Thorp v 3151 Westchester Ave. Food Corp.
2021 NY Slip Op 34016(U)
December 23, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20570/2019E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK : Part IA-12
--X
THERESA THORP,

Plaintiff,

-against-

3151 WESTCHESTER AVE. FOOD CORP., 3151, WESTCHESTER AVE. FOOD CORP d/b/a KEY FOOD, 3151 WESTCHESTER AVE. FOOD CORP. d/b/a BONAVITA KEY FOOD FRESH, KEY FOOD STORES CO-OPERATIVE, INC: KEY FOOD STORES CO-OPERATIVE, INC. d/b/a BONAVITA KEY FOOD FRESH. SME MANAGEMENT CORP., S.M.E. MANAGEMENT CORP. d/b/a KEY FOOD, SME MANAGEMENT CORP. d/b/a BONAVITA KEY FOOD FRESH, S.M.E. HOLDING CORP., S.M.E. HOLDING CORP. d/b/a KEY FOOD, S.M.E. HOLDING CORP. d/b/a BONAVITA KEY FOOD FRESH, AND L & C BAYWEST REALTY CORP.,

Defendants.
--X

DECISION AND ORDER
Index No. 20570/2019E
Motion Seq. #002

HON. KIM ADAIR WILSON
J.S.C.

Kim Adair Wilson, J.:

"**NOTICE OF MOTION FOR SUMMARY JUDGMENT**," dated and filed June 22, 2021, by Beverly McGrath, Esq. (Morris Duffy Alonso & Faley), counsel for all named defendants, seeking an "Order pursuant to CPLR § 3212 dismissing the plaintiff's complaint in its entirety and granting summary judgment in favor of the defendants by their attorneys, MORRIS DUFFY ALONSO & FALEY..." Also submitted is a "**NOTICE OF CROSS MOTION**," dated and filed August 20, 2021, by Everett J. Petersson, Esq. (Everett J. Petersson, P.C.), counsel for plaintiff seeking an "Order striking the Defendants' Answer for spoliation of key evidence..." Defendants' second counsel, Arianna Efstathiou, Esq. (Morris Duffy Alonso & Faley), submits an "**AFFIRMATION IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION**," and an "**AFFIRMATION IN REPLY**," both dated and filed October 5, 2021. In response, plaintiff's counsel submits an "**AFFIRMATION IN REPLY**," dated and filed October 11, 2021 (**NYSCEF Lines 38-90**). The defendants' motion and plaintiff's cross-motion are decided as set forth below.

In this personal injury action, plaintiff Thorp alleges, by way of Summons and Verified Complaint, that on 11/7/2017, at approximately 11:30AM, while a lawful pedestrian/customer upon premises described as Key Food located at 3151 Westchester Avenue in Bronx County ("subject premises"), she was caused to "trip and/or fall due to the

presence of skids, merchandise, crate/and or pallets blocking said exit area" as a result of the defendants' negligence who owned, operated, maintained, managed and controlled the subject premises. In the instant motion, the defendants move for CPLR 3212 summary judgment on the basis that "the object that allegedly caused plaintiff to trip and fall was a trivial defect as well as open and obvious such that plaintiff had the opportunity to observe it using her reasonable senses," and they lacked actual or constructive notice of the alleged condition.

"Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012] *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642 [1985]). Once the movant meets its burden, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial (*Ostrov v Rozbruch*, 91 AD3d 147, *supra*, citing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986]).

In support of their motion, the defendants proffer the pleadings, the deposition transcripts of plaintiff Thorp, non-party witness Michael Thorp (son of plaintiff), and Carlos Fernandez; the incident report; photos of the piece of wood that plaintiff allegedly tripped over; the affidavit of Tom Breslin; still photos of plaintiff from video; and a picture of a "STAPLES" flash drive, which allegedly contains the defendants' security video of plaintiff's accident.

Plaintiff Thorp testified (August 20, 2020) that on November 7, 2017, at approximately 11:30AM, her son, Michael Thorp, drove her to the Key Food supermarket at the subject premises and waited outside for her. She exited her son's vehicle and walked across the same subject sidewalk to retrieve a shopping cart. After shopping, she exited the store at a different exit from which she entered. She was carrying three plastic bags which were not heavy. As she walked toward her son's parked car at the curb, she tripped over what she subsequently learned to be a piece of wood that was on the sidewalk abutting the subject premises and fell. A gentleman, who appeared to be selling medical policies at a table outside, came to her assistance. He handed her son a piece of wood which he described as the cause of plaintiff's fall. Subsequently, a manager came out of the store, and a young lady who took plaintiff's information and asked what happened. The plaintiff testified that she was not looking down as she walked, but instead, was looking straight ahead at her son's vehicle when she tripped and fell. The plaintiff retained the piece of wood and provided photographs of it.

Michael Thorp, a non-party witness, testified (September 24, 2020) that he drove his mother to the supermarket, one in which the family has shopped on a regular basis for ten years. When he drove her there on occasion, he parked outside because the parking lot was usually "jam-packed." His car faced the store's entrance, and he could observe people entering and exiting. He observed his mother exit the store, facing the fruit stand. After making a first right that brings you onto the sidewalk, she made a left to come towards him and then tripped and fell forward. He jumped out of his vehicle and reached her within three seconds; he was the second person to come to her aid. The first was a gentleman who worked for a health insurance company. Mr. Thorp, like plaintiff, testified that the gentleman handed him a piece of wood and stated that it was the cause of plaintiff's fall. Mr. Thorp stated that the wood, given its color and thickness, appeared to be a piece of a pallet. The sidewalk, he testified, was "clear of anything other than that one thing."

Carlos Hernandez testified (September 30, 2020) that he has served as the General Manager at Bonavita Key Food for 16 years. He was not present at the store on the day of plaintiff's accident and never saw the accident report. He could not recall when he first heard of the accident but observed the video of the accident. On the video, he identified his former employees, Joe Milazzo and Stephanie. He stated that it appeared to him, from the video, that the plaintiff tripped on her own. He was, however, aware of a small piece of wood that he observed on the video; he had no prior incidents of anyone tripping on pieces of wood in front of the store. Mr. Hernandez testified that store deliveries are made on the loading dock in the back and most products are delivered on pallets. Pallets are used for displays as a base – outside displays are brought out on pallets using pallet jacks and set up around 8AM, and then brought inside at the end of the day. As for the sidewalks, they are cleaned at 7AM and then re-checked after lunchtime.

Defendants also submit the April 22, 2021 affidavit of Investigator Tom Breslin[1], including photographs and measurements of the piece of wood. On March 11, 2021, Mr. Breslin inspected the subject wood whereupon he photographed and measured same. He described it as light in weight, made of pine and weathered, but not rotted. It appears to have "broke or splintered off a wooden board of unknown origin...measures approximately 8 ½ in length and 1 6/8" at its maximum width at one end with two holes. It comes to a sharper point at the other end...It is 6/10 of an inch thick at most points."

[1] Defendants' counsel inadvertently provides the incorrect date of "April 22, 2014" as the date of Mr. Breslin's affidavit and describes Mr. Breslin as "Mr. Wood" (Affirmation, p. 17).

The incident report dated 11/7/17, states that the accident occurred "[i]n front of the store on sidewalk" and described as a "piece of wood was stuck in between crack of sidewalk customer tripped and fell." Significantly, the author of this report is absent.

Counsel contends that the wood was lying in the middle of the sidewalk upon a sidewalk flag in plain sight; it was open and obvious when plaintiff stepped on it and lost her balance; and the wood does not constitute a hazard or a trap. Counsel further contends that given its trivial nature, the defendants were of no duty to warn plaintiff Thorp of its existence on the sidewalk. A court may determine that a condition is open and obvious when the established facts compel that conclusion (*Schulman v Old Navy/TheGap*, 45 AD3d 475 [1st Dept 2007]). No bright line test exists for determining whether a condition is open and obvious. The test is whether the plaintiff, reasonably using her senses, would have observed the condition. Since the test incorporates a reasonableness standard, it is fact-specific and usually presents a question for resolution by the trier of the fact. The degree to which a dangerous condition is open and visible goes to the issue of comparative fault (*Centeno v Regine's Originals, Inc.*, 5 AD3d 210 [1st Dept 2004]). The established facts are that plaintiff Thorp exited the store, observed her son's parked vehicle, and began walking on an open sidewalk toward the vehicle, looking straight ahead. The defendants have failed to establish that plaintiff Thorp, reasonably using her senses, should have observed the wood piece on the ground. Moreover, even if the wood piece was visible, it does not necessarily mean that it was open and obvious (*Cook v Consolidated Edison Company*, 51 AD3d 447 [1st Dept 2008]). The defendants failed to establish that the wood piece measuring at 8 ½ inches long does not constitute a hazard.

The defendants posit that they lacked actual or constructive notice. A defendant who moves for summary judgment in a trip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470 [1st Dept 2012] citing *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [2010] [internal quotation marks omitted]). Constructive notice is established when a defect is visible, apparent and existed for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy the defect (*Luzinski v Kenvic Associates*, 242 AD2d 242 [1st Dept 2007]). A "(d)efendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Thus, absent such evidence, a defendant generally will be unable to make a prima facie showing that, as a matter of law, it lacked constructive notice of the alleged hazardous condition. Here, the defendants proffer no evidence of the supermarket's maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was

last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). In addition, there is no testimony from the porter responsible for the maintenance. General Manager Carlos Fernandez's sole testimony that the sidewalks are cleaned at 7AM and re-checked at lunch time, with no specific time provided, is insufficient. Notably, Mr. Fernandez was not present on the day of plaintiff's accident and lacks personal knowledge as to whether clean-up occurred at all.

Defendants move for summary judgment dismissal of the plaintiff's complaint in its entirety. Summary judgment is a drastic remedy and should only be employed when there is no doubt as to the absence of triable issues because it deprives the plaintiff of his or her day in court (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). Here, this Court finds that the defendants failed to meet their initial prima facie burden in establishing that no triable issues of fact exist. Accordingly, they failed to shift the burden to the plaintiff to rebut that showing. The defendants' motion is therefore denied.

Plaintiff's Cross-Motion

Plaintiff Thorp's counsel seeks to strike the Answers interposed by defendants asserting that the defendants "willfully destroyed evidence notwithstanding the request that all evidence be preserved." Specifically, counsel contends that, although he mailed two letters, via Federal Express, on November 28, 2017 (21 days post-accident) and again on January 12, 2018, requesting that they preserve their security videotape footage, defendants' counsel provided eighteen (18) seconds of footage prior to plaintiff's accident; they "withheld the last known addresses of potential witnesses, Joe Milazza and Stephanie Montemura;" they "failed to provide the name of the individual responsible to maintain the area where the accident occurred on the day of the accident;" and they "failed to turn over the sidewalk permit that was issued by the City of New York in order for Defendants to have wooden pallets on the sidewalk..." Plaintiff's counsel further contends that he requested the footage for a third and fourth time by way of "COMBINED DEMAND FOR DISCOVERY & INSPECTION and NOTICES, dated October 21, 2019; and "SUPPLEMENTAL DEMAND FOR DISCOVERY (SURVEILLANCE VIDEO FOOTAGE)," dated February 21, 2020, specifically seeking footage showing the four hours before plaintiff's accident. On 11/18/19, during a Preliminary Conference, the Honorable Laura Douglas directed the defendants to respond to plaintiff's demands of 10/21/19 and 11/15/19 within 30 days, but defendants failed to do so. On February 24, 2020, Justice Douglas, during a Compliance Conference, ordered the defendants to turn over, inter alia, the surveillance video for the four hours prior to the accident. Justice Douglas' Orders include the following language in pertinent part, respectively:

11/18/19
In the event of non-compliance, costs or other sanctions may be imposed.

2/24/20
FAILURE TO COMPLY WILL RESULT IN PLAINTIFF'S PRECLUSION FROM OFFERING ANY EVIDENCE AT TRIAL REGARDING THEIR PHYSICAL CONDITION, UNLESS OTHERWISE ORDERED BY THE COURT.

In light of the foregoing and the defendants' partial compliance with plaintiff's demands and Justice Douglas' Orders, this Court respectfully refers the plaintiff's cross-motion seeking to strike the defendants' Answers to Justice Douglas for determination.

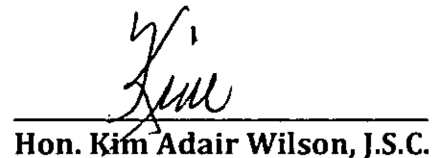
Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that the defendants' motion for summary judgment is DENIED and plaintiff's cross-motion to strike the defendants' Answers is respectfully referred to the Honorable Laura Douglas for determination.

Accordingly, the **defendants' motion is DENIED,** and the **plaintiff's cross-motion is respectfully referred to Justice Laura Douglas** as stated herein.

The movant is directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: December 23, 2021
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.