

Nita v Good Samaritan Hosp. Med. Ctr.
2020 NY Slip Op 34855(U)
October 22, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 600128/2018
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 600128/2018
CAL. No. 2019021500T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 3/26/20
ADJ. DATE 8/6/20
Mot. Seq. # 001 MD

-----X
MICHELLE NITA,

Plaintiff,

- against -

GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, d/b/a GOOD SAMARITAN
THRIFT SHOP,

Defendant.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, filed March 2, 2020; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiff, filed March 11, 2020; Replying Affidavits and supporting papers by defendant, filed July 1, 2020; Other ; it is,

ORDERED that the motion by defendant Good Samaritan Hospital Medical Center, d/b/a Good Samaritan Thrift Shop, for summary judgment dismissing the complaint is denied.

Plaintiff Michelle Nita commenced this action to recover for personal injuries she allegedly sustained when a clothing rack fell toward her at the commercial premises known as Good Samaritan Thrift Shop, located at 179 Deer Park Avenue in Babylon, New York, on July 31, 2017. The subject premises allegedly was operated by defendant Good Samaritan Hospital Medical Center, d/b/a Good Samaritan Thrift Shop, at the time of the subject accident. Plaintiff alleges that defendant was negligent in, among other things, permitting a dangerous condition to exist, namely a clothing rack, and failing to properly maintain and inspect the subject premises.

Defendant now moves for summary judgment dismissing the complaint. It argues, among other things, that no defective or dangerous condition existed on the subject premises, and that it neither created the alleged dangerous or defective condition nor had actual or constructive notice of its existence.

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Defendant also contends that plaintiff is unable to identify the cause of her accident without engaging in speculation. In support of its motion, defendant submits, among other things, the transcripts of the deposition testimony of plaintiff and Reissa Preston, and the affidavit of Reissa Preston. In opposition, plaintiff argues, in part, that defendant's motion is untimely, and that triable issues of fact remain as to the sufficiency of defendant's inspections of the subject premises. In support of her opposition, plaintiff submits, among other things, the affirmation of her attorney.

At plaintiff's deposition, she testified that she was standing, facing the subject clothing rack, when it fell toward her. Clothes allegedly were hanging from the subject clothing rack at the time of the accident. Plaintiff stated that she was not touching the subject clothing rack before it fell toward her. When asked if there was anyone else near the subject clothing rack at the time that it struck her, plaintiff stated that she believed that there was a woman present. She clarified that the woman was not facing her at that time. Plaintiff explained that she caught the cross bar of the subject clothing rack with her left hand, but she was unable to prevent clothing rack from landing on her. The subject clothing rack allegedly never fell to the floor. Plaintiff testified that she visited the subject premises on a weekly basis for the year preceding the accident, and that she had made no prior complaints regarding the store.

At Preston's deposition, she testified that she has volunteered as a cashier at Good Samaritan Thrift Shop since approximately 2015. Preston allegedly volunteered at the subject premises two times per week in July of 2017. Preston further testified that she was on the premises at the time of the accident, but she did not witness the accident. According to her deposition testimony, after hearing a crash, she observed that a clothing rack was on top of plaintiff, and that plaintiff was on the floor. The subject clothing rack allegedly was located in the men's department and had at least four metal feet. Preston allegedly did not recall how many of those feet were and were not in contact with the floor after the accident.

In her affidavit, Preston states that she has served as a volunteer cashier at Good Samaritan Thrift Shop since approximately 2015. She explains that volunteers and employees perform daily opening and closing inspections, which include inspecting all clothing racks. She avers that no employee observed any defects with regard to the clothing racks, and that no employee received any complaints regarding the same. The clothing racks allegedly were in the same condition and were placed in the same manner for years prior to the subject accident.

As an initial matter, CPLR 3212 (a) provides, in pertinent part, that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (see *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 118 NYS3d 155 [2d Dept 2020]). The note of issue was filed by plaintiff on November 1, 2019. The parties do not dispute that 120 days from November 1, 2019, was February 29, 2020, which was a Saturday. Pursuant to General Construction Law § 25-a (1), when a period of time within which an act is required to be performed ends on a Saturday, "such act may be done on the next succeeding business day." Thus,

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defendant's motion for summary judgment was timely, as it was filed on the next business day, Monday, March 2, 2020.

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937 [1995]; *Bishop v Pennsylvania Ave. Mgt., LLC*, 183 AD3d 685, 123 NYS3d 685 [2d Dept 2020]; *Kelly v Roy C. Ketcham High Sch.*, 179 AD3d 653, 113 NYS3d 572 [2d Dept 2020]). In general, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question for the jury to resolve (*see Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]; *Calderon v Cruzate*, 175 AD3d 644, 107 NYS3d 399 [2d Dept 2019]; *Poliziani v Culinary Inst. of Am*, 167 AD3d 790, 89 NYS3d 272 [2d Dept 2018]). In a premises liability action, a defendant property owner, or a party in possession or control of real property, moving for summary judgment has the initial burden of making a *prima facie* showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it (*see Kelly v Roy C. Ketcham High Sch.*, *supra*; *Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 114 NYS3d 118 [2d Dept 2019]; *Chang v Marmon Enterprises, Inc.*, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]). Reference to general cleaning and inspection practices in the absence of evidence of specific cleaning or inspection of the subject area is insufficient to establish a lack of constructive notice (*see Saporito-Elliott v United Skates of Am., Inc.*, 180 AD3d 830, 119 NYS3d 204 [2d Dept 2020]; *Fortune v Western Beef, Inc.*, 178 AD3d 671, 115 NY.S.3d 93 [2d Dept 2020]; *Baptiste v Ditmas Park, LLC*, 171 AD3d 1001, 98 NYS3d 280 [2d Dept 2019]). However, constructive notice will not be imputed when the defect is latent and would not be discoverable upon a reasonable inspection (*see Reed v 64 JWB, LLC*, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019], *lv denied* 35 NY3d 902, 124 NYS3d 308 [2020]; *Marinero v Reynolds*, 152 AD3d 659, 59 NYS3d 87 [2d Dept 2017]; *Taub v JMDH Real Estate of Garden City Warehouse, LLC*, 150 AD3d 1301, 56 NYS3d 220 [2d Dept 2017]).

A defendant can also establish its *prima facie* entitlement to judgment as a matter of law in a premises liability case by demonstrating that the plaintiff is unable to identify the cause of his or her accident without engaging in speculation (*see Segal v Haverstraw Mar. Corp.*, 176 AD3d 887, 107 NYS3d 893 [2d Dept 2019]; *McCarthy v Jones*, 139 AD3d 682, 30 NYS3d 332 [2d Dept 2016]; *Peluso v Red Rose Rest., Inc.*, 106 AD3d 972, 965 NYS2d 603 [2d Dept 2013]). A plaintiff's inability to identify the cause of his or her accident is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see Segal v Haverstraw Mar. Corp.*, *supra*; *DeForte v Greenwood Cemetery*, 114 AD3d 718, 980 NYS2d 499 [2d Dept 2014]; *West v 1718 Pitkin Ave. Realty, LLC*, 123 AD3d 1020, 999 NYS2d 842 [2d Dept 2014]). Proximate cause may be established in the absence of direct evidence of causation by inference from the facts and circumstances underlying the injury (*see Rivera v Waterview Towers, Inc.*, 181 AD3d 844, 121 NYS3d 140 [2d Dept 2020]; *Cross v Roberts*, 162 AD3d 852, 78 NYS3d 249 [2d Dept 2018]; *Simion v Franklin Ctr. for Rehabilitation & Nursing, Inc.*, 157 AD3d 738, 69 NYS3d 64 [2d Dept 2018]). Cases premised on circumstantial evidence require a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be

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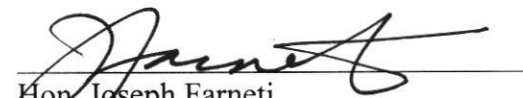
reasonably inferred (*see Simion v Franklin Ctr. for Rehabilitation & Nursing, Inc., supra; Bettineschi v Healy Elec. Contr., Inc.*, 73 AD3d 1109, 902 NYS2d 597 [2d Dept 2010]).

Defendant failed to demonstrate its *prima facie* entitlement to summary judgment dismissing the complaint. Defendant's submissions failed to eliminate triable issues of fact such as whether the subject clothing rack was in a dangerous condition, and whether it lacked constructive notice of the alleged dangerous condition (*see Rosales v Five Star Carting, Inc.*, 185 AD3d 854, 125 NYS3d 563 [2d Dept 2020]; *Holmes v Macy's Retail Holdings*, 184 AD3d 811, 124 NY3d 582 [2d Dept 2020]). Although defendant provided the store's general inspection policy, the record was devoid of evidence as to when the subject clothing rack was actually inspected relative to plaintiff's accident (*see Taub v JMDH Real Estate of Garden City Warehouse, LLC, supra; Lopez v Marshalls*, 123 AD3d 981, 999 NYS2d 866 [2d Dept 2014]; *Green v Albermarle, LLC*, 107 AD3d 948, 966 NYS2d 904 [2d Dept 2013]; *Gerbi v Tri-Mac Enters. of Stony Brook, Inc.*, 34 AD3d 732, 826 NYS2d 101 [2d Dept 2006]). Moreover, defendant failed to establish, *prima facie*, that alleged dangerous condition was not visible and apparent, and would not have been noticed upon a reasonable inspection (*see Malloy v Montefiore Med. Ctr.*, 183 AD3d 811, 122 NYS3d 532 [2d Dept 2020]; *Fortune v Western Beef, Inc., supra*).

Defendant also failed to establish, *prima facie*, that plaintiff was unable to identify the cause of her accident without resorting to speculation (*see Croshier v New Horizons Resources, Inc., supra; Jaklitsch v Kelly*, 176 AD3d 792, 110 NYS3d 438 [2d Dept 2019]; *cf. Segal v Haverstraw Mar. Corp., supra*). Defendant's submissions indicate that no one was touching the subject clothing rack at the time that it tipped over and struck plaintiff, and thus, it is reasonable to infer that defendant's negligence proximately caused plaintiff's injuries (*see generally Simion v Franklin Ctr. for Rehabilitation & Nursing, Inc., supra; Pajovic v 94-06 34th Rd. Realty Co., LLC*, 152 AD3d 781, 59 NYS3d 138 [2d Dept 2017]; *Petit v VDM Van & Stor. Co.*, 75 AD2d 539, 572 NYS2d 799 [3d Dept 1991]). As defendant failed to meet its *prima facie* burden, summary judgment is denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint is denied.

Dated: October 22, 2020


 Hon. Joseph Farneti
 Acting Justice Supreme Court

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