

Armenta v AAC Cross County Mall LLC

2021 NY Slip Op 33978(U)

December 22, 2021

Supreme Court, Westchester County

Docket Number: Index No. 69546/2019

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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MARIA ARMENTA,	Plaintiff,	DECISION & ORDER
		Index No. 69546/2019
		Motion Sequence 1
-against-		
AAC CROSS COUNTY MALL LLC,	Defendant.	

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The following papers were received and considered in connection with the defendant's motion for summary judgment:

- Notice of Motion/Affirmation/Exhibits A-F
- Statement of Material Facts
- Affirmation in Opposition/Exhibit A-C
- Response to Statement of Material Facts
- Reply Affirmation

Factual and Procedural Background

The plaintiff, Maria Armenta ("Armenta"), commenced this action against the defendant, AAC Cross County Mall LLC ("AAC"), on November 27, 2019, to recover damages for alleged injuries she sustained when on April 24, 2019, she was caused to fall on an oil/grease stain located on the top level of the open-air parking garage of the Cross County Mall, located at 750 Central Park Avenue Yonkers, New York. The plaintiff alleges that on

AAC now files the instant summary judgment motion to dismiss the complaint, pursuant to CPLR 3212, arguing that it cannot be held liable for Armenta's injuries suffered

on in the garage because AAC did not have actual or constructive notice of any alleged defective condition, the defect was trivial and open and obvious.

In opposition, Armenta argues that AAC failed to meet its prima facie burden for summary judgment. Armenta asserts that the body of case law regarding whether a defect is trivial or insignificant is limited to cases involving differentials in heights or defects which are so insignificant as to be not actionable and has never been applied to a slip and fall arising from oil or grease on the ground. Armenta also argues that AAC offers no evidence of the oil/grease length, depth, viscosity or how slippery it was and it cannot be deduced from the photos, which were taken from a distance.

Armenta also argues that the defendant failed to show that the defect was open and obvious because her attention was focused on her seven year old daughter on the way out, even though she was aware of the oil or grease on the way in to the mall. Armenta further argues that AAC failed to offer evidence as to when or how the parking lot was last cleaned or inspected for oil spots and Armenta had noticed the same oil patch at least a week prior when she had been to the mall.

In reply, AAC argues that Armenta fails to address or distinguish the controlling precedent that oil and grease spots are incidental to the use of a parking lot or garage and fails to raise issues of fact based upon admissible evidence, to establish that the condition was not trivial or open and obvious. AAC also argues that Armenta slipped and fell on a spot of discoloration that was visibly apparent and known by her from two previous occasions of walking by the spots and therefore, the condition was open and obvious as a matter of law.

AAC further argues that a general awareness that grease or oil may be present on a garage floor, is insufficient to constitute notice of the particular condition. The defendant asserts that the testimony shows that, while there were no specific inspections for oil and grease spots, there were ample and thorough maintenance routines, including daily cleaning of the parking lot and no complaints about the alleged condition. AAC asserts that there is no evidence that it had notice of the condition or that it created the condition.

In support of its motion, AAC relies upon, among other things, deposition transcripts, photographs of the garage, an attorney's affirmation, statement of material facts, and copies of the pleadings. In opposition, Armenta relies upon a the party depositions, additional photos, response to statement of material facts and an attorney's affirmation.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law (*see Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[T]he proponent of a summary judgment motion 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" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) and the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position (*Id.*).

To impose liability upon the defendant, “there must be evidence that a dangerous or defective condition existed, and that the [defendant] had actual or constructive notice of the condition and failed to remedy it within a reasonable time (*Livingston v Better Medical Health, P.C.*, 149 AD3d 1061, 1062 [2d Dept 2017]). Therefore, “a defendant moving for summary judgment in a slip-and-fall action has the initial burden of making a prima facie showing 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” (*Id.*).

‘It is well settled that the existence of a patch of oil or a slippery foreign substance on a floor does not, in and of itself, give rise to a cause of action sounding in negligence’ (*Mercer v City of New York*, 223 AD2d 688, 689 [2d Dept 1996] quoting *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 250). ‘[T]he plaintiff must establish that the oil or foreign substance was present “under circumstances sufficient to charge the defendant with responsibility...to prove either that the defendant had knowledge of the alleged dangerous condition, either actual or constructive, or that it caused the condition to be created by its own affirmative act”’ (*Id.* [citation omitted]). Further, “a general awareness that a dangerous condition, such as grease and oil on a garage floor, may be present, is legally insufficient to constitute notice of the particular condition which caused [Armenta’s] fall (*Id.*).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d

546, 546 [2d Dept 1995]), the Court finds that AAC has met its burden and has made a prima facie showing of entitlement to judgment as a matter of law against Armenta.

The Court finds that Cushman has established that it neither created the condition, nor had actual or constructive notice of the condition that caused Armenta's injuries. In this case, there is no evidence of actual notice to AAC and Armenta is not asserting such notice. Nevertheless, Armenta asserts that AAC had constructive notice of the alleged oil or grease on the ground in the parking garage, since she had been to the mall one week prior and the grease or oil spots had been there, so AAC must have been aware of them.

In rebuttal, AAC's property manager, Josette Squitieri ("Squitieri") testified that the maintenance crew reports to her and is responsible for cleaning the parking lot every day before the mall opens. The crew arrives at 5 a.m. and takes roughly two and a half hours to sweep the entire parking lot with brooms and when Squitieri arrives at work between 8 a.m. and 9 a.m., she observes that the parking lot is swept and clean. Squitieri testified that if an oil stain was found in the lot, the procedure was to apply sand to the affected area and this was done on one prior occasion. Squitieri did not have any specific memory of the date of the Armenta's alleged accident and Armenta failed to report the incident or the oil or grease stain.

Therefore, based on Squitieri's testimony, the Court finds that AAC did not have either actual or constructive notice of the grease or oil stain in the parking garage and that AAC established a consistent cleaning protocol for the area in question. The fact that the lot was stained does not automatically mean that the area was slippery and as per the testimony of the property manager, the area was swept on a daily basis. The plaintiff

testifying that she saw the discolored spots one week prior to the incident, does not indicate that such spots were a dangerous condition when she saw them and that the defendant should have constructive notice of a dangerous condition.

Since the Court has found that there was no actual or constructive notice, the Court need not address the alleged defect being trivial and open and obvious.

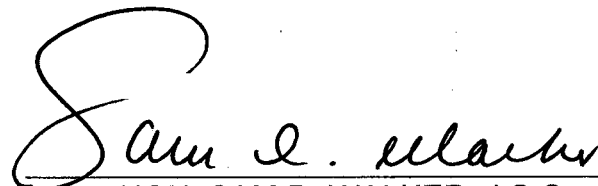
Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment is GRANTED; and it is

ORDERED that the complaint is dismissed as against the defendant, AAC Cross County Mall LLC.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 22, 2021


HON. SAM D. WALKER, J.S.C.