

Kaba v Target Corp.

2020 NY Slip Op 35374(U)

September 25, 2020

Supreme Court, Kings County

Docket Number: Index No. 517457/2017

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 25th day of September 2020

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
Saran Kaba,

Plaintiff,

Index No. 517457/2017
Cal. No. 19 MS 2

-against-

DECISION AND ORDER

Target Corporation d/b/a Target and
FC Queens Place Associates, LLC,
Defendants.

-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
MS2	Doc # 29-48

Upon the foregoing cited papers, defendants' motion for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety on the grounds that defendants neither created nor had actual or constructive notice of the condition and defendant FC Queens Place Associates, LLC, (FCQP) did not owe a duty to plaintiff is decided as follows:

Plaintiff commenced this action to recover for personal injuries she allegedly sustained when she slipped and fell on a liquid substance on September 5, 2017, at the Target store located at Queens Place on Queens Boulevard, in Queens, New York. At the time of the accident, Queens Place was a retail condominium and Target owned the portion of the premises that constituted the Target store.

Plaintiff filed this action on September 8, 2017, in Kings County against defendants Target Corporation d/b/a Target (Target) and FCQP. Defendants moved for summary judgment,

pursuant to CPLR 3212, and sought dismissal of plaintiff's complaint in its entirety on the grounds that defendants neither created nor had actual or constructive notice of the condition and defendant FCQP did not owe a duty to plaintiff. Plaintiff opposed.

As a preliminary matter, plaintiff sought to challenge the use of its deposition. If either a party or a nonparty witness refuses or fails to sign a deposition transcript that has been properly prepared and submitted for signature, the unsigned deposition may be used in any manner authorized (*see Thomas v Hampton Exp., Inc.*, 208 AD2d 824, 825 [2d Dept 1994]). Here, defendants produced a copy of the cover letter transmitted with plaintiff's certified deposition for execution. The cover letter demonstrates that defendants properly prepared and submitted the plaintiff's certified deposition transcript for her signature. Accordingly, plaintiff's unsigned but certified deposition may be used in the instant manner (*see Baptiste v Ditmas Park, LLC*, 171 AD3d 1001, 1002 [2d Dept 2019]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

A defendant moving 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*

Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]; *Johnson v Culinary Inst. of Am.*, 95 AD3d 1077, 1078 [2d Dept 2012]). This burden cannot be satisfied merely by pointing to gaps in the plaintiff's case (see *DeFalco v BJ's Wholesale Club, Inc.*, 38 AD3d 824, 825 [2d Dept 2007]).

Defendants argued that they did not create the condition since plaintiff testified that she did not see the liquid prior to allegedly slipping in it, does not know how long the liquid was on the floor, and admitted she does not have any knowledge as to the source of the liquid that was on the floor. Defendant further argued they did not have constructive notice of the condition since Peter Perez, Service Engagement Leader at Target, testified there were no spills or substances on the floor before the accident because he walked through the area less than ten minutes before the incident and did not stop to clean up any foreign substances on the floor as he is trained to do.

In opposition, plaintiff correctly noted Mr. Perez testified that he did not know if he was looking down at the floor when he traversed the area in question. Plaintiff further averred that she observed droplets emanating from defendant's recycle machine in the area. Therefore, a genuine issue of material fact exists as to whether defendants created the condition that caused the accident (see *Molloy v Waldbaum, Inc.*, 72 AD3d 659, 660 [2d Dept 2010]).

To constitute a lack of actual notice, defendants must proffer evidence sufficient to demonstrate that it lacked awareness of the hazardous condition prior to the incident (see *LoSquadro v R.C. Archdiocese of Brooklyn*, 253 AD2d 856, 857 [2d Dept 1998]). Here, defendants relied on testimony from Target employees demonstrating that Target employees did not guard any spills in the area prior to the incident per protocol and neither plaintiff nor anyone else informed Target employees of a spill in the area prior to the incident. Plaintiff did not

proffer sufficient evidence to the contrary. Therefore, defendants met their prima facie burden of proving a lack of actual notice of the hazardous condition (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

To meet its initial burden on the issue of lack of constructive notice, the 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 (*see Klerman v Fine Fare Supermarket*, 96 AD3d 907 [2012]). Defendant must proffer evidence regarding particularized or specific inspection practices (*see Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]). Testimony regarding general inspection or cleaning practices will not suffice (*see id.*).

Defendants argued that they met their prima facie burden demonstrating regular inspection and cleaning of the area by proffering testimony from Ms. Anna Mok, Store Director of Target, that defendant regularly inspected the subject area. Defendants have also proffered testimony from Mr. Perez that he was in the area retrieving carts less than ten minutes prior and did not observe any spill on the floor. Defendants, however, have not provided any evidence regarding particularized or specific inspection practices of the area in question, such as a log or schedule (*see Quinones v Starret City, Inc.*, 163 AD3d 1020, 1022 [2d Dept 2018]). The testimony from Target employees also referred only to general inspection or cleaning practices, and Perez did not indicate he was conducting an inspection when he passed the area or was looking down. Thus, defendants failed to satisfy their initial burden as to lack of constructive notice (*see id.*). Accordingly, summary judgment on the issues of creation and lack of notice is denied.

FCQP also sought dismissal on the grounds that it did not owe a duty to plaintiff. It argued it is not involved with the interior of the Target store and is not Target's landlord. To

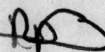
establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Where there is no duty of care owed by the defendant to the plaintiff, there can be no breach, and thus, no liability can be imposed upon the defendant (*see Schindler v Ahearn*, 69 AD3d 837, 838 [2010]).

Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property (*see Khanimov v McDonald's Corp.*, 121 AD3d 1050, 1052 [2014]). The existence of one or more of these elements is sufficient to give rise to a duty of care (*see Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [2006]). "Where none is present, [generally] a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 820 [2d Dept 2008]).

Here, FCQP proffered the affidavit of Kristine Semsar, Lead Program Manager of Site Operations for Target, which stated that FCQP did not own the Target store and was neither Target's landlord nor had any involvement with the interior of the store. Plaintiff proffered no opposition.

Accordingly, defendants' motion for summary judgment is granted to the extent FCQP is granted summary judgment and the complaint against it is dismissed (*see Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d 812, 813 [2d Dept 2019]). The remainder of the motion is denied.

ENTER:



HON. REGINALD A. BODDIE
J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court

2020 SEP 28 AM 9:54
FILED
KINGS COUNTY CLERK

