DeFalco v King Kullen Grocery Co., Inc.
2017 NY Slip Op 30353(U)
February 3, 2017
Supreme Court, Suffolk County
Docket Number: 12-18976
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 12-18976
CAL. No. 16-00469OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 8-15-16 (001)
ADJ. DATE 10-26-16
Mot. Seq. # 001 - MG; CASEDISP

SUSAN DEFALCO,

Plaintiff,

- against -

KING KULLEN GROCERY CO., INC.,

Defendant.

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 11 ; Answering Affidavits and supporting papers 12 - 14 ; Replying Affidavits and supporting papers 15 - 16 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant King Kullen Grocery Co., Inc., for summary judgment dismissing the complaint against it is granted.

Plaintiff Susan DeFalco commenced this action to recover damages for injuries she allegedly sustained on June 9, 2010, when she slipped and fell on an oily substance while shopping at a grocery store owned by defendant and located at 307 Middle Country Road, Selden, New York.

Defendant King Kullen Grocery Co., Inc., now moves for summary judgment in its favor on the grounds that it did not create the alleged dangerous condition and had no actual or constructive notice of its existence. In support of its motion, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a "customer accident report," a transcript of nonparty Paula Arnao's deposition testimony, and a compact disk containing security camera footage.

At her deposition, plaintiff Susan DeFalco testified that at approximately 11:15 a.m. on the date in question, she was shopping at the King Kullen grocery store in Selden, accompanied by her sister, Paula Arnao. She stated that after shopping for about a half-hour, they proceeded to the checkout area. Upon questioning, plaintiff confirmed that she had obtained a white styrofoam container of "broccoli, green pepper, [and] mushroom" from the store's self-serve salad bar, but that she did not add salad dressing or oil to any of those items. She testified that during the check-out procedure, she placed her styrofoam salad container in a plastic bag "because it opens up in the bag," then placed it on the conveyor belt. Plaintiff stated that she then "went to get a magazine," which was located near the start of the conveyor belt, and that she "slid." She explained that her right foot slipped towards the direction she was walking, which caused her to fall to the floor, striking her right wrist and right elbow. Plaintiff indicated that she was "laying in a puddle of oil" approximately "one and a half feet round" in front of the magazine rack. She further noted that there was one set of shopping cart tracks running through it, but no footprints in it.

Plaintiff testified that, subsequent to her fall, the cashier who had been tallying her purchases came to her aid and said "I was wondering why I was cleaning oil up off my conveyor belt all morning long." Plaintiff indicated that the cashier discovered a styrofoam container located at the beginning of the conveyor belt, not enclosed within a plastic bag, but did not view its contents. She explained that the cashier handed that styrofoam container to Paula Arnao, who then placed it on the adjacent checkout aisle's bagging area. Plaintiff stated that the store's manager arrived and instructed the cashier to retrieve ice for plaintiff's now-swelling wrist. Plaintiff further testified that when the cashier returned to the checkout lane with the ice, she, too, slipped on the oil.

Jack Miller, deposed on behalf of defendant, testified that he was the assistant store manager of the King Kullen in Selden at the time of plaintiff's accident. He explained that he arrived at the store to begin his shift at 7:30 a.m. and that, while he goes through the cashier area "most of the day," he didn't conduct an inspection of it prior to plaintiff's alleged fall. However, Mr. Miller denied receiving any complaints of falls or substances on the floor there. He indicated that at approximately 11:20 a.m., one of the store's cashiers informed him that a customer had fallen. Mr. Miller testified that he then reported to the scene of plaintiff's fall and observed oil on the floor "about a foot away" from the magazine rack there. He explained that he subsequently spoke to Paula Arnao, who showed him "the bag that was placed at register 5 that was leaking oil." He stated that he inspected that bag and saw that it contained olives and mozzarella balls from the store's self-serve olive bar that had been placed in a styrofoam "clam shell" box. Mr. Miller testified that he observed only one styrofoam container in that area, and denied seeing the cashier slip on the oil at any point.

Etemad Abdelal testified that she has been employed by King Kullen as a cashier for thirty years and that she was plaintiff's cashier in checkout line number 6 at the time of her accident. Ms. Abdelal stated that when she does not have any customers, she walks around her workstation and inspects the area where customers enter her checkout lane. She indicated that in the two hours prior to plaintiff's fall, she inspected the conveyor belt and the floor in that area "[m]ore than twice." Ms. Abdelal denied seeing anything on the floor during those inspections, denied slipping in that area herself, denied having to clean her conveyor belt that day, and denied seeing any styrofoam containers abandoned at the beginning of her conveyor belt prior to plaintiff's fall. She further denied telling anyone that she had been cleaning her conveyor belt all morning

long, and denied receiving any complaints of any spills on her conveyor belt or the floor in front of it. Regarding the items that plaintiff was purchasing that day, Ms. Abdelal recalled seeing a white styrofoam salad bar container that plaintiff placed inside a bag, decided she did not want, then abandoned on the adjacent aisle's conveyor belt prior to her fall. Ms. Abdelal testified that plaintiff's explanation for why she was abandoning the item was that "the box was leaking." Ms. Abdelal further testified that of the more than 15 other customers who had purchased olives or salad bar items prior to plaintiff's fall, none had a leaking container.

At her deposition, nonparty witness Paula Arnao testified that she was present when her sister, plaintiff Susan DeFalco, fell at the Selden King Kullen store. Ms. Arnao indicated that prior to plaintiff's fall, she watched plaintiff make a salad for herself at the store's self-serve salad bar. She stated that plaintiff filled a styrofoam container with lettuce, tomato, and mushrooms, but did not add any salad dressing or oil. Ms. Arnao testified that when she and her sister arrived at the checkout lane, she entered the lane first and observed nothing on the floor at that time. Regarding the conveyor belt itself, Ms. Arnao stated that the cashier was wiping it down with cleaning fluid, that she smelled vinegar, and that there was a white styrofoam salad container near the conveyor belt's bagging area. She explained that as she began to place her own groceries on the conveyor belt, the cashier said "I've got to clean the belt down" and that "she's been cleaning it." Ms. Arnao denied that the salad container was inside a plastic bag and testified that the cashier moved it to another area after plaintiff's fall. Ms. Arnao stated that she did not see her sister fall, but only observed her after she had already fallen. She indicated that upon her inspection of the area where her sister fell, she observed that there was a "wet" area of approximately four inches by four inches in size.

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40; ***Alvarez v Prospect Hosp.***, 68 NY2d 320). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853). Safety is evaluated "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Basso v Miller***, 40 NY2d 233, 241). A defendant moving for 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 for a sufficient length of time to discover and remedy it" (***Altinel v John's Farms***, 113 AD3d 709, 710; *see* ***Ingram v Long Is. Coll. Hosp.***, 101 AD3d 814). To constitute constructive notice, the alleged dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (***Gordon v American Museum of Natural History***, *supra* at

837; *see* ***Stewart v Sherwil Holding Corp.***, 94 AD3d 977; ***Medina v La Fiura Dev. Corp.***, 69 AD3d 686; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (***Altinel v John's Farms***, *supra*, quoting ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599).

Initially, the Court notes that, in light of plaintiff's contention that the security footage does not depict all of what happened at the time of her accident, coupled with a lack of evidence establishing its chain-of-custody, such footage will not be considered in the determination of this motion (*see generally* ***Read v Ellenville Nat'l Bank***, 20 AD3d 408). Regardless, defendant established a prima facie case of entitlement to summary judgment (*see* ***Wachovsky v City of New York***, 122 AD3d 724; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). As plaintiff does not assert that defendant created the alleged dangerous condition, the Court must determine if defendant had actual or constructive notice of it (*see* ***Gordon v American Museum of Natural History***, *supra*). To that end, defendant adduced testimonial evidence that no complaints were made regarding substances on the floor in the checkout aisle where plaintiff fell, that no other falls occurred in that area prior to plaintiff's, and that the cashier, Ms. Abdelal, inspected the area at least twice in the prior two hours (*see* ***Altinel v John's Farms***, *supra*). Ms. Abdelal also testified that she did not have a need to clean her conveyor belt that day, and did not observe any leaking containers prior to plaintiff's accident. The defendant having made a prima facie case, the burden shifted to plaintiff to raise a triable issue (*see* ***Nomura***, *supra*).

Plaintiff failed to raise such a triable issue (*see* ***Wachovsky v City of New York***, *supra*). In opposition to defendant's motion, plaintiff submits her own affidavit. In that affidavit, plaintiff states that after her fall, the cashier "spontaneously" advised her and her sister that she had been "wiping down her conveyor belt all morning." Plaintiff further states that "[t]here was a white styrofoam salad container at the end of the checkout belt . . . near the magazines," that the styrofoam container was "leaking oil," and "apparently . . . the oil dripped onto the floor behind the conveyor belt checkout counter where [she] fell." Plaintiff's contentions, attempting to prove that defendant had actual notice of the alleged dangerous condition are unavailing. Initially, the statement attributed to Ms. Abdelal, whereby she is claimed to have said she was "cleaning oil up off [her] conveyor belt all morning long" is hearsay subject to no exception (*see* ***Gonzalez v City of New York***, 109 AD3d 510). It is well settled that "the hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority" (***Loschiavo v Port Auth. of New York & N.J.***, 58 NY2d 1040, 1041). There has been no evidence presented that Ms. Abdelal, as a supermarket cashier, was authorized to make a statement on behalf of defendant. Further, "[w]hile hearsay evidence may be submitted in opposition to a motion for summary judgment, it is insufficient, standing alone, to raise a triable issue of fact as to notice of a dangerous condition" (*see* ***Wachovsky v City of New York***, *supra* at 726). Even if true, such statement would only establish that oil was on the conveyor belt, not the floor. Further, plaintiff's statement that oil "apparently" dripped onto the floor from the conveyor belt is speculative and insufficient to defeat summary judgment (*see* ***Baer v A&P***, 264 AD2d 791).

Finally, plaintiff's counsel argues that Ms. Abdelal's statements regarding when she last inspected her checkout aisle are too vague to meet the requirements of ***Birnbaum***. However, Ms. Abdelal's testimony that she inspected the area of plaintiff's fall at least twice in the prior two hours was sufficient (*see* ***Rui-Jiao Liu v City of White Plains***, 95 AD3d 1192). Accordingly, defendant's motion for summary judgment dismissing the complaint against it is granted.

Dated: February 3, 2017

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION