

Ciaramitaro v K. Thompson Foods, LLC

2020 NY Slip Op 35259(U)

October 19, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 603973/2017

Judge: George M. Nolan

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SHORT FORM ORDER

INDEX No. 603973/2017
CAL. No. 2020003200T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 4/9/20 (003)
MOTION DATE 6/11/20 (004)
ADJ. DATE 7/30/20
Mot. Seq. # 003 MotD
004 MD

-----X
FRANK CIARAMITARO and MELISA
CIARAMITARO,

Plaintiffs,

- against -

K. THOMPSON FOODS, LLC, PEPSI-COLA
BOTTLING CO OF NEW YORK and THE
COCA-COLA COMPANY d/b/a COCA-COLA
BOTTLING COMPANY,

Defendants.
-----X

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Upon the following papers read on the e-filed motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by Pepsi-Cola Bottling Company of New York, Inc., filed March 16, 2020, and by K. Thompson Foods, LLC, filed May 18, 2020; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers by plaintiffs, filed July 1, 2020; Replying Affidavits and supporting papers by Pepsi-Cola Bottling Company of New York, Inc., filed July 28, 2020, and by K. Thompson Foods, LLC, filed July 16, 2020; Other ____; it is

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ORDERED that the motion (seq. 003) of Pepsi-Cola Bottling Co. of New York and the motion (seq. 004) by K. Thompson Foods, LLC, are consolidated for the purpose of this determination; and it is further

ORDERED that the motion of defendant Pepsi-Cola Bottling Corp. for summary judgment dismissing the plaintiff's complaint and all cross-claims against it, is denied; and it is further

ORDERED that the motion of defendant K. Thompson Foods, LLC, for summary judgment dismissing the plaintiff's complaint and all cross-claims against it, LLC, is denied.

In this personal injury action, plaintiff, Frank Ciaramitaro (hereinafter "Ciaramitaro") alleges that he slipped and fell on water at a Shop Rite supermarket owned by defendant K. Thompson Foods, LLC (hereinafter "KTF").¹ Plaintiff contends that the water leaked from a refrigerator owned and maintained by defendant Pepsi-Cola Bottling Co. of New York (hereinafter "Pepsi") and located at the end of a checkout aisle in KTF's Shop Rite supermarket. The incident allegedly happened on July 31, 2016.

Pepsi and KTF both move for summary judgment seeking an order dismissing the complaint and all cross-claims against them. In order to establish a *prima facie* case, a plaintiff in a slip-and-fall negligence action must prove either that the defendant created the condition that caused the plaintiff's injuries or that the defendant had actual or constructive notice of the condition (*Schwartz v. Mittleman*, 220 AD2d 656, 632 NYS2d 667 [2d Dept 1995]). However, a defendant who moves for summary judgment in such a 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 (*Britto v. Great Atlantic & Pacific Tea Company, Inc.*, 21 AD3d 436, 799 NYS2d 828 [2d Dept 2004]). "To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v. New York Racing Association, Inc.*, (57 AD3d 598, 599, 869 NYS2d 222 [2d Dept 2008]). Only after the moving defendant satisfies this threshold burden will the court examine the sufficiency of the plaintiff's opposition (*Joachim v. 1824 Church Avenue, Inc.*, 12 AD3d 409, 784 NYS2d 157 [2d Dept 2004]).

In support of its motion, Pepsi submits the pleadings, a transcript of the deposition of plaintiff Frank Ciaramitaro, an affidavit from Daniel De Luca, and a transcript of the deposition of Gregory Aureliano. Pepsi admits that it owned the refrigerator at issue but contends that there is no evidence to show that its refrigerator was leaking, that it did not create the leak, and that it had no actual or constructive notice of any leak. In opposition, plaintiffs submit Ciaramitaro's affidavit, the pleadings, bills of particulars, a transcript of the deposition of Aureliano, a transcript of the deposition of De Luca, a transcript of the deposition of Erika Thompson, and an incident report.

¹Plaintiff Melisa Ciaramitaro makes a claim for loss of services only.

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Pepsi's contention that there is no evidence that its refrigerator was the source of the liquid on the supermarket floor ignores Ciaramitaro's deposition testimony. Ciaramitaro testified that the liquid which caused his fall came from underneath the refrigerator, that he saw "water or liquid of some substance coming from underneath the refrigerator" and he described it as a "continuous stream of water." Although Ciaramitaro also responded "[n]o" when asked if he had "any knowledge as to what the source of that liquid was on the floor," a reasonable fact finder could conclude that the refrigerator was the source of the leak based on Ciaramitaro's testimony that he observed a stream of liquid coming from underneath the refrigerator. Pepsi's contention that the puddle—which Ciaramitaro described as approximately two feet wide and four feet long—came "from some other source," such as rainwater dripping from shopping carts, is appropriately directed toward the trier of fact.

