

<b>Dentel v Target Corp.</b>
2010 NY Slip Op 33025(U)
September 28, 2010
Supreme Court, Suffolk County
Docket Number: 05-24787
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY



**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 8-25-10  
ADJ. DATE 9-1-10  
Mot. Seq. # 005 - MD

-----X  
JODI DENTEL, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 TARGET CORPORATION and TARGET :  
 STORES, INC., :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 14; Notice of Cross-Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 15-16; Replying Affidavits and supporting papers \_\_\_\_; Other \_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (005) by the plaintiff pursuant to CPLR §3212 for an order granting summary judgment on the issue of liability is denied.

This is a negligence action wherein the plaintiff claims she sustained injuries on December 15, 2003 when struck by items which fell from a shelf at the defendants' premises located on Sunrise Highway, Bay Shore, New York. The plaintiff alleges causes of action for negligence, and negligence based upon theories of *res ipsa loquitur* and *respondeat superior*.

The plaintiff seeks summary judgment on the issue of liability because the defendants breached their duty to her when they failed to maintain the store premises in a reasonably safe condition by negligently stocking merchandise on the "riser" portion of the shelving in the toy department, causing items to fall and strike her, as a result of which she sustained injuries.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party, who in order to defeat the motion for summary judgment, must proffer evidence in admissible

form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, plaintiff's verified bill of particulars, supplemental bill of particulars; copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, dated October 16, 2008, and of Raymond Merola on behalf of the Target Corporation, dated October 21, 2009; witness statement of George Kempf; copy of the Guest Incident Report, dated December 15, 2002; and Incident Investigation report.

In opposing this motion, the defendants have submitted an attorney's affirmation.

At her EBT, the plaintiff testified to the effect that at the time of the incident she was standing in a toy aisle which contained Easy Bake Ovens, leaning on the shopping cart on the metal handle looking at her shopping list, when she suddenly felt "like knives" coming down on her head. She put her hands on top of her head and bent over the cart. She was also struck on the left shoulder and lower back by the falling items. She did not know how many boxes fell but later testified there were about 30 or 40 boxes which fell. She did not know how much they weighed. She did not see anyone in the aisle before she arrived there. After the incident, she looked up and saw a storage area from where she thought the items must have fallen. A male and a female employee were at the end of the aisle and asked her if she was okay. She did not know if there was anyone on the other side of the aisle. She was shopping with her boyfriend, but did not know where he was when the incident occurred. When the manager arrived she told him she had numbness in her back, pain in her lower back, a headache, and her arms were numb with pins and needles.

At his EBT, Raymond Merola testified to the effect that he was employed by the Target Corporation as a hard line executive store sales manager and he was in charge of the hard line merchandise sold in the Bay Shore store. Hard lines referred to electronics, entertainment, and toys which were located separately from items which are not hard lines. In 2002, the store toys were located in the rear center of the store. There was a separate toy manager. The overnight manager was in charge of seeing that goods were stocked on the shelves. In the toy department, the shelves were 84 inches high and constructed of metal with braces on the sides, every 4 feet. The upper shelf, known as a riser, was about 7 feet off the floor and was used for stocking and was not for customer use. However, a customer could reach it. The stocking of that upper shelf was done overnight and corresponded with the merchandise stocked on the shelves below it. If additional merchandise were needed on the lower shelves, the merchandise would be obtained from the stock room. There was a large flat basket on the front and the merchandise was stacked on that and then put onto the riser. The riser was

about 18 inches deep, maximum, so only 1 or 2 items could be placed back to back, or aisle to aisle, on the riser shelf, depending upon what the item was. The riser had a 2 inch divider at the center between either side of the aisle. The merchandise could only be stacked to a height of 30 inches above the riser. There was an index card on the front of the riser which indicated that if customers needed assistance they should contact a team member. On the date of the incident, he received a call over his walkie-talkie and responded to the scene immediately. When he arrived, he did not remember seeing anyone there or any merchandise on the floor. He did fill out a report, at the guest's (plaintiff's) request, and wrote that the guest told him 30 or 40 boxes fell from the shelf striking her. He believed 3 photographs were taken at the site, but he did not recall who took the pictures. The report indicated that there were about 19 pieces or toys on the floor. He could not determine what made the boxes fall from the riser. He testified that the Easy Bake Oven boxes weighed about 3 pounds and less than 5 pounds. The Wee M.D. boxes, which the plaintiff also claimed had fallen, weighed about 1 pound to a 1½ pounds each.

Team member George Kempf was the first team member to respond to the site. He wrote in his report that he heard a sound and turned his head and saw boxes falling, skimming a lady's back and that the lady did not look like she was hurt. However, she complained that her neck and back were hurting her. He believed 10 to 15 boxes fell.

"Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. \* \* \* The existence of one or more of these elements is sufficient to give rise to a duty of care" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296, 532 NYS2d 105, 108, *lv dismissed in part, denied in part* 73 NY2d 783, 536 NYS2d 741 [1988]; *accord, Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2005]). Here, the plaintiff has established that the defendants owed her a duty of care as she was present in the defendants' store and the items which she claimed had fallen were stocked on the defendants' riser.

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (*Singh v United Cerebral Palsy of New York City, Inc. et al*, 72 AD3d 272, 896 NYS2d 22 [1<sup>st</sup> Dept 1020]). Liability is predicated only on a failure of the defendant to remedy the danger presented after actual or constructive notice of the condition (*see, Placquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494 [1994]). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (*Baumgartner v Prudential Ins. Co. of Am.*, 251 AD2d 358, 674 NYS2d 84 [1998]). To constitute constructive notice, a condition 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 (*Granillo v Toys "R" us, Inc et al*, 72 AD3d 1024, 899 NYS2d 377 [2<sup>nd</sup> Dept 2010]; *Pelow v Tri-Main Development et al*, 303 AD2d 940, 757 NYS2d 653 [4<sup>th</sup> Dept 2002]). "The issue whether a condition was readily observable impacts on a plaintiff's comparative negligence and does not negate a defendant's duty to keep the premises reasonably safe. An open and obvious condition merely negates the duty to

warn. Likewise, the issue of whether the hazard was “trivial” is also one of fact, dependent on the peculiar facts and circumstances of the case” (*Pelow v Tria-Main Development et al, supra*). “Where there is no evidence that the store created a dangerous condition by stacking small juice cans on the top shelf or had actual notice that the cans were “lopsided” the plaintiff must proceed on the theory of constructive notice. 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 discovery and remedy it” (*Ruggerio et al v Waldbaums Supermarkets, Inc.*, 242 AD2d 268, 661 NYS2d 37 [2<sup>nd</sup> Dept 1997]). Here, the plaintiff has not established that the defendants had actual or constructive notice of a dangerous condition. The plaintiff’s proof is insufficient to establish that an apparent dangerous condition existed for a sufficient length of time prior to the accident for the defendants to remedy the condition (see, *Murphy v 136 N. Blvd. Assocs.*, 304 AD2d 540, 757 NYS2d 582 [2003]), or that the defendants created the condition.

Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (see, *Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [2005]; *Fasano v Green-Wood Cemetery*, 21AD3d 446, 799 NYS2d 827 [2005]). Here, there are factual issues concerning whether or not the defendants were negligent in the manner or method of stacking the riser, thus causing the items to fall. No testimony has been presented to determine whether someone was on the other side of the aisle and caused the items to shift and fall. The testimony adduced supports the position that customers could reach the riser shelf to remove items. No expert testimony has been introduced to set forth the industry standard for stacking risers and whether the defendants violated such standards. Ordinarily, the opinion of a qualified expert that a plaintiff’s injuries were caused by a deviation from industry standards would preclude the granting of summary judgment in a supermarket’s favor ( see, *Ruggerio et al v Waldbaums Supermarkets, Inc.*, supra). Here, such factual issues preclude summary judgment. Therefore, that part of the application for summary judgment on the issue of negligence is denied.

The plaintiff also claims entitlement to summary judgment because the defendants were negligent, relying on the theories of *respondeat superior* and *res ipsa loquitur*.

In a proper case, under the doctrine of *res ipsa loquitur*, the law allows a trier of fact to consider the circumstantial evidence and infer that the defendant was negligent in some unspecified way (*Brink v Costell & Son Development, LLC*, 66 AD3d 1451, 886 NYS2d 301 [4<sup>th</sup> Dept 2009]). When the actual or specific cause of an accident is unknown, under the doctrine of *res ipsa loquitur*, a jury may in certain circumstances infer negligence merely from the happening of an event and the defendants’ relation to it. *Res ipsa loquitur* simply recognizes what is known from everyday experience *i.e.*, that some accidents by their very nature would not ordinarily happen without negligence (*Kambat et al v St. Francis Hospital et al*, 89 NY2d 489, 655 NYS2d 844 [1997]). The plaintiff has pleaded *res ipsa loquitur* as a separate cause of action aside from the negligence cause of action. The doctrine of *res ipsa loquitur* is not a separate theory of liability but rather a “common sense application of the probative value of circumstantial evidence” (*Keyser v KB Toys et al*, 26 Misc3d 1240A, 2010

NY Slip op 50486U [Supreme Court of New York, Suffolk County 2010]. Additionally, the doctrine may be applied even where some of the circumstances are known, as long as the actual specific proximate cause of the accident remains unknown (**Bonura v KWK Asso. Inc.**, 2 AD3d 207, 770 NYS2d 5. The control element requires that the evidence afford a rational basis for concluding that the defendant had responsibility for causing the accident (**Dermatossian v New York City transit Authority**, 67 NY2d 219, 501 NYS2d).

In **Fields v King Kullen Grocery Co.**, 28 AD3d 513, 813 NYS2d 495 [2<sup>nd</sup> Dept 2006], the plaintiff was injured when she was struck by a falling metal barbecue grill displayed on a shelf in the meat department of the defendant's store. The Court determined that there was a triable issue of fact as to whether defendant's control over the grill was of sufficient exclusivity to fairly rule out the chance that the defective condition was caused by an agency other than the defendant's negligence. In that case, the shelf was 6 ½ feet above the ground; there were no ladders or step stools that customers could use to reach the grill; and there was no other sale merchandise on the shelf or within 5 feet of the display. In the instant action, the plaintiff's submissions raise a factual issue nearly identical to the facts in **Fields v King Kullen Co. supra**. Merola testified that the riser shelf was about 7 feet off the ground and the items were stacked up to 30 inches high. Many customers could reach the riser shelf; however, a sign was posted requesting customers to seek assistance. No ladders or steps were provided to assist customers.

The Court should not determine as a matter of law whether the doctrine of *res ipsa loquitur* applies to the facts of this case. This is a question for the jury as the triers of fact to decide. *Res ipsa loquitur* does not create a presumption of negligence against a defendant. Rather, the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent and does not automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted (**Morejon et al v Rais Construction Company et al**, 7 NY3d 203, 818 NYS2d 792 [2006]). In the instant action, there is a triable issue of fact as to whether defendants' control over the riser shelf was sufficiently exclusive to fairly rule out the chance that the defective condition was caused by an agency other than the defendants' negligence. Thus, factual issues preclude summary judgment.

Accordingly, that part of the application for summary judgment on the issue of liability based upon the application of the doctrine of *res ipsa loquitur* is denied.

The plaintiff also moves for summary judgment on liability based on *respondeat superior*. "Under the doctrine of *respondeat superior*, an employer is answerable for the torts of an employee who acts within the scope of his or her employment. The purpose of the rule is to render the employer responsible, in proper case, for the employee's tortious acts, which although errant, were done in furtherance of the employer's business (citations omitted). " (**Rausman v Baugh et al**, 248 AD2d 8, 682 NYS2d 42 [2<sup>nd</sup> Dept 1998]). Under the doctrine of *respondeat superior*, an employer can be held vicariously liable for the torts committed by an employee acting within the scope of the employment (**Fernandez v Rustic Inn, Inc. et al**, 60 AD3d 893, 876 NYS2d 99 [2<sup>nd</sup> Dept 2009]). Here there are factual issues concerning whether

a particular employee or employees of the defendants was negligent. Thus, summary judgment in favor of the plaintiff on the issue of liability predicated on the theory of vicarious liability or *respondeat superior* is precluded by the factual issues relating to the alleged negligence of the defendants.

Accordingly, that part of the plaintiff's application for summary judgment because the employer is vicariously liable for the acts of its employees is denied.

Dated: September 28, 2010

  
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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION