

Bresky v Bergdorf Goodman Inc.

2011 NY Slip Op 30592(U)

March 2, 2011

Supreme Court, New York County

Docket Number: 101985/09

Judge: Milton A. Tingling

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **MILTON A TINGLING**

PART 44

Index Number : 101985/2009

BRESKY, ALIZA

vs

BERGDORF GOODMAN

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/13/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with annexed decision.

FILED

MAR 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/3/11

mgt

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 44

-----X
ALIZA BRESKY,

Plaintiff,

Index No.: 101985/09

- against -

FILED

BERGDORF GOODMAN INC. and
NEIMAN MARCUS GROUP, INC.,

MAR 15 2011

Defendants.

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
J. Tingling:

In this personal injury action, defendants Bergdorf Goodman Inc. (Bergdorf) and Neiman Marcus Group., Inc. (Neiman Marcus) move, pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint against them.

Based on the following, the motion is denied.

Background

At all relevant times herein, plaintiff was an employee of a cosmetics company, Natura Bisse, which maintained a counter on the basement level of Bergdorf's department store in midtown Manhattan. On May 30, 2008, plaintiff fell as she was walking down a hallway to retrieve cosmetics for a customer, when the heel of her shoe got caught in a "gap" between an area of carpet and tile floor. Plaintiff testified that she was propelled forward striking her face against an open cabinet door, fracturing her nose, which required two surgical procedures, among other injuries.

Prior to plaintiff's accident, two other individuals fell in the same area as plaintiff and reported their respective incidents to Bergdorf's security personnel. Specifically, nonparty Eva Tsirklin, a then co-worker of plaintiff's, avers that she fell two times in the exact same area as

plaintiff and that the gap between the tile floor and the carpet was “at least an inch or two deep and three or four inches wide” (Tsirklin Aff., ¶¶ 4, 8). Another employee, nonparty Lauren Manenti, who at that time was employed by the La Mer counter, which was located in the same general area of the Natura Bisse counter, avers that she fell in the same area as plaintiff more than one year before the accident, in late March 2007, injuring her knee as a result (Manenti Aff., ¶¶ 2, 4). While defendants prepared a report of Manenti’s incident, Manenti contests the accuracy of the report (Manenti Aff., ¶¶ 6, 8). Manenti also claims that the gap between the tile floor and the carpet was “at least an inch or two deep and three or four inches wide” (Manenti Aff., ¶ 5).

Nonparty, William Self, a co-worker of plaintiff’s who witnessed the accident, also testified that there was a three to four inch long split in the rug where plaintiff fell (Self dep., at 20, Azzaretto Aff., Ex. E).

A loss-prevention investigator at Bergdorf’s, Francisco Lopez, filled out an accident report on the day in question. Mr. Lopez asked plaintiff what happened and she told him she hit her nose on the door of a stock room cabinet (Lopez dep., at 27, Azzaretto Aff, Ex. D). During his deposition, Mr. Lopez could not recall if the area she was in was carpeted (*id.*, at 28). The accident report makes no mention of plaintiff tripping due to worn and/or missing carpet (Azzaretto Aff., Ex. G).

Discussion

In order for the court to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v*

Citibank Corp., 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 562). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In order to prove that defendant was negligent, plaintiff must prove that: (1) defendant owed a duty to her; (2) the duty was breached; (3) the breach of the duty proximately caused plaintiff's injuries; and (4) plaintiff sustained damages as a consequence of defendant's negligence (*see Kenney v City of New York*, 30 AD3d 261 [1st Dept 2006]). "A defendant who moves for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Bloomfield v Jericho Union Free School Dist.*, 80 AD3d 637, 637 [2d Dept 2011]). While a landowner owes a "duty to maintain its property in a reasonably safe condition so as to prevent foreseeable accidents" (*Segree v St. Agatha's Convent*, 77 AD3d 572, 573 [1st Dept 2010], citing *Basso v Miller*, 40 NY2d 233 [1976]), "it has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (*Bloomfield*, 80AD3d at 637).

Defendants are silent as to whether they created the condition. Moreover, given that: 1) two individuals affirm that they fell due to the condition of the floor in the same area over a year prior to plaintiff's accident; and 2) in one instance defendants' personnel took a written report of the incident involving Manenti, it cannot be said that they did not have notice of the alleged

defect (*see Granillo v Toys "R" Us, Inc.*, 72 AD3d 1024, 1025 [2d Dept 2010] ["a defendant has constructive notice of a defect when it is visible and apparent and has existed for a sufficient length of time before the accident that it could have been discovered and corrected"] [internal quotation marks and citation omitted]).

Rather, defendants argue that the irregularity in the area of the floor which caused plaintiff to fall was a trivial defect and, therefore, defendants cannot be held liable. Generally, injuries resulting from trivial defects are not actionable (*Hahn v Wilhelm*, 54 AD3d 896, 898 [2d Dept 2008]). However, even trivial defects may "have the characteristics of a snare or trap" (*Abreu v New York City Housing Auth.*, 61 AD3d 420, 421 [1st Dept 2009] [internal quotation marks and citation omitted]; *see also Rivera v 2300 X-tra Wholesalers*, 239 AD2d 268 [1st Dept 1997]).

"[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable"; "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the ... facts and circumstances of each [individual] case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997][internal quotation marks and citation omitted]). "In determining whether a defect is trivial as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury" (*Perez v 655 Montauk, LLC*, — AD3d —, 2011 NY Slip Op 00664, 2011 WL 337843 [2d Dept Feb. 1, 2011]).

Here, the evidence submitted, i.e., the affidavits and deposition testimony of three individuals familiar with the area where plaintiff fell, all described either a gap or split in the rug

* 6]
running approximately three to four inches in length. Coupled with the affidavits of Tsirklin, who also witnessed the accident, and Manenti, both of whom aver that they tripped and fell in the same location as plaintiff prior to her accident, this evidence raises issues of fact as to whether the alleged defect was indeed trivial (*see Bruinsma v Simon Prop. Group, Inc.*, 74 AD3d 859 [2d Dept 2010]).

Contrary to defendants' contention, the court cannot conclude, as a matter of law, that the defect was trivial such that it may not be liable.

Furthermore, as there is no inconsistency in plaintiff's deposition testimony and based on a review of the evidence noted above, the court holds there is no feigned issue of fact.

In light of the foregoing, the motion is denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendants Bergdorf Goodman Inc. and Neiman Marcus Group, Inc. is denied.

Dated: 3/2/11

FILED

MAR 15 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

Mat

MILTON A.S. TINGLING