Cruz v BJ Wholesale Club
2015 NY Slip Op 30575(U)
March 5, 2015
Sup Ct, Bronx County
Docket Number: 303224/2013
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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RAMON CRUZ,

Plaintiff,

- against -

BJ WHOLESALE CLUB,

Defendant.

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DECISION AND ORDER

Index No. 303224/2013

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated of December 19, 2014 and the affirmation, affidavit, and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated January 16, 2015; defendant's reply affirmation dated February 27, 2015; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for personal injuries suffered when he slipped and fell on grapes scattered on the floor of a BJ's Wholesale Club ("BJ's") on June 21, 2012. Plaintiff identified the condition in his verified bill of particulars as "grapes, prunes, lettuce and other debris [that] covered an area of nearly three feet." He was also pushing a defective shopping cart at the time of the accident. Defendant now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the grounds that defendant did not create or have constructive notice of a hazardous condition and that the condition was open and obvious.[1] Submitted on the motion are the pleadings, various deposition transcripts, photographs of the accident location, and an affidavit from Esther Castillo ("Castillo"), the Assistant Member Service Manager for the subject BJ's.[2]

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[1] Defendant notes that plaintiff did not claim that defendant had actual notice of the condition as indicated in his Verified Supplemental Bill of Particulars.

[2] The handwritten changes on the errata sheet for plaintiff's deposition transcript are illegible.

Plaintiff testified that he was shopping with his wife Doris Caosano ("Costano"), also known as Doris Altagracia Costano Decruz, and her friend Leudania Guiteirrez, later identified as Modesta Gutierrez ("Gutierrez"), inside a BJ's at 610 Exterior Street. They had been inside the store for more than thirty minutes. The cart he was pushing was faulty and he walked to the front of the store near the cash registers to change to a different cart. His left foot then slipped and he fell to the ground. Plaintiff did not see any debris on the ground at any time before he fell. He then saw a "lot"of crushed grapes, prunes, blackened lettuce and liquid on the floor.[3] He estimated that twenty to twenty-five grapes covered an area roughly eight and one-half inches by eleven inches in size. He believed the debris had been there for at least thirty minutes. Plaintiff admitted that the cart did not cause him to slip and fall. Plaintiff declined going with the ambulance personnel to a hospital. He waited one and one-half hours for his wife and Gutierrez to finish their shopping before he drove them home.

Costano testified that she was walking behind plaintiff when he fell on "smashed, smeared and stepped on" grapes, prunes, lettuce and water on the floor. The area of scattered debris was roughly five feet wide by ten feet long. She did not see the debris when they first entered the store but speculated that it had been there for some time since she saw footprints embedded in debris.

Gutierrez was four to five feet away from plaintiff and did not see him fall. However, prunes, blackberries, black lettuce, water and debris covered a five foot area of the floor. She saw the debris on the ground when they entered the store, when she went to retrieve a store flyer, and after plaintiff fell. She did not say report the condition to anyone at any time nor did she tell plaintiff or his wife of the condition. After the accident, she and Costano did not shop any further, and she waited with plaintiff and the store manager while Costano paid for their groceries. Plaintiff told her that he fell while pushing the shopping cart.

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[3] Plaintiff stated in his verified bill of particulars that he first saw the "grapes and other debris" as he entered the store thirty minutes before the accident.

Castillo testified that she had worked at the subject BJ's for three years, and she was the Assistant Member Service Manager on duty at the time of plaintiff's accident. She responded to the accident and completed an accident report. BJ's employed three to five maintenance workers who were responsible for cleaning the store, and Castillo herself was responsible for inspecting the aisles. She could not recall plaintiff's wife or Gutierrez but she remembered speaking to plaintiff shortly after the accident. Plaintiff told her that he slipped on a grape, which Castillo recorded on an accident report. Castillo inspected the area near the registers and box bin and saw a single "squished" red grape on the floor. She did not see any prunes, discolored lettuce or liquid on the ground.

Castillo averred in an affidavit that she regularly conducted safety walks of the entire store. Each inspection took ten to fifteen minutes, and she last checked the front line area where plaintiff fell twenty to thirty minutes before the accident. She did not see a grape or any other condition on the floor at that time, and she never received a complaint about a hazardous condition before the accident. Castillo personally inspected the front line area after the accident and saw a single grape on the floor. BJ's sold grapes in closed, plastic clamshell packages. She also referred to a floor plan for the subject store and the accident report she completed but neither document was attached to her affidavit.

A party moving for summary judgment in a slip and fall action must demonstrate that it did not create or have actual or constructive notice of the dangerous condition. *See Briggs v. Pick Quick Foods, Inc.*, 103 A.D.3d 526, 962 N.Y.S.2d 46 (1st Dep't 2013); *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 856 N.Y.S.2d 573 (1st Dep't 2008). "A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421, 927 N.Y.S.2d 49, 51 (1st Dep't 2011) (internal citations omitted). Here, defendant has not dispelled all questions of material fact as to constructive notice. *See Jones v. N.Y. City Hous. Auth.*, 293 A.D.2d 371, 742 N.Y.S.2d 5 (1st Dep't

2002). While neither plaintiff nor his wife saw the condition upon entering the store, Gutierrez testified unequivocally that she saw the debris upon entering the store thirty minutes before the accident and again shortly before plaintiff fell. In viewing the evidence in the light most favorable to plaintiff, *see Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 866 N.E.2d 448, 834 N.Y.S.2d 503 (2006), the court is constrained to deny the motion.

Accordingly, it is

ORDERED, that defendant's motion for summary judgment dismissing plaintiff's complaint is denied.

This constitutes the decision and order of the court.

Dated: March 5, 2015

Lucindo Suarez, J.S.C.