

Loper v Stop & Shop Supermarket Co., LLC
2020 NY Slip Op 35188(U)
November 18, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 623927/2017
Judge: Denise F. Molia
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SHORT FORM ORDER

PUBLISH

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CAL. No. 201901173OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 7/28/20
ADJ. DATE 7/31/20
Mot. Seq. # 003 MG; CASEDISP

-----X

SUSAN LOPER,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET
COMPANY, LLC,

Defendant.

-----X

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant, dated June 26, 2020; Answering Affidavits and supporting papers by plaintiff, dated July 1, 2020; Replying Affidavits and supporting papers by defendant, dated July 27, 2020; it is

ORDERED that the motion by defendant for summary judgment dismissing the complaint against it is granted.

This action was commenced by plaintiff Susan Loper to recover damages for injuries she allegedly sustained on October 19, 2015, when she tripped on a potted plant and fell to the ground outside the Stop & Shop grocery store in Riverhead, New York. The subject premises is owned by defendant The Stop & Shop Supermarket Company, LLC.

Defendant now moves for summary judgment in its favor, arguing that it did not create the alleged hazardous condition and had no actual or constructive notice thereof. In support of its motion, defendant submits, among other things, transcripts of the parties' deposition testimony, an affidavit of Janine Cacace, and a copy of a "Clean Sweep" report.

Plaintiff testified that at approximately 2:45 p.m. on the date in question, she entered the Riverhead Stop & Shop supermarket intending to purchase only "one or two things." She indicates that it was "very windy," and the entrance to the store was free of obstructions at such time. Plaintiff avers that at approximately 3:00 p.m., after having made her purchase, she exited the supermarket looking straight ahead. She stated that as she walked out of the door, she tripped and fell on a plastic container of mums

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that “was blown [by wind] into [her] path.” Plaintiff avers that there were multiple potted plants “just blown around that whole area.”

Janine Cacace testified that she has been employed at defendant’s Riverhead supermarket for seven years, and that her current title is customer service manager. She indicated that in 2015 her title was “part-time closer,” meaning that she was the manager for the supermarket’s closing shift, and that her duties included ensuring that the store was clean and well-stocked for the next day’s opening. Ms. Cacace stated that while she does not recall her activities on the date of plaintiff’s alleged incident, the supermarket’s maintenance department was generally responsible for the upkeep of the building’s exterior. Upon questioning, she acknowledged that the supermarket occasionally placed product displays outside the store near its entrance and exit. During October, the items usually included potted mums, pumpkins, and hay bales. She testified that the maintenance department also performed hourly inspections of the entire store pursuant to defendant’s “Clean Sweep” initiative, using a handheld barcode scanner. Ms. Cacace indicated that barcodes were affixed to various locations in the supermarket and that as the inspecting employee viewed each location, he or she would scan its barcode to create a record thereof. The store’s entrance doors were included in the Clean Sweep inspections.

In an affidavit submitted in support of defendant’s motion, Janine Cacace expands upon her deposition testimony, stating that the subject Stop & Shop supermarket has two entrances; the one on the left side is designated “Entrance 1” in Clean Sweep reports, and the one on the right side, is designated “Entrance 2.” She indicates that the October 2015 exterior seasonal product display included potted mums placed on shelving positioned between Entrance 1 and Entrance 2. Ms. Cacace avers that, prior to plaintiff’s alleged incident, she had never been told of any complaints regarding someone tripping on a fallen potted plant. She also uses her affidavit to further explain the Clean Sweep protocols, stating that when hazards are encountered by the employee performing the hourly Clean Sweep inspections, their handheld scanner may be used to electronically document the time the hazard was observed and the time at which it was remedied. Referring to the eight-page Clean Sweep report submitted by defendant in support of its motion, Ms. Cacace indicates that it reflects inspections of Entrance 2 at 3:01:51 p.m., and Entrance 1 at 3:10, with no hazards being recorded.

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, 853, 487 NYS2d 316, 318 [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]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 339, 937 NYS2d 157, 159 [2011]).

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

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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]). 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 *Rong Wen Wu v Arniotes*, 149 AD3d 786, 50 NYS3d 563 [2d Dept 2017]).

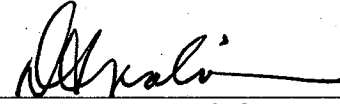
Here, defendant established a prima facie case of entitlement to summary judgment in its favor (see *Hernandes v National Wholesale Liquidators*, 174 AD3d 864, 103 NYS3d 304 [2d Dept 2019]; *Arevalo v Associated Supermarkets, Inc.*, 156 AD3d 852, 65 NYS3d 750 [2d Dept 2017]; see generally *Alvarez v Prospect Hosp.*, *supra*). Through the evidence adduced, defendant demonstrated that it did not create the alleged hazardous condition, that the condition was present for no longer than 15 minutes, and that it received no complaints of such condition. In most cases such as this, a defendant satisfies its burden to “offer evidence as to when the area at issue was last cleaned or inspected before the accident” through testimony of an employee who conducted an inspection prior to an incident. Here, in essence, plaintiff conducted her own “inspection” and acknowledged that no hazardous condition was present as she entered the store 10-15 minutes prior to her alleged fall (see *Mann v Zougras*, 169 AD3d 787, 94 NYS3d 146 [2d Dept 2019]). Thus, the Court need not consider the Clean Sweep report, which was not properly authenticated. The burden then shifts to plaintiff to raise a triable issue (see generally *Vega v Restani Constr. Corp.*, *supra*).

In opposition, plaintiff argues that defendant affirmatively created the alleged dangerous condition. Specifically, plaintiff asserts that the placement of the potted plant upon a concrete bollard prior to its fall into her path of travel was, in and of itself, a negligent act on a “windy” day. Such contention is unavailing. In support of her argument plaintiff submits, among other things, her own affidavit, an affidavit of her husband, and certified meteorological records. It is axiomatic that plaintiff’s alleged incident did not involve the potted plant as it was originally displayed. Rather, she alleges she tripped on the potted plant while it was on the ground and acting as an obstruction in her path of travel. Thus, the alleged defective condition did not arise until the potted plant fell to the ground. Further, there is no evidence that this condition was a recurring one (*cf. Hoppe v Imperial Towers Assoc.*, 181 AD3d 659, 121 NYS3d 324 [2d Dept 2020]). In addition, plaintiff merely speculates that the potted plant was caused to fall to the ground due to the action of wind, and not some other cause, such as another shopper knocking it from its position with his or her shopping cart. There has been no evidence adduced, such as an affidavit of an expert, attesting that the wind on the date in question possessed sufficient strength to push the potted plant from its elevated position. The Court also finds that, as a matter of law, approximately 15 minutes was insufficient time to afford defendant a reasonable opportunity to discover and remedy any hazardous condition (see *Fernandez v JPMorgan Chase Bank, NA*, 170 AD3d 445, 95 NYS3d 196 [1st Dept 2019]; *Mann v Zougras*, *supra*; *Spano v Apogee Retail NY, LLC*, 164 AD3d 1495, 84 NYS3d 203 [2d Dept 2018]). Therefore, plaintiff fails to demonstrate that defendant created the

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alleged hazardous condition, or had actual or constructive notice thereof. Accordingly, the motion by defendant for summary judgment dismissing the complaint against it is granted.

Dated: November 18, 2020



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION