him to remove the shrink wrap from the pallet's contents, Mr. Larreynaga lowered the prongs of the pallet jack and withdrew it from beneath the pallet, leaving the pallet jack in the center of the walkway and its prongs exposed across part of the walkway. Plaintiff walked approximately fifteen steps in a straight line from the store's exit through the walkway when he tripped over the the exposed prongs of the pallet jack, which he described as a "darkish brown" in his testimony at an examination before trial (EBT). Plaintiff testified that he fixed his gaze straight ahead and saw plants on his left and water bottles on his right in his peripheral vision, but never saw the pallet jack, its prongs or Mr. Larreynaga though it appears that there was nothing to obstruct his view.

Defendant herein moves for summary judgment on the grounds that the alleged hazard was open and obvious, therefore relieving defendant of any duty to warn. Furthermore, defendant contends that the pallet jack was not inherently dangerous and that the accident was due wholly to the inattentiveness and lack of care of plaintiff.

Plaintiff, in opposition, argues that whether the hazard was open and obvious is immaterial to whether defendant had a duty to maintain the premises in a reasonably safe manner. Moreover, plaintiff argues that the pallet jack's prongs were not open and obvious as they were allegedly below plaintiff's field of vision, and that given their placement in a busy public walkway the prongs were inherently dangerous.

A landowner must act as a reasonably prudent person in maintaining his or her property in a reasonably safe condition in view of all the circumstances. Such circumstances include the likelihood of injury to others, the seriousness of the injury, the burden of avoiding the risk, and the foreseeability of the harm. (*Basso v Miller*, 40 NY2d 233). The scope of a landowner's duty to maintain the property in a reasonably safe condition may also include the duty to warn of a dangerous condition. (*Cupo v Karfunkel*, 1 AD3d 48).

Although whether and to what extent the landowner's duty was breached is a jury issue, the determination of whether, under the circumstances, a duty exists remains an issue for the court. (*Basso v Miller*, *supra*). A landowner has no duty to warn of an allegedly hazardous condition that is open and obvious. (*Id.*) A condition may be found to be open and obvious where the condition was readily observable by the reasonable use of the injured person's senses. (*Scalfani v Washington Mutual*, 36 AD3d 682).

A determination that the condition was open and obvious will not absolve the landowner of the separate duty to maintain the premises in a reasonably safe manner. (*Cupo v Karfunkel*, *supra*). The landowner may escape liability entirely if, in addition to finding the condition to be open and obvious, the court holds, as a matter of law, that the condition complained of is not inherently dangerous. While such determinations are generally fact specific and left to the jury, a court may make such determinations as a matter of law where the established facts compel that conclusion. (*Tagle v Jakob*, 97 NY2d 165).

However, summary judgment is a drastic remedy that deprives the non-movant of his day in court and is not to be granted where there is any doubt, after giving the non-movant the benefit of every permissible inference, as to the existence of a triable issue. Normally, where the facts are uncontested, summary judgment is appropriate. (*Andre v Pomeroy*, 35 NY2d 361). However, in the context of negligence cases, even where the facts are conceded, there often remains a question of fact as to whether defendant or plaintiff acted reasonably under the circumstances. Thus, summary judgment is appropriate only in the rare case where the behavior of either party fell far below any permissible standard of due care. (*Andre v Pomeroy*, *supra*).

Thus, defendant's burden here is to establish its *prima facie* entitlement to summary judgment dismissing plaintiff's complaint by tendering of evidentiary proof in admissible form that 1) the condition was open and obvious, and 2) the condition was not inherently dangerous. (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065; *Cupo v Karfunkel*, *supra*).

To establish *prima facie* that the condition was open and obvious, defendant offers photographs extracted from the surveillance video of the accident filmed from the direction plaintiff walked that show the pallet jack in plain view with no obstructions at the end of the walkway adjacent to the pallet Mr. Larreynaga was unpacking. Furthermore, defendant points to plaintiff's EBT testimony stating that he looked straight ahead at all times and was not distracted by the adjacent displays. Defendant has thus made a *prima facie* showing that the condition was open and obvious and readily observable through the ordinary use of one's senses.

The burden now shifts to plaintiff to produce evidence demonstrating the existance of a triable issue of fact as to whether the condition was open and obvious. (*Friends of Animals v Associated Fur Mfrs.*, *supra*). In opposition, plaintiff notes EBT testimony establishing that the prongs had been lowered to mere inches above the ground, allegedly below eye level. Plaintiff further testified that the prongs were outside of his field of vision, and that he did not see the pallet jack itself. Plaintiff also made reference to the displays on either side of him as he walked down the walkway, but did not state that he was distracted by such displays.

Plaintiff has failed to carry his burden. Plaintiff adduced no evidence establishing a reasonable explanation as to why the condition was not observable through the ordinary use of one's senses. At no point does plaintiff state that there was anything that obstructed his view of the pallet jack; plaintiff states that he simply did not see the pallet jack, its prongs or Mr. Larreynaga as he approached the scene of the accident. Though plaintiff observed the displays on either side of him, he did not testify that he

was distracted by them. Only in plaintiff's attorney's affirmation are the displays' potential to distract noted, but not substantiated by admissible evidence. Such a feigned issue is insufficient to defeat summary judgment on this issue. (*Pinto v Selinger Ice Cream Corp.*, *supra*). Therefore, summary judgment is granted dismissing the allegations in plaintiff Arnold Schneir's complaint that defendant Food Parade, Inc. had a duty to warn of a hazardous condition.

To establish *prima facie* that the condition was not inherently dangerous, defendant primarily references numerous allegedly analogous cases holding similar devices to be not inherently dangerous.

The cases of *Pinto v Selinger Ice Cream Corp.* (47 AD3d 496) and *Connor v Taylor Rental Center* (278 AD2d 270) relied upon by defendant are distinguishable. In both cases plaintiffs tripped over the prongs of stationary forklifts. However, unlike here, both plaintiffs saw the forklifts well before coming into contact with them. Moreover, the appellate division wrote each decision in such a way as to indicate that the decision was restricted to the specific facts of each case. (*Pinto v Selinger Ice Cream Corp.*, *supra* ["Such circumstances establish..."]; *Connor v Taylor Rental Ctr.*, *supra* ["On these facts..."]).

Likewise, the case of *Stern v Costco* (63 AD3d 1139) on which defendant seeks to rely is inapposite. There, plaintiff fell over a bright orange two foot by three foot flat bed cart raised six inches above the ground. (*Id.*). Though allegedly the cart there was larger than the pallet jack here, defendant has failed to prove whether the pallet jack

was painted with a similarly bright color. The record establishes only that the prongs of the pallet jack were a rusty brown.

Thus, defendant has failed to establish its *prima facie* entitlement to summary judgment by failing to adduce evidence or cite controlling precedent establishing the pallet jack as not inherently dangerous under similar circumstances. Therefore, summary judgment is denied as to the allegations in plaintiff Arnold Schneir's complaint of negligent maintenance of the premises by defendant Food Parade, Inc..

Parenthetically, it should be noted that plaintiff's reliance upon, and plaintiff's expert William Marletta's reference to, OSHA regulations is misplaced. OSHA regulations are meant to regulate the employer-employee relationship with the aim of promoting worker safety. There is nothing in the record to suggest that plaintiff was an employee of defendant Food Parade, Inc., thus he is outside the protected class and the OSHA regulations have no applicability to this case. (*Alesse v Valley Stream Cent. High Sch. Dist. #3*, 202 AD2d 326).

Dated: July 19, 2010

UTE WOLFF LALLY, J.S.C.

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