

Scherer v Golub Corp.
2011 NY Slip Op 32995(U)
November 16, 2011
Supreme Court, Albany County
Docket Number: 4494-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT
ANNA MARIA SCHERER
and VOLKER SCHERER,

COUNTY OF ALBANY

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 4494-11
RJI NO. 01-10-101534

THE GOLUB CORPORATION and
PRICE CHOPPER OPERATING CO., INC.

Defendants.

Supreme Court Albany County All Purpose Term, October 27, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On May 30, 2010, Anna Maria Scherer was shopping in defendants' grocery store when she slipped and fell to the ground. Ms. Scherer, and her husband derivatively, commenced this action against Defendants seeking damages caused by her fall. Issue was joined, discovery is complete and a jury trial date certain is set.

Defendants now move for summary judgment dismissing the complaint. Plaintiffs oppose the motion, and cross move to amend their bill of particulars and for an adverse inference

charge. On this record, because Defendants established their entitlement to summary judgment, and Plaintiffs raised no issue of fact, Defendants' motion is granted and Plaintiffs' cross-motion is denied as moot.

This Court is mindful that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

"To succeed on their motion for summary judgment, defendants [ordinarily bear] the initial burden of demonstrating that they kept their premises in a reasonably safe condition and that they neither created the dangerous condition nor had actual or constructive notice of such condition." (Cerkowski v. Price Chopper Operating Co., Inc., 68 AD3d 1382, 1383 [3d Dept. 2009]; Fontanelli v. Price Chopper Operating Co., Inc., __ AD3d __ [3d Dept. 2011]). However, Defendants may also establish their entitlement to judgment as a matter of law by demonstrating that they were in the process of cleaning the condition that caused Plaintiffs' injury, at the time she was injured. (Williams v Hannaford Bros. Co., 274 AD2d 649 [3d Dept. 2000]; Randall v. Montefiore Medical Center, 7 AD3d 464 [1st Dept. 2004]; Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]). If Defendants establish their right to judgment as a matter of law, the burden then shifts to Plaintiffs to demonstrate, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Here, Defendants established their entitlement to judgment by demonstrating that they were cleaning the spill when Ms. Scherer slipped on it. As submitted by Defendants, Plaintiffs' Amended Bill of Particulars and Ms. Scherer's deposition testimony both specify spilled barbecue sauce with a clear liquid as the cause of Ms. Scherer's fall. With the affidavit of an

assistant manager (hereinafter “Ruiz”) in charge of the department where Ms. Scherer fell, Defendants established that Ms. Scherer’s fall occurred less than five minutes after the spill. Ruiz explained that she was informed of the spill just after it happened and immediately summoned a janitor (hereinafter “Allen”) to clean the spill. She recalled Allen arriving to clean the spill minutes before Ms. Scherer fell.

Allen’s deposition testimony, as submitted by Defendants, further established that he was in the process of cleaning the spill when Ms. Scherer fell. He recounted his being at the spill site when Ms. Scherer walked from behind him to the location of her fall. Although he had not started mopping up the spill, he was in the process of cleaning because he was placing a warning sign when Ms. Scherer fell. Confirming Allen’s testimony, Defendants submitted a video recording which showed Allen and his utility cart at the spill site prior to Ms. Scherer’s arrival. It also clearly shows Allen placing a warning sign at the spill site approximately three seconds before Ms. Scherer fell.

Because Defendants’ demonstrated that they were in the process of cleaning the spill when Ms. Scherer fell they established their entitlement to judgment as a matter of law (Williams v Hannaford Bros. Co., supra; Randall v. Montefiore Medical Center, supra), thereby shifting the burden to Plaintiffs to raise a triable issue of fact.

With the burden shifted, Plaintiffs failed to raise a triable issue of fact. First, because the attorney’s affirmations Plaintiffs submitted are not based upon “personal knowledge of the operative facts [neither is of any]... probative value.” (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392, 1395 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). “Similarly, the [Plaintiffs’

attorney's] memorandum of law... [has] no evidentiary value." (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004]). Plaintiffs reliance on their engineering expert's affidavit is also misplaced, because it fails to raise a triable issue of fact relative to Defendants' cleaning of the spill at the time of Ms. Scherer's fall. Nor did the affidavit of Mr. Rocco, a store patron. Although he allegedly saw no cleanup person when he arrived at the spill scene, he acknowledged that a cleanup cart was already in the vicinity of the spill when he arrived. Rather than raising an issue of fact, Mr. Rocco's allegations further support Defendants' claim that they were in the process of cleaning the spill. Additionally, Ms. Scherer's statement, as similarly recounted by Mr. Rocco, that "immediately after [she fell she] heard the store manager heatedly reprimanding... the store's janitor about why he hadn't yet cleaned up the spill" is also unavailing. The statement constitutes inadmissible hearsay "and cannot, in any event, be deemed of sufficient probative value to defeat a motion for summary judgment" (Dominy v Golub Corp., 286 AD2d 810, 811 [3d Dept. 2001], quoting Walker v Golub Corp., 276 AD2d 955 [3d Dept. 2000][internal quotation marks omitted]; Davis v Golub Corp., 286 AD2d 821 [3d Dept. 2001]; Raczes v. Horne, 68 AD3d 1521 [3d Dept. 2009]), and "plaintiffs failed to adduce any evidence as to the speaking authority of the declarant." (Alvarez v. First Nat. Supermarkets, Inc., 11 AD3d 572, 574 [2d Dept. 2004]). Lastly, Plaintiffs' speculative hypotheses based upon their claim that Defendants' video was improperly truncated raised no issue of material fact.

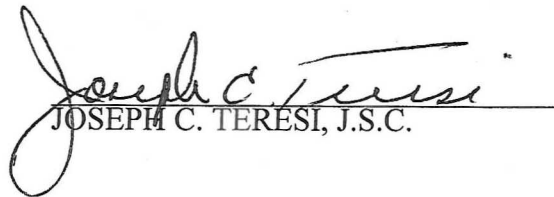
Accordingly, Defendants' motion for summary judgment is granted and Plaintiffs' cross motion is denied as moot.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being

delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 16, 2011
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 16, 2011, Affidavit of Panagiota Hyde, dated September 16, 2011, with attached Exhibits "A" - "M"; Affidavit of Amanda Monge, dated September 16, 2011, with attached Exhibit 1; Affidavit of Meghan Ruiz, dated September 16, 2011.
2. Notice of Cross-Motion, dated October 11, 2011; Affirmation of Richard Ancowitz, dated October 11, 2011, with attached Exhibits "A" - "D"; Affirmation of Richard Ancowitz, dated October 11, 2011, with attached Exhibits "A" - "B."
3. Affidavit of Panagiota Hyde, dated October 27, 2011, with attached Exhibits "A" - "B"; Affidavit of Thomas Hensor, dated October 27, 2011, with attached Exhibit 1.
4. Affidavit of Panagiota Hyde, dated October 20, 2011, with attached Exhibit "A"; Affidavit of Amanda Monge, dated October 19, 2011, with attached Exhibit 1.