Simmons v Gristede's Foods, Inc.
2016 NY Slip Op 31020(U)
February 10, 2016
Supreme Court, New York County
Docket Number: 152851/2014
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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TERRIE SIMMONS,

Plaintiff,

Index No. 152851/2014

-against-

GRISTEDE'S FOODS, INC., GRISTEDE'S FOODS NY, INC, d/b/a GRISTEDES,

Defendant.

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Donna M. Mills, J.:

In this personal injury action, defendants Gristede's Foods, Inc., Gristede's Foods NY, Inc, d/b/a Gristedes ("Gristedes") move, pursuant to CPLR 3212, for summary judgment. Plaintiff Terrie Simmons ("Simmons" or "plaintiff") cross-moves for summary judgment.

Simmons alleges that, as a result of Gristedes' negligence, she slipped and fell in a Gristedes supermarket located at 686 North Main Street, New York, New York, and that she sustained serious injuries as a result. Complaint, ¶¶ 3, 7, 8.

Gristedes' motion for summary judgment

"The mere existence of a foreign substance, without more, is insufficient to support a claim of negligence." Segretti v Shorenstein Co., E., 256 AD2d 234, 234 (1st Dept 1998).

> "A defendant seeking summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence. A defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident."

Sabalza v Salgado, 85 AD3d 436, 437-38 (1st Dept 2011) (internal citations omitted). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a

sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). "[A] 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall." Piacquadio v Recine Realty Corp., 84 NY2d 967, 968 (1994). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." Ceron v Yeshiva Univ., 126 AD3d 630, 632 (1st Dept 2015).

In support of its motion, Gristedes submits transcripts of the deposition testimony of plaintiff and of Luis Torres ("Torres"), the store manager at the time of the incident. Plaintiff testified that the incident occurred between 9:00 and 9:15 a.m. on October 17, 2013, in the recycling area in back of the store, which was reached by going through double doors. Plumer affirmation, exhibit D at 16, 19, 20. She testified that as she walked in the recycling area, her left foot slipped from under her. Id. at 20. With respect to the cause of her fall, plaintiff testified:

> Q Do you know what caused you to fall?
> A No, no.
> [Plaintiff's attorney:] Just, you are talking about before the accident, or after the accident, or any time?
> [Gristedes' attorney:] At any time.
> A Well, there was wet on the floor, because I am laying in wet.
> Q When did you realize there was wet on the floor?
> A After I hit the floor.

Id. at 27. Plaintiff testified further that she did not report the wet condition on the floor until after she fell. Id.

Torres testified that the bottle and can recycling area was in the "back room," sharing an open space with the store receiving area. Id., exhibit F at 10-11. He stated that nobody had

complained to him about the condition of the recycling area floor before the time of the incident, and that he did not know of anyone falling there prior to that time. Id. at 16. Immediately following the incident, he did not observe any produce, ice or trail of drip marks on the floor of the back room area. Id. at 19. A photograph taken by Torres soon after the accident reveals wetness on the floor, which appears to be linoleum tile. Id., exhibit E. In the Gristedes incident report that he filled out that day, under the category "CUSTOMER DESCRIPTION OF INCIDENT," Torres wrote: "Slip on water on floor. Enter back room to put bottle into machine." Id., exhibit G. Under the category "DESCRIBE CONDITION OF LOCATION," he wrote: "Some water on floor from produce [delivery] just came in." Id. With respect to the incident report, Torres testified as follows:

> Q How did you know that the water was from the produce delivery?
> A I didn't. I assume it came from the produce delivery.
> Q Do you have a time record, that would indicate when any particular delivery came in?
> A No.
> Q Do you have personal knowledge as to when that particular produce delivery came in, prior to Ms. Simmons' accident?
> A No.

Id., exhibit F at 25-26. He stated that the area was cleaned "at least once or twice a day" (id. at 20), and that the routine for cleaning was "[c]hangeable," "[de]pending, if there is anything, that we clean up. If the truck came in heavy and anything spilled, we got to clean it up; cat litter broke, depending on what comes in, from the truck." Id. at 21-22.

Gristedes has presented evidence that it had neither actual nor constructive knowledge of the subject condition. Torres stated that he was not informed of the condition prior to the incident, and his testimony indicates that Gristedes regularly attended to the recycling area,

cleaning it at least once daily and when circumstances required it to be cleaned. Accordingly, Gristedes has demonstrated, prima facie, entitlement to summary judgment, and the plaintiff must show evidence of a triable issue of fact to defeat the motion.

In opposition to Gristedes' motion and in support of her cross motion, plaintiff submits the affidavit of Shaynee Bailey ("Bailey"), a witness who was not previously known to Gristedes. Bailey's affidavit was executed on July 24, 2015, more than twenty-one months after the incident, four months after the conclusion of discovery, and three weeks after Gristedes' notice of motion for summary judgment. In it, Bailey states:

> "I myself had complained to two employees approximately 8:00 a.m. on October 17, 2013, about the condition of the floor in the bottle return area of Gristedes located at Roosevelt Island, New York. I told the store employees that the floor around the bottle deposit was wet and slippery. I had slipped and almost fell myself the morning of October 17, 2013 just prior to 8am."

Silverstein affirmation, exhibit E.

Although plaintiff's counsel provides no account of the late discovery of this witness, Bailey's affidavit raises a triable issue of fact as to whether Gristedes had notice of the subject condition prior to plaintiff's fall. Accordingly, Gristedes' motion for summary judgment is denied. The denial of the motion is without prejudice to Gristedes seeking leave to renew the motion if, following the deposition or further investigation of Bailey, Gristedes is so advised.

Plaintiff's cross motion for summary judgment

Gristedes urges the court not to consider plaintiff's cross motion for summary judgment because it was filed on August 11, 2015, twenty days late. CPLR 3212(a) ("such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown"). A court has discretion to decide whether there is sufficient

good cause to accept a late motion for summary judgment. Gaffney v BFP 300 Madison II, LLC, 18 AD3d 403, 403 (1st Dept 2005). The court finds that the late discovery of the witness Bailey is sufficient good cause to accept the motion.

"To establish a prima facie case on a slip and fall, plaintiffs . . . must show that the defendants either created a dangerous condition or had actual or constructive knowledge of the condition." Lemonda v Sutton, 268 AD2d 383, 384 (1st Dept 2000) (internal citation omitted).

Plaintiff relies on Bailey's affidavit to establish that Gristedes had notice of the condition that led to plaintiff's fall. However, her affidavit raises factual issues that preclude summary judgment. For example, Bailey makes the conclusory statement that she spoke with two Gristedes "employees," but she provides no description of these employees, their responses, or the circumstances of this conversation that might lead to their identification.

Plaintiff further submits the notarized but not sworn letter of plaintiff's acquaintance, Denise Jones ("Jones"). Silverstein affirmation, exhibit F. Jones' letter described the incident site soon after the incident as follows: "There was a murky liquid on the floor. It was dirty and there were footprints going through it." Id. This account is not sufficient to demonstrate, as a matter of law, that Gristedes had actual or constructive knowledge of the condition prior to the incident.

Accordingly, it is

ORDERED that the motion of defendant Gristede's Foods, Inc., Gristede's Foods NY, Inc, d/b/a Gristedes (motion sequence number 001) is denied without prejudice; and it is further

ORDERED the cross motion of plaintiff Terrie Simmons is denied.

DATED: 2/10/14

ENTER:

Denise M Molla

J.S.C.