

Cohen v Costco Wholesale Corp.

2016 NY Slip Op 30573(U)

April 7, 2016

Supreme Court, New York County

Docket Number: 154225/10

Judge: Arlene P. Bluth

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

----- X
BARBARA COHEN,

Plaintiff,

- against-

COSTCO WHOLESALE CORPORATION, COSTCO
WHOLESALE MEMBERSHIP, INC. and "COSTCO"
and "JOHN DOE", as further described in the annexed
complaint,

Defendants.
----- X

Index No. 154225/10

Motion Seq: 02

DECISION/ORDER
ARLENE P. BLUTH, JSC

The motion by defendants Costco Wholesale Corporation, Costco Wholesale Membership, Inc. and "Costco" (defendants) for an order pursuant to CPLR 3212 granting summary judgment in favor of defendants and dismissing plaintiff's complaint against them is denied.

Plaintiff alleges that she was injured when she fell in the parking lot of a Costco in Nanuet, New York on July 7, 2009 between 11:00 a.m.- 12:00 p.m. Plaintiff traveled to the Costco with her boyfriend, Larry Solnik, to pick up contact lenses. Plaintiff alleges that as she and Mr. Solnik were returning to their vehicle after picking up the contact lenses, plaintiff stepped in a pothole and fell forward when her toes were caught on the edge of the pothole.

After plaintiff fell, a Costco employee, Christian Boedding, arrived with a wheelchair to assist plaintiff and draft a report documenting the incident.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury” (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632, 7 NYS3d 66 [1st Dept 2015]). “[W]hether a dangerous or defective condition exists on the

property of another so as to create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury” (*Siegel v City of New York*, 86 AD3d 452, 454, 928 NYS2d 1 [1st Dept 2011]). “Although a plaintiff bears no burden to identify precisely what caused [her] slip and fall, mere speculation about causation is inadequate to sustain the cause of action” (*Acunia v New York City Dept. of Educ.*, 68 Ad3d 631, 631-32, 891 NYS2d 70 [1st Dept 2009]).

Defendants claim that they are entitled to summary judgment for three reasons. First, defendants assert that the pothole that plaintiff allegedly tripped over did not exist. Defendants submit photographs that they claim were taken right after the accident which purportedly depict the location where plaintiff fell (affirmation of defendants’ counsel, exhibit I). Defendants argue that these photographs demonstrate that no dangerous condition existed because no pothole is pictured. Defendants also claim that Mr. Boedding, the Costco employee who inspected the area immediately after the accident, was unable to find the pothole. Defendants conclude that they cannot be held liable for a defective condition that never existed.

Second, defendants claim that plaintiff cannot establish that the alleged defect caused her to fall because plaintiff is unable to identify where she fell or what condition caused her to fall. Defendants argue that plaintiff’s deposition testimony demonstrates that she never saw the alleged pothole and could not identify the pothole on a photograph. Defendants insist that the Court should ignore plaintiff’s errata sheet in which she changed her response to a question about

the position of Mr. Solnik. During the deposition, plaintiff stated that Mr. Solnik was ahead of her. Plaintiff's errata sheet claimed that Mr. Solnik was behind her. Defendants also assert that Mr. Solnik admitted that defendants' photographs depicted the area where the accident occurred. Defendants' claim that this admission means that the Court should disregard Mr. Solnik's testimony describing the pothole because the photographs do not depict a pothole.

Third, defendants maintain that there is no evidence that defendants created, or had actual or constructive notice of a pothole that did not exist.

Thus, defendants have made a prima facie showing that they are entitled to summary judgment. The burden shifts to the plaintiff to raise a triable factual question sufficient to defeat the motion.

In opposition, plaintiff argues that there are triable issues of fact regarding the alleged pothole. Plaintiff insists that Mr. Solnik's testimony regarding the dimensions of the pothole establishes an issue of fact regarding the existence of the pothole. Plaintiff claims that plaintiff's errata sheet should be credited. Plaintiff also claims that defendants' photographs do not depict the entire area of the accident. Plaintiff argues that defendants failed to show that they lacked actual or constructive notice of the pothole. Plaintiff claims that it is an issue of fact regarding how long the pothole was in the Costco parking lot before the accident occurred.

Plaintiff has raised issues of fact. As an initial matter, plaintiff is not required to "prove precisely which particular defect in the [parking lot] caused her to fall in order to avoid summary judgment" (*Kovach v PJA, LLC*, 128 AD3d 445, 445, 11 NYS3d 2 [1st Dept 2015] [internal quotations and citations omitted]). Plaintiff stated that while walking in the Costco parking lot, she tripped over a hole that "was several inches and it had to be wide enough for my foot to go

down in it.” Further, Mr. Solnik testified that he saw the pothole and that he witnessed plaintiff trip over the pothole. The testimony from plaintiff and Mr. Solnik, if believed by a jury, would provide a sufficient nexus between the alleged pothole in the Costco parking lot and the circumstances of her fall to establish causation (*see Cherry v Daytop Village, Inc.*, 41 AD3d 130, 131, 837 NYS2d 109 [1st Dept 2007]).

Plaintiff has also raised an issue of fact regarding defendants’ photographs. Mr. Solnik testified that although the photographs depicted the general area where plaintiff fell, the photographs failed to capture the pothole that he observed. Whether the photographs cover the specific spot where the plaintiff fell is an issue for the jury to decide.

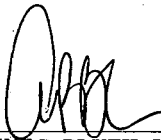
The changes to plaintiff’s testimony evident in the errata sheet are credibility issues that should be resolved by a jury. Although defendants claim that the pothole never existed, if the jury believes plaintiff that the pothole did exist, then the jury must decide whether defendants had actual or constructive notice of the alleged pothole.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Costco Wholesale Corporation, Costco Wholesale Membership, Inc. and “Costco” is denied.

This constitutes the Decision and Order of the Court.

Dated: April 7, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC