

Schwam v HomeGoods, Inc.
2021 NY Slip Op 33453(U)
July 12, 2021
Supreme Court, Westchester County
Docket Number: Index No. 58567/2019
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
 IAS PART WESTCHESTER COUNTY
 PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
 DEANNA SCHWAM,

DECISION & ORDER

Plaintiff(s),

Index No: 58567/2019

-against-

Motion Sequence No. 1

HOMEGOODS, INC., a TJX Company, THE TJX
 COMPANIES, INC., and MARSHALLS OF MA,
 INC.,

Defendants.
 -----X

The following papers (e-filed document nos. 25-43; 46-47) were read on the motion by the defendants for an order granting summary judgment dismissing the complaint.

Notice of Motion-Affirmation-Exhibits (A-I)
 Affirmation in Opposition-Affidavit-Memorandum of Law-Exhibits (A-E)
 Reply Affirmation (and corrected)

Upon reading the foregoing papers, it is

ORDERED the motion is denied; and it is further

ORDERED the matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues to recover damages for injuries allegedly sustained in a trip-and-fall accident that occurred on April 16, 2019, at a HomeGoods store located in Greenburgh, New York, which is owned and operated by the defendants. The accident allegedly occurred when the plaintiff, a customer in defendants' store, tripped and fell over a rolled-up rug located on the floor near the front left entrance to the store. At deposition, defendants' assistant merchandise manager, Jacqueline Ortiz (Ms. Ortiz), testified that the subject rug had been placed in the location where the plaintiff fell by another customer who was returning the subject rug (*see* Ortiz deposition tr at 32). Ms. Ortiz further testified that it was customary for customers returning larger pieces of merchandise, such as a rug, to

place the merchandise on the left side of the front entrance to the store “where they see the space” (*id.* at 20). Plaintiff testified at deposition that she did not observe the rug prior to the fall.

Following the completion of discovery, defendants move for an order granting summary judgment dismissing the complaint upon the grounds that the rolled-up rug over which plaintiff tripped and fell was an open and obvious condition and not inherently dangerous. Plaintiff opposes the motion. For the reasons that follow, the motion is denied.

On a motion for summary judgment the court’s function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant’s favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, defendants failed to establish their *prima facie* entitlement to judgment as a matter of law. First, a defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a trip-and-fall case involving the premises has the initial burden of demonstrating, *prima facie*, 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 Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]; *Przywalny v New York City Tr. Auth.*, 69 AD3d 598, 598 [2d Dept 2010]; *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655, 656 [2d Dept 2009]). To sustain this burden, “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 [2d Dept 2008]). “Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice” (*Rogers v Bloomingdale’s, Inc.*, 117 AD3d 933, 933-934 [2d Dept 2014] [internal quotation marks omitted]). Here, defendants failed to proffer any competent evidence demonstrating when the subject area was last cleaned or inspected relative to the time when plaintiff fell (*see Herman v Lifeplex, LLC*, 106 AD3d 1050, 1052 [2d Dept 2013]). At deposition, the defendants’ employee, Marco Estrada Salinas, testified that he did not recall the last time he was in the area where the plaintiff fell (*see Salinas deposition tr* at 32). Similarly, Ms. Ortiz testified at deposition that she did not recall the last time she was in the area where the plaintiff fell and did not know how long the rug had been in the location

where the plaintiff fell prior to the incident (*see* Ortiz deposition tr at 32-34). Such testimony, without more, is insufficient to sustain defendants' *prima facie* burden.

Second, “[w]hile a landowner has a duty to maintain its premises in a reasonably safe manner, it does not have a duty to protect against an open and obvious condition, which, as a matter of law, is not inherently dangerous” (*Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855, 856 [2d Dept 2013] [internal citations omitted]). However, “[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition” (*Holmes v Macy’s Retail Holdings, Inc.*, 184 AD3d 811, 811 [2d Dept 2020]; *Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061, 1062 [2d Dept 2010]).

“The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case” (*Holmes*, 184 AD3d at 811 [internal quotation marks, brackets, and citations omitted]; *see Russo v Home Goods, Inc.*, 119 AD3d 924, 925-926 [2d Dept 2014]). Thus, “[t]he issue of whether a condition is open and obvious and not inherently dangerous is case-specific, and usually a question of fact for a jury” (*Clayton v Marcy Supermarket & Deli Corp.*, 191 AD3d 842, 843 [2d Dept 2021]; *see Lee v Acevedo*, 152 AD3d 577, 578 [2d Dept 2017]). “A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Cassone v State of New York*, 85 AD3d 837, 838-839 [2d Dept 2011]). Furthermore, the issue of whether a defective condition is open and obvious relates to the question of an injured plaintiff’s comparative negligence in failing to see what should have been seen, and “does not negate a landowner’s duty to maintain its premises in a reasonably safe condition[.]” (*Ruiz v Hart Elm Corp.*, 44 AD3d 842, 843 [2d Dept 2007]; *see Cooper v American Carpet & Restoration Servs., Inc.*, 69 AD3d 552, 553 [2d Dept 2010]; *Salomon v Prainito*, 52 AD3d 803, 805 [2d Dept 2008]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

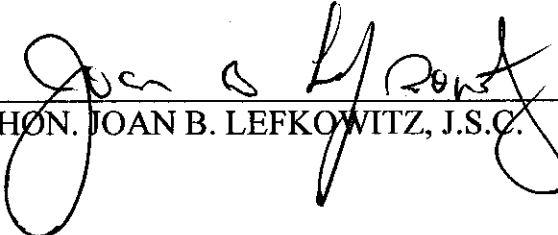
Here, viewing the evidence submitted by the defendants in support of their motion, which includes the plaintiff’s deposition testimony and video surveillance of the incident, in a light most favorable to the plaintiff, the nonmoving party, defendants failed to establish, *prima facie*, that the rolled-up rug over which plaintiff tripped and fell was an open and obvious condition that was not inherently dangerous as a matter of law (*see Clayton*, 191 AD3d at 843; *Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154-1155 [2d Dept 2020]; *Holmes*, 184 AD3d at 811-812; *Russo*, 119 AD3d at 926). The subject rug was located low to the floor near the store’s front left entrance directly in front of merchandise (pottery plants) propped up on a display table in an area in which customers gathered and walked. Further, the plaintiff testified at deposition that she did not see the subject rug prior to the alleged fall and that immediately prior to the fall, she was looking in the right direction and straight towards the candy aisle, which is where she intended to go, and as

she proceeded that way, her left foot caught the rug causing her to fall (*see* Plaintiff deposition tr at 19-22). “Given the totality of these circumstances, the defendants have failed to eliminate triable issues of fact as to whether they created an unsafe condition for the plaintiff” (*Russo*, 119 AD3d at 926, citing *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634 [2d Dept 2010]).

Insofar as defendants failed to demonstrate their *prima facie* entitlement to judgment as a matter of law, the court need not consider the sufficiency of the plaintiff’s opposing papers (*see Alvarez*, 68 NY2d at 324). Accordingly, defendants’ motion is denied.

ENTER,

Dated: White Plains, New York
July 12, 2021


HON. JOAN B. LEFKOWITZ, J.S.C.