

Marte v Danice Stores Inc.

2018 NY Slip Op 31108(U)

June 4, 2018

Supreme Court, New York County

Docket Number: 451321/2013

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

SARAH MARTE,

INDEX NO.

451321/2013

Plaintiff,

MOTION DATE

05/25/2018

- v -

DANICE STORES INC and 181ST WASHINGTON HEIGHTS
ASSOCIATES LLC,

MOTION SEQ. NO.

001

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 25, 26, 28, 29

were read on this application to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment of defendant DANICE STORES, INC. is denied, and it is further

ORDERED that counsel are directed to appear for a discovery status conference in IAS Part 59, Room 331, 60 Centre Street, on June 5, 11 AM.

DECISION

Defendants Danice Stores, Inc. moves for summary judgment dismissing the complaint and cross-claim against it. Plaintiff Sarah Marte opposes the motion.

This action arises out of an assault that took place at movant's clothing store on January 16, 2010, during which

plaintiff alleges that she was injured, after having been confronted and then struck about her body by two non-party unknown female customers, one whose first name was Walise (last name unknown). She seeks to recover damages from the movant, alleging that the negligence of the movant in failing to provide adequate or proper security was a substantial factor in causing her injuries.

Movant argues that it is entitled to summary judgment because the alleged actions of the non-party unknown customers in assaulting the plaintiff were sudden and unforeseeable and therefore a claim of negligent provision of security cannot be demonstrated. Zamore v Bar None Holding Co., LLC, 73 AD3d 601 (1st Dept 2010); Lewis v Jemanda New York Corp., 277 AD2d 134 (1st Dept 2000) ("Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was beyond any duty defendant may have had as a landowner to its patrons").

However, in response, plaintiff argues that the movant is not entitled to summary disposition because there is evidence in the form of her deposition testimony that she notified the cashier employed by defendant of her concerns relating to the persons who eventually assaulted her, who did nothing to assist her, raising an issue of fact as to whether movant acquired knowledge which imposed upon it a legal duty to act.

"While a public establishment is under no duty to protect its customers from the unforeseeable risk of harm from the criminal activities of third persons, there is nevertheless a duty to control the conduct of such persons when the establishment has the opportunity to control or is reasonably aware of the necessity for such control"
Banayan v F.W. Woolworth Co., 211 AD2d 591, 592 (1st Dept 1995).

Plaintiff testified that on the day in question, before entering movant's store, while passing by the shoe store next door, she, along with other pedestrians, witnessed a commotion in which a shoe store employee first apprehended and then released her ultimate assailants, who apparently had been caught shoplifting. The individuals proceeded to run from the shoe store, and one of them, whose face plaintiff saw, brush passed and nearly hit her. She then entered movant's store, began shopping, and as she passed the second rack of clothing, heard low whispers and conversing behind a clothing rack. Realizing that the persons behind the rack were the individuals who had just run out of the shoe store and with some apprehension, plaintiff, to move away from these individuals, gathered up some clothes items, and placed them on the cashier's counter. She pretended to want to purchase the items, but whispered to the cashier, in a "very soft voice" that "there are two individuals that are behind me on the far-right side and they are dangerous. They came from shoplifting at another store." Plaintiff continued:

"[H]e nodded so I turned around. I said you don't have this size and at that point my plan was for me to leave the store. However as soon as I turned around, one of them immediately just zoomed in on my face and that was the girl that I had the face-to-face encounter prior to this store. ...The other one I only had seen at the back of her, came around the clothing rack and said oh, don't worry, this one is mine. She shoved me across and my head hit the counter. I mean I thought when I warned him that something was going to be done.

I was unconscious for some time. The next thing I remember was when I was waking up on the floor, which somehow, although I fell on my back I was on my face when I woke up and I was still being beaten all over my body by both of them, my head, my face, my back, my legs, everywhere. I woke up to still the beating and eventually when I---as I was turning to sit up while they were beating me, one said let's go".

Plaintiff testified that she only first spoke to the cashier when she was approximately an arm's length away immediately prior to the incident. She described the assault as beginning "almost instantaneously" and "within a minute" after she spoke to that cash register attendant.

Plaintiff argues that issues of fact remain whether movant knew about the danger posed to plaintiff in sufficient time before the assault to have arrested it. She contends that because she notified defendant of the actions of her assailants before the attack and because defendant has not provided her with any discovery, including any incident report, surveillance video or deposition testimony of a witness with knowledge of what transpired prior to the assault, and what actions movant

took or did not take, this court should deny movant's motion as premature.

The movant counters that additional discovery is not warranted as plaintiff has not shown what further evidence might be unearthed that would support her claim that defendant was negligent on the date and time in question.

The court agrees with plaintiff. Plaintiff's deposition testimony that the cashier, from a very short distance, witnessed the assault upon plaintiff, but made no effort to try to stop the attack, raises issues of fact whether defendant was negligent. Banayan, supra, at 592 (1st Dept 1995).

This constitutes the decision and order of the court.

6/4/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	