

Obeng v Shop Rite

2014 NY Slip Op 32925(U)

March 3, 2014

Supreme Court, Westchester County

Docket Number: 59451/11

Judge: Robert M. DiBella

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
ALEXANDER OBENG,

Plaintiff,

-against-

SHOP RITE,

Defendant.

-----X
DIBELLA, J.

**DECISION AND ORDER
Motion Seq. No. 001-002**

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The following papers have been read and considered on this motion by defendant for summary judgment dismissing the complaint, pursuant to CPLR 3212, and cross motion by plaintiff to strike defendant's answer and for an adverse inference charge at trial, pursuant to CPLR 3126:

- 1) Notice of Motion (seq. no. 001); Affirmation in Support of J. Daniel Velez, Esq.; Exhibits A-H; Affidavit of Robert Vasquez; Proposed Order;
- 2) Notice of Cross Motion (seq. no. 002); Affirmation in Opposition and In Support of Cross Motion of Kyle Newman, Esq.; Exhibits A-O; Affidavit of Alexander Obeng; Affidavit of Robert Vasquez;
- 3) Reply Affirmation in Support of Motion and In Opposition of Cross Motion of J. Daniel Velez, Esq.; and
- 4) Reply Affirmation of Kyle Newman, Esq.

In this personal injury action, defendant moves for summary judgment dismissing the complaint, pursuant to CPLR 3212. Plaintiff opposes the motion and cross-moves to strike defendant's answer and for an adverse inference to be drawn at trial, pursuant to CPLR 3126. For the reasons set forth below, the motion is granted and the cross motion is denied.

This is an action for personal injuries allegedly sustained by plaintiff on August 23, 2011 at approximately 1:30 PM when he slipped and fell in an aisle while shopping in a

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Shop Rite store located at 23 Prospect Street, Greenway Plaza, Yonkers, New York. Plaintiff alleges he slipped and fell on a liquid substance in aisle #15. As he was looking for odor sprays in aisle #15, he testified that he walked approximately five yards and slipped and fell on clear liquid soap. During his deposition, plaintiff described the liquid as clear, clean and he did not see any footprints or shopping cart marks of any kind through the substance.

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

An owner of property has a duty to maintain his or her property in a reasonably safe condition. *Kellman v. 45 Tiemann Assocs., Inc.*, 87 NY2d 871 (1995). To establish a *prima facie* case of negligence against a defendant, a plaintiff must establish that defendant either created the dangerous or defective condition or had actual or constructive notice of the dangerous or defective condition. *Leary v. North Shore University Hosp.*, 218 AD2d 686 (2d Dep't 1995). However, a defendant moving for summary judgment in such

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an action must establish its *prima facie* entitlement to judgment as a matter of law by presenting sufficient evidence that it did not create the dangerous condition or have actual or constructive notice of the alleged dangerous condition for a sufficient length of time to discover and remedy it. *Orlov v. BFP 245 Park Co., LLC*, 84 AD3d 764, 765 (2d Dep't 2011). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time before the accident's occurrence to permit defendant to discover and remedy it. *Gordon v. Am. Museum of Natural History*, 67 NY2d 836, 837 (1986); *Gonzalez*, 11 AD3d at 656; *Perlongo v. Park City 3 & 4 Apartments, Inc.*, 31 AD3d 409, 410 (2d Dep't 2006).

Defendant contends that summary judgment should be granted in its favor dismissing the complaint because there is no evidence that Shop Rite created the alleged dangerous condition, and the evidence supports its position that it also did not have actual or constructive notice of it.

Defendant has met its *prima facie* burden of establishing that it is entitled to judgment as a matter of law. There is no evidence to support a finding that defendant created the condition. With regard to whether defendant had actual notice of the alleged dangerous condition, the deposition testimony of the assistant manager Benjamin Pabone confirms that he was not aware of the condition prior to plaintiff's accident and he did not receive any complaints with regard to the alleged dangerous condition. With regard to constructive notice, based on the testimony of plaintiff and the affidavit of the maintenance worker Robert Vasquez, defendant has submitted sufficient evidence to indicate it did not

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have constructive notice. See *Payen v. Western Beef Supermarket*, 106 AD3d 710 (2d Dep't 2013) (defendant established entitlement to summary judgment based on testimony that employees inspected the aisles every 15 to 20 minutes and that the manager had not been notified of any liquid on the floor prior to the accident); *Dragotta v. Walmart, Inc.*, 39 AD3d 800 (2d Dep't 2007) (defendant met its *prima facie* burden by demonstrating the puddle in which the plaintiff fell was clear, the maintenance personnel conducted a safety sweep every hour, and the defendant's employee was not aware of any complaints of the puddle on the floor); *Masotti v. Waldbaums Supermarket*, 227 AD2d 532 (2d Dep't 1996). Plaintiff described the liquid substance upon which he slipped as clear, clean, not dirty, and without any footprints or cart tracks through it. See, e.g., *Dragotta*, 39 AD3d at 801; *Masotti*, 227 AD2d at 533. Robert Vasquez states in his Affidavit that he was the maintenance employee who was working on the day of plaintiff's accident. He clearly states that he last inspected aisle #15 at 1:00 PM on the date of the accident, approximately 30 minutes before the accident, at which time the alleged wet condition did not exist.

Plaintiff, in opposition, has failed to set forth admissible evidence sufficient to raise a triable, material issue of fact that defendant created the condition, or had actual or constructive notice of said condition.

In the cases cited by plaintiff, summary judgment was inappropriate for the exact reason why it is appropriate in this case. See, e.g., *Musachio v. Smithtown Central Sch. Dist.*, 68 AD3d 949 (2d Dep't 2009); *Rodriguez v. Hudson View Assocs., LLC*, 63 AD2d

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1135 (2d Dep't 2009); *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572 (2d Dep't 2006). In those cases, the court found that defendant did not produce any evidence of when the area was last inspected or cleaned. Here, the exact opposite scenario is present, as defendant has produced evidence, in the form of the Affidavit of Mr. Vasquez, which indicates the time he last inspected and cleaned the area, which was approximately 30 minutes before to the accident.

Plaintiff's counsel seems to raise an issue with Mr. Vasquez's ability to recall that he inspected the aisle at 1:00 PM more than a year after the incident, finding it incredulous. However, counsel's doubt as to Mr. Vasquez's ability to recall the facts and circumstances that occurred on the date of the accident is nothing more than mere speculation and plaintiff has failed to submit any admissible evidence to raise any issue of fact, as he is required to do upon defendant setting forth his *prima facie* entitlement.

Moreover, certain contradictions raised by plaintiff are insufficient to raise genuine issues of fact to preclude summary judgment in favor of defendant. For instance, plaintiff notes that the assistant manager Benjamin Pabone stated there was only one maintenance person, Robert Vasquez, working at the time of the accident and Mr. Vasquez stated he was one of two maintenance personnel working at the time. In any event, since Mr. Vasquez stated in his affidavit the time he last personally inspected the aisle (at which time there was no spillage on the floor), whether there were one or two maintenance workers is irrelevant.

In his cross motion, plaintiff seeks to strike the answer of defendant for its failure to

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produce surveillance footage and for an adverse inference charge to be given at the time of trial against defendant, pursuant to CPLR 3126. Plaintiff contends that defendant has failed to produce surveillance footage depicting the location and happening of the subject slip and fall accident. Plaintiff relies on the Customer Incident Report, which was prepared by Shop Rite's assistant manager Mr. Pabone on the date of the accident. That report indicated that the accident was captured on video surveillance cameras. During discovery, plaintiff sought the production of any such surveillance videos. Defendant responded by indicating it did not have any. During his deposition, Mr. Pabone was questioned about the video, and he indicated that, although he filled out the Customer Incident Report, he has not seen any surveillance video and he is not sure why he checked off "Yes" that there was surveillance video.

The Court notes that counsel for the parties attended at least four discovery conferences, at which times discovery orders were entered. On April 29, 2013, a Trial Readiness Stipulation and Order (Lefkowitz, J.) was entered pursuant to which the parties stipulated that all discovery was completed or waived and the matter was ready for trial. Further, on May 3, 2013, plaintiff's counsel filed a Note of Issue which also indicated that all discovery was complete. At no time during any of those discovery conferences and prior to filing the Note of Issue and Trial Readiness Stipulation and Order did plaintiff raise the issue of the non-production of the surveillance video, such that the matter could be addressed and an appropriate order could be made. Plaintiff, instead, by filing the Note of Issue and stipulating to the Trial Readiness Stipulation and Order, indicated that

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discovery was complete or waived. Therefore, plaintiff waived any objection to the non-production of the video such that the imposition of sanctions in the form of striking defendant's pleadings or for an adverse inference is inappropriate. See *Iscowitz v. County of Suffolk*, 54 AD3d 725 (2d Dep't 2008); *Simpson v. City of New York*, 10 AD3d 601 (2d Dep't 2004). Moreover, plaintiff did not make a clear showing that defendant's conduct was willful, contumacious or in bad faith to warrant striking defendant's answer. See *Iscowitz*, 54 AD3d at 79.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment in favor of defendant; and it is further

ORDERED that plaintiff's cross motion is denied.

This is the Decision and Order of the Court.

Dated: ~~February~~ **March 3**, 2014
White Plains, New York


Hon. Robert DiBella, JSC

To: Simmons Jannace, LLP
Via e-file

James Newman, PC
Via e-file