Lisi v Hollister Co.

2025 NY Slip Op 35295(U)

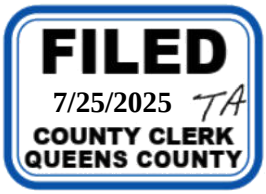
July 23, 2025

Supreme Court, Queens County

Docket Number: Index No. 706123/20

Judge: Timothy J. Dufficy

Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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ADELAIDE LISI,

Plaintiff,

Index No.: 706123/20
Mot. Date: 7/15/25
Mot. Seq. 3

-against-

HOLLISTER CO.,

Defendant.

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The following papers were read on this motion by defendant for an order, pursuant to CPLR 3212, granting summary judgment in favor of defendants and dismissing plaintiff's complaint.

	PAPERS NUMBERED
Not. of Mot, - Affidavits - Exhibits.....	EF 41-42;EF 44-46
Memorandum of Law.....	EF 43
Answering Affidavit - Exhibits.....	EF 48-53
Memorandum of Law.....	EF 54
Replying Affidavit -Exhibits.....	EF 57-59

Upon the foregoing papers, it is ordered that the motion by defendant is denied.

In this action, the plaintiff alleges that, on September 1, 2019, while shopping at the defendant's store, she tripped and fell over the legs of a metal display rack containing jeans, causing her to sustain injuries. In the Complaint, amplified by the Bill of Particulars, the plaintiff alleges that the defendant created an unsafe condition by, *inter alia*: utilizing unsafe lighting conditions that obscured the legs of the clothing rack; playing loud music that distracted and disoriented the plaintiff; and, by allowing the allowing the legs of the clothing rack to be obscured by clothing.

Defendant moves for summary judgment, submitting, among other things, the pleadings, the plaintiff's Verified Bill of Particulars and Supplemental Bill of Particulars; the transcript of the plaintiff's deposition transcript; and, the deposition transcript of Sebastain Carvajal (Caravajal), a stock person at the store. Defendant argues, in sum and substance, that: it is entitled to summary judgment, because the condition was "open and obvious and not inherently dangerous"; the plaintiff cannot identify the cause of her fall;

and, the defendant did not create an unsafe condition or have actual or constructive notice of the condition.

In her deposition transcript, submitted by defendant, the plaintiff described the store as being crowded, because it was Labor Day. She also described the area where she fell as being "cluttered and dimly lit." She testified that as she was walking through the pants section, her left foot got caught on a clothing rack that had clothes draped over it. She also identified photographs showing the area of the store where her accident occurred and showing a clothing rack placed on top of a rug. She testified that she tripped over the base of the clothing rack shown in the photographs and that the base of the rack was covered by clothing.

Carvajal testified that he did not receive any complaints about the music or lighting conditions. However, he also had no testimony to offer as to the size or dimension of the clothing rack or the condition of the area of the store where the accident occurred. Although he was working at the time of the accident, he did not recall the accident.

Although the defendant claims that the clothing rack was open and obvious and not inherently dangerous, it does not submit any evidence such as surveillance video, photographs, or expert opinion, to support this contention.

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact, and he or she must do so by tender of evidentiary proof in admissible form (*see Alvarez v Prospect Hosp*., 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Alvarez v Prospect Hosp*., *supra*, 68 NY2d 320, 324).

A party seeking summary judgment may not merely point to gaps in the opponent's proof to obtain relief. Rather, the movant must adduce affirmative evidence of its entitlement to summary judgment (*Torres v Industrial Container*, 305 AD2d 136 [1st Dept. 2003]). On a motion for summary judgment, facts must be viewed "in the light

most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

"A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (*Bishop v Pennsylvania Ave. Mgt., LLC,* 183 AD3d 685 [2d Dept 2020], quoting *Chang v Marmon Enters., Inc*., 172 AD3d 678, 678 [2d Dept 2019].) Therefore in a premises liability case, a defendant moving for summary judgment has the burden of establishing, *prima facie*, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it (*see Hamm v Review Assoc., LLC,* 202 AD3d 934 [2d Dept 2022]; *Mowla v Baozhu Wu*, 195 AD3d 706, 707 [2d Dept 2021]; *Fields v New York City Hous. Auth*., 186 AD3d 1330, 1330-1331[2d Dept 2020]; *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938, 938 [2d Dept 2017].)

A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]. "To meet its initial burden on the issue of lack of constructive notice, the moving party is required to offer some evidence as to when the accident site was last inspected or maintained prior to the plaintiffs accident" (*Kelly v Roy C. Ketcham High Sch.*, 179 AD3d 653, 654 [2d Dept 2020]).

Furthermore, "a store owner is charged with the duty of maintaining its premises in a reasonably safe condition for its patrons" (*Robinson v 206-16 Hollis Ave. Food Corp.* 82 AD3d 735 [2d Dept 2011], quoting *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 [2d Dept. 2010].) To be entitled to summary judgment, a defendant is required to show, *prima facie*, that it maintained its premises in a reasonably safe condition and that the condition which caused the accident, which as a matter of law was not inherently dangerous, was open and obvious (*see Robinson*, *supra*, 82 AD3d at 736; *Carson v Baldwin Union Free School Dist*., 77 AD3d 878 [2d Dept 2010]; *Cupo v Karfunkel*, 1 AD3d 48 [2d Dept 2003].)

"The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently

dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" (*Holms v Macy 's Retail Holdings, Inc*., 184 AD3d 811 [2d Dept 2020]). "The issue of whether a condition is open and obvious and not inherently dangerous is case-specific, and usually a question of fact for a jury" (*Clayton v Marcy Supermarket & Deli Corp*., 191 AD3d 842, 843 [2d Dept 2021]).

As an initial matter, the Court finds the defendant's argument, that the plaintiff cannot identify the cause of her fall, is without merit. A complete reading of the deposition transcript indicates that the plaintiff clearly testified that she tripped over the base of a clothing rack and identified the condition in photographs marked at the deposition.

In regards to the defendant's other arguments, viewing the evidence most favorably to the plaintiff, the Court finds that the defendant failed to meet its *prima facie* burden of showing that it maintained the store in a reasonably safe condition and that the clothing rack was open and obvious and not inherently dangerous (*see Elfassi v Hollister Co.*, 167 AD3d 569 [2d Dept 2018]; *Robinson v 206-16 Hollis Ave. Food Corp.,* 82 AD3d 735 [2d Dept 2011].) Defendant submitted the plaintiff's deposition testimony in which she described the area of the store as being crowded, cluttered and dimly lit, and that the base of the clothing rack was obscured by clothing. As stated above, the defendant did not submit any photographs or video of the clothing rack and the stock person did not offer any testimony as to the clothing rack or its condition at the time of the accident.

As the defendant has not addressed the issue of whether it created an unsafe condition; and, while notice is not relevant on a claim that the defendant created the condition, the defendant offers no evidence as to when the clothing rack was last inspected before the accident. Thus, the motion must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]).

In any event, assuming without deciding, that the defendant met the *prima facie* burden, the evidence submitted in opposition by plaintiff is sufficient to raise an issue of fact. The opposing proof includes, among other things, surveillance videos showing a very crowded, dimly lit store with narrow aisles, as well as the photographs of the rack

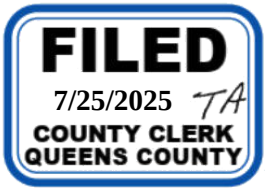
atop the rug, that were used at plaintiff's deposition. Plaintiff also submits the affidavit of an expert architect, who opines that: placement of the rack with a raised base, in a highly trafficked area of the store was a dangerous condition; the placement of the rack on top of a rug created an optical illusion; and, the width of the aisles of the store was too narrow and in violation of ADA guidelines.

Finally, it is well settled that "[t]he nature or location of some hazards, while they are technically visible, make them likely to be overlooked" (*Westbrook v WR Activities-Cabrera Mkts*., 5 AD3d 69, 72 [2d Dept 2004].) Even a condition that is generally apparent "to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Elfassi v Hollister Co.*, 167 AD3d 569 [2d Dept 2018], quoting *Mazzarelli v 54 Plus Realty Corp*., 54 AD3d 1008, 1009 [2d Dept 2008].)

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied.

Dated: July 23, 2025



TIMOTHY J. DUFFICY, J.S.C.