

Davis v Western Beef, LLC

2014 NY Slip Op 31997(U)

June 10, 2014

Sup Ct, Bronx County

Docket Number: 50111/12

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

LEVERN DAVIS, an infant by his mother and natural guardian, SANDRY MAYHAN, and SANDRA MAYHAN, individually,,

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**
Index No.: 350111/12

WESTERN BEEF, LLC.,

Defendants.

HON. MARK FRIEDLANDER

Defendant moves for an order, pursuant to CPLR§3212, granting summary judgment in favor of defendant, Western Beef, Inc. (*sic*), dismissing plaintiffs' complaint on the ground that plaintiffs do not have a cause of action, as no triable issues of fact exist. The motion is decided as hereinafter indicated.

This is an action by the infant plaintiff, Levern Davis ("Davis") to recover for personal injuries allegedly sustained on July 8, 2011, as a result of his slipping and falling on liquid or water on the floor in the freezer area of defendant's store. Plaintiff's mother, Sandra Mayhan ("Mayhan"), asserts a derivative claim for loss of services, society, comfort, affection and money spent for medical care and attention on behalf of her son.

In support of the motion, defendant submits a copy of the pleadings, transcripts of the deposition testimony of: (1) plaintiffs, Davis and Mayhan; and (2) Radhames Delossantos ("Delossantos"), the store manager of defendant; and the affidavit of Delossantos.

The facts, as culled from the pleadings, deposition testimony and Delossantos' affidavit,

are as follows: Defendant is the owner and operator of a supermarket located at 2055 Webster Avenue, Bronx, New York. On July 8, 2011, at approximately 2:00 P.M., Davis was in the freezer part of the meat section inside defendant's store. Davis testified he was walking, not looking down, when he fell on a wet substance(a liquid he believed to be water from the meats) on the floor. Prior to Davis's accident, neither he nor Mayhan saw any liquid or other substance on the floor where he slipped. After the accident, he described the liquid where he fell as being approximately two to three feet wide and about one foot long. Mayhan described the wet spot as clear, being between three and one half feet long and approximately two feet wide. There was no debris in the area. Mayhan further testified that, prior to the accident, store employee(s) were taking meat into the back, stocking, moving meat around on those "little crates or wheel things," through the meat department. Mayhan saw this about two times. When asked if she saw anything coming off of it, such as liquid or water or anything like that, Mayhan responded: "It was kind of dripping from the meat."

In addition to his deposition testimony, Delossantos submitted an affidavit wherein he stated the following: At the time of Davis' accident, he was the store manger of defendant's supermarket. Part of his duties included constantly walking the entire store to ensure that the store and its floors were clean. If any spills were encountered during these walks, he would assign someone to immediately clean it up. His routine, including the day of the accident, was to continuously walk around the store throughout the day, inspecting all areas of the store every twenty to twenty-five minutes. Each full walk through encompassed approximately twenty to twenty-five minutes. Less than twenty to twenty-five minutes prior to plaintiff's fall, he had passed the area where Davis' accident occurred. At that time, and prior to Davis' accident, he

had neither seen nor been informed that there was any liquid or spill of any type on the floor in the subject area. No prior incidents or complaints about a wet condition on the floor where Davis fell had been received by him.

Delossantos testified at his deposition that meat was brought out from the back by meat department personnel using meat dollies. These meat dollies are a type of cart on wheels, and are about four feet tall. Delossantos testified as follows:

Q. Have you ever noticed when frozen meat is coming out from the back on dolly and being brought to the meat aisle, whether or not it melts and water forms?

A. No.

Q. You never saw that?

A. Because they have like diapers on the bottom.

Q. Have you ever seen those diapers get water on them from the meat?

A. Yeah.

Q. Have you ever seen meat that's thawing on a dolly ever get water onto the floor?

A. No.

(Tr. pg. 28, lines 17 – 25, pg. 29, lines 2 – 6, 12).

Q. And do you ever see anybody from the meat department in the meat aisle with a mop or a broom?

A. Yes.

Q. What do they do with the mop or broom in the meat aisle when you've seen them there?

A. If the floor gets wet they have to mop it up. And they put up a caution sign, one of those yellow poster that we use.

- Q. When you've seen them out there with a mop and putting up a sign, what was it that they were doing?
- A. They were mopping the floor.
- Q. What were they mopping up?
- A. Could be - - well, we have the boxes of chicken.
- Q. What causes something to be needed to be mopped from the boxes of chicken?
- A. Because they got ice inside, that's how they come.
- Q. When you're taking out the box and you're stocking the meat aisle, sometimes water can get from that box onto the floor?
- A. Yeah.

(Tr. pg. 30, lines 4 – 25, pg. 31, lines 2 –3).

Defendant has demonstrated that it did not cause or create the condition complained of, or have actual constructive notice thereof. The motion papers establish that defendant did not receive any complaints about the alleged defective condition prior to the accident. Plaintiffs both testified that they did not see any liquid or water on the floor prior to Davis' fall. Delossantos also testified that, less than twenty to twenty-five minutes prior to Davis' fall, he inspected the area where Davis fell and there was no liquid or spill on the floor. *Phillip v. Young Men's Christian Ass'n. Of Greater New York*, — A.D.3d — (1st Dept. 2014), 2014 N.Y. Slip Op 03013; *Briggs v. Pick Quick Foods, Inc.*, 103 A.D.3d 526 (1st Dept. 2013); *Rodriguez v. New York City Housing Authority*, 102 A.D.3d 407 (1st Dept. 2013); *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 (1st Dept. 2008). Delossantos' testimony establishes that any water from thawing meat on the dollies never reached the floor because they had "diapers" on the bottom. Further,

there is no evidence that defendant's employees brought out any dollies with boxes of chickens packed in ice prior to Davis' fall.

Defendant's motion for summary judgment is granted and plaintiffs' complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 6/10/14



MARK FRIEDLANDER, J.S.C.