Boyd v Gristedes Food, Inc.
2012 NY Slip Op 31758(U)
June 27, 2012
Supreme Court, New York County
Docket Number: 110748/2009
Judge: Paul Wooten
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SCANNED ON 7/6/2012
[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CHRISTINE BOYD,
Plaintiff,

-against-

INDEX NO. 110748/2009

MOTION SEQ. NO. 001

GRISTEDES FOOD, INC.,
Defendant .

The following papers numbered 1 to 4 were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3
Reply Affidavits — Exhibits (Memo)	4

Cross-Motion: ☐ Yes ■ No

This is a negligence "slip-and-fall" action brought by Christine Boyd (plaintiff) to recover damages for injuries allegedly sustained when she slipped and fell on chicken grease on the floor of defendant's supermarket, located at 307 West 26th Street, New York, New York. The parties have completed discovery and Note of Issue was filed on July 7, 2010. Gristede's Food, Inc. (defendant) now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint for plaintiff's failure to establish a *prima facie* case of negligence. Plaintiff has filed opposition to the motion.

FILED JUL 06 2012 NEW YORK COUNTY CLERK'S OFFICE

BACKGROUND

This action arises out of an accident that occurred on October 16, 2008 at approximately 7:20 p.m.[1] in which plaintiff allegedly slipped and fell on chicken grease while walking past a

[1] The time of the accident used by the Court is based on the information contained within the Customer Incident Report completed by grocery manager Daniel Matko on the day of the accident and signed by both the plaintiff and Matko. The Court notes that there are inconsistencies in both the Complaint and plaintiff's deposition testimony regarding her allegations of the time of the accident. Plaintiff alleges in her Complaint, verified only by her attorney, that the accident occurred at approximately 6:00 p.m. However, "[a] 'bare allegation' contained in an attorney verified complaint is 'patently insufficient' to raise a triable issue of fact" (*Irizarry v. Heller*, 95 AD3d 951 [2d Dept 2012]). Moreover, during her deposition, plaintiff testified that the accident occurred "[i]n the middle of the -- afternoon. I couldn't give you the exact time" (Notice of Motion, exhibit B at 19). She further testified that she arrived at the store at 3:00 p.m. or 4:00

[* 2]

chicken warmer display in the deli section at defendant's supermarket. Plaintiff alleges that the incident resulted in physical injuries.

The chicken warmer display holds cooked chickens and chicken parts. Defendant's employees enclose the chickens in plastic containers at the deli counter before placing them in the chicken warmer display. The chickens are usually transferred from the deli counter to the chicken warmer display between 5:00 p.m. and 5:30 p.m.

Plaintiff testified at her deposition that she did not see the grease prior to her fall and does not know how long the grease had been on the floor prior to her accident (Notice of Motion, exhibit B at 41, 46). After she fell, plaintiff testified that she observed yellowish brown chicken grease splattered over "maybe three tiles." (*id.* at 42-43).

Defendant's grocery manager Daniel Matko (Matko) testified that he worked from 4:00 p.m. until 12:00 a.m. on the date of the accident (Notice of Motion, exhibit C at 10). As part of his job responsibilities, he performs a routine walkthrough of the entire store every 30 minutes beginning at 4:00 p.m. (*id.* at 10). Prior to the accident, he performed a walkthrough inspection beginning at 7:00 p.m. and ending around 7:10 p.m., approximately 10 minutes prior to the accident (*id.* at 52). Matko testified that he did not feel or see any chicken grease on the floor during this walkthrough inspection (*id.* at 52). Matko does not maintain any inspection records.

Following the accident, plaintiff showed Matko where she slipped on the chicken grease (*id.* at 42). Matko denies seeing or feeling any chicken grease on the floor immediately after the accident (*id.* at 42-43). Thereafter, Matko and plaintiff completed the Customer Incident Report. Matko testified that he wrote down plaintiff's version of the incident on the Customer Incident Report, and that plaintiff executed the incident report (*id.* at 42, 51). Matko also testified that plaintiff confirmed when she signed the Customer Incident Report that she was

p.m. and was in the store for "maybe 5 minutes" prior to the accident (*id.* at 20, 25).

"saying that this is exactly what happened" (*id.* at 51).

There have been no prior complaints or incidents regarding chicken grease on the floor near or around the chicken warmer. Plaintiff testified that she shops at the store every day and has never noticed any chicken grease on the floor prior to the accident (Notice of Motion, exhibit B at 24-25, 52).

Defendant argues that it is entitled to summary judgment dismissing the complaint, as a matter of law, because plaintiff cannot show that defendant created the condition that caused the accident, or that it had actual or constructive notice of the dangerous condition. Specifically, defendant asserts that there is no evidence that the defendant caused the chicken grease to spill on the floor or had actual or constructive notice of the chicken grease prior to plaintiff's accident. Plaintiff argues that the motion should be denied as there are triable issues of fact regarding whether defendant created a dangerous condition by spilling the chicken grease on the floor while transferring the chickens from the deli counter to the chicken warmer display, whether defendant's placement of the chicken warmer display within an aisle where patrons regularly traverse is a design defect, and whether defendant had constructive notice of the chicken grease spill.

In support of its summary judgment motion, defendant submits, *inter alia*, the deposition transcripts of plaintiff and Matko, as well as an affidavit of Matko. In opposition, plaintiff submits Defendant's Response to Combined Demands for Discovery and Inspection dated February 15, 2010, the Customer Incident Report dated October 16, 2008, and the deposition transcripts of plaintiff and Matko.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*See Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Centruy-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well-established that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition,

[* 5]

nor had actual or constructive notice of its existence" (*id.* at 500; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well-settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

DISCUSSION

Defendant has met its initial burden of demonstrating that it neither created the purportedly dangerous condition that caused plaintiff to slip and fall, nor had actual or constructive notice of its existence. Matko's affidavit and deposition testimony indicate that he performed a routine walkthrough of the entire store every 30 minutes during his shift from 4:00 p.m. to 12:00 a.m. On the day of the incident, Matko states that he performed a walkthrough beginning at 7:00 p.m. which concluded at approximately 7:10 p.m., during which he did not see any chicken grease on the floor. Matko also inspected the area shortly after plaintiff's accident and did not see any chicken grease. The Court finds that this evidence is sufficient to establish, prima facie, defendant's entitlement to judgment as a matter of law (*see Smith*, 50 AD2d at 500-01 [defendant met initial burden by providing evidence that bathrooms were cleaned and monitored regularly and no problems were noted during inspections prior to accident, and that post-accident inspections indicated no hazardous conditions]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [defendant met initial burden "by producing

evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480, 481-82 [1st Dept 2010]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether defendant created the dangerous condition. Her evidence "provides nothing more than mere speculation as to the cause of the accident and offers nothing to indicate that defendant created . . . the hazard" (*Smith*, 50 AD3d at 501). While circumstantial evidence of causation or negligence is sufficient even if it does not negate *remote* possibilities that the injury was not caused by the defendant (*Dillon v Rockaway Beach Hosp. & Dispensary*, 284 N.Y. 176, 179 [1940]), the possibility that debris found in the aisle is due to a customer is not remote (*see Morales v Foodways, Inc.*, 186 AD2d 407, 408 [1st Dept 1992]). The mere fact that defendant's employees placed the enclosed chickens in the chicken warmer display approximately one and a half to two hours prior to the accident, along with the existence of chicken grease on the floor at the time of the accident, does not require the inference that the condition was created by defendants. (*See Morales*, 186 AD2d at 408).

Moreover, the Court finds that plaintiff fails to raise a triable issue of fact as to whether the defendant's placement of the chicken warmer display is a design defect because plaintiff failed to present an expert affidavit or any other admissible evidence to support this claim (*see Tkach*, 265 AD2d at 632 [holding that the customer's theory that the placement of the chicken display is a design defect fails in the absence of an affidavit or testimony from a qualified expert]).

Plaintiff also failed to raise a triable issue of fact as to whether defendant had actual or constructive notice of the dangerous condition. Plaintiff's sole theory as to notice is that the chicken grease may have been on the floor from the time the employees transported the

chicken to the chicken warmer display until the time that she fell, a period of approximately one and a half to two hours. Plaintiff avers that this is a sufficient amount of time to constitute constructive notice. However, plaintiff presents no evidence indicating that the chicken grease was spilled on the floor at the time the chickens were transported to the chicken warmer display. In fact, plaintiff testified that she did not see the chicken grease until after the accident. Plaintiffs failure to present evidence to indicate how long the chicken grease was on the floor is fatal to her allegation that defendant had constructive notice of the dangerous condition (*see Kane v Human Serv. Ctr., Inc.*, 186 AD2d 539, 539 [2d Dept 1992] [the mere existence of a puddle on the floor was insufficient to impute actual or constructive notice to defendant where plaintiff 'never noticed the puddle until after the accident, nor did she show that the puddle had been on the floor for any length of time"]).

Lastly, Plaintiff's reliance on *Weller v Colleges of the Senecas* is misguided (217 AD2d 280, 285 [4th Dept 1995]). The *Weller* court, in reversing the ground maintenance company's summary judgment award, held that triable issues of fact existed as to whether the ground maintenance company owed a duty to conduct reasonable inspections of the bike pathway and whether the grounds maintenance company breached this duty by failing to discover the tree root that resulted in the bike rider's accident (*id.* at 285). The present case is distinguishable in two respects. First, in the present case, plaintiff failed to present any evidence as to how long the chicken grease was present on the floor, whereas in *Weller* the tree root existed for a significant period of time. Second, in this case, Matko testified that the location of the accident was regularly inspected, including an inspection approximately 10 minutes prior to the accident.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

For these reasons and upon the foregoing papers, it is,

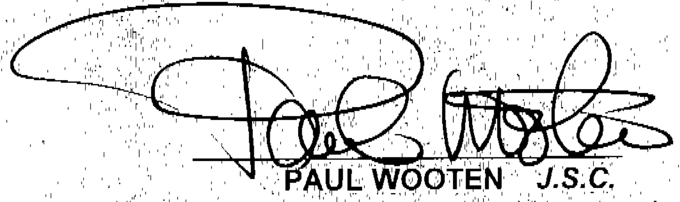
[* 8]

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that defendant shall serve a copy of this Order, with Notice of Entry, upon plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 6-27-12



PAUL WOOTEN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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