

**Hernandez v L&K Holding Corp.**

2011 NY Slip Op 31764(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 008873/09

Judge: Thomas P. Phelan

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 2  
NASSAU COUNTY

CATALINA HERNANDEZ,

Plaintiff(s),

-against-

L&K HOLDING CORPORATION and OLD  
COUNTRY DELI CORP.,

Defendant(s).

ORIGINAL RETURN DATE:03/04/11  
SUBMISSION DATE: 05/02/11  
INDEX No.: 008873/09

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1, 2
Answering Papers.....	3, 4
Reply.....	5, 6, 7

Motions by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint are granted.

On March 26, 2009, plaintiff allegedly tripped and fell on an entry mat as she exited defendant Old Country Deli Corp. ("the deli"). Prior to the date of the accident, plaintiff frequented the deli two to three times per week for the past ten years. Plaintiff used the same entrance each time she went to the deli (pl's dep. tr., pp. 15-16).

Plaintiff was in the deli for approximately five minutes prior to the incident. (Id., pp. 17, 18). On the day of the incident plaintiff did not have any problem walking through the doorway into the deli nor did she notice anything loose with regard to the entranceway or the floor in the entranceway when she entered the deli (Id., p. 18). When plaintiff exited the deli, the front door was open (Id., p. 19). As plaintiff was exiting the deli she did not have any problem seeing (Id., p. 20). She was carrying a bag with a sandwich with one hand and a coffee in her other hand (Id., pp. 21, 22). At the time of the incident, plaintiff was wearing dress shoes with a 2-2 1/2 inch heel (Id., pp. 22, 23). Plaintiff testified as follows at pages 24 and 25 of her deposition transcript as to the happening of the accident.

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Q: As you were walking out the deli, did you ever look down at the entranceway at all?

A: I could not describe that.

Q: As you were walking out of the deli immediately before your accident, did you ever look down at the entranceway?

A: I don't know if I looked down. I only exited.

Q: Well, as you were walking out of the deli that morning right before your accident, what was in your line of sight; what was in your view; what did you see?

A: I didn't notice.

Q: Did your accident occur inside of the deli or outside of the deli or something else?

A: In front of the deli.

Q: How do you say?

A: Yea, one step outside of the deli, exiting the deli.

Q: As the accident occurred, did you slip, did you trip or something else?

A: What it felt like was my shoe getting stuck between the carpet and the exit.

Q: What did your shoe get stuck on.

A: Ok - when I extracted the foot, I felt like pulling the carpet or the mat.

Q: Which foot got stuck between the carpet and the exit?

A: My right.

Q: What part of your foot got stuck?

A: The heel of my shoe.

Plaintiff further testified as to the happening of the accident on page 26 of her deposition transcript as follows:

Q: You told us before that when you extracted your foot, you felt like you were pulling the carpet and the mat. When did you extract your foot?

A: I did not say that I pulled carpet. What I said was that it felt like my heel was stuck in the carpet, my shoe, that area but that's what it felt like when I tried to remove my shoe from there.

Plaintiff did not actually see what caused her to fall because she was not looking down when she had her accident. At pages 89 and 90 of plaintiff's deposition transcript she stated:

Q: Now, on the day of the accident, when you were exiting the deli, did you ever look down at the floor?

A: I am not specifying if I looked down. I just went out.

Q: Did, you look down? Yes or no.

A: I don't know.

Q: Did you actually see the heel of your shoe get stuck on the mat?

A: No.

Q: As you were exiting the deli, did you see either of your two feet step onto the mat?

A: No.

Q: Was there anything that obstructed your view of the mat?

A: No.

Larry Faltings, the owner of the deli, testified on its behalf. Mr. Faltings was at the deli on the date of the incident but did not see plaintiff's accident. The deli was leased from co-defendant (the "landlord"). There were no complaints regarding the front entrance/exit of the deli nor were there any prior incidents involving a trip and fall or slip and fall in the deli (Faltings dep. tr., p. 49). The rubber mat that was outside the deli entrance was placed there by Mr. Faltings and was there on a regular basis (Id., p. 54). Mr. Faltings confirmed that plaintiff would come into the deli 2-3 times per week (Id., p. 71). After plaintiff's accident, Mr. Faltings did not see any change either in the interior mats or the exterior mat that plaintiff claims caused her fall.

Mr. Doogan is the manager for the subject property. Pursuant to the lease the deli had the duty to maintain the deli including all exits and entrances. Mr. Doogan's responsibilities were limited to collecting money and meetings with contractors. An out-of-possession landlord is not liable for injuries that occur on the leased premises unless the landlord is actually obligated to repair or maintain the subject premises (*Mitaras v Pickman*, 60 AD3d 827 [2d Dept. 2009]). Also, an out-of-possession Landlord who retains the right to reenter the leased premises cannot be deemed to have constructive notice of a condition of the premises unless the condition was a statutory violation. There is no allegation of a statutory violation (see *Guzman v Haven Plaza House Development Fund*, 69 NY2d 559 [1987]). Mr. Doogan testified that there were no prior incidents involving the doorway at the subject premises nor were there any trip and falls or slip and falls in the deli prior to the date of the accident (Doogan dep. tr., p. 64). Mr. Doogan also indicated that there were no lawsuits for personal injury involving the subject premises (Doogan dep. tr., p. 64).

In order to establish a *prima facie* case of negligence in a premises liability action, a plaintiff must demonstrate that a defendant created the condition which caused the accident or had actual or constructive notice of said condition (*Hartley v Waldbaum, Inc.*, 69 AD3d 902 [2d Dept. 2010]; *Kramer v K-Mart Corp.*, 226 AD2d 590 [2d Dept. 1996]). Actual notice by definition requires proof that defendant was aware of the presence of the alleged condition prior to the happening of plaintiff's incident (see, *Cameron v Bohack*, 27 AD2d 362 [2d Dept. 1967]). "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 discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

A defendant moving for summary judgment in a slip and fall case has the initial burden of showing that it neither created the alleged condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy same (*Valdez v Aramark Services*, 23 AD3d 639 [2d Dept. 2005]; see also, *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404 [1957]). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611 [2d Dept. 1987]; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133 [2d Dept. 1986]). Plaintiff argues that the heel of her right shoe became stuck in the edge of the mat outside of the deli entrance without any explanation. Mr. Faltings, who was present at the time of plaintiff's accident, didn't see any difference in the mat after plaintiff's accident nor did plaintiff contradict Mr. Faltings' characterization of the condition of the mat before and after plaintiff exited the deli. Defendants have made an adequate *prima facie* showing of entitlement to summary judgment.

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Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (*Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065 [1979]). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240 [1st Dept. 1990], *aff'd* 76 NY2d 927 [1990]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see Indig v Finkelstein*, 23 NY2d 728 [1968]; *Werner v Nelkin*, 206 AD2d 422 [2d Dept. 1994]; *Fink, Weinberger, Freedman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 [1st Dept. 1981], *app. dismissed*, 53 NY2d 1028 [1981]; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868 [3d Dept. 1993], *lv app. denied*, 82 NY2d 660 [1993]).

In opposition to the motion, plaintiff argues that the presence of the rubber mat in or about the area of the entrance/exit doorway coupled with the right differential between the floor and the door saddle constituted a dangerous tripping hazard. Moreover, plaintiff's attorney opines that because the rubber mat covered the alleged uneven condition of the area, the risk of an accident not only increased, but also the likelihood of a heel penetrating the mat increased. The assertions of plaintiff's attorney are based on speculation. Plaintiff asserts her right heel got caught in the mat but has not demonstrated with any documentary evidence that the mat was dangerous or defective (*see Matter of Linney v City of Plattsburgh* 49 AD3d 1020 [3d Dept. 2008]). There is no documentary evidence to support plaintiff's conclusory statement that defendant created a "trap-like condition, to wit: a rubber mat cresting [*sic*] a tripping hazard which plaintiff's heel of her shoe penetrated and caused her to fall to the ground" (Aff. In Opp. ¶ 13). Assertions merely stating conclusions of fact or law are not enough to defeat a motion for summary judgment (*Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 [2d Dept. 1999]; *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 (2004); *Williams v. SNS Realty of Long Island*, 70 AD3d 1034 [2d Dept. 2010]; *Hayden v Waldbaum, Inc.*, 63 AD3d 679 [2d Dept. 2009]).

Plaintiff also argues that defendants failed to offer any evidence as to whether the area in question was last inspected relative to the accident. This is a feigned issue. Plaintiff was able to enter the deli without a problem and had been going in and out of the deli for approximately ten years, 2-3 times per week prior to the incident, without making a complaint to defendants. Plaintiff's attorney's affidavit about the area of the entrance/exit doorway having a height differential, that the rubber mat covered an uneven condition near it, and that plaintiff's heel penetrated the mat is speculative, conclusory and not based on any evidentiary fact sufficient to defeat the within motions (*Slintak v Price Chopper Supermarkets*, 81 AD3d 808 [2d Dept. 2011]; *Crapanzano v Balkon Realty Co.*, 68 AD3d 1042 [2d Dept. 2009]). Plaintiff has failed to demonstrate that defendants created the condition that caused the fall or that defendants had actual or constructive notice of the condition. Defendants' motions for summary judgment are granted.

All proceedings under index number 008873/09 are terminated.

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This decision constitutes the order of the court.

Dated: 6-21-11

HON THOMAS P. PHELAN

J.S.C.

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**ENTERED**  
JUN 23 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE