Sears v JB Natural Food, Inc.
2021 NY Slip Op 31417(U)
April 26, 2021
Supreme Court, Kings County
Docket Number: 519639/2019
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of April, 2021.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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SHARON SEARS,

Plaintiff,

- against-

JB NATURAL FOOD, INC.,

Defendant.

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DECISION/ORDER

Index No. 519639/2019

MS #3

The following e-filed papers read herein:	NYSCEF Doc.
Notice of Motion and Affidavits (Affirmations) Annexed	26-34
Opposing Affidavits (Affirmations)	35-36
Reply Affidavits (Affirmations)	37

Upon the foregoing papers in this personal injury action, defendant JB Natural Food, Inc. (Natural) moves in motion sequence (mot. seq.) three for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint.

Background

On November 19, 2018, at approximately 8:45 p.m., plaintiff, a pedestrian, was injured when she tripped and fell on the sidewalk adjacent to the defendant's store at 880 Utica Avenue at the corner of Church Avenue in Brooklyn, New York. Plaintiff claims the reason for her fall was the defendant's negligent placement of boxes on the sidewalk while unloading produce at the location. The property is not owned by the defendant, the lessee. The Note of Issue has been filed.

Defendant supports its motion with the pleadings, EBT transcripts for plaintiff and defendant, and an affirmation of counsel.

At her deposition, plaintiff testified that on the date of her accident, she left her home to go to defendant's store. The B46 bus stops on that corner. She explained that the store is on the corner, with entrances on both streets. It has its produce outdoors around the perimeter of the store and an awning over it. She testified that her accident was on the sidewalk of the Church Avenue side of the store. She had a handbag on her shoulder and had been perusing the produce and had put some in a shopping bag when she asked an employee where the ginger was, and he pointed to it. As she followed his finger with her eyes and approached the ginger, she tripped and fell over produce boxes that were on the ground waiting to be unpacked. Plaintiff testified that she did not see the boxes she tripped over before she fell [Page 34]. She identified the area of the sidewalk where the boxes were on a photograph (Doc 33). She said her right knee hit the sidewalk and the rest of her body landed on the boxes [Page 42]. She testified that she shopped there two or three times per week, and that there were always boxes all over the sidewalk. She walked around them, usually.

Chu Hun Cho appeared for an examination before trial on November 30, 2020 on behalf of JB Natural Food. He is the "owner" of the company (Doc 27). At the time, the store had five employees (*id.* at 9). The store is one floor (and a basement) and it is situated on a corner (*id.* at 12). Vegetables and fruit are located outside of the store and after it is delivered, the produce is stored in the basement in either wooden crates or paper boxes (*id.* at 12-17). The produce would be stocked in the morning and then again when the stock is finished (*id.* at 19). There were no questions asked about boxes being left on the sidewalk. He did not know if the workers were trained how to stock the produce or if anyone inspected the sidewalk on a regular basis or the last time it was inspected before plaintiff's accident (*id.* at 22).

Defendant's attorney states that "the alleged defect (the boxes on the sidewalk) was open and obvious and not inherently dangerous as a matter of law." Alternatively, he argues that "there is no evidence that JB Natural Food caused or created the alleged dangerous condition nor had actual or constructive notice of it." He cites several cases that involve trips and falls inside of stores, not on the sidewalk outside of stores.

Plaintiff's counsel urges the court to find that defendant has failed to make a prima facie case for summary judgment. He then also discusses a number of court decisions which involved accidents in store aisles, that is, inside of stores. These are only tangentially applicable here.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

"An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition . . . and must warn of any dangerous or defective condition of which it has actual or constructive notice" (*Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 707 [2015]).

However, the Second Department has held that an owner or tenant has no duty to protect or warn against a condition that is *both* open and obvious *and not inherently dangerous* (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *see also Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696-697 [2d Dept 2019]; *Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]).

Regarding public sidewalks, which are not analyzed exactly like interior store aisles, the Second Department has held that "[a]n abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk [unrelated to any condition regarding the sidewalk material in New York City] only when the owner or lessee . . . created the condition . . . because of a special use . . . ." (*Maya v Town of Hempstead*, 127 AD3d 1146, 1147 [2015]; *see also Lahens v Town of Hempstead*, 132 AD3d 954, 955-956 [2015]). Displaying produce and flowers along the exterior of a store along a sidewalk is a special use. "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966, 967 [2017]; *see also Karpel*, 174 AD3d at 695).

Here, there is no dispute that the lessee of the entire ground floor commercial space made special use of the sidewalk abutting the store by displaying produce and flowers along the public sidewalk, which would result in liability *for any unsafe condition* caused by that use. While plaintiff's deposition testimony establishes that the defendant regularly left boxes on the sidewalk in front of the store, which was an open and obvious condition, she testified that before she fell the employee was standing in front of the boxes and she did not see them – there is a triable issue of fact as to whether the boxes on the sidewalk was *also* an inherently dangerous condition.

Contrary to defendant's argument that "[t]he alleged condition was open and obvious thereby barring the plaintiff's action as a matter of law," the legal standard to succeed on a summary judgment motion in the Second Department, since its 2003 decision in *Cupo v Karfunkel*, 1 AD3d

48, 52 [2d Dept 2003], requires an owner or tenant which seeks to prove it had no duty to protect or warn must establish that the condition was both open and obvious and not inherently dangerous. This is because "open and obvious" can result in a finding of plaintiff's comparative fault by the jury but is not a complete defense.

Defendant's second argument, that "there is no evidence that JB Natural Food caused or created the alleged dangerous condition nor had actual or constructive notice of it," is completely without merit. There is no evidence that defendant did not cause or create the allegedly dangerous condition. It was the only tenant on the ground floor. There is no dispute that the boxes at issue contained produce which were going to be stocked by defendant's employees. A store owner cannot permit his employees to conduct themselves without any training or any rules and then claim he had no notice that they were acting without any regard for the safety of their customers or passing pedestrians.

In conclusion, defendant fails to make a prima facie case for summary judgment. Whether the boxes on the sidewalk created an inherently dangerous condition is a question of fact for the jury.

Accordingly, it is **ORDERED** that defendant's motion for summary judgment dismissing the amended complaint in mot. seq. no. 3 is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J. S. C.