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SHORT FORM ORDER

INDEX No. 09-34604
CAL. No. 11-00670OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 8-19-11
ADJ. DATE 11-3-11
Mot. Seq. # 002 - MD

MONICA BALTIC, Plaintiff, - against - COSTCO WHOLESALE CORPORATION, JOSEPH BRUTON and MELVILLE STEAKHOUSE, LLC d/b/a BLACKSTONE'S, Defendants.	YANOVER & YANOVER Attorney for Plaintiff 300 Garden City Plaza, Suite 419 Garden City, New York 11530 GALLAGHER, WALKER, BIANCO, et al. Attorney for Defendant Costco 98 Willis Avenue Mineola, New York 11501 LEWIS JOHS AVALLONE AVILES, LLP Attorney for Defendants Bruton & Melville Steakhouse, LLC 425 Broad Hollow Road, Suite 400 Melville, New York 11747

Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 8 - 9; 10 - 12 ; Replying Affidavits and supporting papers 13 - 14 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Costco Wholesale Corporation for summary judgment dismissing the complaint as asserted against it is denied.

In this action, the plaintiff seeks to recover damages for personal injuries which she purportedly sustained while she was shopping at a Costco warehouse store, located in Melville, New York. The store is owned by defendant Costco Wholesale Corporation (hereinafter Costco). The plaintiff was purportedly injured when she was struck by a flatbed shopping cart loaded with merchandise, which was being pushed by another customer. The individual pushing the cart was an employee of defendant Melville Steakhouse, LLC d/b/a Blackstone's (hereinafter Blackstone's), and was at the store with defendant Joseph Bruton, managing partner of Blackstone's. Bruton and two Blackstone's employees were at the store, in the course of their employment, for the purpose of purchasing furniture for the restaurant. In the complaint, the plaintiff alleges that she sustained injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, she alleges that

defendant Costco was negligent in, *inter alia*, failing to adequately supervise the activities conducted at its premises; negligently and carelessly failing to properly maintain, operate and control the premises; failing to properly maintain the aisles and walkways of the premises; allowing dangerous and hazardous activities to be conducted at the premises; failing to properly supervise customers at the premises thereby causing a danger to those individuals who were lawfully shopping thereat; and in negligently and carelessly failing to post warning signs to patrons. The plaintiff also alleges that Costco is liable under the doctrine of res ipsa loquitur.

Defendant Costco now moves for summary judgment dismissing the complaint as asserted against it on the grounds that (1) it neither created nor had actual or constructive notice of the alleged dangerous condition which caused the plaintiff's injury, and (2) the conduct of defendants Bruton and Blackstone's was the sole proximate cause of the plaintiff's injuries.

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion, Costco submits, *inter alia*, the deposition testimony of the plaintiff, the deposition testimony of Joyce Malik on behalf of Costco, and the deposition testimony of Joseph Bruton on behalf of Blackstone's. As is relevant to this motion, the plaintiff testified that the incident occurred while she was shopping at a Costco warehouse store. She was standing in an aisle with her head turned looking at a potential item for purchase, and she was struck in the right side by a flatbed cart stacked high with very large boxes. According to the plaintiff, she could not see the person that was pushing the cart from behind the boxes. The cardboard boxes came in contact with her body striking her right arm and ribs. After striking her, the individual pushing the cart moved the cart to the left and continued pushing it, until she told him to stop. The plaintiff testified that she did not observe any Costco employees prior to the incident, but that two Costco employees came over to her shortly following the accident.

Joyce Malik, an administrations manager employed by Costco, testified that she was working on the date of the incident, and was first informed of the incident by a Costco employee. Malik responded to the scene of the accident and observed two flatbed carts loaded with big brown boxes in the area. Malik testified that the store had both traditional shopping carts and flatbed shopping carts for customer use. Flatbed shopping carts were open floor beds approximately three feet wide and six feet long. Malik testified that there were no instructions posted for customers with respect to the operations of flatbed carts, but as employees they were instructed and trained to pull flatbed carts rather than to push them. This was for safety purposes. There had been occasions where she observed a customer pushing a cart

loaded with inventory and either instructed them to pull it instead of push it, or otherwise assisted them to get to the front of the store in a safe manner. According to Malik, customers' normal reaction was to push rather than pull the flatbed carts. Malik did not know if a customer had been struck by a flatbed cart in the past, but she had observed instances where customers struck merchandise with the carts.

Malik testified that the outdoor furniture was displayed in a section in the rear of the warehouse. Costco did not have employees assigned to assist people in this section; however, three employees were assigned to the clothing section which was directly next to the outdoor furniture section. The three employees assigned to the clothing section would be able to observe the outdoor furniture section.

According to Malik, two floor walks occurred hourly, one by a manger and one by a member of the service department. The service department employee had a check list form to fill out on the floor walk. If they saw any hazards during the floor walk they would either remove the hazard themselves or bring it to a manager's attention at the conclusion of the floor walk, and the manager would have the condition corrected. The purpose of the manager's floor walk was safety and productivity. As such, a manager would also check for hazards during a floor walk. Malik initially testified that when managers and members service employees did rounds one of the things they would look for was how particular flatbed carts were stocked and in which direction it was moving. Flatbed carts which were stacked high and being pushed are a safety hazard because the person pushing the cart cannot see in front of the cart and is in danger of striking something, including another person. However, Malik later testified that member service employees were not looking for the manner in which carts were being maneuvered by customers. It was also not something managers would be looking for, but was something they would stop to correct if they observed. Malik did not believe that all employees were instructed that if they saw something that was unsafe they were supposed to do something about it, but she believed that this was common sense.

Joseph Bruton, managing partner of Blackstone's, testified that on the date of the incident he was at the Costco warehouse store with two Blackstone's employees for the purpose of purchasing outdoor patio furniture for the restaurant. One by one they loaded approximately five large boxes onto three flatbed carts. It took them approximately twenty to thirty minutes to load the carts. During that time, no one from Costco spoke to them, or provided them with any instruction on the proper manner to load the cart. At no time did Burton speak to a Costco employee about his intended purchase, about requiring assistance in the purchase, or about loading the merchandise. Blackstone's brought its own employees to load the merchandise and at no time did a Costco employee help or offer to help. Burton did not recall if he observed any Costco employees during the time he was loading the carts. Burton testified that when his cart was loaded the boxes reached a height that was above his head, approximately six feet high. He did not recall if he could see over the top of the boxes on his cart. After loading the carts, he and his employee proceeded to the registers in the front of the store. It took approximately five minutes for them to maneuver the flatbed carts from the furniture display to the front of the store. He did not have any difficulty maneuvering his cart through the store. He maneuvered the cart by standing off to the cart's left side and moving it along. He was able to see directly in front of him. The two Blackstone employees maneuvered their carts behind him in the same manner. He never considered or attempted to pull the cart because it weighed too much. Nobody from Costco came up to them at any time and instructed them to pull the cart behind them or to operate the cart in a different way. Nor did anyone

from Costco talk to them about restacking the boxes on the cart. Burton testified that when they had reached the front of the store and were on their way to the registers the employee who was maneuvering the cart directly behind his cart struck the plaintiff. Burton did not see the plaintiff prior to the incident and did not witness the incident. According to Burton, he did observe cashiers and other Costco employees present in the area. When he spoke to the employee pushing the cart, following the incident, the employee stated that he did not see the plaintiff. Burton did not know if the employee could see over the boxes stacked on his cart.

The evidence submitted fails to establish Costco's *prima facie* entitlement to summary judgment dismissing the action against it. It is settled that an owner is under a duty to maintain its property in a reasonably safe condition, in view of all the circumstances, including the likelihood of injury to others, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk (*see* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; ***Zuk v Great Atl. & Pac. Tea Co.,*** 21 AD3d 275, 799 NYS2d 504 [1st Dept 2005]; ***Fleischer v Melmarkets, Inc.***, 174 AD2d 647, 571 NYS2d 509 [2d Dept 1991]; ***Henderson v Waldbaums***, 149 AD2d 461, 539 NYS2d 795 [2d Dept 1989]). Foreseeability does not require the prediction of the exact manner in which the negligence will result in injury, rather it is enough that the defendant be aware of the risk of danger (*see* ***Henderson v Waldbaums***, *supra*). In order to recover damages for a breach of this duty, a plaintiff must establish that the owner created, or had actual or constructive notice of the hazardous condition which precipitated the injury (***Zuk v Great Atl. & Pac. Tea Co.***, *supra*).

In moving for summary judgment, it is the defendant that has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]). Although a general awareness of a condition is insufficient to constitute constructive notice of the specific condition that caused an injury, a defendant who had actual notice of a recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (*see* ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]; ***Edwards v Great Atl. & Pac. Tea Co., Inc.***, 71 AD3d 721, 895 NYS2d 723 [2d Dept 2010]). Moreover, a defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's case (*see* ***Tsekhanovskaya v Starrett City, Inc.***, *supra*; ***Amendola v City of New York***, *supra*; ***Edwards v Great Atl. & Pac. Tea Co., Inc.***, *supra*).

Contrary to Costco's contention, the evidence submitted here was insufficient to establish that it did not have actual or constructive notice of a dangerous condition on its premises, to wit, a customer operating a flatbed cart in a dangerous manner (*see* ***DiFranco v Golub Corp.***, 241 AD2d 901, 660 NYS2d 514 [3d Dept 1997]; ***Henderson v Waldbaums***, *supra*; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, *supra*; *compare* ***Zuk v Great Atl. & Pac. Tea Co.***, *supra*; ***Vale v Poughkeepsie Galleria Co.***, 297 AD2d 800, 748 NYS2d 65 [2d Dept 2002]). Under the circumstances of this case, the evidence submitted was also insufficient to demonstrate that the negligence of Blackstone's in operating the flatbed cart was the sole proximate cause of the plaintiff's injuries (*see* ***DiFranco v Golub Corp.***, *supra*). An intervening act does not break the sequence of cause and effect when it might reasonably have been foreseen (*see* ***Henderson v Waldbaums***, *supra*; *compare* ***Torre v Paul A. Burke Constr.***, 238 AD2d 941, 661 NYS2d 145 [4th Dept 1997]).

In light of Costco's failure to meet its *prima facie* burden, the sufficiency of the papers submitted in opposition to the motion need not be addressed (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*). Accordingly, the motion by defendant Costco Wholesale Corporation for summary judgment dismissing the complaint as asserted against it is denied.

Dated: 3/16/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**