

Schmeelk v King Kullen Grocery Co., Inc.

2012 NY Slip Op 33231(U)

April 23, 2012

Sup Ct, Suffolk County

Docket Number: 18587-09

Judge: Peter Fox Cohalan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
ELIZABETH SCHMEELK,

Plaintiff,

-against-

KING KULLEN GROCERY CO., INC. and "JOHN
DOE", said name being fictitious and unknown,

Defendants.
-----x

CALENDAR DATE: January 11, 2012
MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:
Isaacson, Schiowitz & Korson, LLP
150 Broadway, Suite 1600
New York, New York 10038

DEFT'S/RESP ATTORNEY:
Kennedy & Gillen, Esqs.
1050 Franklin Avenue, Suite 308
Garden City, New York 11530

Upon the following papers numbered 1 to 17 read on this motion for summary judgment ;
Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 13-15 ; Replying
Affidavits and supporting papers 16-17 ; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the plaintiff, Elizabeth Schmeelk, for summary judgment
pursuant to CPLR §3212 as a matter of law on her negligence action against the defendants,
King Kullen Grocery Co., Inc., and "John Doe", is granted on the issue of liability only.

This plaintiff, Elizabeth Schmeelk (hereinafter Schmeelk), instituted this action for
personal injuries allegedly sustained by her as a result of an accident on May 20, 2007 at the
defendant King Kullen Grocery Co., Inc.'s store (hereinafter King Kullen) located at 2044
Montauk Highway in Bridgehampton, Suffolk County on Long Island, New York. In her
complaint Schmeelk alleges she was shopping at the King Kullen store and was
approximately eleven (11) feet from the end of aisle #11 when she heard a noise and saw a
loading cart or U-boat cart stacked with merchandise which ran into her, knocking her to the
ground. There were no witnesses to the accident except Schmeelk and King Kullen's
employee, Maurice Williams (hereinafter Williams), who was pushing the U-boat in front of
him and did not see Schmeelk. Schmeelk claims King Kullen was negligent because its own
internal rules required the U-boat to be pulled by its employees, not pushed from behind. This
lawsuit was thereafter commenced.

Schmeelk now moves for summary judgment pursuant to CPLR §3212 arguing that, as
a matter of law, King Kullen is negligent because Williams was pushing a U-boat stacked over
six (6) feet high and struck her knocking her to the ground. King Kullen in opposition argues
that there are issues of fact regarding the striking of Schmeelk by the U-boat and that the
violation of King Kullen's internal policy to pull a U-boat and not push it is not a basis to find
negligence as a matter of law.

For the following reasons, Schmeelk's motion for summary judgment pursuant to CPLR §3212 on her negligence action is granted as a matter of law as no issue of fact has been raised by King Kullen to warrant denial of the motion on the issue of liability.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. *Romano v. St. Vincent's Medical Center of Richmond*, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); *Barrett v. General Electric Company*, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); *McCormack v. Graphic Machinery Services, Inc.*, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). Schmeelk has established that, while shopping in King Kullen in aisle #11, she was struck by a U-boat (loading cart) stacked over six (6) feet high with boxes which U-boat Williams was pushing from behind around a corner and he could not see the area in front of him. Williams, a former employee, is no longer available to testify. Schmeelk points out that King Kullen's internal guidelines require that a loading cart stacked with merchandise to be shelved should be pulled from the front rather than pushed from behind. King Kullen argues that negligence should not be based upon a violation of its own internal policies or guidelines. However, the Court finds that King Kullen's negligence is not predicated on the violation of its internal guidelines or its policies but upon the recognition of the reasonable standard of care. Williams was pushing a U-boat stacked high with merchandise, during business hours with customers present in the store, and was unable to see where he was going and ran over Schmeelk. This is unreasonable behavior.

Schmeelk has established as a matter of law a prima facie case of entitlement to summary judgment on her complaint alleging negligence by King Kullen. The burden then shifted to King Kullen to raise a factual issue requiring a trial. King Kullen has failed to raise an issue of fact warranting a denial of the relief sought. King Kullen, in an attorney affidavit only, argues that there is a question of fact as to a duty owed to Schmeelk. King Kullen states its argument (p.4) as follow:

" it is undisputed that plaintiff was injured when she was accidentally struck by a u-boat operated by a former King Kullen employee. She fails to offer any evidence, however, that this former employee acted unreasonably or failed to do what a reasonable prudent and careful person would have done under the circumstances."

However Schmeelk has established that King Kullen did have internal guidelines and policies which required a loading cart to be pulled by an employee rather than pushed from behind. Pulling a loading cart allows the operator to see that which is in front of him to avoid the very mishap that happened in this case. The internal guidelines establish not a requirement but what a reasonably prudent person would do when moving merchandise stacked high on a loading cart during business hours while members of the public invited to shop are present in

the store. King Kullen's internal policy and guidelines just reflect the standard of care imposed by law, in the context of a shopping market with customers on the premises and the moving of stacked merchandise on loading carts.

In its papers King Kullen also advances an argument that Schmeelk cannot "identify any legal duty or standard of care applicable to King Kullen" (p.5) as to the operation of U-boats. The issue of whether or not King Kullen owes a duty of care to reasonably avoid an injury to Schmeelk is a question of law to be determined by the Court. As the Court of Appeals, in *Eiseman v. State of New York*, 70 NY2d 175, 187, 518 NYS2d 608 (1987), stated:

Embedded in the law of this State is the proposition that a duty of reasonable care owed by the tort-feasor to the plaintiff is elemental to any recovery in negligence (see, e.g., *Pulka v. Edman*, 40 NY2d 781, 782, 390 NYS2d 393, 358 NE2d 1019; *Palsgraf v. Long Is. R. R. Co.*, 248 NY 339, 344, 162 NE 99). Foreseeability of injury does not determine the existence of duty *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 482 E.2d 34). Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts (*De Angelis v. Lutheran Med. Center.*, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 449 N.E.2d 406). "While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree' " (*Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 229, 513 N.Y.S.2d 356, 505 N.E.2d 922, quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 301 N.Y.S.2d 554, 249 N.E.2d 419; see also, *Fazzolari v. Portland School Dist. No. 1J*, 303 Ore. 1, 734 P.2d 1326 [Linde, J.]).

King Kullen and all other supermarkets owe a legal duty and a standard of care to their customers who are shopping in their stores not to run them over with a loading cart stacked high with merchandise. See, *Fox v. Marshall*, 88 AD3d 131, 135-136, 928 NYS2d 317, 320 (2nd Dept. 2011). Therefore King Kullen's argument that there is no legal duty to prevent injury to Schmeelk from a stacked loading cart is without legal merit.

As the Court noted in *Andre v. Pomeroy*, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Millerton Agway Co-op v. Briarcliff Farms*, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no

genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.”

King Kullen has failed in its opposition papers to raise an issue of fact which would warrant denial of Schmeelk's motion for summary disposition. Williams' failure to provide an affidavit or shed some light on the events which transpired at the time of the accident leaves only Schmeelk's uncontested testimony as to the happening of this accident and the deposition testimony of the King Kullen store manager, John Petersen, concerning his conversation with Williams where he quoted Williams as telling him that, rather than pulling the U-boat, he pushed it from behind and struck the plaintiff.

Accordingly, Schmeelk's motion for summary judgment on the issue of liability only pursuant to CPLR §3212 as a matter of law on her negligence action against King Kullen, and "John Doe" is granted on the issue of liability only and the case will be scheduled at a time to be determined by the parties pursuant to this Court's rules for certification for trial on the issue of damages only. See, N.Y. Civil Practice, Weinstein, Korn & Miller §3212.15.

The foregoing constitutes the decision of the Court.

Dated: April 23, 2012



J.S.C.

HON. PETER FOX COHALAN