

<b>Morrison v BKCS Ltd.</b>
2021 NY Slip Op 31765(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 160799/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

BESSIE MORRISON

INDEX NO. 160799/18

- v -

MOT. DATE

BKCS LTD. d/b/a BREAD & BUTTER, et al.

MOT. SEQ. NO. 002

Table with 2 columns: Document type (Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits, Answering Affidavits — Exhibits, Replying Affidavits, Letters) and No(s) field.

This personal injury action arises from an alleged slip and fall at defendants' Bread and Butter store. Defendants BKCS Ltd. d/b/a Bread and Butter (Bread and Butter) moves for summary judgment. Plaintiff opposes the motion. The motion is timely brought after note of issue was filed and therefore, summary judgment relief is available. The for the following reasons, the motion is granted.

In her complaint, plaintiff alleges that her accident occurred on August 3, 2018, when she was at the Bread & Butter premises, located at 303 Fifth Avenue, New York, New York when she was caused to slip and fall upon a dangerous and unsafe condition and as a result, she suffered serious personal injuries.

At her deposition plaintiff testified that she and her friend Nina walked to the Bread and Butter store together on the date of the accident. Plaintiff had been to the Bread and Butter store on prior occasions but not within the week before the incident. She described the weather when her and Nina entered the store as follows: "it was like dry, drizzling" and "...it was like, sprinkling; like not hard. Not hard; like sprinkling".

Plaintiff testified that she does not remember seeing any puddles on the floor as she and Nina walked into the premises of Bread and Butter through the 31st Street entrance. Plaintiff further testified that from the time she walked from the chicken buffet to the cashier, she saw no puddles on the floor and did not observe any spilled food. She paid the cashier for her food, put it in the bag and left the bag at the cashier and grabbed a cup to get some ice from the ice machine.

Dated: May 24, 2021

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

When asked how the accident happened, plaintiff testified: “[w]hen I was coming – I was looking for the ice; I asked Nina where it was. And I was going around—because I was already coming—walking with the cup, looking. As I was passing by the island, when I was getting ready to turn, I slipped and fell on the puddle of water, and twisted my ankle.” The plaintiff testified that she did not know how the puddle of water got there or how long the water was there and that she did not know of anyone who complained about the water prior to her fall.

Plaintiff testified about the condition that allegedly caused her to fall as follows:

Q. Did you see a puddle of water before you fell?

A. No.

Q. How do you know there was a puddle of water there?

A. Because when I slipped and fell, I seen the water.

Q. So you didn't see it before. At what point did you see the water?

A. When I was falling, I seen it.

Defendant produced for deposition its store manager Kie Tae Lee, who was in charge of overseeing the general operations of the store including staff supervision. Mr. Lee testified that he learned about the accident from the cashier who told him “somebody fell” and that when he came to the front of the store by the Fifth Avenue entrance he found a woman lying on the floor next to the cookie shelves in the middle of the store.

When asked about the alleged condition which plaintiff claims caused her to fall, Lee further testified:

Q. When you saw Ms. Morrison on the floor did you observe the condition of the floor at that time?

A. Yes.

Q. What did you see?

A. I see drops of water on the floor.

Q. Do you know where that water came from?

A. I don't know.

Q. After the accident happened and Ms. Morrison left the restaurant by way of the ambulance did you undertake to investigate the source of the water?

A. Yes.

Q. What was the result of your investigation?

A. My result of investigation was that it was starting to rain outside.

Q. Before she fell?

A. Before, no.

Q. After. After they left and I see the water, but at that time there were people coming in and walking out with the umbrella coming in the store, so the wetness on the umbrella was on the floor.

Lee testified that the store did not have any written policies and procedures regarding the maintenance of the premises, but that he and his co-workers sweep and mop: “the process is anything that is on the floor we clean up”. Lee stated that he swept and then mopped the floors at around 11:30am that morning before the lunch crowd. Lee further testified that he was in the area where plaintiff was on the floor twenty minutes prior to the incident and observed and picked up dirty napkins. He also testified that the store has signs “caution, wet floor with the yellow cone?” and that he put out the yellow signs twenty minutes prior to plaintiff's fall because he noticed it was getting cloudy, dark.

Defendant Surrey Investors, Inc. (Surrey), an out-of-possession landlord, produced Richard Chieffo for a deposition, the president of 303 Fifth Avenue, Surrey's managing agent. Chieffo stated in his affidavit that as an out-of-possession landlord, it plays no role in the day-to-day maintenance of the

Bread and Butter store premises, that they did not have any employees, agents or servants at the premises on the date of the accident and that Surrey did not receive any notice of the condition that allegedly caused plaintiff to slip and fall.

Defendants argue that based on the testimony of plaintiff, defendants established that they did not create the allegedly dangerous condition and that there were no complaints received by them regarding any dangerous condition at or around the site of plaintiff's accident and that there is no evidence that defendants had actual notice of the wet condition.

Plaintiff opposes the motion and argues that questions of fact exist as to whether Lee failed to notice the water when he visited the scene twenty minutes prior the plaintiff's fall and whether he took proper safety precautions. Plaintiff further argues that triable issues of fact exist as to whether defendants had actual and/or constructive notice of the water condition because there is conflicting testimony regarding the condition of the floor.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The record before the court shows that defendants neither created or had actual notice of the wet condition based on the deposition testimony of both plaintiff and defendants witness Mr. Lee. Further, it is undisputed that defendants did not receive any complaints regarding any condition at or around the area where plaintiff fell prior to the accident.

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 (see *Gordon American Museum of Natural History*, 67 NY2d 836, 837-838, 492 N.E.2d 774, 501 N.Y.S.2d 646). "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" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599, 869 N.Y.S.2d 222; see *Ahmetaj v Mountainview Condominium*, 171 AD3d at 684).

Here, Mr. Lee testified that he swept and mopped the floor in the area where plaintiff fell around 11:30 am and that twenty minutes prior to plaintiff's fall he observed only a dirty napkin on the floor in the vicinity which he picked up. Plaintiff claimed that she did not notice any water when she entered the "semi-crowded" store, nor did she observe any water until after she slipped and fell. The record is devoid of any evidence that the alleged water condition was present for a sufficient time to place defendant on notice of said condition. Therefore, plaintiff failed to raise a triable issue of fact on whether defendants had actual or constructive notice of the alleged condition.

Finally, plaintiff's argument that summary judgement should be denied because there of the conflicting testimony is rejected. The cases cited by plaintiff are distinguishable from the instant case. It is undisputed that plaintiff had no knowledge of the "puddle" prior to her fall or how long it was there, and it was only when she was on the floor that she saw the water. Further, there is no evidence in the record to conclude that the alleged condition was in fact a recurring condition to put defendants on notice.

Based on the foregoing, defendants' have met their burden and established entitlement to judgment as a matter of law.

**Conclusion**

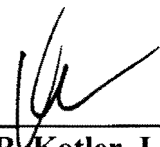
In accordance herewith, it is hereby

**ORDERED** that defendants' motion for summary judgment dismissing plaintiff's complaint is granted in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: May 24, 2021  
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.