Gerner v Shop-Rite of Uniondale, Inc.
2015 NY Slip Op 32750(U)
June 9, 2015
Supreme Court, Nassau County
Docket Number: 011527/13
Judge: Daniel R. Palmieri
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Justice Supreme Court

TRIAL TERM PART: 20

----------x

JOAN GERNER,

Plaintiff,

-against-

SHOP-RITE OF UNIONDALE, INC. and SHOP-RITE SUPERMARKETS, INC.,

Defendants.

----------x

INDEX NO.: 011527/13

SEQ. NUMBER - 001
MOTION DATE: 4-28-15
SUBMIT DATE:5-11-15

The following papers have been read on this motion:

Notice of Motion, dated 3-26-15.....1
Affirmation in Opposition, dated 4-15-15.....2
Reply Affirmation in Support, dated 5-7-15.....3

Defendant's motion for summary judgment pursuant to CPLR §3212 is denied.

All requests for relief not specifically addressed are denied.

On January 22, 2013 at 2:00 p.m. after having had lunch at a café area of defendant's supermarket, plaintiff tripped on a footing which held up a divider separating the café area from an aisle in the store.

The divider did not create a continuous fence but was composed of sections which allowed passage to and from the café area. The Court has viewed the video footage of the accident which has been supplied by defendant. The plaintiff entered the café from a different area and after dining is seen leaving the area through an open section of the divider. On the same footage which shows her fall, two other persons are shown exiting the area through a different but a similar space in the aisle. Although defendant claims that plaintiff cannot identify what caused her to fall, the video footage

clearly shows that her foot tripped and got caught on a portion of the divider that rested on the floor perpendicular to the divider and which jutted into the aisle. Although contended by defendants there is no support for the proposition that plaintiff exited in an unauthorized manner. There are no signs, directional markings or configurations from which a patron could deduce that there was a designated exit route.

Although it may be arguable that the condition was open and obvious and not dangerous the Court finds that these are questions for the jury, and that it cannot be said to be so as a matter of law. *Monaghon v Lake Park, 135 Crossways Park Drive,* 80 AD3d 679 (2d Dept. 2011). *Cf., Bellini v Gypsy Magic Enters., Inc.,* 112 AD3d 867 (2d Dept. 2013).

That plaintiff did not, as defendant contends, go to the store to shop is irrelevant to the issue of defendant's liability and serves no purpose in advancing the discourse as to liability. The Court notes that it is not disputed that plaintiff attended the café as a customer and there is no evidence that the use of the café was restricted to grocery shoppers.

Although neither party gives the dimensions of the protrusion upon which plaintiff tripped it is clear from the video that it was the smallest object in the vicinity of the fall but not so small as to be considered trivial. *Trincere v County of Suffolk*, 90 AD2d 976 (1997).

Defendant does not deny that it either created the condition or had neither actual nor constructive notice because its witnesses have stated that the condition has existed since 2011. There is no evidence that the divider, has since 2011 been affixed in such a manner that it is not capable of

being moved.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3213[b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v. Farrell Line,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court must deny the motion, irrespective of the strength of the opposing papers. *Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212(b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.,* 66 NY2d 965 (1985); *Zuckerman v. City of New York,* 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato,* 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of its allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.,* 207 AD2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates,* 191 AD2d 631 (2d Dept. 1993). Nor can mere speculation serve to defeat the motion.

However, the court must draw all reasonable inferences in favor of the nonmoving party.

Nicklas v. Tedlen Realty Corp., 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett,* 187 AD2d 553 (2d Dept. 1992); *Barr v. County of Albany,* 50 NY2d 247, 254 (1980); *James v. Albank,* 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.,* 198 AD2d 330 (2d Dept. 1993).

Defendant contends that the condition here was open and obvious and not inherently dangerous. See, *Schulman v. Old Navy/Gap Inc.,* 45 AD3d 475 (1st Dept. 2007), *Cupo v. Karfunkel,* 1AD3d 48, 52 (2d Dept. 2003) [condition must be both open and obvious and as a matter of law not inherently dangerous].

While defendant argues that the footing is open and obvious it is also arguable that such a device is inherently dangerous. *Cf., Bellini V. Gypsy Magic Enter Inc.*, 112 AD3d 867 (2d Dept. 2013). A circumstance which is inconsistent with defendant's contention.

Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances especially where the condition may be obscured. *Atehortua v. Lewin*, 90 AD3d 794 (2d Dept. 2011) [video footage of the accident]. Defendant has failed to show that the conditions here did not obscure the area of the fall or contribute to creating a dangerous condition. *Shapiro v City of Amsterdam*, 96 AD3d 1211 (3d Dept. 2012); *Gallagher v. County of Nassau*, 74 AD3d 877 (2d Dept. 2010).

Based on the record before it, the Court finds that the defendant has not made a *prima facie*

showing of entitlement to judgment as a matter of law. The defendant has not sustained its burden of establishing that the danger was open and obvious and not inherently dangerous, which might free it from liability. *Tenenbaum v. Best 21 Ltd.,* 15 A.D.3d 646 (2d Dept. 2005). It also has not shown that the defect was trivial as a matter of law, which can also be a complete defense. *Schiller v St. Francis Hosp.,* 108 AD3d 758(2d Dept. 2013). Finally, defendant's papers do not indicate that it had no notice and/or did not create the condition complained of. *See, Sarbak v Sementilli,* 51 AD3d 1001 (2d Dept. 2008).

Thus, the record presented by movant does not establish that the condition was not inherently dangerous as a matter of law, and the fact that it may have been open and obvious to the injured plaintiff does no more than raise a triable issue of fact as to her comparative negligence. *Devlin v Ikram,* 103 AD3d 682 (2d Dept. 2013); *Klee v Cablevision Systems Corp.,* 77 AD3d 794 (2d Dept. 2010) [homeowner trips over cable installed by defendant on her property].

Nor can the Court find, as a matter of law, that the defect described in the moving papers was so trivial that it cannot give rise to tort liability. *See Fairchild v. J. Crew Group, Inc.,* 21 A.D.3d 523, 524 (2d Dept. 2005); *Sanna v. Wal-Mart Stores,* 271 A.D.2d 595 (2d Dept. 2000); *see generally, Trincere v. County of Suffolk,* 90 N.Y.2d 976 (1997). Rather, whether a given condition is trivial or dangerous, generally presents a question of fact for the jury. *Hahn v. Wilhelm,* 54 A.D.3d 896 (2d Dept. 2008).

In view of the foregoing, the motion must be denied for failure of the defendant to make out its *prima facie* case for judgment as a matter of law and in any event because there are material issues of fact.

Plaintiff has raised a question of fact as to whether the footing was obscured by planters which

are shown in the video and whether the footing was encroaching into the aisle which plaintiff had succeeded in entering before she fell.

Finally, the Court has considered the unsigned deposition transcript of Danielle Johnston who testified on behalf of defendant. Although not signed, she was produced as a representative of defendant, her deposition is certified by the notary before whom it was given, there has been no claim of inaccuracy and no claim of prejudice. *Pavance v Marte,* 109 Ad3d 970 (2d Dept. 2013).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 9, 2015

HON. DANIEL PALMIERI
Supreme Court Justice

Attorney for Plaintiff
Siler & Ingber, LLP
By: Jeffrey P. Miller, Esq.
301 Mineola Blvd.
Mineola, NY 11501

Attorney for Defendant
Simmons Jannace DeLuca, LLP
By: Jacqueline R. Garren, Esq.
43 Corporate Drive
Hauppauge, NY 11788