Rivera v Victoria's Secret Stores, LLC
2014 NY Slip Op 31505(U)
June 11, 2014
Supreme Court, New York County
Docket Number: 155874/12
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

---X

Francis Rivera,

Plaintiff,

-against-

Victoria's Secret Stores, LLC and General Growth Properties, Inc., D/B/A Staten Island Mall,

Defendants.

---X

DECISION AND ORDER
Index Number: 155874/12
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-14
Opposition Affirmation and Exhibits	15-19
Reply Affirmation and Exhibits	20

In this trip and fall action, defendant Victoria's Secret Stores, LLC, moves for an Order, pursuant to CPLR §3212, granting defendant summary judgment dismissing the action against it.[1]

Factual Background

On January 29, 2012, while shopping at the Victoria's Secret Store (the store) at the Staten Island Mall, plaintiff tripped and fell on a clothing rack. Plaintiff was injured as a result of the fall.

Plaintiff had previously visited this store numerous times and had recently been to the store over the holiday season on or about December 2011. On this occasion, plaintiff entered the

[1]This matter was dismissed as against General Growth Properties, Inc., d/b/a Staten Island Mall by stipulation on or about September 27, 2012.

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store with her 20 year old daughter (daughter) and walked to the back of the store in the section where she usually shopped. Plaintiff's daughter then indicated that she wanted to shop in the PINK section, which is located near the front entrance of the store. While at the PINK section, plaintiff and her daughter began looking at sweaters and pants on shelves by the wall. They then proceeded to walk towards a clothing rack nearby.

According to plaintiff, the clothing rack was a standing metal rack with a white wooden base, upon which dark colored sweaters were hanging. (See Plaintiff's deposition, Defendant's Exhibit D, pp. 39-40). Plaintiff was browsing through the sweaters on the clothing rack and when she turned, her foot hit the base of the rack at which point plaintiff tripped and fell onto both of her knees and hands. Her daughter tried to help her up and a store employee asked if she was okay. Plaintiff responded "yes" and left the store with her daughter to find her husband.

When plaintiff found her husband, she explained what had happened. Plaintiff then returned to the store with her husband and children and spoke to the manager, Rosalia DiMaggio (DiMaggio), who did not observe the incident firsthand. DiMaggio completed an incident report for plaintiff. She also offered plaintiff a chair to sit and offered to call an ambulance, but the plaintiff refused. Plaintiff's husband then took photographs of the standing metal clothing rack after this incident.

On or about September 4, 2012, Plaintiff commenced this personal injury action by filing a Summons and Complaint alleging that she suffered injuries due to defendant's negligence. Defendant Victoria's Secret filed their Answer on or about October 2, 2012.

Arguments

Defendant Victoria's Secret Store, LLC, maintains that it cannot be held liable because

the alleged instrument of injury was both open and obvious and not inherently dangerous. Additionally, defendant argues that it met its duty to maintain the premises in a reasonably safe condition. Defendant also maintains that the doctrine of res ipsa loquitur is inapplicable to this case because it is common for trip and falls to occur in the absence of negligence.

Plaintiff claims that the motion must be denied because defendant created the dangerous conditions. Plaintiff also maintains that there are issues of fact as to whether defendant had actual or constructive notice of the dangerous condition created by the clothing rack.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260

AD2d 201 [1st Dept 1999].

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). Plaintiff has no duty to warn of an open and obvious danger; however, a latent hazard may preserve that duty (see *Westbrook v. WR Activities-Cabrera Markets,* 5 A.D.3d 69, 71, 773 N.Y.S.2d 38, 41 [N.Y.App. Div. 2004]). The question of whether a condition is latent or open and obvious is generally fact-specific and thus a question for the jury, only to be determined as a matter of law when the established facts compel such a conclusion, and may do so on the basis of clear and undisputed evidence. See *Tagle v. Jakob,* 97 N.Y.S.2d 165, 169, 763 N.E.2d 107, 110 [2001].

Here, the condition of which plaintiff complains, the wooden base of a metal clothing rack in defendant's store, was open and obvious and not inherently dangerous. Although plaintiff claims that she did not see the base prior to walking up to the clothing rack, she admits that she knows that all racks have a base. The base of the rack in question was not obscured or covered with clothing, which is confirmed by the photographs provided by plaintiff depicting the clothing rack standing unobstructed and uncluttered with ample space around the rack in the store. See *Shulman v. Old Navy/The Gap, Inc.,* 45 A.D.3d 475, 845 N.Y.S.2d 341 (1st Dept. 2007) (summary judgment granted to defendant department store holding that metal bracket on clothing rack was open and obvious and not inherently dangerous where such brackets were present throughout the store and plaintiff admitted that she knew the bracket was there).

Even if, as plaintiff argues, the color of the base caused the base to blend in with the

floor, plaintiff cannot argue that she did not know that the base was there. Plaintiff herself testified at her deposition that she knows that all racks have bases. (See Deposition Transcript of Francis Rivera, Defendant's Exhibit D, page 50, lines 20-25, page 51, lines 2-6.) Additionally, not only were there several other similar racks with similar bases in the store that were readily observable, but plaintiff's daughter's deposition testimony confirms that the base on both sides of this particular rack was visible. (See Deposition Transcript of Frances Rivera, Defendant's Exhibit E, page 17, lines 15-25). As such, the rack was readily observable, rather than a "hidden" condition. Thus, defendant had no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous, such as an observable clothing rack base. See *Shulman,* 45 A.D.3d 475, 845 N.Y.S.2d 341.

Plaintiff provided an affidavit of an engineering expert. Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant standards would preclude a grant of summary judgment in favor of the defendants (see, e.g., *Trimarco v. Klein,* 56 N.Y.2d 98, 106, 45 N.Y.S.2d 52, 436 N.E.2d 502; *Diaz v. New York Downtown Hosp.,* 99 N.Y.2d 542, 544 [2002]). However, an expert's conclusions cannot be speculative and must be supported by facts. See *Murphy v. Conner,* 84 N.Y.2d 969, 972 (1994). When the expert fails to identify the basis for the standards he used, his opinion does not raise a triable issue. *Id.*

Here, the plaintiff's expert does not identify any industry standards he used in his assessment of the clothing racks and their bases. The expert outlined several "safety remedies are required" yet fails to establish a basis for such requirements. Aside from making conclusory statements, not based on foundational facts or any industrial standards (see *Romano v. Stanley,* 90 N.Y.2d 444, 661 N.Y.S.2d 589, 684 N.E.2d 19), plaintiff presents no evidence of any issues

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of fact.

Plaintiff does not address the inapplicability doctrine of res ipsa loquitor in opposition to defendant's motion. As such, plaintiff's claim of res ipsa loquitor claim is dismissed without opposition. Accordingly, it is

ORDERED, that the within application is granted, in its entirety; and it id further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Victoria's Secret Stores, LLC, and against plaintiff Francis Rivera, dismissing the complaint.

This constitutes the decision and order of the Court.

Dated: June 11, 2014

ENTER:

Joan M. Kenney, J.S.C.