

Caulker v TJX Cos., Inc.
2020 NY Slip Op 30575(U)
January 6, 2020
Supreme Court, Queens County
Docket Number: 706229/17
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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FANTA CAULKER,
Plaintiff,

Index No.: 706229/17
Mot. Date: 12/17/19
Mot. Seq. 4

-against-

THE TJX COMPANIES, INC., THE TJX
COMPANIES INC D/B/A MARSHALLS, and
ANKAMAR INC.,
Defendants.

FILED
JAN - 8 2020
COUNTY CLERK
QUEENS COUNTY

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The following papers read on this motion by defendants The TJX Companies, Inc. and The TJX Companies Inc. d/b/a Marshalls (collectively, Marshalls) for an order, pursuant to CPLR 3212, granting summary judgment to Marshalls, severing and dismissing each claim and cross-claim asserted against them, on the grounds that there exists no material issues of fact regarding Marshalls' non-liability; and directing the Clerk of the Court to enter judgment severing and dismissing each claim, cross-claim, and cause of action asserted against Marshalls in this action; and on the cross-motion by defendant Ankamar, Inc. (Ankamar) for an order, pursuant to CPLR 3212, granting summary judgment to Ankamar and severing and dismissing the common-law and contractual indemnification asserted by Marshalls against Ankamar; and directing the Clerk of the Court to enter judgment severing and dismissing the cross-claims for common-law and contractual indemnification asserted by Marshalls against Ankamar.

	PAPERS
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	EF 76-77; 79-93
Memorandum of Law in Support.....	EF 78
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 102-112
Answering Affidavits-Exhibits (by Plaintiff).....	EF 95; 97-101
Memorandum of Law in Opposition (by Plaintiff).....	EF 96
Replying Affidavits-Exhibits (by Marshalls).....	EF 113-115
Replying Affidavits-Exhibits (by Marshalls).....	EF 116
Replying Affidavits-Exhibits (by Ankamar).....	EF 117

Upon the foregoing papers, it is ordered that motion by Marshalls is denied; and defendant Ankamar's cross-motion is denied, as premature.

The underlying action arises out of a slip-and-fall whereby plaintiff Fanta Caulker alleges that, on or about September 15, 2015, at approximately 9:10 am, she was walking within a "Marshalls" department store, located at 168-23 Jamaica Avenue, Queens, New York, when she slipped on a "wet and slippery condition" within the store. Plaintiff maintains that she sustained serious personal injuries due to the negligence of defendants. It is undisputed that Marshalls owned, managed, maintained, operated and controlled the subject store where the accident occurred.

Marshalls' motion for an order, pursuant to CPLR 3212 granting summary judgment to Marshalls, severing and dismissing each claim and cross-claim asserted against them, on the grounds that there exists no material issues of fact regarding Marshalls' non-liability; and directing the Clerk of the Court to enter judgment severing and dismissing each claim, cross-claim, and cause of action asserted against Marshalls in this action, is denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965].) Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc. & Indem. Co.*, 62 NY2d 916 [1984].) The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980].)

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries. (*See Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]). However,

absent a duty of care, there is no breach and no liability. (*Id.*; see also *Marasco v C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]).

A landowner has a duty to maintain their property in a reasonably safe condition (see *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Mathew v A.J. Richard & Sons*, 84 AD3d 1038, 1039 [2011]). A property owner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all of the attendant circumstances, "including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [internal quotation marks omitted]; see *Cupo v Karfunkel*, 1 AD3d 48, [2d Dept. 2003].) "[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury' " (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [some internal quotation marks omitted], quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993] [internal quotation marks omitted]; see *Aguayo v New York City Hous. Auth.*, 71 AD3d 926, 927 [2d Dept 2010].)

A defendant who moves for summary judgment in a slip-and-fall case 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 *Knack v Red Lobster*, 98 AD3d 473 [2d Dept 2012]; *Sloane v Costco Wholesale Corp.*, 49 AD3d 522, 523 [2d Dept 2008]; see also *Kramer v SBR & C.*, 62 AD3d 667 [2d Dept 2009]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

It is undisputed that Marshalls and non-party, US Maintenance Inc., entered into a contract for US Maintenance Inc. to perform floor care and janitorial services at the subject accident site, and, thereafter, US Maintenance Inc. subcontracted with defendant Ankamar to assume all the duties and responsibilities of US Maintenance Inc., including floor care.

Marshalls established its *prima facie* entitlement to judgment, as a matter of law, by submitting evidence that it neither created nor had actual or constructive notice of the

condition that allegedly caused the plaintiff's accident. In support, defendant Marshalls submits, *inter alia*: the examination before trial transcript testimony of Herbert Bull, the owner of Ankamar, in September, 2015, who testified that Ankamar was responsible for performing janitorial work at the store, including mopping and only Ankamar employees performed the morning cleaning services at the store; the examination before trial transcript testimony of Jennifer Morrison, a Marshalls employee on duty at the time of the accident, who was working in the aisle next to the aisle where the plaintiff slipped and who testified that she was not apprised of a wet and slippery floor at any time prior to the accident; and the examination before trial transcript testimony of plaintiff herself, wherein she testifies, *inter alia*, that: prior to the accident, she did not see water on the floor and there were no Marshalls employees in the area where the accident occurred. Marshalls also submits a twenty-six (26) minute video of surveillance footage from the time leading up to the subject accident, during the accident, and immediately after the accident, which shows that no Marshalls employees were in the specific area where the accident occurred at the time of the accident, and which depicts an employee of Ankamar, Samuel Reyes, mopping the area of the floor in the area where the accident happened, from 8:58 a.m. to 9:01 a.m. Finally, the surveillance video footage also shows that three (3) customers traversed the area prior to the plaintiff slipping and after Mr. Reyes mopped, with no difficulty whatsoever.

Plaintiff raises a triable issue of fact in opposition. Plaintiff submits, *inter alia*, her own examination before trial transcript testimony, wherein she testifies, *inter alia*, that: she did not see any caution signs in the area where she fell; she did not see the water before she slipped, she did see water on the floor after she slipped, and that she did not see anyone cleaning the floor area where she fell prior to her accident. Plaintiff established that there were no warning or caution signs near the area where the plaintiff fell to warn of the possible presence of a wet condition. The issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether Marshalls had either actual or constructive notice

of a defective condition, whether Marshalls created a defective condition causing plaintiff's accident, and whether Marshalls acted reasonably under the circumstances (See *Gonzalez v American Oil Co.*, 42 AD3d 253 [1st Dept 2007]). On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, Marshalls' motion must be denied.

Turning now to the cross-motion by defendant Ankamar for an order granting it summary judgment on the cross-claims for common-law and contractual indemnification asserted by co-defendant Marshalls against Ankamar, the cross-motion is decided as follows:

As the issue of Marshalls' negligence has not yet been decided, the issues of common-law and contractual indemnification are not yet ripe. As it has not yet been adjudged as to whether Marshalls is liable to the plaintiff, the issue of whether cross-moving co-defendant Ankamar is liable to Marshalls is not yet ripe (*Marano v Commander Electric, Inc.*, 12 AD3d 571 [2d Dept 2004]; *Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923 [2d Dept 2003]; *Prenderville v International Service Systems*, 10 AD3d 334 [1st Dept 2004]; *Gomez v National Center for Disability Services, Inc.* 306 AD2d 103 [1st Dept 2003]; *Northland Associates v Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 [4th Dept 2004]).

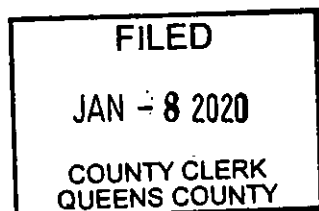
Accordingly, it is

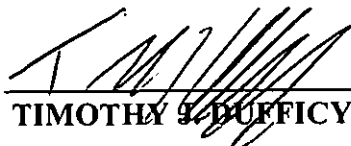
ORDERED that the motion by defendant Marshalls is denied; and it is further

ORDERED that the cross-motion by co-defendant Ankamar is denied, as premature.

The foregoing constitutes the decision and order of the Court.

Dated: January 6, 2020




TIMOTHY S. DUFFICY, J.S.C.