Viloria v Modell's Sporting Goods, Inc.
2019 NY Slip Op 32204(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 156824/2017
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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FRANKLYN VILORIA,

Plaintiff,

- v -

MODELL'S SPORTING GOODS, INC., MODELL'S SPORTING GOODS CO., INC,

Defendants.

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INDEX NO. 156824/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36-47 were read on this motion to/for summary judgment.

Defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff defaulted on the motion.

I. PERTINENT BACKGROUND

In the summons and complaint, plaintiff alleges that on December 18, 2016, while shopping at defendants' premises, a heavy boxing bag fell on his foot, injuring him. (NYSCEF 38).

At his deposition, plaintiff testified that as he passed the boxing bag while looking at exercise equipment on the second floor, someone ran by him and the bag fell on his foot. Plaintiff denies having touched the bag before it fell, and states that no one else had witnessed the accident. After 911 was called, he was taken by ambulance to the hospital where he underwent testing. He is unaware of their results and the extent of his injuries. Plaintiff was in a lot of pain and was told by hospital staff that he should not walk on his swollen ankle. Several months later, plaintiff saw his primary care doctor and three other doctors, one of whom

recommended surgery. Instead, plaintiff underwent physical therapy for a few months to treat his pain. (NYSCEF 44). He had the surgery on August 17, 2018. (NYSCEF 41).

Although plaintiff had previously fractured the same foot in 2007, he did not have surgery. (NYSCEF 44).

II. CONTENTIONS

Defendants deny that that they were negligent and assert that plaintiff cannot prove, *prima facie*, that they were. They deny having had notice of a dangerous condition before plaintiff's accident, relying on the affidavit of their property and risk manager who claims that, after reviewing unidentified documents kept in defendants' ordinary course of business, they had no notice of any dangerous conditions before the accident. The manager submits the post-accident liability claim report, which was completed the day of the accident and provides that plaintiff allegedly told the store manager that he was standing by the boxing bag's stand and it fell and dropped on his toes. The report also reflects the manager's statement that no corrections were needed to prevent a recurrence, but that steps were taken to ensure that the equipment was secure. (NYSCEF 45).

There is also no indication that the bag was improperly displayed, and, in any event, given plaintiff's testimony that the bag had fallen after people ran by it, defendants maintain that any possible negligence on their part was superseded by an intervening cause. (NYSCEF 44).

Defendants also argue that plaintiff cannot establish a causal connection between the accident and his injuries, relying on an expert affidavit of an orthopedic surgeon, who conducted an independent medical examination of plaintiff on January 21, 2019, and states that an MRI taken during the examination reflects only the 2007 fracture. The surgeon also opines the plaintiff's 2018 surgery is unrelated to an injury that he could have sustained as a result of the

accident at issue. (NYSCEF 46).

III. ANALYSIS

A defendant moving for summary judgment in an action involving a dangerous condition bears the *prima facie* burden of establishing that it neither created nor had actual or constructive notice of the condition. (*Del Marte v Leka Realty LLC*, 156 AD3d 453 [1st Dept 2017]). Constructive notice exists when "[the] condition was dangerous … visible and apparent, and had existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it." (*See Harrison v New York City Tr. Auth.*, 113 AD3d 472, 473 [1st Dept 2014]).

Defendants' reliance on the post-accident liability report as proof that there was no actual or constructive notice of a dangerous condition before plaintiff's accident is misplaced, as the report contains no statements based on personal knowledge of the conditions before the accident. (*Compare Stadler v Lord & Taylor LLC*, 165 AD3d 500 [1st Dept 2018] [photographs insufficient to meet defendant's burden as they did not accurately depict accident location at time of plaintiff's fall], with *Schwartz v Kings Third Ave. Pharm., Inc.*, 116 AD3d 474, 475 [1st Dept 2014] [photographs showing display rack was properly maintained before plaintiff's injury sufficient to support dismissal]).

Defendants also offer no evidence of inspections or other proof as to the condition of the display before the accident. (*See e.g., Hill v Manhattan N. Mgt.*, 164 AD3d 1187 [1st Dept 2018] [defendant did not establish when area was last inspected before plaintiff's fall]; *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992 [2d Dept 2009] [defendant did not meet *prima facie* burden of establishing lack of constructive notice of dangerous condition of display case absent evidence based on personal knowledge of when display last inspected before accident]).

Defendants thus fail to establish, *prima facie*, that they neither created the condition nor had actual or constructive notice of it. (*Compare Rosado v Home Depot*, 4 AD3d 204 [1st Dept 2004] [where plank fell on shopper at defendant's premises, no evidence supported conclusion that employees created hazard from negligently stacking boards or that defendant had actual or constructive notice of condition as boards could have been moved by shoppers], with *Musilli v Kohler Co.*, 50 AD3d 1600 [4th Dept 2008] [undisputed that shower door display, which fell on patron, was insufficiently secured with self-tapping screws prior to accident]).

That defendants' witness found no documented instances of notice of the dangerous condition does not resolve whether they created the condition or should have had constructive notice of it, and their complaint that plaintiff offers no evidence that they created the condition or had notice of it improperly shifts the burden to plaintiff, when defendants bear the burden on this motion to provide affirmative evidence that they were not negligent. (*See Brady v City of N. Tonawanda*, 161 AD3d 1526, 1527 [4th Dept 2018] [movant for summary judgment does not meet its burden by pointing to gaps in opponent's proof]).

That someone in the store may have caused by the bag to fall does not demonstrate that a third party's superseding act was so extraordinary "that responsibility for the injury may not be reasonably attributed to the defendant" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 423 [1st Dept 2014], quoting *Kush v City of Buffalo,* 59 NY2d 26, 33 [1983] [reasonable to attribute harm to defendant school that failed to supervise children handling chemicals]). Moreover, whether a superseding act was foreseeable or extraordinary constitutes factual issues. (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317 [1980]).

Moreover, although a defendant may be absolved of liability by the act of a third party, there is no absolution "where the risk of the intervening act occurring is the very same risk which

renders the actor negligent." (*See De'L. A. v City of New York*, 158 AD3d 30, 36 [1st Dept 2017] [assault that occurred when defendant violated its own policies was same type of risk caused by defendant's negligence]). The risk of the bag falling on plaintiff due to another person knocking it over is the risk arising from a faulty display. (*See Soto v GMRI, Inc.*, 2013 WL 3208271 [Dist Ct, ED NY] [patron knocking over unsecured coat rack that hit plaintiff not superseding act]).

As defendants' expert does not address the indication in the medical records that plaintiff's foot was newly injured after the accident, nor does he address whether the accident aggravated plaintiff's prior foot injury, defendants fail to establish that plaintiff's injuries were not caused by the accident. (*See Reilly v Fulmer*, 9AD3d 818, 819 [3d Dept 2004] [presence of earlier injury or condition making victim more susceptible to subsequent injury will not allow tortfeasor to escape liability]).

That plaintiff defaulted on the motion does not relieve defendants of their *prima facie* burden on this motion. (*See Liberty Taxi Management Inc., v Gincherman*, 32 AD3d 276, 277, n1 [1st Dept 2006] [failure to submit opposition papers will not justify granting summary judgment alone, as court must assess whether movant is entitled to judgment as matter of law]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied; and it is further

ORDERED, that the clerk of the trial support office is directed to place the matter on the trial calendar, as the note of issue was filed in March 2019.

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7/26/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE