

Khorana v Stop & Shop Supermarket Co. LLC

2012 NY Slip Op 31878(U)

July 3, 2012

Sup Ct, Nassau County

Docket Number: 011655/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 14

_____ X

MEENAKASHI KHORANA,

Plaintiff,

Index No.: 011655/10
Motion Sequence...01
Motion Date...04/25/12
XXX

-against-

THE STOP & SHOP SUPERMARKET
COMPANY LLC. d/b/a a/k/a SUPER STOP
AND SHOP SUPERMARKET, STOP AND
SHOP, INC., and STOP AND SHOP
SUPERMARKET,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Affirmation in Reply.....X

Upon the foregoing papers, the motion by the Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC. d/b/a a/k/a SUPER STOP AND SHOP SUPERMARKET, STOP AND SHOP, INC. and STOP AND SHOP SUPERMARKET (“Stop & Shop”), seeking an Order of this Court awarding them summary judgment and dismissing the Plaintiff’s complaint, is determined as hereinafter provided.

In this action, the Plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of the negligence of the Defendant. The complaint alleges that on March 31, 2010, the Plaintiff was caused to trip and fall due to the existence of a slippery substance on the floor of the Stop & Shop supermarket located at 653 Hillside Avenue, New Hyde Park, County of Nassau, State of New York.

The Plaintiff commenced this action on June 17, 2010, by the filing of the summons and complaint and purchase of an index number. Issue was joined by the service of the Defendant's answer, dated July 13, 2010. The Plaintiff filed her Note of Issue on November 28, 2011. The Certification Order, dated September 15, 2011, states that motions for summary judgment must be filed within sixty (60) days of the filing of the Note of Issue. As such, the time to file summary judgment motions expired on January 27, 2012. The Nassau County Clerk's Office Endorsement Cover Page reveals that the Defendant's motion for summary judgment was filed on January 31, 2012, four (4) days late. The Court will first address the issue of timeliness which was raised in the Plaintiff's opposition papers.

The Plaintiff claims that the Defendant's application is untimely as it was submitted four (4) days late without leave of court. In response, the Defendant states that good cause exists for the late filing of the motion. The Defendant's counsel states that the motion, although not filed until January 31st, was served upon the Plaintiff's counsel on January 24, 2012, prior to the Court's deadline. (*See* Affidavit of Service, sworn to on January 24, 2012, attached to the Defendant's Reply as Exhibit "B") Counsel for the

Defendant submits the Affidavit of Rhonda Herbert, a paralegal employed with the Defendant's law firm, wherein Ms. Herbert states that the motion, together with the filing fee, was also mailed to the Court on January 24th. Counsel submits that the firm anticipated that the motion would be filed on or before the deadline of January 27th. Counsel further states that this rises to the level of good cause as there was a reasonable expectation and reliance that the Court would receive and file the motion before the deadline.

It is incumbent upon the movant to ensure that a motion is filed in a timely fashion. In the instant matter, the Defendant has proffered a reasonable excuse for the delay in the filing of the motion. Further, the motion was served in a timely fashion. The Court, in its discretion, under the particular circumstances of this case, will deem the motion timely filed and consider same on its merits.

The Plaintiff alleges that she was caused to slip and fall at Stop & Shop due to a wet, slippery substance, later learned to be from a can of soup. The Plaintiff alleges that the Defendant had actual and/or constructive notice of the defective condition and failed to timely remedy same.

In support of the motion, the Defendant relies on the deposition testimony of the Plaintiff, an Assistant Store Manager of Stop & Shop, Richard Comolli, and a non-party witness, Helene Phelan. The Plaintiff testified at her Examination Before Trial, that on March 31, 2010, she went to the Stop & Shop in New Hyde Park and first headed to the aisle in which the soda was located. (*See Plaintiff's Transcript*, dated May 11, 2011, page 15,

attached to the Defendant's Notice of Motion as Exhibit "E") Thereafter, she got four cartons of pudding and placed them into her shopping cart. (*Id.* at pages 17-18) The Plaintiff then realized that she wanted another carton of pudding. (*Id.* at page 18) She left her shopping cart on the side of the aisle, got another carton of pudding, and on her way back to the shopping cart, she slipped and fell on a light yellow liquid substance with her left foot. (*Id.* at pages 21, 26-28) The Plaintiff did not see anything on the floor prior to the accident. (*Id.* at page 26) The Plaintiff does not recall whether there were any other customers in the aisle at the time of her accident. (*Id.*) The Plaintiff also could not recall whether there were any footprints or tire tracks in the liquid when she first observed it.

