

Blaustein v Gristede's Foods, Inc.

2012 NY Slip Op 30869(U)

April 2, 2012

Sup Ct, NY County

Docket Number: 114461/08

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 114461/2008
BLAUSTEIN, LINDA H.
vs.
GRISTEDE'S FOODS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

Motion to/for: _____
[No(s)] _____
[No(s)] _____
[No(s)] _____

upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

APR 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/2/12

JUDITH J. GISCHE, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----X

LINDA H. BLAUSTEIN,

Plaintiff,

-against-

GRISTEDE'S FOODS, INC. and GRISTEDE'S
OPERATING CORP.,

Defendants.

Decision and Order
Index No.: 114461/08
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED

APR 03 2012

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Recitation, as required by CPLR § 2219 [a] of the papers
considered in the review of this (these) motion(s):

Papers	Number
Defs' n/m (3212) w/DS affirm, TN affid, exhs	2
Pltf's opp w/MKA affirm, LHB, RG affids, exhs	3
Defs' reply w/DS affirm	4
Various stips	4

NEW YORK
COUNTY CLERK'S OFFICE

Gische J.;

This is a personal injury action. Issue was joined and
plaintiff filed the note of issue March 23, 2011. Presently
before the court is a timely motion by defendants for summary
judgment dismissing plaintiff Linda H. Blaustein's complaint.
(CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Background

On November 29, 2007, at approximately 9:45 p.m., plaintiff
entered into defendants' supermarket, located at 202 East 96th
Street, New York, New York (the Supermarket). As plaintiff
entered the Supermarket, she proceeded towards the shopping carts
located by the cash registers at the front of the store. As she

walked towards the shopping carts, plaintiff claims she slipped on a mushy, "baby foodish type" substance, causing her to fall (Notice of Motion, Exhibit B, Plaintiff's Deposition p. 47). Plaintiff claims that she was looking straight ahead, and did not see the substance as she made her way towards the shopping carts (*Id.*). After her fall, plaintiff claims she noticed at least one piece of glass in the area where she fell.

At the time of the accident, Thomas Nsowa, assistant manager of the Supermarket, was assisting another customer in the first aisle (Notice of Motion, Exhibit C, Thomas Nsowa's Deposition p. 35). After the accident, one of the cashiers called Mr. Nsowa over the intercom to come to the front of the store (*Id.* at 38). When Mr. Nsowa arrived, he observed plaintiff on the floor, bleeding from the knee (*Id.* at 39). Mr. Nsowa inquired if plaintiff needed an ambulance, to which plaintiff allegedly replied "no." (*Id.* at 49).

Plaintiff showed Mr. Nsowa the piece of glass she claims to have landed on (*Id.* at 50). Mr. Nsowa testified at his deposition that after the incident, he personally swept the area to see whether there was any other broken glass. He stated that although he swept "the whole place," he did not find any broken glass or any mushy substance (*Id.*). Mr. Nsowa took the plaintiff's information, and filled out an accident report. In his deposition, Mr. Nsowa testified that during a typical night

shift at the Supermarket, there would be at least five people, including himself, who would "walk the floor and make sure the floors were clean" (*Id.* at 28-29).

As a result of the accident, plaintiff claims she sustained serious injuries to her right leg and right knee.

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the cause of action has no merit, sufficient to warrant the court, as a matter of law, to direct judgment in its favor (*Bush v. St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The defendant's motion must be denied if it fails to produce admissible evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, *supra*; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v. Perlbinde*r, 307 AD2d 230 [1st Dept. 2003]).

When the defendant moves for summary judgment in a "slip-and-fall" case, it 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 (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598 [2d Dept 2008] [internal quotation marks and citations omitted]). Only after the movant has satisfied this threshold burden will the court then examines the

sufficiency of the plaintiff's opposition remedy (*Birnbaum v New York Racing Assn., Inc.*, supra).

To meet the this burden, defendants must offer some evidence showing of when the area in question was last cleaned or inspected relative to the time of plaintiff's fall (*Id.* at 598-99). Defendants have not met this burden.

Mr. Nsowa's deposition testimony only refers to the general practice of inspecting the store (Notice of Motion, Exhibit C, Thomas Nsowa's Deposition p. 28-29), and not to any specific inspection of the area in question on the day of, and prior to, the accident. Nor does the supplemental sworn affidavit by Mr. Nsowa prove, as defendants claim, that based upon his usual practice, Mr. Nsowa must have inspected the area where plaintiff fell no more than 15 to 20 minutes before the accident occurred and, therefore, the store would have lacked sufficient time (i.e. constitute constructive) to have addressed the dangerous conditions (i.e. the "baby foodish" substance) alleged. At best, all that defendants have established is what Mr. Nsowa's practice is.

Establishing what their usual practice is, however, does not eliminate triable issues of fact. In her supplemental affidavit, plaintiff states that after she fell, she noticed that the floor around her was dirty and had visible wheel marks. She also noticed of the substance she slipped on was wet but the edges

were drier. Thus, she contends the substance (and dangerous condition) was on the ground for some time. Though defendants discount the sworn affidavit as "self serving," it is not contradicted by her deposition testimony and her credibility must be assessed by the trier of fact.

Having failed to prove that plaintiff's accident was not due to a dangerous condition at the premises which could have been but was not promptly taken care of, defendants' motion for summary judgment must be denied. Plaintiff has, in any event, raised issues of fact that warrants denial of the motion. Although defendant has raised other points about plaintiff's accident reconstruction expert making conclusory statements, his opinion is not the basis for the court's decision to deny the motion.

Therefore, defendants' motion is denied. Since the note of issue has been filed, plaintiff shall serve a copy of this decision and order on the Office of Trial Support so this case may be scheduled for trial. Any relief not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York

April 2, 2012

So Ordered:



Hon. Judith J. Glische, JSC

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