

Brown v Wakefern Food Corp.

2017 NY Slip Op 33124(U)

May 22, 2017

Supreme Court, Westchester County

Docket Number: 60676/15

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
YVONNE BROWN,

Plaintiff,

-against-

Index No. 60676/15
Motion Sequence No. 002
Decision and Order

WAKEFERN FOOD CORP. D/B/A SHOP-RITE
SUPERMARKET OF NEW ROCHELLE AND
SHOP-RITE SUPERMARKETS, INC.,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motion:

- Notice of Motion/Affirmation in Supp/Exhibits A-M/Aff of Service
- Affirmation in Opp/Exhibits A-B/Aff of Service
- Reply Affirmation/Aff of Service

In this action for negligence, defendants Wakefern Food Corp. d/b/a Shop-Rite Supermarket of New Rochelle and Shop-Rite Supermarkets, Inc. (together, Shop-Rite), move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint. Plaintiff Yvonne Brown (Brown) opposes the motion. Upon the forgoing papers, the motion is granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on June 22, 2015, to recover damages for physical injuries she allegedly sustained on September 3, 2014, when she slipped and fell in the Shop-Rite

supermarket located at 8 Joyce Road, New Rochelle, New York. The complaint contains one cause of action sounding in negligence. Issue was joined by service of Shop-Rite's answer with affirmative defenses on or about July 17, 2015, after which the parties conducted discovery, including party depositions and the reciprocal exchange of documentary evidence, pursuant to the preliminary conference and follow-up compliance conference orders.

According to Brown, she went with her husband and granddaughter to Shop-Rite on the afternoon of September 3, 2014, to shop for groceries. After she walked through the corridor-like entrance atrium, passing the Shop-Rite pharmacy and several third-party businesses (a barber shop, a Boost Mobile and a Chase bank), which rent space along one side of the entrance atrium, Brown passed through the vegetable and bakery sections of the supermarket. Brown recalled that, after she passed further into the supermarket, she noticed water on the floor and mentioned it to one of the Shop-Rite employees (Brown tr at 21). When, almost a half later, she had finished her grocery shopping, Brown paid for her items at the register. While her husband took the grocery cart out the car, Brown got a rain-check for a particular item, and walked into the entrance atrium and entered the Shop-Rite pharmacy to pick up her medication (*id.* at 26). Brown explained that the other side of the entrance atrium, as well as several displays in the middle of the entrance atrium, are used by Shop-Rite for displaying assorted grocery products, including bottled water.

Brown testified that, after she picked up her medication in the pharmacy, she walked out of the pharmacy, took a few steps and "slipped in the water and fell" (*id.* at 38). When asked about the cause of her fall, Brown stated: "[t]here was liquid on the floor that I didn't see. Water on the floor that I did not see" (*id.* at 40). She also stated that, after she fell, she was assisted up

by a gentleman, who was entering the store when she fell, and by a Shop-Rite employee, James Smith (Smith), who reportedly told her that: “the guy was cleaning around here. He was mopping around here” (*id.* at 41, 46). Brown testified that, after she fell, she looked at the floor and saw the water, which she described as covering an area of approximately three feet by four feet, and which had particles of debris in it and cart tracks running through it (*id.* at 49, 50, 54, 55).

It is plaintiff’s theory that Shop-Rite should be held liable for her injuries, because it had both actual and constructive notice of the condition that caused her to slip and fall, in that it failed to take proper measures to inspect, remedy or eliminate the condition. Alternatively, Shop-Rite should be held liable for her injuries, because it created the hazardous condition by improperly mopping the floor, by failing to dry it properly, and by failing to warn and/or prevent entry into the area of the hazardous condition.

It is well settled that, to establish a *prima facie* case of negligence in a slip and fall action, a plaintiff must demonstrate that:

“the defendant created the condition which caused the accident, or that the defendant had actual or 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 defendant’s employees to discover and remedy it’”

(*Kraemer v K-Mart Corp.*, 226 AD2d 590, 590 [2d Dept 1996]; citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). A plaintiff must provide “some evidence that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it . . . The mere happening of

the accident does not establish liability on the part of the defendant” (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 251 [1984], *affd* 64 NY2d 670 [1984]).

It is defendant’s position that Brown cannot establish a prima facie claim of negligence, because there is no evidence as to how the water got there, how long it was there, whether it (Shop-Rite) had notice of the condition before her accident; or that, in the absence of actual notice of the condition, that it had a reasonable opportunity to discovery and remedy the condition prior to her accident. Shop-Rite supports its motion with, among other things, Brown’s deposition transcript in which she gave the following testimony regarding the area where she fell.

“Q. The water that you saw following your fall, do you know how it got to be on the floor?

* * *

A. The worker told me that someone had cleaned - - had cleaned the floor and probably forgot that area, forgot to dry that area.

Q. Did you see any workers cleaning that area of the floor while you were inside the store?

A. I didn’t observe it.

Q. Okay. And other than what this worker told you, do you have any personal knowledge as to how that water came to be on the floor?

A. No.

Q. Do you know how long that water was on the floor prior to your accident?

A. No

(*id.* at 56).

* * *

Q. Do you know of anyone - -

A. No.

Mr. Gatti: Let him finish.

Q. - - that made any complaints about the water that you fell on - -

A. I don’t know.

Q. At any point prior to your accident?

A. I do not know”

(*id.* at 58).

Shop-Rite also offers the testimony of its assistant manager at that location, Smith, whose

job duties include: "making sure that the store is safe, secure" (Smith tr at 11). Smith explained that the store has maintenance staff who report to him, and who are tasked with keeping the store clean and its floors clear of foreign substances (*id.* at 17).

When questioned about the subject accident, Smith recalled having been told by another Shop-Rite employee that someone had fallen by the pharmacy in the entrance atrium (*id.* at 33). Smith testified that he went over to Brown, saw her husband there with her, and offered his assistance (*id.* at 34). While he was with her, he observed a two feet by two feet area of "liquid on the floor," which he described as follows:

"A. It was - - it was an area of water not so much pool, but it looked like it was like a trail. So it's - - looks like somebody went through it with either a carriage or a stroller or something, and it was kind of like - - like a line.

Q. Okay. So you saw tracks from some kind of wheeled thing.

A. Yes"

(*id.* at 37, 39).

When asked, Smith could not remember whether he said anything to Brown about the floor having been cleaned before she fell (*id.* at 47, 48). When he was next asked about his own recollection about floor maintenance in that area, he stated that he did not remember whether anyone had been cleaning the floor in the area where Brown fell before she fell, nor did he remember when that area was last cleaned (*id.* at 48, 49). Regarding procedures for floor cleaning, Smith stated that Shop-Rite's standard procedure is for its employees to place warning signs around newly cleaned floors (*id.* at 50).

Upon further questioning, Smith stated that he did not remember anybody complaining about water in that area prior to Brown's fall (*id.* at 60), but did recall another Shop-Rite employee, Christian Orozco (Orozco), who works in the pharmacy, standing there with Brown when he arrived at the scene.

Shop-Rite submits a sworn affidavit from Orozco regarding the subject event (notice of motion, exhibit L). In the affidavit, Orozco states that, while he does not specifically recall Brown's accident, or responding to the scene, he does recall an older woman speaking with the EMS workers right outside the pharmacy. Orozco explains that his duties as a pharmacy technician require him to stand, for most of his shift, by the service counters adjacent to large plate glass windows facing the entrance atrium, and that, in the course of his work, he was constantly on the lookout for any foreign substance on the store floor (*id.* ¶¶ 4, 5). He states that, had a four foot by three foot area of water been on the floor outside the pharmacy, he would have readily seen it, and he would have called maintenance to clean it. He denied having any recollection of any liquid on the floor on that day, and he denied being aware of any complaints of any liquid or other slipping hazard on the floor in that area on that day (*id.* ¶¶ 7-10).

Based on this evidence, Shop-Rite contends that it is entitled to summary judgment dismissing the complaint based on lack of prior notice, actual or constructive, of an area of water on the floor outside the pharmacy.

In opposition, Brown argues that there is a material question of fact as to prior notice based on Smith's purported statement to her that the person who cleaned the floor had probably forgotten to dry that area, and Smith's failure to refute that statement.

For the following reasons, Shop-Rite's motion is granted. According to plaintiff's testimony, despite her having walked through the entrance atrium on her way into the store, the only area of wetness she noticed prior to the accident was the wetness she noted and reported about in a different section of the supermarket. Brown's testimony confirms that she was only in the supermarket for about a half hour before the accident occurred, and she acknowledged that she, herself, did not observe the water outside the pharmacy in the entrance atrium prior to falling

down. Neither Orozco nor Smith had any recollection of anyone complaining about water on the floor in the subject area prior to Brown's fall, and there is no evidence as to how long the water was there. The only the evidence offered to show that Shop-Rite might have had prior knowledge of the water condition is Brown's own testimony of what Smith reportedly told her. However, Smith's inability to recall his conversation with Brown, does not constitute evidence of prior notice, and plaintiff offers no explanation for failing to support her own recollection of Smith's statement with competent evidence from either of the two other individuals who were present when Smith came over to the scene, that being Brown's husband and Orozco. Furthermore, even if the Court were to credit Brown's recollection of Smith's purported statement, it would be of no import, because it does not constitute competent evidence that Shop-Rite had actual or constructive notice of the alleged condition (*see Tyrrell v Wal-Mart Stores*, 97 NY2d 650, 652 [2001]; *Cohn v Mayfair Supermarkets*, 305 AD2d 528, 529 [2d Dept 2003]). Under the circumstances, Brown's unsubstantiated self-serving testimony is insufficient to show that Shop-Rite either created the hazardous condition, or had actual or constructive notice of the hazardous condition, and then allowed that condition to exist for a sufficient length of time without remedying it (*Gordon v American Museum of Natural History*, 67 NY2d at 837; *Roy v City of New York*, 65 AD3d 1030, 1031 [2d Dept 2009]).

Accordingly, it is

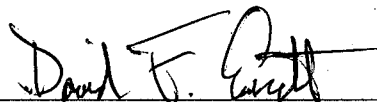
ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an affirmed bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
May 22, 2017

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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