Richard Comolli testified at an Examination Before Trial on behalf of the Defendant, Stop & Shop, on June 6, 2011. Mr. Comolli testified that on the date of the accident he was an Assistant Store Manager. On the date of the accident, Mr. Comolli was notified by a customer that a can of soup fell off the shelf and it broke. (*See* Comolli Transcript, page 8, attached to the Defendant's Notice of Motion as Exhibit "F") Mr. Comolli was in aisle nine when he heard the customer from aisle seven state that a can of soup fell and broke open. The protocol at Stop & Shop, once a complaint is made regarding a spill, is to go immediately to the area with orange cones and call maintenance for a clean up. (*Id.* at pages 10-11) Mr. Comolli first observed the Plaintiff when he went to aisle seven with the cones. He testified that he saw the Plaintiff on the floor just behind the area where the soup spilled. (*Id.* at page 11) After observing the Plaintiff on the floor, he asked whether she was

alright and, thereafter, her daughter arrived at the scene. (*Id.* at page 12)

At the time of the accident, Mr. Comolli testified that he was performing a store tour which consisted of walking back and forth through every aisle. He toured aisle seven about ten minutes prior to being notified about the soup spill and did not observe any spilled soup at that time. (*Id.* at pages 24-25)

Helene Phelan, a non-party witness, witnessed the accident in March, 2010. (*See* Phelan Transcript, dated November 11, 2011, page 8, attached to the Defendant's Notice of Motion as Exhibit "G") At the time of the accident, Ms. Phelan was walking in the soup aisle attempting to get a worker to clean up the spill. (*Id.* at page 9) Ms. Phelan testified that upon pulling a can of soup off of a shelf, another soup can fell on the floor, broke and soup began to spill out of it. (*Id.* at page 10) Thereafter, when Ms. Phelan was walking to get a worker to inform them of the spill, she heard a holler from behind her and saw the Plaintiff on the floor in the vicinity of the soup spill. (*Id.* at pages 12-13) At the time of the accident, Ms. Phelan observed that the Plaintiff was alone. (*Id.* at page 13) According to Ms. Phelan, from the time the soup can fell to the time of the accident, it was approximately one to two minutes, but less than five minutes. (*Id.* at pages 14-15)

Based on the testimony of the Plaintiff, Mr. Comolli and Ms. Phelan, the Defendant seeks summary judgment dismissing the Plaintiff's complaint as the Plaintiff cannot establish a *prima facie* case of negligence against the Defendant.

The Plaintiff's counsel, in opposition, states that there are four different

versions of the events which warrants denial of the motion for summary judgment. In addition to the deposition transcripts proffered by the Defendant, he also submits the deposition testimony of the Plaintiff's daughter who arrived at the scene after the accident occurred. The Plaintiff's daughter, Swati Khorana, testified that she spoke with the store manager who stated that he was sorry, he called maintenance to clean up the spill, but that maintenance failed to come. (See Khorana Transcript, page 12, attached to the Plaintiff's Opposition as Exhibit "F")

Summary judgment standards are well settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible form "sufficiently to warrant the court as a matter of law in directing judgment". *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Failure to do so "requires denial of the motion, regardless of the sufficiency of the opposing papers". *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). When such a showing has been made by the movant, then to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact". (CPLR § 3212, subd [b]; *Zuckerman v. City of New York*, *supra* at 562). On a summary judgment motion, the evidence must be viewed in a light most favorable to the nonmoving party. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931 (2007).

The question presented by this motion is whether the Plaintiff has raised a triable issue of fact that the Defendant had notice of the condition and/or created it. Viewing the evidence herein in a light most favorable to the Plaintiff, the court finds that the Plaintiff

has failed to raise the requisite issue of fact on this question.

As noted above, this action is sounded in negligence. It is well settled that to establish a *prima facie* case of negligence, it is incumbent upon the plaintiff to establish that the defendant either created the dangerous condition or had actual or constructive notice thereof. *Golding v. Powell & Dempsey, Inc.*, 247 A.D.2d 510 (2d Dept. 1998); *Carrillo v. PM Realty Group*, 16 A.D.3d 611 (2d Dept. 2005). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it”. *Golding v. Powell & Dempsey, Inc.*, 247 A.D.2d 510 (2d Dept. 1998), *supra* quoting *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Having reviewed the record, the Court finds that the Defendant has established its entitlement to judgment as a matter of law. The testimony of the non-party witness, Helene Phelan, conclusively establishes that the Defendant did not create the defective condition. Ms. Phelan testified that she caused the can of soup to fall to the floor. Further, the evidence presented reveals that the soup was on the floor for only a matter of minutes prior to the Plaintiff’s accident. Moreover, there is no evidence that there was any delay on the part of the Defendant in addressing the spill. Rather, Mr. Comolli testified that he had toured the soup aisle approximately ten minutes prior to the accident and there was no soup on the floor at that time. After being notified about the spill, he then immediately called for maintenance and went to the aisle with cones according to store protocol. Therefore, the

defective condition did not exist for a sufficient length of time prior to the accident to permit the Defendant's employees to discover and remedy it. The Plaintiff's counsel's contentions that there are four different versions of the circumstances surrounding the Plaintiff's accident and the timing of the fall is without merit.


Accordingly, it is hereby

ORDERED, that the motion by the Defendant, pursuant to CPLR § 3212, seeking an order granting summary judgment dismissing the within complaint is **GRANTED**; and it is further

ORDERED, that the Plaintiff's complaint is **DISMISSED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
July 3, 2012



Hon. Randy/Sue Marber, J.S.C.
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ENTERED

JUL 06 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE