SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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LINDA RUNDLE,

Plaintiff,

- against -

OLLIES BARGAIN OUTLETS INC. and DUNNING FARMS LLC,

Defendants.

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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.

Index No. EF003697-2019

DECISION and ORDER

Motion Date: July 7, 2021, #1

The following papers numbered 1 to 7 were read and considered on a motion by the Defendants, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Notice of Motion- Warner Affirmation- Exhibits A-M, 1- Memorandum of Law 1-4
Opposition- Del Duco Affirmation- Exhibit 1 5-6
Reply- Warner Affirmation 7

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted in part and denied in part.

Introduction

The Plaintiff Linda Rundle was allegedly injured when shopping at a store being operated by the Defendant Ollies Bargain Outlets, Inc. (hereinafter "Ollie's") when a glass shelf on a table she was inspecting fell and struck her hand.

The Defendant Dunning Farms LLC is the owner of the property at which the store is located, and leases the same to Ollie's.

The Defendants move for summary judgment.

The motion is granted in part and denied in part.

Factual/Procedural Background

At an examination before trial, the Plaintiff testified that she went to Ollie's on the day in question to buy a desk for her son.

The desk at issue was sitting on top of "a high platform, a shelf." That is, about three and one-half feet off of the ground. The desk was black and made of metal.

She was not able to see the top of the desk "[b]ecause it was high." It was "higher than [her] head. It was higher than [her] eye level of [her] head."

She did not see any glass on the top of the desk.

She leaned the desk forward "slightly" to look at it. When she did, glass that was on the top of the desk "came down and it hit [her] across [her] knuckles" on her left hand. The glass was approximately three feet wide and less than a foot wide. It was "thick." The glass scraped her skin, but did not cut it.

After the accident she saw a female Ollie's employee walking through the area, Lila Smith, who was an assistant manager. Smith asked her to fill out an accident report.

After the Plaintiff left Ollie's, she went to urgent care in Rock Hill.

A few days later she went back to Ollie's and took three photographs of the desk and area.

At an examination before trial, Emily Ulatoski, the Plaintiff's daughter, testified that the accident occurred when her mother leaned the desk forward with her right hand, and a dark gray glass shelf slid off, hitting her hand. When asked whether her mother moved the desk forward a

little, a lot, somewhere in the middle, Ulatoski responded, "[s]omewhere in the middle." She observed the glass fall from the bottom of "two little platforms." Ulatoski never made any complaints at Ollie's about a dangerous condition in the store, and was not aware of anyone else making such complaints. Nor did she observe any previous accidents at the store.

At an examination before trial, Fran Jaeschke, Ollie's General Manager, testified that Ollie's sells a fair amount of furniture made by Sauder, including the subject desk. The furniture is delivered to Ollie's in boxes. Ollie's Furniture and Flooring Supervisor assembles a sample, and the sample is displayed on a platform. Once an item is on display on a platform, the manager on duty checks "to make sure the furniture is secured away from the edge and it is put together properly." The manager also checks that the furniture does not wiggle, that pieces are not falling off, and that all pieces are assembled. If the furniture is not put together properly, it is taken down, which does not happen often.

Here, she testified, the desk at issue was secured to the platform by placing it back from the edge. Its legs could not be secured to the platform because it was made of metal. The desk has a glass piece which is affixed to the desk with suction cups.

In general, she testified, the manager on duty performs a safety walk before the store opens, walks the store often during the day and before closing at night. When Jaeschke performs her safety walks, she "puts hands" on the furniture, meaning "to touch them and make sure they don't wiggle." With respect to the desk at issue, the manager inspects the desk to ensure that the glass is secured.

Jaeschke trained Lila Smith as to the procedure for the safety walks. Smith shadowed Jaeschke when she was promoted.

Jaeschke testified that the above safety procedures were part of the training provided to all managers.

Jaeschke was off on the date of accident, but learned about it the same day when Smith called her for directions on how to fill out the accident report.

During her safety walks, Jaeschke never observed that the glass was not affixed to the desk. Nor was she aware of any prior complaints concerning the desk, or any prior accidents.

At an examination before trial, Lila Smith testified that, when she was promoted to assistant team leader, she was trained by Jaeschke. Smith shadowed Jaeschke, and Jaeschke trained her, among other things, to assure that desks were secure.

Smith testified that managers walked the store in the morning and at night. The checklist of items to accomplish included making sure that all furniture was safe and secure.

When Smith opened the store in general, she walked the entire store and ensured, among other things, that all of the furniture was safe and secure. She made the same inspection at night.

While on duty, she walked the store throughout the day to look for any potential hazards. If any hazards were observed, they were removed as soon as possible.

With respect to furniture pieces, Smith was trained to grab the furniture and make sure it did not wiggle, which she did.

Ollie's sold desks, which were located on "the top shelf of steel racking and then underneath was where all the stock was kept." The platform was about 3½ feet high and "quite long," to wit: about fifteen feet long and eight to twelve feet wide, with multiple pieces of furniture on it. The platform was "very sturdy."

The desk at issue was steel, black in color, with a surface to write on and secondary shelf.

The desk could not be secured to the platform because it was metal. However, the desk was put far away enough from the edge of the platform so that a child could not grab it and pull it forward. Further, managers on duty when the furniture was assembled made sure that it was secured properly and that it was away from the edge of the platform.

On the day in question, Smith opened the store at 9:00 or 10:00 a.m. As the manager on duty, she arrived about an hour before opening, and cleaned, counted drawers and performed her inspection. Thus, at the very least, the last time the furniture section was inspected on the day in question was in the hour before the store opened.

Smith was the manager on duty at the time of the accident. After the accident occurred, the Plaintiff told her that she was looking at a desk in the furniture section, pulled on it and leaned it forward to get a better look, and that the shelf slid and hit her hand. Smith went to the area of the accident with the Plaintiff, who demonstrated how the accident happed. The Plaintiff showed Smith how "[s]he reached up to the writing portion of the desk and leaned it forward." Smith was not aware of any other accidents or complaints relating to the desk. She also never observed the glass shelving on the desk out of place.

The Motion at Bar

Based upon the foregoing, the Defendants now move for summary judgment seeking dismissal of the complaint.

In support of the same, they submit an affirmation from counsel, Jarett Warner.

Warner asserts that this case concerns a claim by the Plaintiff that she was injured at Ollie's on January 28, 2018, when she "inexplicably tilted a display desk towards her and caused the glass resting on top of the desk to purportedly hit her hand."

However, he argues, the case should be dismissed as against Dunning, the landlord, because Dunning did not owe or breach a duty of care to the Plaintiff, as it was not involved in the operation or maintenance of the store or the subject desk, and did not create or have notice of the alleged dangerous and defective condition at issue.

Similarly, he asserts, the action should be dismissed as against Ollie's because the alleged dangerous and defective condition to the desk was readily observable through the use of one's senses, and because Ollie's did not cause or create the condition, or have actual or constructive notice of the same.

Finally, he argues, there is no basis for the Plaintiff's negligent hiring, training or supervision claims, as there is no evidence that Ollie's knew of any particular facts that would lead it to reasonably investigate its employees.

In further support of the motion, the Defendants submit an affidavit from Cheryl Chase, an officer of Dunning Farms Manager, Inc., and the Managing Member of Dunning Farms LLC.

Chase notes that, at the time of the accident, Dunning owned the building where the accident occurred, which it had leased to Ollie's.

Pursuant to the terms of the lease, she asserts, Ollie's was responsible for the maintenance, operation, orderliness and cleanliness of the interior of the premises. This included the responsibility for ensuring that the display merchandise was safe for Ollie's customers and invitees.

Further, she avers, Dunning did not possess any knowledge as to the operation of the store, or as to the display of merchandise, or as to the desk at issue.

In addition, she argues, Dunning did not create or otherwise have any notice of any

alleged dangerous and defective condition at issue, and did not previously receive any complaints from anyone about the desk at issue.

In opposition, the Plaintiff submits an affirmation from counsel, John Del Duco.

Initially, Del Duco asserts, the glass at issue was semi-transparent and the same color as the display desk. Thus, he argues, it was not readily observable.

Moreover, he notes, there is no testimony concerning any specific inspection of the glass itself on the date of the injury prior to the accident.

In fact, he asserts, the manager who was on duty at the time of the accident (Smith) admitted that she would not have inspected the top of the display desk when making her initial review of the store prior to opening.

In reply, the Defendants submit an affirmation from counsel, Jarett Warner.

Initially, Warner argues, the Plaintiff did not oppose those branches of the motion which were to dismiss the complaint as against Dunning, and to dismiss the allegations of negligent hiring, etc.

In any event, he asserts, the Plaintiff did not raise any triable issues of fact.

Discussion/Legal Analysis

A store owner is charged with the duty of maintaining its premises in a reasonably safe condition for its patrons. *Peralta v. Henriquez*, 100 N.Y.2d 139; *Dow v. Hermes Realty, LLC*, 155 A.D.3d 824 [2nd Dept. 2017]; *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634 [2nd Dept. 2010]. To impose liability on a store owner for an injury arising from an alleged dangerous or defective condition on the property, a plaintiff must demonstrate the defendant either created the condition, or had

actual or constructive notice of it and failed to remedy it within a reasonable time. *Dow v. Hermes Realty, LLC*, 155 A.D.3d 824 [2nd Dept. 2017]. To constitute constructive notice, a defect must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. *Mandarano v. PND, LLC*, 157 A.D.3d 664 [2nd Dept. 2018].

A defendant store owner, to be entitled to summary judgment, must demonstrate, *prima facie*, that it maintained the premises in a reasonably safe condition, and that it did not create or have actual or constructive notice of a dangerous or defective condition on the premises that posed a foreseeable risk of injury to persons expected to be on the premises. *Franzese v. Tanger Factory Outlet Centers, Inc.*, 88 A.D.3d 763 [2nd Dept. 2011]; *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634 [2nd Dept. 2010].

Proof that the alleged dangerous and defective condition was open and obvious negates the defendant's obligation to warn of the condition. However, it does not preclude a finding of liability against the owner for failure to maintain the property in a safe condition. *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634 [2nd Dept. 2010]. Such proof is also relevant to the issue of the plaintiff's comparative fault. *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634 [2nd Dept. 2010].

The issue of whether a dangerous condition is open and obvious is fact specific, and usually a question of fact for a jury to resolve. *Franzese v. Tanger Factory Outlet Centers, Inc.*, 88 A.D.3d 763 [2nd Dept. 2011]; *Etminan v. Esposito*, 126 A.D.3d 854 [2nd Dept. 2015]; *Cassone*

v. State, 85 A.D.3d 837 [2nd Dept. 2011]. Further, whether a hazard is open and obvious cannot be divorced from the surrounding circumstances. *Etminan v. Esposito*, 126 A.D.3d 854 [2nd Dept. 2015]; *Cassone v. State*, 85 A.D.3d 837 [2nd Dept. 2011]. 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. *Etminan v. Esposito*, 126 A.D.3d 854 [2nd Dept. 2015]; *Russo v. Home Goods, Inc.*, 119 A.D.3d 924 [2nd Dept. 2014]; *Cassone v. State*, 85 A.D.3d 837 [2nd Dept. 2011]; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634 [2nd Dept. 2010].

Here, Ollie's did not demonstrate, *prima facie*, that the glass on the desk was not in fact a dangerous or defective condition.

Rather, at least one purpose of a floor sample is to allow customers to examine an item they are considering purchasing.

Here, given the height at which the desk at issue was displayed, it is not "inexplicable," but rather clearly foreseeable, that a customer might manipulate the desk in order to view it more closely.

Given such, it cannot be said, as a matter of law, that the presence of dark piece of glass on the desk, secured only by suctions cups, did not constitute a foreseeable danger to customers.

Further, given such, there is, at a minimum, a question of fact whether the glass shelf was "open and obvious."

In any event, as noted *supra*, this would negate only Ollie's duty to warn.

Further, Ollie's did not demonstrate, *prima facie*, that it did not create the condition, or have actual or constructive notice of the same.

Concerning such, Ollie's relies on its practice of patrolling the store and assuring that items are secured.

However, the alleged event at issue was not caused by a desk that was not secured. Rather, it was caused by the manner in which the sample desk was displayed, to wit: at a height, with a glass shelve secured by nothing more than suction cups. Given such, a jury might reasonably conclude that Ollie's "created" the alleged dangerous and defective condition, or had actual or constructive knowledge of the same.

Thus, that branch of the motion which is for summary judgment dismissing the complaint as against Ollie's, as owner of the store, is denied without need to consider the Plaintiff' opposing papers.

However, the testimony proffered by Ollie's is sufficient to demonstrate, *prima facie*, that it may not be held liable as an employer on a negligent hiring or retention cause of action.

Such a cause of action requires an employer to answer for a tort committed by an employee against a third person when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm. *D.T. v. Sports and Arts in Schools Foundation, Inc.*, 193 A.D.3d 1096 [2nd Dept. 2021]; *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 A.D.3d 875 [2nd Dept. 2006]. The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his employees. *D.T. v. Sports and Arts in Schools Foundation, Inc.*, 193 A.D.3d 1096 [2nd Dept. 2021]; *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 A.D.3d 875 [2nd Dept. 2006]. Thus, a negligent hiring claim

does not require the existence of any particular relationship between the plaintiff and the defendant employer. Rather, the defendant is responsible for the harm its negligently hired employee causes to any third party. *D.T. v. Sports and Arts in Schools Foundation, Inc.*, 193 A.D.3d 1096 [2nd Dept. 2021]; *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 A.D.3d 875 [2nd Dept. 2006].

Here, Ollie's demonstrated, *prima facie*, that such was not the case.

In opposition, the Plaintiff failed to raise a triable issue of fact.

Thus, the branch of the motion which is to dismiss the allegations of negligent hiring, etc. against Ollie's is granted.

As to Dunning, it is not disputed that Dunning is an out of possession landlord.

In general, an out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises, and has a duty imposed by statute, or assumed by contract or a course of conduct. *Fuzaylova v. 63–28 99th St. Farm Ltd.*, 161 A.D.3d 946 [2nd Dept. 2018].

Thus, where a complaint sounds in common-law negligence, and the plaintiff does not allege the violation of a statute, a defendant may demonstrate a *prima facie* entitlement to judgment as a matter of law by establishing that he or she is an out-of-possession landlord who is not bound by contract or course of conduct to maintain the premises. *Fuzaylova v. 63–28 99th St. Farm Ltd.*, 161 A.D.3d 946 [2nd Dept. 2018]. The mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises. *Fuzaylova v. 63–28 99th St. Farm Ltd.*, 161 A.D.3d 946 [2nd Dept. 2018].

Here, the Plaintiff does not allege the violation of a statute.

Otherwise, Dunning demonstrated, *prima facie*, that it is an out-of-possession landlord who is not bound by contract or a course of conduct to maintain the premises.

Thus, that branch of the motion which is for summary judgment dismissing the complaint as against Dunning is granted.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted in part and denied in part, as set forth herein, and the complaint is dismissed as against the Defendant Dunning Farms LLC; and it is further,

ORDERED, that the remaining parties are directed to, and shall, appear for a status conference on Wednesday, November 17, 2021, at 9:30 a.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York. If Courts are not in session and open to the public on the date of the scheduled conference, a virtual conference will be held on that date at a time designated by the Court.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 31, 2021
Goshen, New York

ENTER

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