

Simonetti v TVI, Inc.
2018 NY Slip Op 33331(U)
December 19, 2018
Supreme Court, Suffolk County
Docket Number: 16-2051
Judge: Sanford N. Berland
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INDEX No. 16-2051

CAL. No. 17-02446OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:**Hon. Sanford N. Berland, A.J.S.C.**MOTION DATE 3-6-18ADJ. DATE 5-8-18

Mot. Seq. # 004 - MD

-----X
MARY SIMONETTI,

Plaintiff,

- against -

TVI, INC. d/b/a SAVERS,

Defendant.
-----X

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment: Notice of Motion and supporting papers 1-14; Answering Affidavits and supporting papers 15-27; and Replying Affidavits and supporting papers 28-29, it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint against it is denied.

Plaintiff Mary Simonetti commenced this action to recover damages for injuries resulting from a trip and fall accident that occurred on December 27, 2015, at the Savers thrift store located at 700 East Patchogue-Yaphank Road in Medford, which is owned by the defendant, TVI, Inc. The complaint alleges that plaintiff, who was 83 years old at the time of the accident, was injured when she tripped on a floor mat as she entered the store and fell. Although both the complaint and the bill of particulars assert that the defendant's alleged negligence in failing to maintain the premises in a reasonably safe condition included, among things, permitting the floor to be "wet, slick and slippery" and placing a floor mat in a position that allowed a gap to be present between the floor mat and the door, at her deposition, plaintiff testified that her fall came about when the tip of her right shoe caught on an a wet entryway rug, causing her to fall forward onto her face and to suffer a host of injuries, including a broken nose, a mild concussion, a fractured left arm and dental damage.

Defendant now moves for summary judgment dismissing the complaint on the ground that it did not create a dangerous condition nor did it have notice of such condition. Among other things,

defendant argues that the floor mat does not constitute a dangerous condition, and that, in any event, any claimed defects are trivial and not actionable. In support of its motion, defendant submits copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, an affidavit by Raymond Weinberg, photographs of the area in the store where the incident occurred, a DVD disk containing surveillance video footage of the incident and various still photographs. In opposition to the motion, plaintiff also submits copies of the pleadings, bill of particulars, transcripts of the parties' depositions and the surveillance video, as well two photographs, several "still" images printed out from the video recording and her own affidavit. The two photographs offered by plaintiff, and which are also among the larger number offered by the defendant, together show plaintiff lying face down and prone on a bare floor, except for her lower legs and feet, which are lying somewhat diagonally on the upper half of a reddish-brown mat, her left foot resting on the apex of the mat's upturned and over-folded lower-left corner.

Plaintiff testified that she arrived at the Savers store located at 700 East Patchogue-Yaphank Road, Medford, New York on the afternoon of December 27, 2015. She testified that the weather was cold and very wet that day, and that it was drizzling when she arrived at the store, although there was snow on the ground from a previous snow storm that had occurred on Christmas day. She testified that there was no snow or ice on the sidewalk or at the entrance to the subject store. Plaintiff testified that there are two sets of glass doors at the front of the store, and that one pair are entrance doors and the other pair are exit doors. She testified that there is a vestibule area in between the glass doors and another pair of glass doors which lead to the inside of the store. She testified that she entered the store through the exit doors, and that there were a few patrons entering the store at the same time walking to her right. She testified that she pushed the doors open and took a step into the vestibule area when the tip of her right shoe got caught on a floor mat and she tripped and fell forward to the floor. Plaintiff was shown photographs of the subject area and floor mat that she tripped on, and a photograph that depicts her lying on the floor, and she testified that it looks like "my shoe picked up the rug." In her affidavit submitted in opposition to the current motion, she states, among other things, that she viewed the surveillance video of her accident only after she had been deposed, confirms that the accident occurred "immediately after" she had opened the doors from the vestibule into the store and had proceeded over the threshold, and avers that as she was taking a third step into the store with her right foot, she "felt the entire toe of my right shoe 'catch' up against a raised surface" that "was higher than the height of my shoe" and that "it was the sheer height differential that caused me to lose my balance and fall." She further avers that "as I was falling, I did not feel anything moving or shifting beneath my feet until the point that I landed on the ground."

Raymond Weinberg testified that at the time of the incident, he was the retail sales manager of the Medford Savers store - a position he still holds - and was working at the store that day. He testified that as depicted in several of the photographs that were marked as exhibits at his deposition, and which also have been submitted in support of the current motion, at the time of Mrs. Simonetti's fall, two rectangular floor mats made of a "rubber like" material were used around the entrance to the store - one placed in the vestibule near the doors that open into the interior of the store, the other, perpendicular to the first, on the interior side of those doors. According to Weinberg, the floor mats were provided by an outside vendor, First United, which changed them on a weekly basis, and were vacuumed in place by store employees Tuesdays through Saturdays. Also according to Weinberg, although store employees

never moved the mats, the outside cleaning service that, among other things, swept and polished the floors twice each week did have to lift rugs in order to do so but always put them back in place. Weinberg further testified that he has never received any complaints concerning the floor mats, that he has never had any reason to complain to First United about the condition of the mats and that he is unaware of any incidents occurring at the Savers store similar to the one at issue here. Moreover, Weinberg testified that as one of his regular duties is to maintain the inside of the store, including collecting shopping baskets from the aisles of the store and placing them in their storage area located in the front of the store, adjacent to the entrance doors, he regularly looked at the floor mats¹ when he put the shopping baskets back to ensure they were in their proper place and secure and not folded over, and, further, that prior to Mrs. Simonetti's fall, he had never seen the mats folded over or out of place.

In his affidavit, Weinberg avers that the video footage on the DVD submitted by the defendant in support of its motion was taken simultaneously with the subject events and that it has not been edited or altered. He states that the video accurately reflects Mrs. Simonetti's fall and the events surrounding it as he was working in the store on the day of the incident. The court has viewed the DVD disk footage as provided by both parties, and while it is not possible - because of the surveillance camera's angle of view and the obstructing presence of a row of wheeled shopping bins along the entryway - to see more than what appears to be the far edge of the interior floor mat or view the corner that is upturned in the photographs taken of Mrs. Simonetti after she had fallen, both a number of store patrons and then Mr. Weinberg can be seen traversing the area in the minutes before the individual identified as Mrs. Simonetti enters through the interior doors and promptly falls. Approximately a minute and a half before Mrs. Simonetti falls, Mr. Weinberg is seen entering the store from the vestibule pushing one large shopping cart ahead of himself with his right hand and pulling another behind himself; although he can be seen glancing backward at one point to make sure the trailing cart is clearing the doorway, he does not appear to look downward toward the portion of the mat closest to the vestibule doors nor does he appear to do so when, a half minute or so later, he briefly reenters that area to return a hand basket to one of the stacks to the right of the entryway. After that, no one else is seen in the entryway until Mrs. Simonetti appears. She is seen pulling open one of the two vestibule doors, taking a couple of steps and then lurching forward and below the camera's view. Although Mr. Weinberg avers that upon rushing to Mrs. Simonetti's assistance after her fall, he "did not see any issues with the mats at that time that would have caused her to fall," the still photograph - which he can be seen taking on the surveillance video - clearly shows her left foot lying atop the mat's upfolded lower left corner. Also, although not apparent from the video recording, the still photographs taken just after Mrs. Simonetti fell and while she was still lying prone on the floor of the entryway, indicate that the mat upon which her legs were resting was positioned differently from the standard description that Mr. Weinberg provided at his deposition and which was depicted in several of the other photographs used at his deposition and offered by the defendant on the current motion; specifically, the left-most edge of the mat is positioned farther to the right than in the later photographs and the mat itself appears to be parallel, rather than perpendicular, to the mat on the vestibule side of the doorway. Whether the upfolding of the mat's lower left corner and

¹ Weinberg testified that subsequent to Mrs. Simonetti's fall, the Savers store's practices changed, and the floor mats were placed around the entrance only when called for by weather conditions.

the rightward shift and different orientation of the mat were the result of Mrs. Simonetti's fall or possible causes of it is not evident on the current record.

It is well settled that 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 eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (*Etminan v Esposito*, 126 AD3d 854, 6 NYS3d 103 [2d Dept 2015]; *Blatt v L'Pogee, Inc.*, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]). The duty to maintain the property in a safe condition also includes a duty to provide the public with a safe means of ingress and egress (*Grizzell v JQ Associates, LLC*, 110 AD3d 762, 973 NYS2d 268 [2d Dept 2013]; *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). However, a property owner is not a guarantor of safety, and is only charged with a duty to use reasonable care under the circumstances in maintaining its property in a safe condition (*see Peralta v Henriquez*, 100 NY2d 139 [2003]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). A landowner has no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*Costidis v City of New York*, 159 AD3d 871, 70 NYS3d 74 [2d Dept 2018]; *Gerner v Shop-Rite of Uniondale, Inc.*, 148 AD3d 1122, 50 NYS3d 459 [2d Dept 2017]; *Mathew v A.J. Richard & Sons*, 84 AD3d 1038, 923 NYS2d 218 [2d Dept 2011]; *Tyz v First St. Holding Co., Inc.*, 78 AD3d 818, 910 NYS2d 179 [2d Dept 2010]).

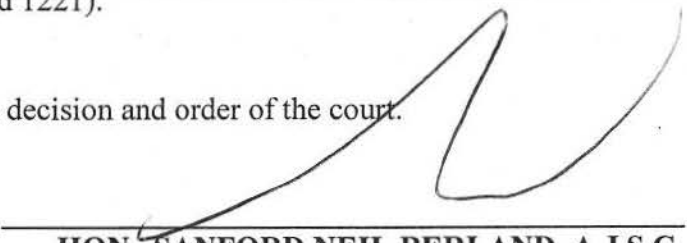
In a trip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655, 656, 880 NYS2d 352 [2d Dept 2009]). While generally it is for the jury to determine whether a dangerous or defective condition exists on the property of another so as to create liability (*Coriat v Miller*, 164 AD3d 120, 783 NYS3d 217 [2d Dept 2018]; *Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]), there is no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous (*Bartholomew v Sears Roebuck & Co.*, 159 AD3d 786, 69 NYS3d 813 [2d Dept 2018]; *Mathis v D.D. Dylan, LLC*, 119 AD3d 908, 990 NYS2d 581 [2d Dept 2014]; *Boyle v Pottery Barn Outlet*, 117 AD3d 665, 985 NYS2d 291 [2d Dept 2014]; *Mathew v A.J. Richard & Sons*, 84 AD3d 1038, 1039, 923 NYS2d 218 [2d Dept 2011]).

Photographs of the floor mat and the area where Mrs. Simonetti's fall occurred are submitted by both parties to support their respective positions. Indeed, such photographs may be used to determine that an alleged defect is or is not actionable (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802 [2015]; *Cobham v 330 W. 34th SPE, LLC*, 164 AD3d 644, 83 NYS3d 537 [2d Dept 2018]; *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 931 NYS2d 650 [2d Dept 2011]). Here, although the photographs support defendant's contention that the floor mats used at the savers store are of a type that if properly maintained and positioned do not ordinarily present a dangerous or defective condition (see *Touloupis v Sears, Roebuck & Co.*, 155 AD3d 807, 63 NYS3d 518 [2d Dept 2017]), the photographs, in conjunction with other evidence, also indicate that as a result of the defendant's own conduct, at least one of the floor mats may have been malpositioned in a way or in a condition that caused or contributed to Mrs. Simonetti's fall. Thus, although the defendant contends that the surveillance video exonerates it of any responsibility for the accident by demonstrating, among other things, its diligence in monitoring the entryway to its store, plaintiff asserts that it does not and that it shows that the defendant either created a dangerous defective condition or overlooked one that it had ample opportunity to discover and rectify. On a motion for summary judgment, the court cannot determine credibility (*Vega v Restani Construction Corp.*, 18 NY3d 499, 505 [2012]; *Ferrante v American Lung Association*, 90 NY2d 623 [1997]), and the "facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Construction Corp.*, *supra* at 503, quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). In the circumstances presented here, issues of material fact that cannot be resolved on the submitted record require that the defendant's motion be denied (see generally *Pajovic v 94-06 34th Road Realty Co., LLC*, 152 AD3d 781 [2d Dept 2017], quoting *Buglione v Spagnoletti*, 123 AD3d 867, 867, 999 NYS2d 453 [2d Dept 2014], and citing *Schneider v Kings Hwy. Hosp. Ctr., Inc.*, 67 NY2d 743, 744-745, 500 NYS2d 95, 490 NE2d 1221).

The foregoing constitutes the decision and order of the court.

Dated:

12/19/2018
 Riverhead, New York


 HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION

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NON-FINAL DISPOSITION