

Garcia v 32nd St. 99 Corp.
2016 NY Slip Op 30548(U)
April 1, 2016
Supreme Court, New York County
Docket Number: 154445/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MARIA C. GARCIA,

Plaintiff,

Index No. 154445/14

-against-

DECISION/ORDER

32ND STREET 99 CORP., RJF 110 REALTY LLC,
JACK’S WORLD, LLC and JACK FRANCO,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Maria C. Garcia commenced the instant action against defendants 32nd Street 99 Corp. (“32nd Street”), RJF 110 Realty LLC (“RJF”), Jack’s World, LLC (“Jack’s World”) and Jack Franco (“Franco”) seeking to recover damages for injuries she allegedly sustained when she tripped and fell at the premises owned and operated by defendants. Defendants 32nd Street, RJF and Franco now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint. In a Partial-Stipulation of Discontinuance dated February 18, 2016, plaintiff discontinued the action as against Jack’s World and Franco. Thus, the court will address the motion only as it pertains to defendants 32nd Street and RJF. For the reasons set forth below, the motion is denied.

The relevant facts are as follows. On or about September 15, 2013, plaintiff was a

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customer at the Jacks 99 Cent Store located at 110 West 32nd Street, New York, New York (hereinafter referred to as the “store” or the “subject premises”), owned and operated by defendants 32nd Street and RJF. Plaintiff testified that as she was walking toward the right side of the cashier displays, she fell over David Ades, the head cashier manager for the first floor of the store, who was kneeling on the ground in order to fix merchandise on certain pegboard shelves in front of the cashier counter, and sustained injuries (the “accident”). Surveillance footage from the date of the accident shows that plaintiff fell when she tripped over Mr. Ades as he was kneeling down in front of the cashier displays. Defendants 32nd Street and RJF now move for summary judgment dismissing the complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

It is well established that “[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk.” *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 322 (1st Dept 2006). “[W]hether a condition...constitutes a reasonably safe environment, depends on the totality of the specific

facts of each case.” *Powers v. 31 E 31 LLC*, 123 A.D.3d 421, 422 (1st Dept 2014), citing *Russo v. Home Goods, Inc.*, 119 A.D.3d 924, 925-26 (2d Dept 2014). “However, a court may still afford summary judgment to a landowner or licensed occupier on the ground that the condition complained of by a visitor was both open and obvious and, as a matter of law, not inherently dangerous.” *Broodie v. Gibco Enters., Ltd.*, 67 A.D.3d 418 (1st Dept 2009); *see also Johnson v. 301 Holdings, LLC*, 89 A.D.3d 550 (1st Dept 2011); *see also Remes v. 513 West 26th Realty, LLC*, 73 A.D.3d 665 (1st Dept 2010); *see also Schwartz v. Hersh*, 50 A.D.3d 1011 (2nd Dept 2008). “[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion.” *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 (1st Dept 2004). “To establish an open and obvious condition, a defendant must prove that the hazard ‘could not reasonably be overlooked by anyone in the area whose eyes were open.’” *Powers*, 123 A.D.3d at 422, citing *Westbrook*, 5 A.D.3d at 72. “The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses.” *Powers*, 123 A.D.3d at 422.

In the instant action, 32nd Street and RJF’s motion for summary judgment must be denied on the ground that there is an issue of fact as to whether the condition over which plaintiff tripped and fell was open and obvious. Defendants have failed to meet their burden of establishing that the condition was open and obvious in view of all of the circumstances, including the plaintiff’s testimony and the surveillance footage, which demonstrate that plaintiff’s accident occurred when she was walking toward the cash registers and Mr. Ades

