

Shock v Costco Wholesale Corp.

2013 NY Slip Op 32894(U)

November 12, 2013

Supreme Court, Richmond County

Docket Number: 101100/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101100/10
Motion No.:003, 004**

**IDA SHOCK and
HOWARD SHOCK,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**COSTCO WHOLESALE CORPORATION and
COSTCO,**

Defendants

The following items were considered in the review of the following motions for summary judgment and to file a late jury demand.

| <u>Papers</u> | <u>Numbered</u> |
|--|---------------------------|
| Notice of Motion and Affidavits Annexed | 1 |
| Affirmation in Opposition | 2 |
| Affirmation in Reply | 3 |
| Notice of Motion and Affidavits Annexed | 4 |
| Affirmation in Opposition | 5 |
| Affirmation in Reply | 6 |
| Exhibits | Attached to Papers |

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendants' first motion is for summary judgment dismissing the plaintiffs' complaint arguing that the condition at issue was *de minimis*. The defendants' second motion is one to permit the filing of a jury demand *nunc pro tunc*. The defendants' motion for summary judgment is denied; and the motion for the filing of a late jury demand is granted.

Summary Judgment

This is an action to recover for personal injuries allegedly sustained by the plaintiff, Ida Shock, as a result of a fall in the Staten Island, New York Costco store on October 11, 2007. The plaintiff alleges that she fell due to a crack in the cement floor at the threshold of the produce cooler. At her deposition the plaintiff testified that the photographs submitted in connection with this motion

were fair and accurate representations of the defect in the cement floor. The plaintiff testified that the alleged defect was a crack approximately six inches long with a depth of approximately one inch.

In support of defendants motion for summary judgment the affidavit of Joanne Grippi, the Front End Manager at the State Island, Costco. In her affidavit in support Ms. Grippi avers that she took photographs of the alleged defect and annexed them to this motion as Exhibit “H”. Moreover, she avers that:

6. I personally measured the defect as I took the photographs marked as EXHIBIT “H”. I used a blue colored plastic ruler to measure the dimensions of t his defect in the floor. As the Court can see, I measured the length to be approximately 3 to 4 inches.
7. I inserted the ruler into the defect in an attempt to obtain a measurement of its depth.
8. Although I inserted the ruler into the deepest part of the defect, the defect was so shallow that the lip of the defect was barely higher than the base of the ruler. Therefore, I could not line up the lip with a marked number on the ruler. Nevertheless, I can state with certainty that the defect was not more than a quarter of one inch deep at it[s] greatest depth.¹

However, the motion submitted contains no photograph under the exhibit tab for “Exhibit H”. Photographs are annexed at Exhibit “I”, but they do not contain any instrumentation for the court to ascertain the depth of the crack in the cement floor.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable

¹ Aff of Joanne Grippi at 2.

to the party opposing the motion”.² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁶

Whether a dangerous or defective condition exists depends on the facts and circumstances in each case.⁷ It has been recognized that ” [t]he owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection”⁸ Here, the defendants argue that the defect in question was too trivial to be considered a trap or nuisance. But their argument is undermined by the lack of photographic evidence demonstrating the depth of the defect. While photographs are annexed to the court’s copy of the motion, it is impossible for the court to rule as a matter of law on those photographs that the crack in question is so trivial that it would not constitute a trap or nuisance, because they lack any device to demonstrate the depth and length of the defect. Consequently,

² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁶ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁷ *Trincere v. County of Suffolk*, 90 NY2d 976 [1997].

⁸ *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993].

the defendants failed to meet their prima facie burden.

However, even had the defendants' included the photographs taken by Joanne Grippi, the motion would have been denied. Defendants' witness, Bruce Dezendorf, the Assistant General Manager at the Staten Island, New York Costco, testified that a corporate facility auditor, Anthony Toliver, conducted an inspection of the facility on September 19, 2007. Mr. Dezendorf authenticated the report prepared by Mr. Toliver wherein it states that there was "... a spall along an expansion joint at the entrance threshold that needs to be filled in. Photo 100." Therefore, the reports generate by Costco itself raise an issue as to the trivial nature of the defect in question. Consequently, summary judgment is denied.

Late Jury Demand

The defendants move to permit the filing of a late jury demand *nunc pro tunc*. The New York State Civil Practice Law and Rules requires that a jury demand must be served within fifteen days after the service of the note of issue.⁹ Here, the plaintiffs served the note of issue on the defendants on April 12, 2013, therefore the defendant was required to serve its jury demand by April 27, 2013 which fell on a Saturday. Consequently, the last day to file the jury demand was April 29, 2013 the next business day. The defendants filed the jury demand on May 3, 2013, but did not receive notice that the jury demand was rejected until May 10, 2013.

In requesting permission to file the late jury demand the defendants assert that there was no intent to waive a jury demand, nor is there any prejudice to the plaintiffs.¹⁰ "A motion for such relief must be based upon a factual showing that the earlier waiver of that right was the result of either inadvertence or other excusable conduct indicating a lack of intention to waive such a

⁹ CPLR § 4102.

¹⁰ See, *Schwartz v. Sunlight Apartments, Inc.*, 274 AD 901 [2d Dept. 1948]; see also, *A.S.L. Enterprises, Inc. v. Venus Laboratories*, 264 AD2d 372 [2d Dept. 1999].

right”¹¹ In his affirmation in reply, defendants’ attorney states that the basis for this extension was an unusually busy schedule in preparation for a trial in Supreme Court Kings County on April 18, 2013. Despite the assertions by plaintiffs’ attorneys that they began preparing for a bench trial even before the time to move for summary judgment had expired. The defense attorney’s schedule coupled with the exceptionally short delay in filing the jury demand and the demonstration of no prejudice to the plaintiffs supports finding in favor of the moving defendants. Consequently, the defendants’ motion to file a late jury demand *nunc pro tunc* is granted.

Accordingly, it is hereby:

ORDERED, that the defendants’ motion for summary judgment is denied; and it is further

ORDERED, that the defendants’ motion to file a late jury demand *nunc pro tunc* is granted; and it is further

ORDERED, that this action is hereby transferred to JCP 8, 18 Richmond Terrace, on Monday, December 16, 2013 at 9:30 a.m. for a Pre-Trial Conference; and it is further

ORDERED, that the parties must supply a list of HIPAA compliant authorizations that will be needed for trial to opposing counsel at the time the case first appears on the JCP 8 calendar. Thereafter, HIPAA authorizations are to be served within sixty (60) days.

ENTER,

DATED: November 12, 2013

Joseph J. Maltese
Justice of the Supreme Court

¹¹ *Caruso, Caruso & Branda, P.C. v Hirsch*, 60 AD3d 886, 887 [2d Dept 2009].