

Piotrowski v 155 S. Broadway, Inc.

2019 NY Slip Op 34671(U)

September 19, 2019

Supreme Court, Nassau County

Docket Number: Index No. 0600486/18

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 8

HELEN AND JOSEPH PIOTROWSKI,

X

Plaintiffs,

Index No. 0600486/18
Motion Sequence...02
Motion Date...07/15/19

-against-

155 SOUTH BROADWAY, INC.,
PETER L. SAMAHA and LYNN SAMAHA,

Defendants.

X

Papers submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing the papers, the motion by the Defendants, 155 SOUTH BROADWAY, INC., PETER L. SAMAHA and LYNN SAMAHA, (hereinafter collectively referred to as "Defendants"), seeking an Order, pursuant to CPLR § 3212, granting them summary judgment dismissing the Complaint of the Plaintiffs, HELEN PIOTROWSKI ("Helen") and JOSEPH PIOTROWSKI ("Joseph"), is decided as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, Helen, on January 18, 2015 at approximately 4:15 p.m., when she allegedly slipped and fell on ice in the parking lot of a McDonald's restaurant, located at the

Defendants' premises at 155 South Broadway, Yonkers, New York (*See* Bill of Particulars, dated February 28, 2017, annexed to Motion as Exhibit "C"). The moving Defendants are the owners of the McDonald's restaurant and adjacent parking lot.

The Plaintiff, Helen, testified at her deposition that she slipped and fell after leaving the McDonald's while walking back to her car where her husband, Joseph, was waiting (*See* Plaintiff, Helen's Deposition Transcript at pp. 9-11, annexed to Motion as Exhibit "D"). Helen testified that the weather at the time was "drizzling and...freezing cold" (*Id.*). She was carrying a tray with drinks on it as she left the McDonald's and the accident occurred on her way back to the car (*Id.* at pp. 11, 15). Helen did not see the alleged patch of ice on her way into the restaurant (*Id.* at p. 22). She also did not see the patch of ice while she was walking out of the McDonald's (*Id.* at p. 23). As Helen was walking back to the car, her right foot slipped on ice which caused her to fall to the ground (*Id.* at p. 19).

Plaintiff, Joseph, testified at his deposition that he did not witness his wife fall, but did see her after the fall (*See* Plaintiff Joseph's Deposition Transcript at p. 7, annexed to Motion as Exhibit "E"). Joseph learned that his wife had fallen when someone knocked on his window and told him "I think your wife is hurt" (*Id.*). Thereafter, Joseph observed his wife laying on the ground on ice and water (*Id.*).

In support of their motion, the Defendants submit the deposition testimony of Teresa Blackburn, the Shift Manager employed by the subject McDonald's who was present at the time of the Plaintiff's fall (*See* Blackburn Deposition Transcript at p. 12, annexed to Motion as Exhibit "F"). Ms. Blackburn testified that she did not have any

independent recollection of the approximate time the Plaintiff's accident occurred (*Id.* at pp. 11-12). Upon her memory being refreshed by reviewing a copy of the incident report, Ms. Blackburn testified that she thought the accident was at 4:20 p.m. (*Id.*). Ms. Blackburn testified that the weather was "raining or snowing, and it was very cold outside" on the date in question (*Id.*). Ms. Blackburn first learned that there was an accident on the property when someone verbally called from the door that someone had fallen outside (*Id.* at p. 13).

According to Ms. Blackburn's testimony, there was an inspection process in place for the parking lot in January of 2015 (*Id.* at pg. 29). Ms. Blackburn explained that they had "daily travel paths" which consists of doing a "checklist to check each area of the store, and then every 30 minutes we do an outside travel path to make sure that there's no slippery areas in the front or garbage, no overflowing cans, things of that nature" (*Id.*). Ms. Blackburn further testified that along with her, a maintenance person named "Manuel" performed the daily travel paths (*Id.*). If any issues were found outside such as ice, the maintenance person would shovel and/or put salt down if needed. (*Id.* at pg. 39). When asked to further specify whether Ms. Blackburn and Manuel walk the travel path "side by side" or whether they "sort of branch off", Ms. Blackburn testified that they "go off path from each other" (*Id.* at p. 32).

The Court takes particular note that Ms. Blackburn initially testified that she did have an independent recollection of conducting the daily travel paths on January 18, 2015, the most recent of which would have been at 4:00 p.m., she subsequently testified "I

can't say for absolutely sure" whether she had an independent recollection of how the 4:00 p.m. travel path went (*Id.* at pp. 30-32).

Ms. Blackburn also confirmed that the subject McDonald's does not keep any log or record regarding the daily travel paths (*Id.* at p. 34). Ms. Blackburn could not recall having any issues regarding ice formation in the parking lot prior to the date of Plaintiff's accident. Per Ms. Blackburn, no complaints were made regarding ice in the parking lot prior to the subject accident. Following the accident, Ms. Blackburn testified that steps were taken to alleviate any ice issues, to wit, checking the dining room, curbs, and sidewalk. Salt was applied to the sidewalk *after* the Plaintiff's fall at 4:20 p.m. With specific regard to the subject parking lot, however, Ms. Blackburn did not think anything was done because they did not "find any ice patches that day that [she could] recall" (*Id.* at p. 35).

An incident report was completed by Ms. Blackburn shortly after the Plaintiff's fall (*See* Incident Report, dated 1/18/15, annexed to Motion as Exhibit "G"). Per Ms. Blackburn, the words used to describe the incident were a combination of her own and that of the Plaintiff. The Incident Report reads, in pertinent part, as follows: "FELL LEAVING STORE, CROSSING DT LANE. SLIPPED ON ICE, FELL & HURT LEFT KNEE. AMBULANCE WAS CALLED..."

The Defendants now move for summary judgment arguing that they did not have actual or constructive notice of the alleged dangerous condition, nor did they cause or create such condition. In opposition, the Plaintiffs contend that the Defendants failed to meet their initial burden establishing their *prima facie* entitlement to summary judgment

due to lack of evidence demonstrating when the accident site was last cleaned or inspected prior to the Plaintiff's fall.

Legal Analysis

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v. Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395, 404 [1957]). A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of such condition for a sufficient length of time to discovery and remedy it (*Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]; *Mehta v. Stop & Shop Supermarket Co., LLC*, 129 A.D.3d 1037 [2d Dept. 2015]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611 [2d Dept. 1987]; *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 133 [2d Dept. 1986]).

Furthermore, to meet its burden on the issue of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the Plaintiff's fall (*See Sartori v. JP Morgan Chase Bank, N.A.*, 127 A.D.3d 1157 [2d Dept. 2015]). "Mere reference to general cleaning practices with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*Herman v. Lifplex, LLC*, 106 A.D.3d 1050 [2d Dept. 2013]; *Rodriguez v. Shoprite Supermarkets, Inc.*, 119 A.D.3d 923, [2d Dept. 2014]).

Here, the Defendants failed to establish, prima facie, their entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate material issues of fact. While the Defendants' witness, Ms. Blackburn, testified generally regarding the inspection procedures that were in place on the date in question, the record is devoid of any evidence that shows when the specific accident location was last inspected and/or cleaned. Indeed, while Ms. Blackburn testified that she and the maintenance worker, Manuel, conduct the travel paths together, she candidly conceded that they "go off path from each other." In the absence of any sworn testimony from the maintenance worker, Manuel, the Defendants cannot demonstrate, prima facie, when the accident location was last inspected thereby warranting denial of Defendants' motion. The Defendants' argument that the Plaintiff elected not to depose Manuel has no bearing on the fact that it is the Defendants' initial burden to establish their prima facie entitlement to summary judgment.

As the Defendants failed to satisfy their prima facie burden, their motion for summary judgment is denied, regardless of the sufficiency of the opposing papers (*See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, *supra*).

Parenthetically, however, even if the Defendants met their prima facie burden, the Plaintiffs' opposition papers present clear questions of fact as to who actually inspected the area of the Plaintiff's fall and whether the Defendants by their own conduct caused and/or contributed to the subject dangerous icy condition that existed on the property.

Accordingly, it is hereby,

ORDERED, that the motion by the Defendants, 155 SOUTH BROADWAY, INC., PETER L. SAMAHA and LYNN SAMAHA, seeking an Order, pursuant to CPLR § 3212, granting them summary judgment dismissing the Complaint of the Plaintiffs, HELEN PIOTROWSKI and JOSEPH PIOTROWSKI, is **DENIED**.

This constitutes the decision and Order of this Court.

Dated: Mineola, New York
September 19, 2019



Hon. Randy Sue Marber, J.S.C.

ENTERED

SEP 19 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE