Agoglia v King Kullen Grocery Co., Inc.
2021 NY Slip Op 33424(U)
May 5, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 616777/2019
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 616777/2019
CAL. No. 202001016OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 4/15/21
ADJ. DATE
Mot. Seq. # 002 MD

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FRANK AGOGLIA,

Plaintiff,

- against -

KING KULLEN GROCERY CO., INC.,

Defendant.

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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant, dated March 16, 2021; Answering Affidavits and supporting papers by plaintiff, dated April 23, 2021; Replying Affidavits and supporting papers by defendant, dated April 28, 2021; it is,

ORDERED that the motion by defendant King Kullen Grocery Co., Inc., for summary judgment dismissing plaintiff's complaint against it is denied.

This action was commenced by plaintiff Frank Agoglia to recover damages for injuries he allegedly sustained on July 29, 2019, when a shopping cart with a missing wheel caused him to fall inside the King Kullen supermarket in North Babylon, New York. It is undisputed that defendant King Kullen Grocery Co., Inc., owned the subject premises and the shopping cart.

Defendant now moves for summary judgment in its favor, arguing that it did not create the alleged defect, and had neither actual nor constructive notice thereof. In support of its motion, defendant submits, among other things, transcripts of the parties' deposition testimony, a transcript of the deposition testimony of nonparty Barbara Russo, and an affidavit of Robert Paplin.

Plaintiff testified that at approximately 7:00 p.m. on the date in question he arrived at the subject King Kullen grocery store. He stated that he was driven there by his daughter, Barbara Russo, who also accompanied him during his shopping. Plaintiff indicated that he chose a shopping cart which was "[r]ight outside of the store, leading up to the store." Upon questioning, he stated that he had shopped at the subject store every week for approximately 15 years, that he has never encountered a problem with a

shopping cart supplied by defendant, and that the shopping cart he chose on the subject date performed without issue until the time of the incident. With regard thereto, plaintiff testified that he and his daughter shopped inside the supermarket for 30 minutes and chose enough groceries to fill their shopping cart. He stated that they made one final stop in the dairy section prior to paying for their items, at which time he removed one container of milk from its refrigerated case and placed it in his shopping cart. Plaintiff indicated that after he placed the milk container into the shopping cart, the cart tipped over toward him, spilling his groceries and causing him to fall to the floor. He testified that a man came over to him, identified himself as the store manager, asked him what happened, examined the subject shopping cart, and stated that one of its wheels was missing.

Nonparty Barbara Russo testified that she accompanied plaintiff, her father, to the King Kullen supermarket on the night in question. She stated that it was she who chose the shopping cart in question, and that she selected it from the many carts in the parking lot because it was the closest one to her car. Ms. Russo indicated that her father took control of the cart, pushed it into the store without incident, and shopped for 30 minutes. She testified that at one point, while they were near the store's dairy section, her father placed a container of milk in the cart. Ms. Russo stated that he then placed both of his hands on the cart's handle and began turning the cart toward the pasta aisle. She indicated that as he turned the shopping cart to his left, the cart tipped over and he fell sideways with it to the floor. Ms. Russo testified that as her father was being taken to an ambulance, a store manager named Bob turned the subject shopping cart upright, "leaned" on it, and discovered that it tipped due to a missing wheel. She stated that she then took one photograph of the cart with her cellular phone. Asked if she observed the missing wheel in the vicinity, she answered in the negative.

Robert Paplin testified that he is an assistant store manager and has been employed by defendant for 26 years. He stated that he worked in defendant's North Babylon store for approximately three years, including on the date of plaintiff's incident. Mr. Paplin indicated that on the evening in question, he was alerted to plaintiff's fall and responded to the scene, where he observed plaintiff on the floor and his cart lying on its side. He testified that he returned the cart to an upright position, then "went to move it and it seemed to tip over." Mr. Paplin stated that he then noticed that its front wheel was missing. He indicated that he later asked the "cart person" on duty that night, Chris, if he found a detached shopping cart wheel in the parking lot, and he reported he did. Questioned regarding the store's shopping cart maintenance protocols, Mr. Paplin explained that the cart person, an employee who retrieves carts from the parking lot and restores them to a central location at the entrance of the supermarket, removes garbage from the carts and, if discovered, reports any wheel problems to management or takes the cart out of service. He testified that when a certain number of carts are taken out of service due to mechanical issues, the King Kullen maintenance department is contacted and repairs are requested.

