SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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ZINA KAABACHI,

Plaintiff,

- v -

SAKS & COMPANY LLC,SAKS FIFTH AVENUE LLC

Defendants.

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INDEX NO. 154799/2020

MOTION DATE 06/13/2024, 07/26/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

Plaintiff moves (Motion Seq. 001), pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendants Saks & Company LLC and Saks Fifth Avenue LLC. Defendants oppose.

Defendants move (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety, or, in the alternative, for partial summary judgment dismissing plaintiff's claim of complex regional pain syndrome (CRPS). Plaintiff opposes.

I. PERTINENT FACTS

On December 5, 2018, plaintiff was shopping in the women's handbag section of defendants' Saks OFF 5TH retail store located at 125 East 57th Street in Manhattan (premises) when a display shelf fell from its brackets and struck her left foot (NYSCEF 43). Plaintiff

alleges that, because of the incident, she sustained injuries to her left foot and subsequently developed symptoms she attributes to CRPS (*id.*).

In her verified bill of particulars, plaintiff alleges that defendants created and failed to remedy a dangerous condition by improperly installing, securing, and inspecting the shelf, and asserts both actual and constructive notice (NYSCEF 45). Plaintiff further states that she intends to rely on the doctrine of res ipsa loquitur (*id.*).

At the time of the incident, Natasha Martinez was working as the store's General Manager, and Patrick Ard was working as the Asset Protection Supervisor (*id.*). Surveillance video of the incident was produced in discovery (NYSCEF 72). Plaintiff testified that the surveillance video accurately depicts the incident (NYSCEF 46).

Ard testified at his deposition that he spoke with plaintiff after the accident, prepared an incident report, and inspected the shelf and brackets (NYSCEF 48). Despite the display shelf falling, he found nothing unusual upon his inspection of the area immediately after the incident (*id.*). Ard also testified that, based on his review of the surveillance video, it appeared a handbag strap may have been involved in dislodging the shelf (*id.*).

Martinez testified at her deposition that, in her more than ten years of retail management experience, shelves should be affixed to brackets in some manner, such as with screws, suction cups, or slide mechanisms, and that she could not recall how the display shelves at the premises were actually attached (NYSCEF 49). She further testified that no installation or inspection records were maintained pertaining to the display shelves, and that inspections occurred only after sale associates reported any problems (*id.*).

In her affidavit, submitted in opposition to plaintiff's motion, Martinez stated that the shelving at issue was installed between December 2015 and March 2016, when the store first

opened, and that the key stripping was affixed to the wall while the brackets and shelves were intended to be movable (NYSCEF 72). She further averred that, based on her retail experience since 2009, the shelving system used at the premises was of a type routinely used in the industry, and that she was not aware of any issues or injuries relating to the shelving during her tenure at the store from 2015 through July 2020 (*id.*).

Safety Expert Disclosures

Plaintiff's expert, Kristen Cooper VanWieren, a Certified Safety Professional, affirmed that industry standards required shelves to be secured to brackets so they could not fall, that the subject shelf at the premises was never attached, and that defendants failed to conduct regular inspections (NYSCEF 67). She relies on deposition testimony, the surveillance video, and OSHA standards in support of her opinion that defendants departed from accepted retail safety practices and that these departures caused plaintiff's accident (*id.*).

Defendants' expert, J. Terrence Grisim, is a Certified Safety Professional with more than 40 years of experience in loss prevention and retail safety (NYSCEF 54). Grisim affirmed that the shelving system in the women's handbag section, installed between December 2015 and March 2016, was of the type routinely used in the retail industry (*id.*). He explained that the "key stripping" was affixed to the wall and designed with multiple slots to allow brackets and shelves to be moved and adjusted for display purposes (*id.*). In his opinion, the shelving was in good working order until the incident and had not caused prior issues (*id.*). He further stated that retail industry standards do not require shelves to be affixed to brackets, and criticized plaintiff's expert for relying on an OSHA construction standard that does not apply to retail displays (*id.*).

Medical Expert Disclosures

Plaintiff expert, Justin A. Willer, M.D., a neurologist, who examined plaintiff and affirmed that she meets the internationally accepted Budapest criteria for CRPS (NYSCEF 84). He observed that she suffers from hyperalgesia, edema, skin color changes, tremor, and a significant temperature asymmetry in the left foot, which he concludes are causally related to the 2018 incident and permanent in nature (*id.*).

Defendants expert, Lloyd Saberski, M.D., a pain management specialist, who conducted an independent medical examination of plaintiff and affirmed that plaintiff does not meet the Budapest criteria (NYSCEF 64). He attributes her complaints to a localized contusion rather than CRPS, citing the absence of objective findings such as edema, skin changes, or consistent neurological deficits, and concludes that her presentation is inconsistent with CRPS (*id.*).

II. LEGAL STANDARD

"The 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 eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). "The proponent must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "This burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). "[I]f the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his/her failure to meet the strict requirement of tender in admissible form" (*Zuckerman*, 49 NY2d at 562).

A. Motion Seq. 001 – Plaintiff's Motion for Summary Judgment

Plaintiff contends that defendants created a dangerous condition by failing to properly secure a shelf to its brackets, allowing it to fall onto her foot and resulting in lasting injury. She argues that the shelves should have been affixed to brackets, that no installation or inspection records were maintained, and that the absence of such constitutes negligence. Plaintiff further contends that defendants departed from accepted retail safety standards, and that the video of the incident corroborates her account that the shelf fell without any improper action on her part.

Defendants oppose, arguing that plaintiff's expert affirmation is conclusory and relies on an inapplicable OSHA provision. They contend that no law, regulation, or industry standard requires retail shelves to be affixed to brackets, and that the shelving at issue was an industry-standard system installed when the store opened in 2015–2016 that had not caused problems in the years prior to the accident. Defendants further maintain that employees regularly monitored the shelving and reported no issues, that inspection after the incident revealed nothing unusual, and that the surveillance video supports an inference that a handbag strap may have dislodged the shelf.

In reply, plaintiff argues that defendants fail to raise a triable issue of fact, that Martinez's affidavit contradicts her deposition testimony and should be disregarded, that no records or

testimony establish how the shelf was installed or maintained, and that Ard conceded that the video does not show a handbag strap dislodging the shelf. Plaintiff further asserts that defendants' expert relies on unsupported assumptions, while her own expert's opinion is grounded in accepted industry standards.

To establish liability, a plaintiff must show that the defendant created the dangerous condition, or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see Reyes v Latin Am. Pentecostal Church of God, Inc.*, 181 AD3d 459, 459–460 [1st Dept 2020]; *Haseley v Abels*, 84 AD3d 480, 480 [1st Dept 2011]).

Actual notice requires proof that the defendant was aware of the specific condition alleged to be dangerous (*Piacquadio v Recine Realty Corp*., 84 NY2d 967, 969 [1994]). Constructive notice requires that the condition be visible and apparent, and that it exist for a sufficient period prior to the accident to permit discovery and remediation (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

Here, plaintiff has not established that defendants created or had notice of a dangerous condition. Martinez testified that, in her experience, shelves should have been affixed to brackets, but she could not recall how the subject shelves were attached, and defendants submit her affidavit stating that the system was designed to be movable. Ard testified that he inspected the shelf after the incident and found nothing unusual. On this record, plaintiff has not shown that defendants created the condition, nor had shown actual notice, as there is no evidence that defendants were aware of this particular shelf being unsecured.

Plaintiff likewise fails to establish constructive notice, since she points to no proof that the condition was visible and apparent for a sufficient period of time prior to the accident to permit discovery and remediation (*see Gordon*, 67 NY2d at 837; *Reyes*, 181 AD3d at 459–460).

Accordingly, plaintiff has not met her prima facie burden and her motion for summary judgement is denied.

B. Motion Seq. 002 – Defendants' Motion for Summary Judgment

Defendants contend that they neither created nor had actual or constructive notice of any defective condition, emphasizing that the shelving was an industry-standard movable system installed when the store opened in 2015–2016, had not caused problems in the years before the accident, and appeared intact when inspected immediately afterward. They argue that res ipsa loquitur is inapplicable because the shelving was accessible to customers and vendors and therefore not within defendants' exclusive control. Finally, defendants assert that plaintiff's CRPS claim is unsupported.

Plaintiff opposes, arguing that Martinez's deposition testimony that shelves should have been affixed to brackets and that no installation or inspection records existed raises triable issues that cannot be reconciled with Martinez's later affidavit or defendants' expert. She contends that Ard's speculation about a handbag strap is unsupported by the surveillance video. Plaintiff further argues that the absence of installation or inspection records supports constructive notice.

Defendants reply that plaintiff fails to raise a triable issue, reiterating that the shelving was an industry-standard movable system that appeared intact when inspected, that res ipsa loquitur does not apply because the shelving was accessible to customers and vendors, and that plaintiff's liability expert relies on an inapplicable OSHA provision. They further argue that plaintiff's expert's opinion is conclusory, and plaintiff's IME demonstrates she sustained only a contusion, not CRPS.

Creation / Notice

"[A] defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (*Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017] [internal citations omitted]).

A defendant may demonstrate a lack of constructive notice "by producing evidence of its maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell" (*Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). That evidence may be settled through witness testimony that the area was inspected shortly before an accident (*see Kennedy v 30W26 Land, L.P.*, 179 AD3d 556, 557 [1st Dept 2020] [finding no constructive notice where employee testified that she did not see puddle on floor when she inspected area five to 10 minutes before accident]; *Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571-572 [1st Dept 2014] [similar]), or through a regular maintenance schedule that was followed prior to the accident (*see Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469, 470 [1st Dept 2008] [finding no constructive notice where witness testified that stairs cleaned twice per day, once in morning and once at night, and that area free of alleged dangerous condition when witness finished cleaning it night before accident]; *cf. White v MP 40 Realty Mgt. LLC*, 187 AD3d 561, 563 [1st Dept 2020] ["Proof of a regular maintenance schedule (alone) does not suffice for purposes of showing that it was followed" (internal quotation marks and citations omitted)]).

Here, defendants rely on Ard's testimony that he observed nothing unusual when he inspected the shelf after the accident and on Martinez's affidavit describing the shelving as an industry-standard movable display that had not caused prior problems. Plaintiff, however, points to Martinez's deposition testimony that shelves should have been affixed to brackets and that no installation or inspection records were maintained. This testimony, if credited, could support an inference that defendants created the condition or failed to discover it through reasonable inspection. Moreover, Martinez affirmed there were no installation or inspection records at the premises regarding the display shelves, and that defendants relied on sales associates to report any problems. On this record, defendants fail to establish it lacked constructive notice absent evidence that the shelf was inspected before the accident or proof of a regular maintenance schedule that was followed prior to the accident.

Accordingly, defendants' motion for summary judgment is denied.

Res Ipsa Loquitur

Plaintiff further opposes, invoking the doctrine of res ipsa loquitur. Res ipsa loquitur permits, but does not require, an inference of negligence where the accident is of a kind that does not occur absent negligence, the instrumentality was within the defendant's exclusive control, and the plaintiff did not contribute to the occurrence (*see Dermatossian v NYCTA*, 67 NY2d 219, 226 [1986]; *Banca di Roma v Mut. of Am. Life Ins. Co.*, 17 AD3d 119, 120 [1st Dept 2005]).

Plaintiff argues that shelves do not ordinarily fall absent negligence, and that the video supports her claim that the shelf fell without any action on her part. Defendants counter that the shelving was accessible to customers and vendors and therefore not within their exclusive control and further suggest that a handbag strap may have dislodged the shelf. Both parties rely on the surveillance video but interpret it differently, leaving its significance to the factfinder.

As the First Department has recognized, res ipsa loquitur generally precludes summary judgment for either side, and permits an inference of negligence but does not compel one (*Maroonick v Rae Realty LLC*, 210 AD3d 410, 410–411 [1st Dept 2022] [although doctrine applied, plaintiff not entitled to summary judgment because circumstantial proof was not so convincing and defendant's response not so weak as to render negligence inescapable]; *Mejia v New York City Tr. Auth*., 291 AD2d 225, 227 [1st Dept 2002] [res ipsa properly applied where object fell on passenger, but jury must determine whether inference warranted]). Here, as in those cases, the competing interpretations of the evidence create issues of fact as to whether res ipsa applies, and summary judgment is inappropriate.

CRPS Claim

Defendants argue that plaintiff's CRPS claim is unsupported, relying on their doctor's conclusion that plaintiff's presentation was inconsistent with CRPS and attributable only to a localized contusion. Plaintiff submits her expert's opinion that, applying the recognized diagnostic standards for CRPS, her symptoms are consistent with the condition. These conflicting medical opinions present issues of fact that cannot be resolved on summary judgment (*see Hornsby v Cathedral Parkway Apartments Corp.*, 179 AD3d 584 [1st Dept 2020]).

Accordingly, defendants have not met their prima facie burden and motion Sequence 002 is denied in its entirety.

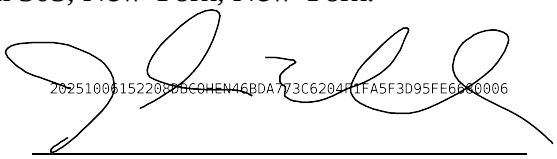
IV. CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability (Motion Sequence 001) is denied; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint, or alternatively dismissing plaintiff's claim of complex regional pain syndrome (Motion Sequence 002), is denied in its entirety; and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference on January 28, 2026, at 10 a.m. at 71 Thomas Street, Room 305, New York, New York.



10/6/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE