

Merritt v Target Store 2856
2019 NY Slip Op 34052(U)
June 4, 2019
Supreme Court, Dutchess County
Docket Number: 2017 -50067
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (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 DUTCHESS**

-----X
NICOLE MERRITT,

Plaintiff,

-against-

TARGET STORE 2856 and TARGET
CORPORATION,

Defendants.
-----X

ACKER, J.S.C.

DECISION AND ORDER

Index No.: 2017-50067

The following papers numbered 1-20 were considered in connection with the motion of Defendants Target Corporation and Target Corporation s/h/a Target Store 1856 (hereinafter "Defendants") for an Order pursuant to CPLR §3212(b) dismissing any claim for punitive damages¹ and granting Defendants summary judgment dismissing Plaintiff's Complaint:

Notice of Motion-Affirmation of Edward D. Laird, Esq.-Exhibits A-G-	
Memorandum of Law	1-10
Affirmation in Opposition of John A. Del Duco, Esq.-Exhibits 1-5	11-16
Reply Affidavit of Christopher Muniz-Exhibit H-Reply Affirmation of Kimberley F. Wallace, Esq-Exhibit I	17-20

This action was commenced by Plaintiff Nicole Merritt (hereinafter "Plaintiff") on or about January 11, 2017. It is alleged that on August 8, 2016, Plaintiff was injured when her foot struck a sharp piece of metal that was protruding from a display near the bread aisle in the

¹ There is no indication in Plaintiff's complaint that she has asserted a claim for punitive damages. Moreover, Plaintiff's counsel confirms in opposition that Plaintiff has made no claim for punitive damages and does not intend to make any such claim.

Target Store located on Route 9 in the Town of Poughkeepsie ("Target").

The Defendants move for summary judgment alleging that they did not create or have notice of an alleged dangerous condition on the premises and that the condition was trivial in nature and non-actionable as a matter of law. In support of the motion, Defendants submit the pleadings, Plaintiff's Verified Bill of Particulars, the depositions transcripts of Plaintiff and Christopher Muniz and Keith Blair, on behalf of Defendants and a video of the area in question at the time of the incident.

It is well settled that on a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012]. "Issue finding, rather than issue determination, is the court's function on a motion for summary judgment." *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept. 2016].

Facts

On the day of the accident, at approximately 9:00 am, Plaintiff was shopping in Target with her children. While she was in the produce aisle, she “parked” her grocery cart near a display and went to select produce. When she returned to the cart with her items, she stepped between the cart and the display and scraped her foot on the bottom edge of the display. She was wearing sandals at the time of the accident and she alleges that her exposed skin was cut as a result of the contact.

“A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition.” *Gani v. Ave. R Sephardic Congregation*, 159 AD3d 873 [2d Dept. 2018]. A defendant property owner, or a party in possession or control of real property, who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition, nor had actual or constructive notice of its existence. *Id.* “A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it.” *Id.* at 873–74.

In the instant matter, Defendants established a *prima facie* case of entitlement to summary judgment by providing evidence demonstrating that they did not create the condition at issue and that they did not have actual or constructive notice of said condition.² Keith Blair,

² However, Defendants did not establish a *prima facie* case that the condition was trivial in nature and non-actionable, as they failed to provide any photographs or dimensions of said condition. See *Grundstrom v. Papadopoulos*, 117 AD3d 788 [2d Dept. 2014] (defendant failed to establish as a matter of law that the alleged defect was trivial and therefore not actionable as it failed to submit any objective measurements of the dimensions of the alleged defect).

who was employed by Defendants as a property and management technician on the date of the accident, testified that at or around the day of the accident, he conducted daily inspections of the area where Plaintiff was injured between 8:00 am and 8:30 am. He further testified that he did not recall any issues with the display in question on the day of the incident, nor in the week immediately prior to that day. Defendants also provide the testimony of Christopher Muniz, an Executive Team Leader for Target on the day of the incident. He testified that he was unaware of any other incidents regarding a guest or customer injuring themselves on any fixtures prior to Plaintiff's accident.

In opposition, Plaintiff provides her own affidavit with color photographs of the condition at issue, which she avers she took at the time of her accident. These photographs depict the bottom of a display case showing a strip of metal protruding off the bottom of the wood frame, as well as what appears to be damage to the corner of the display, with a protruding screw. In reply, Defendants submit an affidavit of Christopher Muniz ("Muniz Affidavit") with an annexed photograph, which he avers is a photograph that he took of the display that allegedly caused Plaintiff's injuries on August 8, 2016. It appears that this photograph is of a different display than that shown in Plaintiff's photographs. Notably, this photograph was not submitted on Defendants' direct motion, and is only submitted in reply in an apparent effort to dispute the validity of the photographs submitted by Plaintiff in opposition.³ In so doing, Defendants have created a question of fact as to which photographs accurately depict the display which allegedly caused Plaintiff's injury. Indeed, on its direct motion, the Defendants submit a video which shows the area in which Plaintiff was injured for the time period immediately before the

³ As Mr. Muniz's photograph appears to show a display with no defect, it is surprising that Defendants failed to submit said photograph as an exhibit to their direct summary judgment motion.

Plaintiff's accident, as well as the aftermath. See Exhibit G of the Wallace Affirmation.

Although the video appears to show Plaintiff cutting her foot on the bottom of a display case, the quality of the video is not sufficient to permit the viewer to compare that display case with the photographs that have been submitted by the parties. Defendants did not present the Court with any still photographs from that video in reply in order to support their argument that Plaintiff's photographs were not taken on the date of the accident and/or that they do not depict the display in question. Accordingly, there is a question of fact regarding the identity and condition of the display in question and Defendants' motion for summary judgment is denied.

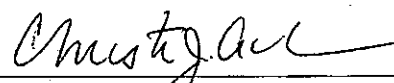
The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Therefore, it is hereby

ORDERED that the Defendants' motion is DENIED; and it is further

ORDERED that the parties shall appear for the previously scheduled settlement conference on **August 1, 2019** at 9:30 am. Please refer to Section III(F) of the Court's Individual Part Rules regarding the documents due on or before that date, if not already submitted.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
June 4, 2019


CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF