

Charles-Roney v Nostrand Meat Corp.

2023 NY Slip Op 34939(U)

April 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 504020/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of April, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X

JOHANE CHARLES-RONEY,

Plaintiff,

-against-

NOSTRAND MEAT CORP. and NOSTRAND
RETAIL GROUP, LLC;

Defendants.

-----X

Index No.: 504020/2020

DECISION AND ORDER

Motion Sequence #3

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	75-87,
Opposing Affidavits (Affirmations).....	89-95,
Reply Affidavits (Affirmations)	98

After a review of the papers and oral argument on the motion the Court finds as follows:

The instant action results from an alleged slip and fall incident that occurred on July 1, 2019. On that day, the Plaintiff Johane Charles-Roney (hereinafter “the Plaintiff”) was allegedly injured inside of the premises located at 1891 Nostrand Avenue, Brooklyn, New York (hereinafter “the Premises”). The Plaintiff contends that the incident occurred when she slipped and fell on the floor of a butcher shop operated by commercial tenant Defendant Nostrand Meat Corp. (“Nostrand Meat”) at the Premises. The Premises is purportedly owned by Defendant Nostrand Retail Group, LLC. (“Nostrand Retail”) (or collectively referred to as the “Defendants”).

The Defendants now move (motion sequence #3) for an order pursuant to CPLR §3212 granting summary judgment and dismissal of the complaint. The Defendants argue that the instant

matter should be dismissed because the Defendants did not create the condition or have actual or constructive notice of the alleged defect. In support of their application, the Defendants rely on the deposition of the Plaintiff, the deposition of Anthony Marchese, an affidavit from Geoffrey Henry, and a video.

In opposition, the Plaintiff argues that the Defendants have not met their *prima facie* burden. The Plaintiff argues that the Defendants failed to provide sufficient evidence regarding when the floor at issue had last been cleaned or inspected. In the alternative, the Plaintiff contends that even assuming that the Defendants had met their *prima facie* showing, the Plaintiff has raised sufficient issues of fact to defeat Defendants' summary judgment motion. Specifically, the Plaintiff points to deposition testimony relating to whether the water condition was on the aisle floor for a sufficient period of time that would permit a finding that the Defendants had constructive notice of the condition at issue.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853; see also *Akseizer v. Kramer*, 265 A.D.2d 356 [2d Dept 1999]. Moreover, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Moreover, as the Court of Appeals made clear in *Andre v. Pomeroy* “when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]; *see also McElwain v. Olashansky*, 220 A.D.2d 394, 395, 6 631 N.Y.S.2d 886, 886 [2d Dept 1995].

In a slip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.*, 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

The Plaintiff sat for her deposition on June 18, 2021 (NYSCEF Doc. 79). When asked how she travelled to the store on the day of her accident, the Plaintiff stated, “I walked from my house to go the market.” When asked whether she walked with someone or she was alone, the Plaintiff stated, “[b]y myself.” When asked how far the store was from her home, the Plaintiff stated, “[o]ne

block.” When asked whether she noticed any carpets or mats on the floor, the Plaintiff stated, “[n]o.” (Page 28). When asked if it had rained that day, the Plaintiff stated, “[n]o.” When asked how often she visited the store, the Plaintiff stated, “[w]hen I need to go and go shopping, that's where I would go.” (Page 29). When asked what time of day her accident occurred, the Plaintiff stated, “[i]t was in the morning.” (Page 31). When asked how long she was in the store before her accident, the Plaintiff stated, “I might have been there around five or ten minutes.” “I don't remember.” When asked whether she was holding anything at that time, the Plaintiff stated, “I had the basket in my hand, I had my purse, and I don't remember exactly everything I had in the basket.” (Page 31). When asked where in the store the accident occurred, the Plaintiff stated, “[i]t happened by the refrigerator.” When asked what she was doing at that time, the Plaintiff stated, “I was walking to the freezer to pick up some things, to buy a couple things from the freezer.” (Page 32). When asked what caused her to fall, the Plaintiff stated, “[t]he way I fell is my foot slipped, and my foot absolutely slid. It slid down on the floor, and I had sandals on my feet, and then the sandal, there was some type of liquid on the floor, some liquid, so I slipped on that liquid, and I had sandals on my feet and the sandals actually left a trace mark on the floor where the liquid was.” When asked when she first noticed liquid on the floor, the Plaintiff stated, “I saw the liquid afterwards, because it was wet, my foot slipped in it. It was wet, it was cold, and then the side of my shorts were wet.” (Pages 32-33).

Anthony Marchese's deposition was conducted on June 23, 2021 (NYSCEF Doc. 81). Mr. Marchese stated, “I'm the owner of Nostrand Meat Corp.” When asked if there were other owners, Mr. Marchese stated, “I'm the sole owner.” When asked how long he has owned his business, Mr. Marchese stated, “[r]oughly 21 years.” When asked whether he was familiar with Defendant Nostrand Retail, Mr. Marchese stated, “I'm not sure, but I believe they're my landlord. (Page 9).

When asked whether a written lease for the premises he utilizes was in effect during the time the accident occurred, Mr. Marchese stated, “[y]es.” (Page 10). When asked when he was made aware of the Plaintiff’s accident, Mr. Marchese stated, “[m]aybe close to a year, if I had to guess.” When asked whether he had asked anyone about the incident, Mr. Marchese stated, “I asked my manager if he recalled anybody slipping and falling.” (Page 11). When asked what he was told, Mr. Marchese stated, “I mean, just that there was an incident; that somebody slipped and fell.” When asked how his manager was informed, Mr. Marchese stated, “I don’t know.” When asked if he knew whether his manager witnessed the fall, Mr. Marchese stated, “[h]e did not.” (Page 12). When asked what the store hours were on or around the time of the Plaintiff’s accident, Mr. Marchese stated, “Monday through Thursday, eight -- 8:00 a.m. to 8:00 p.m. Friday and Saturday, 8:00 a.m. to 9:00 p.m. Sunday, 8:00 a.m. to 5:00 p.m.” (Page 16). When asked whether he ever spoke to the store manager regarding whether there was something on the floor that caused the Plaintiff to slip, Mr. Marchese stated, “[n]o.” (Page 18). When asked if he knew whether there was any substance on the floor at the time, Mr. Marchese stated, “I’m not aware of anything.” When asked to clarify, Mr. Marchese stated, “I don’t -- I don’t know one way or the other.” (Page 19). When asked if at the time of the accident there was a policy in place to document an accident like this, Mr. Marchese stated, “[n]o.” When asked whether there was, during the relevant period, a routine protocol regarding cleaning the floors, Mr. Marchese stated, “[e]very couple of hours, we have a floor guy who will walk around and sweep. If there are any spills anywhere or somebody dropped something, we’ll put down the cones that say “Wet Floor” to make people aware of it. And then they will get a mop and a bucket or paper towels or whatever and clean up the spill.” When asked whether, around the time of the accident, there was a log or other record of cleaning done that day, Mr. Marchese stated, “[n]o.” (Page 25). When asked whether there was, during the

relevant period, a routine to sweep or do a walk through on or before 11:00 am every day, Mr. Marchese stated, “there is a floor guy on the floor from opening to closing, so every two hours, three hours. It's not a set time. If the floor looks like it's -- you know, there is paper on it or whatever, they will routinely walk around with a dustpan and a broom and just pick up loose paperwork, things like that.” If the floor is dirty, then they wouldn't do it.” (Page 26).

As part of his affidavit, Geoffrey Henry stated “on July 1, 2019 and the present date, I am the manager at the store known as NOSTRAND MEAT CORP. located at 1891 Nostrand Avenue, Brooklyn, New York.” “Both on July 1, 2019 and continuing through the present date, in order to ensure that the facility is clean and that the floors are free from debris and/or any spills and/or substances on which one may trip, an employee is designated each morning to walk through the entire store before it opens to the public, and ensure that the floors are free from debris any spills and/or substances on which one may trip.” Mr. Henry stated that, “[o]n July 1, 2019, I was the employee that opened the store to the general public while the above referenced procedures were in full force and effect.” Mr. Henry also stated that, “I do not have any recollection of any employee or member of the public notifying myself that there was a wet substance and/or debris present on any of the floors of NOSTRAND MEAT CORP. on July 1, 2019 at or around 11:30 am.” “After witnessing the slip and fall depicted in the footage submitted in support of defendant's motion, I went to assist the female customer that fell on July 1, 2019 at NOSTRAND MEAT CORP. at or around 11:30 am.” Mr. Henry also stated that “[b]ased upon my review of the [video] footage and recollection of the events depicted on the footage, I am unable to determine whether any wet and/or otherwise slippery substance was present on the floor at or around 11:30 am.” (See Defendants Motion, Affidavit of George Henry, NYSCEF Doc. 85).

Turning to the merits of the instant motion, the Court finds that there is an issue of fact regarding whether the Defendants “created the allegedly dangerous condition” ... or “...had actual or constructive notice of it.” *Hudlin v. Epicurean Deli*, 46 A.D.3d 752, 847 N.Y.S.2d 479 [2nd Dept, 2007]. The deposition testimony of Anthony Marchese and George Henry indicates that they did not know, with any specificity or detail, when the floor of the store had last been cleaned prior to the Plaintiff’s accident. Reference was made to their general cleaning practices. Moreover, the Defendants presented no documentary evidence such as log-books or sign in sheets relating to cleaning and/or inspections. “[R]eference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question.” *Quinones v. Starret City, Inc.*, 163 A.D.3d 1020, 1021–22, 81 N.Y.S.3d 184, 185–86 [2d Dept 2018], quoting *Rong Wen Wu v. Arniotes*, 149 AD3d 786, 787, 50 N.Y.S.3d 563, 564 [2d 2017].

A motion will fail if it merely presents testimony regarding general cleaning and inspection procedures, and fails to provide evidence regarding when the area in question was last cleaned or inspected relative to when the Plaintiff’s injury occurred. “Since the defendant did not submit evidence regarding any specific inspection or cleaning of the area on the date of the accident, the defendant failed to establish that it did not have constructive notice of the alleged dangerous condition.” *Ansari v. MB Hamptons, LLC*, 137 A.D.3d 1174, 28 N.Y.S.3d 397 [2nd Dept, 2016]; *Williams v. New York City Hous. Auth.*, 119 A.D.3d 857, 990 N.Y.S.2d 549 [2nd Dept, 2014]; *Farrell v. Waldbaum's, Inc.*, 73 A.D.3d 846, 847, 900 N.Y.S.2d 453, 454 [2nd Dept, 2010]. In light of this lack of specificity by someone with knowledge, the Court cannot determine, 1) whether the Defendants caused the alleged condition, 2) whether the Defendants had actual notice of the alleged condition, or 3) whether the period of time the alleged condition existed was sufficient to

impute constructive notice to the Defendants. *See Babb v. Marshalls of MA, Inc.*, 78 A.D.3d 976, 911 N.Y.S.2d 640 [2nd Dept, 2010] and *Yearwood v. Cushman & Wakefield, Inc.*, 294 A.D.2d 568, 742 N.Y.S.2d 661 [2nd Dept, 2002].

Additionally, the Defendant has not shown that the condition at issue was open and obvious and not inherently dangerous. As stated above, the Plaintiff stated that she slipped on a liquid substance as she was shopping. The video attached to the motion (NYSCEF Doc. 82) is unclear but does show the Plaintiff fall. Whether the condition was inherently dangerous and/or open and obvious under these circumstances is a question of fact. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]; see also *Bissett v. 30 Merrick Plaza, LLC*, 156 AD3d 751, 752, 67 N.Y.S.3d 268, 269 [2d Dept 2017].

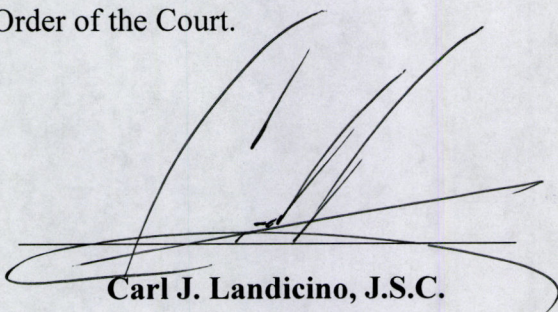
Finally, testimony or other evidence purporting to show the extent or lack of injuries that the Plaintiff may have suffered relates to the issue of damages not liability. In any event, even assuming that the Defendants had made a showing that the Plaintiff was not injured, the Plaintiff's medical evidence raised a question of fact.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

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KINGS COUNTY CLERK
FILED