In his affidavit, Mr. Paplin states that employees were regularly assigned to collect shopping carts from the store's parking lot, that cart collection is performed numerous times per day, and that all carts are returned to the front of the store at the end of each day. He avers that "[t]he operation of shopping cart (sic) was checked by King Kullen employees as they were collected." Mr. Paplin further states that the last time defendant's maintenance crew retrieved damaged shopping carts from the North Babylon store, prior to the subject incident, was on July 8, 2019.

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 [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 [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 [2011]).

The owner or possessor of real property has "a nondelegable duty to maintain the equipment on its premises in a reasonably safe condition" (***Albergo v Deer Park Meat Farms, Inc.***, 138 AD2d 656, 656, 526 NYS2d 580 [2d Dept 1988]; *see also* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]). For a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (***Touloupis v Sears, Roebuck & Co.***, 155 AD3d 807, 808, 63 NYS3d 518 [2d Dept 2017], quoting ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). 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 prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it" (***Malloy v Montefiore Med. Ctr.***, 183 AD3d 811, 812, 122 NYS3d 532 [2d Dept 2020]; *see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). A defendant may meet its prima facie burden on the issue of lack of constructive notice by offering some evidence as to when the alleged-defective condition was last inspected relative to the time of plaintiff's incident (*see generally* ***Carro v Colonial Woods Condominiums***, 178 AD3d 893, 112 NYS3d 540 [2d Dept 2019]).

Defendant failed to establish a prima facie case of entitlement to summary judgment in its favor (*see* ***Gatto v Coinmach Corp.***, 172 AD3d 1176, 101 NYS3d 390 [2d Dept 2019]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). While it demonstrated that it did not create the alleged defective condition, and that it had no actual notice of the shopping cart's missing wheel prior to plaintiff's incident, defendant did not demonstrate a lack of constructive notice thereof. While Mr. Paplin testified that a detached shopping cart wheel was discovered in the parking lot of the subject store on the evening in question, defendant has not adduced evidence of the precise location where the wheel was found, or if the wheel was located in the area where plaintiff obtained the subject cart. Defendant also adduced no evidence linking the wheel allegedly discovered in the parking lot to the subject cart, Mr. Paplin having testified that all of the shopping carts' wheels were virtually identical. Furthermore, defendant submitted no evidence, other than a recitation of its general customary procedures, of when the subject shopping cart was last inspected (*see generally* ***Piotrowski v Texas Roadhouse, Inc.***, 192 AD3d 1147, 141 NYS3d 350 [2d Dept 2021]; ***Griffin v PMV Realty, LLC***, 181 AD3d 912, 119 NYS3d 876 [2d Dept 2020]; ***Herman v Lifeplex, LLC***, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]). Unlike in the

cases of ***Cataldo v Waldbaum, Inc.*** (244 AD2d 446, 664 NYS2d 126 [2d Dept 1997]) and ***Rejaee v Costco Price Club*** (140 AD3d 641, 33 NYS3d 710 [1st Dept 2016]), movant did not establish when the wheel became detached from the subject cart and, therefore, did not establish, prima facie, that it did not have a reasonable amount of time to discover and remedy the defect (*see generally* ***Malloy v Montefiore Med. Ctr.***, *supra*). Defendant having failed to meet its prima facie burden, the Court need not review plaintiff's papers in opposition (*see generally* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, defendant's motion is denied.

Dated: May 5, 2021
Riverhead, New York

WILLIAM G. FORD, J.S.C.

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