

Nelson v AMF Bowling Ctrs., Inc.

2019 NY Slip Op 34784(U)

August 5, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 17-604926

Judge: William G. Ford

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SHORT FORM ORDER

INDEX No. 17-604926
CAL. No. 18-02354OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

P R E S E N T :

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1-17-19
ADJ. DATE 4-4-19
Mot. Seq. # 001 - MG; CASEDISP

JUDI NELSON,

Plaintiff,

- against -

AMF BOWLING CENTERS, INC.,

Defendant.

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by the defendant, dated December 18, 2018; Answering Affidavits and supporting papers by the plaintiff, dated March 14, 2019; Replying Affidavits and supporting papers by the defendant, dated April 3, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant AMF Bowling Centers, Inc., for summary judgment dismissing the complaint against it is granted.

This action was commenced by plaintiff Judi Nelson to recover damages for injuries she allegedly sustained on November 27, 2015, when she tripped and fell at AMF Babylon Lanes, a bowling alley located at 430 Sunrise Highway, West Babylon, New York. In her bill of particulars, plaintiff alleges that she tripped and fell due to a "defective and dangerous condition" at lane number 47.

Defendant AMF Bowling Centers, Inc. (AMF), now moves for summary judgment in its favor, arguing that it did not create the alleged dangerous condition, and did not have actual or constructive notice thereof. In support of its argument, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, transcripts of three nonparty witnesses' deposition testimony, a copy of a "customer incident report," and a compact disk containing video footage.

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Plaintiff testified that on the date in question, she was participating in a bowling tournament at the AMF Babylon bowling alley. She indicated that she was a “very good tournament bowler” and had participated in tournaments for approximately five years prior to the subject incident. Plaintiff stated that bowling tournaments are held at many different bowling alleys and that prior to bowling on a lane, she would often “test” the lane to find out whether her foot was “going to stick or not,” “[b]ecause if you stick, you’re going to fall.” She testified that such testing would help her decide whether or not to wear a “slider sock” while playing on a lane. Plaintiff explained that a slider sock is a piece of cloth that is affixed to the front portion of a player’s bowling shoe, allowing it to glide on the floor. She stated that she was familiar with AMF Babylon’s lanes from participating in prior tournaments there, and knew that her foot would “stick on them,” which informed her decision to wear a slider sock on the date of her accident.

Plaintiff testified that she usually bowled tournaments in a six-member group and that one of the group’s members, “Vinny,” was usually tasked with inspecting the “approach” area of the bowling lane, between the chairs and the foul line. She stated that he would inspect it and rub his foot over the area, a practice that she observed in a video recording of the subject accident. Plaintiff acknowledged that a second, unknown male from her bowling group also inspected the same area prior to her accident. Regarding the circumstances of her fall, she indicated that she “picked up [her] ball, went to throw it . . . [and] just went down.” Plaintiff testified that she did not know what caused her to fall until afterwards, when she observed that a 4 to 6 inch piece of wood was protruding from the floor of the approach to what she believed was lane 46, having been pulled up by her toe sleeve. Asked to explain further, she stated that she assumes there was a splinter in the wood flooring and that as her foot slid into it, her shoe became caught on the splinter, pivoting her forward and exposing the splintered piece of flooring. Upon questioning, plaintiff denied seeing the splinter at any time prior to her fall, and acknowledged that three people, including one person who also used a slider sock, bowled successfully on the lane in question prior to her fall. Asked what became of the large splinter, she indicated that AMF employees took it and “ran with it.”

Anthony Mahoney testified that he is employed by Bowlmor AMF Corporation as an operations manager and that his duties include overseeing the day-to-day operations of the AMF Babylon bowling alley. He stated that AMF Babylon employs a facilities manager and three mechanics who perform maintenance and make any necessary repairs to the bowling lanes. Questioned as to the inspection practices at the bowling alley, Mr. Mahoney indicated that there is a general practice of oiling the lanes, sweeping out the gutters, and using a dust broom on the “approach area and the settee area,” especially before tournaments. He testified that such preparations are supervised by him, but are mainly performed by the bowling alley’s facilities manager and mechanics. Mr. Mahoney stated that after the mechanics complete their tasks, he performs a visual inspection of each lane.

Regarding the date in question, Mr. Mahoney testified that lanes 33 through 56 were reserved for the tournament, which was to commence at approximately 7:00 p.m. He indicated that while the bowling alley had opened at 11:00 a.m., he arrived at 4:00 p.m. to begin his shift. He stated that preparation of lanes 33 through 56 for the tournament would have commenced at approximately 5:00 p.m., after which he inspected each lane, finding nothing wrong. He further stated that he had not received any complaints of splintered wood at the approach to any of the lanes prior to plaintiff’s accident. Mr. Mahoney testified that plaintiff’s accident occurred in the area of lanes 47 and 48. He further testified that plaintiff handed him an approximately one-inch piece of wood, claiming that it was what caused her fall, prompting him to perform

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an inspection of the area. Mr. Mahoney stated that “the lane looked fine” to him, but that one of the alley’s mechanics, Eric Falkstrom, also inspected the location. He indicated that he observed Mr. Falkstrom rub the area in question with a rag.

Nonparty Vincent Lore testified that after viewing the surveillance video of the accident scene, he saw nonparty Scott Teitler inspect the approach to lane 47 at approximately 7:17 p.m. Then, Mr. Lore stated that he saw himself take a practice throw of his bowling ball on lane 47 at approximately 7:21 p.m., saw Mr. Teitler throw a ball down the same lane directly after him, and that neither encountered any issues with the approach. He indicated that following plaintiff’s fall, he inspected the middle of the approach to lane 47 and observed a one-inch wide, four-to-six-inch long piece of wood flooring was “curled up.” Mr. Lore testified that this was the first time he had seen the piece of flooring in that condition. Mr. Lore further testified that there was no water, liquid, gum, or any other substance in the area.

Nonparty Eugene DeFazio testified that he is plaintiff’s “significant other,” and that he was present at the time of her incident. He stated that he did not observe any splintered wood at the approach to lane 47 prior to plaintiff’s fall, nor has he seen splintered flooring at the approach of any bowling lane in his 51 years of experience. Asked to describe the splinter of wood that was exposed after plaintiff’s fall, he indicated that it was six inches long and tapered from approximately one-inch wide down to a point. Finally, Mr. DeFazio testified that it was he who filled out the accident report on plaintiff’s behalf, because she was unable to write at the time.

Nonparty Scott Teitler testified that he was a member of plaintiff’s bowling group on the incident date, that he has been a bowler for 42 years, and that he has been employed by “many” bowling alleys in the past. He indicated that despite his years of experience, he has only seen splintered wood on a bowling lane’s approach “[m]aybe once or twice,” and that on those occasions it was impossible to see the splinter until after it had been pulled up by something. Upon being shown video footage of the accident area at 7:17 p.m. and 7:19 p.m. on the date in question, he testified that he saw himself performing a pre-bowling inspection of lanes 47 and 48, and did not find anything out of the ordinary. The video footage being advanced to 7:21 p.m., Mr. Teitler saw himself throw a ball down lane 47 without incident, immediately prior to plaintiff’s fall. Asked if he was “a hundred percent sure that had [he] seen something sticking up from the approach [prior to plaintiff’s fall] that [he] would have told somebody,” he responded “yes.”

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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O’Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157 [2011]).

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The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). In a premises liability case, a defendant real property owner who moves for summary judgment “has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence” (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137, 61 NYS3d 523 [2017]; *see Gani v Ave. R Sephardic Congregation*, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]). 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” (*Torre v Aspen Knolls Estates Home Owners Assn., Inc.*, 150 AD3d 789, 790, 54 NYS3d 84 [2d Dept 2017]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]). “When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed” (*Reed v 64 JWB, LLC*, 171 AD3d 1228, 1229, 98 NYS3d 636 [2d Dept 2019]; *see McMahon v Gold*, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]). Further, “the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case” (*Riviere v City of New York*, 127 AD3d 720, 720-721, 7 NYS3d 219 [2d Dept 2015]). Finally, to meet its prima facie burden on the issue of lack of constructive notice, “the moving defendant must offer evidence as to when the area at issue was last cleaned or inspected before the accident” (*Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948, 94 NYS3d 318 [2d Dept 2019]; *see Reed v 64 JWB, LLC, supra*; *Rong Wen Wu v Arniotes*, 149 AD3d 786, 50 NYS3d 563 [2d Dept 2017]).

AMF established a prima facie case of entitlement to summary judgment in its favor (*see Reed v 64 JWB, LLC, supra*; *Saggio v Town of Islip*, 78 AD3d 922, 910 NYS2d 665 [2d Dept 2010]; *Stelter v Cordes*, 146 AD 300, 130 NYS 688 [2d Dept 1911]); *see generally Alvarez v Prospect Hosp., supra*). AMF demonstrated, prima facie, that its employee, Mr. Mahoney, inspected the accident location at some time between 4:00 p.m. and 6:45 p.m. on the date in question. AMF further demonstrated, prima facie, through the deposition testimony of the witnesses, that it did not create a dangerous condition, that it did not receive any complaints of a dangerous condition, and that any dangerous condition was not “visible and apparent.” Specifically, each of the deposed witnesses denied seeing anything unusual at the approach to lane 47 of the AMF Babylon bowling alley prior to plaintiff’s fall (*see generally Hagan v City of New York*, 166 AD3d 590, 87 NYS3d 325 [2d Dept 2018]). In essence, AMF established, prima facie, that the alleged dangerous condition, if any, was a latent defect and not able to be discovered absent extraordinary measures (*see Reed v 64 JWB, LLC, supra*). The burden, thus, shifts to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

Plaintiff fails to raise a triable issue (*see generally Kulchinsky v Consumers Warehouse Ctr., Inc.*, 134 AD3d 1068, 21 NYS3d 721 [2d Dept 2015]). In opposition, plaintiff submits only her attorney’s affirmation. Therein, plaintiff argues that defendant’s evidence is inadmissible, that AMF has not proved, as a matter of law, that it did not create or negligently fail to discover the dangerous condition, and that triable issues remain “as to whether plaintiff assumed the risk of the unsafe, hidden, trap of the broken shard in the approach area.” Initially, the Court notes that plaintiff’s arguments regarding the admissibility of the submitted deposition transcripts, the video footage, and the “customer incident report” are unavailing. Each of the deposition transcripts submitted to the Court is accompanied by a certification page signed by the relevant stenographer, and plaintiff does not contest their accuracy (*see Tsai Chung Chao v Chao*, 161

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AD3d 564, 78 NYS3d 297 [1st Dept 2018]; *Cirald v County of Westchester*, 147 AD3d 813, 47 NYS3d 95 [2d Dept 2017]). Further, as to the video and incident report, both were identified and authenticated by witnesses at their depositions (*see generally New York v Patterson*, 93 NY2d 80, 688 NYS2d 101 [1999]; *Zegarelli v Hughes*, 3 NY3d 64, 781 NYS2d 488 [2004]).

As to the alleged dangerous condition, plaintiff has not adduced any evidence that such condition was detectable prior to plaintiff's slide sock exposing it by force. It is well established "that the failure to make a diligent inspection constitutes negligence only if such inspection would have disclosed the defect" (*Reed v 64 JWB, LLC, supra* at 1229, quoting *Ferris v County of Suffolk*, 174 AD2d 70, 76, 579 NYS2d 436 [2d Dept 1992]). Here, not only did the witnesses deny observing any visible defect in the approach to lane 47 prior to plaintiff's fall, multiple people walked on, and bowled on, such surface without sensing cracked or splintered wood (*see Kane v Peter M. Moore Constr. Co., Inc.*, 145 AD3d 864, 44 NYS3d 141 [2d Dept 2016]).

Accordingly, the motion by defendant AMF Bowling Centers, Inc., for summary judgment dismissing the complaint against it is granted.

Dated: August 5, 2019

Riverhead, New York



WILLIAM G. FORD J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION