Roman v Compare Supermarket
2016 NY Slip Op 31417(U)
July 22, 2016
Supreme Court, New York County
Docket Number: 155897/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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FLOR ROMAN

Plaintiff,

- against -

COMPARE SUPERMARKET,

Defendant.

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Index No. 155897/12

JOAN A. MADDEN, J.:

In this personal injury action, defendant Compare Supermarket moves for summary judgment dismissing the complaint. Plaintiff opposes the motion.

Background

Plaintiff sues for damages arising out of personal injuries she allegedly sustained on May 20, 2011, when she slipped and fell on an unknown substance on the floor at a supermarket owned by defendant.

Plaintiff testified that the accident occurred sometime between noon and 1:00 pm after she walked into the freezer section of the supermarket and took about 10 and 15 steps. She had been in the supermarket for five minutes before the accident. The freezer was about five to seven steps in front of her when she fell to a sitting position. In the area where she fell there were shelves to the left and the cashiers were to her right. Plaintiff testified that after she fell her leg was wet and dirty, and that he hand was dirty and smelled. She also testified that substance looked like "dirt from the floor." Although she could not identify what she fell on she said that "a young lady that was there said that they had apparently mopped." (Plaintiff Dep, at 54). She further testified that she stayed on the ground for an hour after she fell, and that an unidentified woman tried to call an ambulance but that she refused because she had left her young granddaughter alone in her apartment. She did not fill out an incident report.

Defendant's manager at the time of the incident, Pedro Riezgo (Riezgo), testified that his duties involved overseeing all the departments at the store. He also testified that he worked Monday through Saturday from 9:00 am to 5:00 pm. There were also three assistant managers in the store and that throughout the day, Riezgo or the assistant manager would walk around the store. The store also employed a cleaner named Flavio who maintained the store by cleaning, sweeping, mopping and emptying the garbage. In addition to Flavio's work, every department was responsible for cleaning their area throughout the day. According to Riezgo, the store also used an outside service that would come in each night and clean the floor. He also testified that he was never told about a customer falling in the store in May 2011, that searched the stores records but found no incident reports relating to the claim, and that in May 2011 there were no issues with the refrigerators and freezers in the store leaking.

Defendant argues that it is entitled to summary judgment as there is no evidence that it created the condition on which plaintiff fell or had constructive notice of it.

Plaintiff opposes the motion, arguing that the defendants have failed to make out a prima facie showing of entitlement to summary judgment on the issue of notice, as defendant has failed to provide specific evidence as to when it last inspected the area where plaintiff fell prior to the accident. Specifically, plaintiff points out that there was no set cleaning schedule and that Riezo was unable to recall if he worked on the date of the incident, pointing to his testimony that he worked at another store and often traveled to get there between 11:00 am and noon. In addition, plaintiff argues that there are issues of fact as to whether defendant created the condition by mopping the floor.

In reply, defendant asserts that plaintiff's testimony that before her fall she did not notice that the location of her accident was slippery and dirty and her inability to pinpoint the time of

her fall, which she testified occurred between noon and 1:00 pm, shows that the condition on which she fell was not "visible and apparent" for a sufficient length of time for defendant's employees to remedy the condition. Defendant also argues that the testimony of the employee that the floor had just been mopped is hearsay and not admissible to oppose summary judgment.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"It is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dept. 1996). For an owner to be held liable, it must be shown that "the owner or possessor either created the condition, or ha[d] actual or constructive knowledge of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2d Dept. 2000).

As a preliminary matter, the record is insufficient to raise a triable issues of fact as to whether defendant created the condition by mopping the floor as the only evidence to support this theory is a hearsay statement from an unidentified person. See Aquino v. Kuczinski, Vila &

Associates, P.C., 39 AD3d 216, 221 (1st Dept 2007)(hearsay statements from security guard introduced to show that defendant casino was aware of condition on which plaintiff fell were insufficient to defeat summary judgment). There is also no evidence that defendant had actual notice of the condition. However, for the reasons below, the court finds that defendant has not met its burden on showing that it lacked constructive notice of the condition.

"'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 [the] defendant's employees to discover and remedy it.'" Birnbaum v. New York Racing Association, Inc., 57 AD3d 598, 598 (2d Dept. 2008), quoting Gordon v. American Museum of Natural History, 67 NY2d 836, 837 (1986). In the case of an alleged slip and fall on a foreign substance on the floor, the defendant meets its initial burden on a motion for summary judgment by offering "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." Birnbaum v New York Racing Association, Inc., 57 AD3d at 598-599; See also, Spector v. Cushman & Wakefield, Inc., 87 AD3d 422, 423 (1st Dept. 2011) (holding that defendant was not entitled to summary judgment dismissing complaint when it "failed to meet its burden with respect to actual or constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident"); Ross v. Betty G. Reader Revocable Trust, 86 AD3d 419, 421 (1st Dept. 2011).

This burden can be met by evidence of "frequent inspections for debris and tripping hazards ... performed by store employees on the date of the accident, but prior to the accident." Lee v Port Chester Costco Wholesale, 82 AD3d 842, 842 (2d Dept 2011). However, a

defendant's burden on summary judgment is not met by a showing of a "general practice" of inspections and cleaning. Edwards v Wal- Mart Stores Inc., 243 AD2d 803, 803 (3d Dept 1997); see also Porco v Marshalls Department Stores, 30 AD3d 284, 285 (1st Dept 2006)(evidence that a store is "cleaned daily," and inspections made "on a regular basis" not proof of cleaning and inspections conducted on the date in question). Instead, there must be evidence of "particularized or specific" inspections and cleaning in the area where the plaintiff fell on the date of the accident." Birnbaum v New York Racing Association, Inc., 57 AD3d at 599.

In this case, although defendant provides testimony as to its general inspection and cleaning procedures, it provides no evidence of when the area where plaintiff fell was last inspected or cleaned prior to the accident. Therefore, defendant has failed to meet its initial burden on its motion for summary judgment to make a prima facie case that it had no actual or constructive notice of the alleged condition which caused plaintiff to fall. See Quintana v. TCR, Tennis Club of Riverdale, Inc., 118 AD3d 455, 456 (1st Dept 2014)(affirming trial court's denial of defendant's motion for summary judgment where defendant failed to establish a lack of constructive notice of the condition since "[t]he moving papers contain no indication of when the area was last inspected prior to the accident").

Furthermore, contrary to defendant's argument, plaintiff's testimony that she did not notice the condition on which she fell prior to her fall is insufficient to establish defendant's lack of notice. See Wade-Westbrooke v. Eshaghian, 21 AD3d 817, 817 (1st Dept 2005)("that plaintiff did not notice the hazard on the morning of, and just prior to the accident, that circumstance does not definitively establish [defendants'] lack of notice). Finally, the record raises issues of fact as to whether the hazard on which plaintiff fell was "visible and apparent" based on her description

of the substance as "dirty." Accordingly, as defendant has not met its burden of showing lack of constructive notice, its motion for summary judgment is denied.

Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties are to proceed forthwith to mediation.

DATED: July 22 2016

J.S.C.

HON. JOAN A. MADDEN
J.S.C.