As Pepsi did not establish, as a matter of law, that the water that caused the plaintiff to slip did not come from its refrigerator, its motion for summary judgment must be denied (see *Bautista v. Kysor/Warren*, 96 AD3d 982, 947 NYS2d 162 [2nd Dept 2012]).

In support of its summary judgment motion, KTF submits, among other things, photographs and the deposition transcripts of Ciaramitaro, Thompson, Aureliano, and De Luca. KTF contends that it did not create the complained-of puddle and had no actual or constructive notice thereof. In opposition, plaintiffs submit an affidavit from Ciaramitaro, the pleadings, bills of particulars, transcripts of the depositions of Aureliano, De Luca, and Thompson, and an incident report.

KTF failed to meet its burden of showing that it lacked constructive notice of the puddle. KTF submitted the testimony of Gregory Aureliano, who was a co-manager of the supermarket at the time of the accident. While Aureliano stated that he performed hourly inspections of the supermarket, he could not recall the results of any inspections that day and admitted that he had no independent recollection of what he did on July 31. Indeed, when asked "[a]s you sit here today, do you recall what you found and what you didn't find" during the inspections, Aureliano replied "[n]o." Similarly, when asked "[d]o you actually have an independent memory of what you did on July 31, 2016?," Aureliano replied "[n]o, I don't remember." Aureliano did not know the results of any inspections, to the extent they were performed, by the front end manager or maintenance personnel. He also did not know when the area was last mopped prior to the accident. And KTF has not submitted any records of any inspections or cleaning. Aureliano merely testified to his general cleaning and inspection procedure, which is insufficient (*Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 114 NYS3d 118 [2d Dept 2019]; *Lebron v 142 S 9, LLC*, 151 AD3d 835, 54 NYS3d 679 [2d Dept 2017]; *Valdes v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 150 AD3d 926, 54 NYS3d 436 [2d Dept 2017]; *Ansari v MB Hamptons, LLC*, 137 AD3d 1174, 28 NYS3d 397 [2d Dept 2016]).

To the extent that KTF contends that the puddle was not visible and apparent, KTF failed to eliminate all questions of fact on this issue. In addition to plaintiff's testimony that he saw the puddle after he fell, Aureliano's testimony also indicates that he saw the puddle. Although portions of his testimony were inconsistent and contradictory, Aureliano testified that he saw plaintiff slip on "[a] little water." When asked specifically whether plaintiff slipped on water, Aureliano stated that it was raining, "all the wagons were wet and people were coming in, so it could have been water from the wagon that

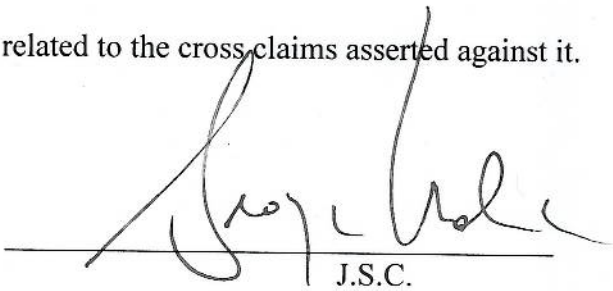
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fell on the floor, that’s what it looked like to me.” When his inconsistent testimony is viewed in the light most favorable to plaintiffs, it appears that Aureliano observed the water on the floor; indeed, he said “that’s what it looked like to me” when describing the water on the floor. Thus, Aureliano’s testimony raised triable issues of fact as to whether the alleged puddle was visible and apparent (*see Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 4 NYS3d 431 [4th Dept 2015] [noting that “defendant submitted the deposition testimony of a store manager, who admitted that she observed water on the floor,” and although “that employee also stated that a person walking through that area would have a difficult time seeing the water on the floor, that testimony, at most, raises a triable issue of fact whether the puddles were visible and apparent”]; *Porco v Marshalls Dept. Stores, supra* [“The record, including plaintiff’s description of the configuration of the substance and defendants’ witness’s observation of the same, indicates that the substance was visible and apparent.”]).

Additionally, KTF’s contention that “there is no evidence that there was even a liquid substance on the floor or the source of said liquid” is erroneous. As discussed above, Ciaramitaro testified that he slipped on liquid that originated underneath the refrigerator. Ciaramitaro also stated that a manager named Greg mopped up the puddle after the accident. And although Gregory Aureliano’s testimony was internally contradictory and inconsistent on this point, he stated that he observed Ciaramitaro slip on “[a] little water.” Furthermore, KTF’s contention that the puddle existed for only “one to two minutes prior to his fall” is not persuasive for the same reasons stated above.

KTF does not include any additional argument related to the cross claims asserted against it. Thus, KTF’s motion is denied in its entirety.

Dated: October 19, 2020



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION