

Ovalles-Sosa v Khoudari
2022 NY Slip Op 35110(U)
August 26, 2022
Supreme Court, Bronx County
Docket Number: Index No. 21655/2020E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 21655/2020E
Motion Sequence No. 004
Motion Date: 5/23/2022

-----x
INES OVALLES-SOSA,

Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman

AMY KHOUDARI AND LAURA KHOUDARI
AS SUCCESSOR TRUSTEES, SIGNATURE
BANK, MARIN MANAGEMENT CORP., LOT
LESS NYC, INC., LOT LESS CLOSEOUTS, INC.,
and 5545 RIVERDALE, INC.,

Defendants.
-----x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these motions:

<u>PAPERS</u>	<u>Numbered</u>
Lot Less NYC, Inc., Lot Less Closeouts, Inc., and 5545 Riverdale, Inc.'s Notice of Motion, Affirmation in Support and Exhibits thereto.....	1
Ines Ovalles-Sosa's Affirmation in Opposition and Exhibits thereto.....	2
Reply Affirmation.....	3

Defendants LOT LESS NYC, INC., LOT LESS CLOSEOUTS, INC., and 5545 RIVERDALE, INC., (hereinafter referred to as "Defendants Lot Less"), herein move, by NOTICE OF MOTION, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting LOT LESS Summary Judgment. Plaintiff INES OVALLES-SOSA (hereinafter referred to as "Plaintiff"), has submitted opposition thereto and reply affirmation having been submitted. Due deliberation having been had, the motion is decided as follows:

Plaintiff, INES OVALLES-SOSA, commenced this action by filing a Summons and Complaint alleging personal injuries sustained on January 2, 2020, when a box fell from a shelf and hit her on the head at the Lot Less Store located at 5545 Broadway, Bronx, NY (hereinafter referred to as "Subject Premises"). Plaintiff commenced this action against Defendants Lot Less alleging the Defendants' employees negligently stocked the shelves, causing the shelves to move and a box to fall from an eight feet high shelf onto the Plaintiff causing serious injuries to the Plaintiff. Defendants Lot Less moves for summary judgment on the issue of liability alleging

that Plaintiff has failed to prove a prima facie case of negligence nor that the Defendants had notice of the condition. Furthermore, that Plaintiff's allegations are based upon mere speculation.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1 st Dept. 1989). It is well settled that issue finding is the key to summary judgment. *Rose v. DaEcib USA*, 259 A.D. 258, 686 N.Y.S.2d 19 (1 st Dept. 1999). Summary judgment will only be granted if there are no material triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp*, 3 N.Y.2d 385, 144 N.E.2d 498 (1957). If the movement meets this burden, the opponent must rebut the prima facie showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See *Zukerman v. City of New York*, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. *Winegrad*, 64 N.Y.2d at 853.

The Plaintiff alleges that while traversing an aisle within the retail store of the Subject Premises Defendants Lot Less through employees permitted or caused a dangerous condition to exist in negligently and improperly stocking the shelves, causing the shelves to move and a box to fall from an eight feet high shelf onto the Plaintiff causing serious injuries to the Plaintiff herein. The Plaintiff further argues that it was an employee of Defendants Lot Less improper stocking of shelves which caused the shelves to shake and the box to fall. The Plaintiff argues that by failing to remedy the situation, Defendants Lot Less created a dangerous condition, causing the Plaintiff to sustain injuries.

In support of their motion, Defendants Lot Less submits copies of the pleadings, deposition transcripts of the Plaintiff which were taken on July 9, 2021 and July 19, 2021 (NYSCEF Doc. No. 56, 57), an expert report by Envista Forensics (NYSCEF Doc. No. 64) and exhibits annexed thereto. Defendants Lot Less argues that the Plaintiff is speculating about whether a store employee created a dangerous condition and whether Defendants Lot Less had actual or constructive notice of the alleged dangerous condition (NYSCEF Doc. No. 52, p. 7). Defendants Lot Less submits the expert report of Mark R. Cipolone, P.E., an associate of Envista Forensics, who concludes that "Lot Less has taken reasonable steps to ensure that hazardous conditions are prevented and are addressed quickly if they occur" (NYSCEF Doc. No. 64, p. 10 ¶ 8). Mr. Cipolone also concludes that "there is no way to determine, within a reasonable degree of engineering certainty, the orientation of the box when it struck Ms. Ovalles-Sosa" (NYSCEF

Doc. No. 64, p. 10 ¶ 10). He notes that the conclusions of Plaintiff engineering expert Harold Krongelb, P.E. are speculative and invalid because Mr. Krongelb made unreasonable assumptions regarding the location of the box, the size of the box, and how the box collided with the Plaintiff's head (NYSCEF Doc. No. 64, p. 8). Defendants Lot Less further asserts that Plaintiff had no way of knowing where the box fell from because she did not see the box before the accident nor as it was falling. Defendants Lot Less claims that because the Plaintiff cannot confirm what the employee was doing at the time of the accident nor where the box fell from, Plaintiff's evidence that Defendants Lot Less created a dangerous condition, had actual notice of the condition, or had constructive notice of the condition is purely speculative. Moreover, Defendants Lot Less argues that they did not create a dangerous condition, they had no actual notice of the condition, nor did they have constructive notice of the condition. They claim that store procedures ensure that merchandise is properly stocked, noting that if merchandise is on the floor or an item is improperly stocked an employee is required to fix it.

In opposition to the motion, the Plaintiff references the report of expert engineer Harold Krongelb, P.E. who determined that Defendants Lot Less were negligent because they failed to use reasonable caution when stocking merchandise on the top shelf. In his report, Mr. Krongelb concludes that the box fell with a force of 260 pounds and that it is reasonable to see that items placed too close to the edge of the shelf will fall (NYSCEF Doc. No. 65 p. 8). Plaintiff testified over a two day deposition that the accident occurred on January 2, 2020, and that while bending down to pick up an item, a box fell and hit her on the head (NYSCEF Doc. No. 56 July 9th, 2021 & NYSCEF Doc. No. 57 July 14th, 2021 Examination Before Trial). Plaintiff also testified that the box was small and white, and that she felt dizzy and suffered a headache after being hit in the head by the box. Plaintiff argues that she saw the employee on the other side of the aisle stocking the shelves, which caused the shelves to shake and the box to fall on the Plaintiff. Plaintiff further testified that she determined the box fell from the top shelf because she looked up and saw an empty space with other boxes the same size behind the empty space. Plaintiff testified that she noticed the shelf was shaking and that she noticed an employee of the store at aisle 2, which is the back of aisle 3. Plaintiff further testified aisle 2 was behind the shelves she was facing at the time of the accident and that is where she saw the store employee, walked around to aisle 2 and saw employee arranging and organizing the upper part of the shelves. Plaintiff testified she knew the individual to be a store employee because she had seen her work in the area before, and she was stocking shelved close to the top shelf.

Plaintiff further submitted an affidavit in opposition to the motion wherein Plaintiff attests that "I determined that an item that fell on me was caused to fall by a store worker one aisle over stocking the shelves which caused the shelves to move (P65) The shelf moving and the box falling occurred simultaneously. (P.68) Therefore it was obvious that the employee moving the shelf unit caused the box to fall." (NYSCEF Doc. No. 77) Plaintiff also argues that there is no written rule, regulation, or log related to inspection practices and that mere reference to

inspection practices without evidence of inspection is not enough to establish a lack of constructive notice.

Clearly, question of fact exists based upon the conflicting evidence brought forth by each party's expert testimony. It is well settled that on a motion for summary judgment the court may not weigh the credibility of witnesses. See, *Glick v. Dolleck v. Tri-Pack Export Corp.*, 22 N.Y.2d 439 (1968); *Perez v. Bronx Park South Associates*, 285 A.D.2d 402 (1st Dept. 2001). The court in the case of *Quinn v. Krumland*, 179 A.D.2d 448 (1st Dept. 1992) stated: "The function of a court on a motion for summary judgment is not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of a material issue of fact." Additionally, Plaintiff has raised a question of fact as to whether an employee was negligently and improperly stocking the shelves, causing them to shake as a result of which in turn caused a box to fall from the top shelf and hit the Plaintiff.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendants LOT LESS NYC, INC., LOT LESS CLOSEOUTS, INC., and 5545 RIVERDALE, INC.'s Motion for Summary Judgment pursuant to CPLR §3212 on the issue of liability is denied.

ORDERED AND ADJUDGED that the Defendants LOT LESS NYC, INC., LOT LESS CLOSEOUTS, INC., and 5545 RIVERDALE, INC., shall serve a copy of this Order wit Notice of Entry within thirty (30) days from the date of entry.

This constitutes the Decision and Order of the Court.

Dated: August 26, 2022


HON. WILMA GUZMAN, J.S.C.