

**Cashwell v Stop & Shop Supermarket Co. LLC**

2020 NY Slip Op 35183(U)

November 9, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 614567/2018

Judge: Joseph A. Santorelli

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# ORIGINAL

SHORT FORM ORDER

INDEX No. 614567/2018  
CAL No. 202000782OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 6-18-2020  
SUBMIT DATE 10-15-2020  
Mot. Seq. # 05 - MD

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DINA CASHWELL and CHRISTOPHER ANDREW CASHWELL,

Plaintiff,

-against-

THE STOP & SHOP SUPERMARKET COMPANY LLC and SUPER STOP & SHOP #100526,

Defendants.

**THE LAW OFFICE OF GREGORY GOODMAN, P.C.**  
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Upon the following papers numbered 1 to 63 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 15 - 46; Replying Affidavits and supporting papers 47 - 63; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

In this action to recover damages for personal injuries, plaintiff Dina Cashwell moves for an order granting summary judgment on the issue of liability and dismissing the defendants' affirmative defense of comparative negligence. The defendants oppose this application in all respects.

This is an action to recover damages for injuries allegedly sustained by plaintiff Dina Cashwell on July 13, 2017, when she slipped and fell in the Super Stop and Shop supermarket located at 3126 Jericho Turnpike, East Northport, New York. Plaintiff claims that the defendants were negligent in, among other things, "permitting and affirmatively causing an inherently dangerous condition to exist without regard to the safety of patrons" and "failing to warn customers of the slick/slippery unknown substance in the area where customers traversed".

According to plaintiff's testimony, the accident took place inside the frozen food aisle within 5-10 minutes of her entering the supermarket at 9:30 am. The plaintiff was wearing sandals and walking from the front of the store toward the back of the store. She indicated that the store was practically empty when the fall occurred and that it occurred about midway down the aisle. She stated that the ice cream freezer was on her left as she walked down the aisle. She testified that there were approximately

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twenty cardboard boxes of frozen food, with some boxes having plastic shrink wrap around them, in the middle of the aisle on a device that took up half of the aisle. The plaintiff walked to the right of the boxes with the freezers to the right of the plaintiff and the boxes in the middle of the aisle. The plaintiff claims that her left foot “lost traction” due to slipping on water on the floor which caused her to fall to the ground. The plaintiff noticed that the “puddle” of water covered the area from the boxes all the way to the freezers on the right side, which she stated was approximately three feet in length. She then went to customer service to ask for assistance and spoke with the manager on duty, Bill Andrew. She remembered him asking a store associate to check the frozen food aisle and that the associates returned and stated “I think the frozen food is leaking. There’s water on the floor.” The plaintiff claims that the manager then told the associate to have another employee “put yellow cones out and clean it up.” The plaintiff went back to the aisle and took a photo of the aisle. All parties agreed that the yellow cones and employee in the photo were not there when the plaintiff slipped.

Bill Andrew testified at an examination before trial. He testified that he did not ask anyone to go check the aisle and after speaking with the plaintiff went and checked the frozen food aisle himself. He claims that he did not find any water on the floor and that the “shrink wrap” might have condensation but it would not leak onto the floor. He testified in reference to the apparatus upon which frozen foods were brought from the back to the freezers, which he referred to as a “Uboat”, and about the procedures used for loading frozen foods into the freezers. He also testified about how maintenance employees perform what they call a “clean sweep”. He indicated that the “clean sweep” involves, among other things, cleaning up spills, whereby the employee will “walk the store scanning bar codes once an hour from 9:00 am and 8:00 pm, and if there’s any spills, [or] garbage on the floor they react to it.” He explained that the bar codes are placed around the aisles, usually toward the front or back of each aisle in such a distribution that the workers are forced to actually walk up and down the aisles to scan them. The company protocol was to perform a “clean sweep” every hour. On the date of the plaintiff’s injury, the first “clean sweep” was not performed until approximately 10:23 am, even though Andrew testified that one should have been performed at 9:00 am.

The plaintiff now moves for summary judgment in her favor on the issue of liability arguing that the defendants created the condition and have actual or constructive notice of the condition. In opposition, defendants argue that the plaintiff failed to meet her prima facie burden for summary judgment and that even if the Court found that she had met her burden, there are triable issues of fact.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and

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must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

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 Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Frank v JS Hempstead Realty, LLC*, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; *Guzman v State of New York*, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control, or special use of the property (*see Reynolds v Avon Grove Props.*, 129 AD3d 932, 12 NYS3d 199 [2d Dept 2015]; *Chernoguz v Mirrer Yeshiva Cent. Inst.*, 121 AD3d 737, 994 NYS2d 362 [2d Dept 2014]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). However, where none of these factors are present, a party may not be held liable for a dangerous condition on property (*see Reynolds v Avon Grove Props.*, *supra*; *Sobel v City of New York*, 120 AD3d 485, 991 NYS2d 93 [2d Dept 2014]; *Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]). To constitute constructive notice, the condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *see Schubert-Fanning v Stop & Shop Supermarket Co., LLC*, 118 AD3d 862, 988 NYS2d 245 [2d Dept 2014]; *Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]; *Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]). In opposition on the issue of lack of constructive notice, defendant must offer some evidence as to when the subject area was last cleaned or inspected to the time when the plaintiff fell (*see Farren v Board of Educ. of City of N.Y.*, 119 AD3d 518, 988 NYS2d 684 [2d Dept 2014]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 887 NYS2d 215 [2d Dept 2009]). A plaintiff's "inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on

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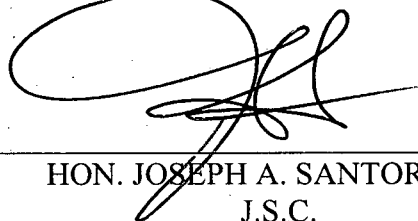
speculation” (*Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; see *Dennis v Lakhani*, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]).

Based upon a review of the motion papers the Court concludes that the plaintiff has failed to establish entitlement to judgment as a matter of law and that there are material and triable issues of fact presented and thus the motion for summary judgment must be denied. Even assuming, arguendo that the plaintiff sustained her initial burden the defendants proffered sufficient facts to necessitate a trial.

The plaintiff’s motion to dismiss the defendants’ affirmative defense of comparative negligence is similarly denied.

The foregoing shall constitute the decision and Order of this Court

Dated: November 9, 2020

  
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HON. JOSEPH A. SANTORELLI  
J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION