Faber v Binghamton Giant Mkts., Inc.
2013 NY Slip Op 33925(U)
December 18, 2013
Supreme Court, Broome County
Docket Number: 2010-1170
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 23rd day of September 2013.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

Nicoline Faber on behalf of Danielle Faber, an infant,

Plaintiff,

vs.

Binghamton Giant Markets, Inc, and A. L. George, LLC,

Defendant.

DECISION AND ORDER

Index No. 2010-1170
RJI No. 2010-1739-C

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the defendant Binghamton Giant Market, Inc. (Binghamton Giant) seeking summary judgment dismissing the complaint of the plaintiff Nicoline Faber (Ms. Faber) on behalf of her daughter, Danielle Faber (Miss Faber), an infant. In the event the motion is not granted, Binghamton Giant seeks summary judgment granting it common law indemnification from its co-defendant A. L. George, LLC (A. L. George).

Both Ms. Faber and A. L. George oppose the motion.

Background

This action arises out of an incident that occurred at a Binghamton Giant grocery store when Miss Faber slipped on a wet liquid on the floor of the beverage aisle. Ms. Faber commenced this action seeking recovery for the personal injuries suffered by her daughter.

Binghamton Giant seeks summary judgment against the plaintiff, contending that it did not have a duty to remedy a condition – the spill – which it did not cause and of which it was not aware (i.e., did not have actual or constructive notice). In the alternative, Binghamton Giant asserts it is entitled to common law indemnification from A. L. George, as it was apparently an A. L. George employee who, in the course of placing merchandise on a store shelf, dropped a glass Snapple bottle causing it to break and the liquid to spill on the floor.

Ms. Faber opposes the motion on the basis that there are issues of fact that preclude summary judgment. A. L. George opposes the motion, arguing the statements attributed to one

of its former employees are inadmissible and there are issues of fact that preclude summary judgment.

Law

Summary judgment is a drastic remedy which should be granted only when it is clear that there is no material issue of fact for resolution by a jury (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Redcross v. Aetna Cas. & Sur. Co.*, 260 AD2d 908, 913 [3d Dept 1999]). It is well established that the function of the court on a motion for summary judgment is issue finding, not issue determination, and if a genuine issue of fact is found, summary judgment must be denied (*see Sillman*, 3 NY2d at 404; *see also Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 AD2d 609, 611 [3d Dept 2003]; *Schaufler v. Mengel, Metzger, Barr & Co., LLP*, 296 AD2d 742, 743 [3d Dept 2002]; *Encotech, Inc. v. Cotton Fact, Inc.*, 280 AD2d 748, 749 [3d Dept 2001]). The moving party on such a motion bears the initial burden to establish a prima facie case of entitlement to judgment as a matter of law (*see Encotech*, 280 AD2d at 749). That burden is met by producing evidentiary proof that demonstrates the absence of any issue of material fact (*Oswald v. Oswald*, 107 AD3d 45, 47 [3d Dep.2013]). Once this initial burden is met, it is incumbent on the opposing party to lay bare his or her proof establishing the existence of a triable issue of fact (*see id.* at 749-750). Once the prima facie case is established, the opposing party must come forward with proof in admissible form to demonstrate the necessity of a trial on an issue of fact (*see id.*).

To prevail on its motion for summary judgment, Binghamton Giant must first establish that "its property had been maintained in a reasonably safe condition, and that it did not create a dangerous condition that caused plaintiff's fall or have actual or constructive notice of that

condition" (*Carpenter v. J. Giardino, LLC*, 81 AD3d 1231 [3d Dept 2011], *quoting Stewart v. Canton-Potsdam Hosp. Found., Inc.*, 79 AD3d 1406 [3d Dept 2010]).

Once the movant makes a prima facie showing of entitlement to summary judgment, the opponent must produce evidence in admissible form to create an issue of fact sufficient to defeat the motion (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]). Accordingly, upon Binghamton Giant making a prima facie showing that it neither created nor had actual or constructive notice of the spill, the burden shifts to the plaintiff to submit evidentiary facts from which a jury could infer that Binghamton Giant created the spill or had actual notice of it or that the spill existed for a sufficient length of time before the accident to permit its employees to discover and remedy it (*Grant v. Radamar Meat*, 294 AD2d 398, 399 [2d Dept 2002]). With respect to the issue of constructive notice, the plaintiff would need to present some evidence to raise an issue of fact "that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendant to discover it and take corrective action" (*Pierson v. North Colonie Cent. School Dist.*, 74 AD3d 1652, 1654-5 [3d Dept 2010], *citing Boyko v. Limowski*, 223 AD2d 962, 964 [3d Dept 1996]).

Discussion

a. Summary judgment

The parties appear to agree that Binghamton Giant did not create the dangerous condition by spilling the beverage and did not have actual notice of it. However, their agreement in that regard is based largely, if not entirely, on two statements attributed to a former A. L. George employee, John Knapp. One statement is typed and unsigned and the other is handwritten and signed, but not sworn to. According to the statements, the spill occurred when Mr. Knapp

dropped one or more bottles of Snapple while stocking shelves and the fall occurred while he left to obtain cleaning supplies. However, the record on this motion lacks any sworn statement by or testimony of Mr. Knapp. Thus, without those two statements, there is no firsthand account in this record from any party – or anyone – regarding how and when the liquid spilled on the floor.

Binghamton Giant acknowledges that the Knapp statements are hearsay, but argues that several exceptions apply to make them admissible.[1] Specifically, Binghamton Giant states that the written statements are admissible as statements against interest, declarations against interest, adoptive admissions, and records kept in the ordinary course of business.

The law is clear that where, as here, the statement is hearsay, the proponent of the statement must establish the applicability of a hearsay rule exception (*see Tyrrell v. Wal-Mart Stores*, 97 NY2d 650, 652 [2001]). In *Tyrrell*, the Court held that an unidentified store employee's statement that "I told somebody to clean up this mess" was inadmissible, as the plaintiff failed to establish that such employee was authorized to make the statement and therefore the admission was not binding on the employer.

Here, while A. L. George was apparently aware of the statements[2] by Mr. Knapp, there is absolutely no evidence that he was authorized to speak on behalf of or bind the company at the time the unsworn statements were made. In addition, because the statements seem to lack

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[1] Hearsay statements are out of court statements offered to prove the truth of the matter asserted in the statement and are generally inadmissible, unless an exception applies.

[2] Mr. Knapp's former A. L. George supervisor, Gregory Lynch, testified that he transcribed one of the statements during a meeting with Mr. Knapp (*see* Lynch Deposition at pp 30-33).

the "systematic and routine characteristics generally associated with business records," it does not appear that they were kept in the "ordinary course of business" as contemplated by the business records exception to the hearsay rule (*see Matter of Jodel KK*, 189 AD2d 63, 64 [3d Dept 1993]; *see also 92 Ct. St. Holding Corp., LLC v. Monnet*, 106 AD3d 1404, 1406 [3d Dept 2013][an unsigned report may be considered in opposition to a motion for summary judgment only when it is not the sole competent evidence submitted but, standing alone, such a report is insufficient to raise a triable issue of fact sufficient to defeat the motion]).

As Binghamton Giant has not established the applicability of any exception to the hearsay rule, the statements attributed to Mr. Knapp are hearsay, are not in admissible form, and may not be considered on this motion for summary judgment. Without those statements, there is no admissible evidence in the record regarding how the spill occurred. Neither Binghamton Giant nor the plaintiff has submitted a firsthand account of who caused the spill. Consequently, Binghamton Giant has not made a prima facie showing for purposes of this motion that it did not create the dangerous condition by spilling the beverage or have actual notice of it.

However, even if the statements were admissible, issues of fact would still remain with respect to the issue of constructive notice.

A party will have constructive notice of a condition where it is visible and apparent and existed for a sufficient length of time prior to the accident to permit that party to discover and remedy it (*see Briggs v. Pick Quick Foods, Inc.*, 103 AD3d 526, 527 [1st Dept 2013], *citing Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Even where a supermarket has actual or constructive notice of a dangerous condition, it still has a reasonable time to correct or warn of its existence (*see Scherer v. Golub Corp.*, 101 AD3d 1286, 1287 [3d

Dept 2012]). In that regard, actions have been dismissed where the evidence establishes that the spill lasted no longer than five to fifteen minutes (*see Freiser v. Stop & Shop Supermarket Co., LLC,* 84 AD3d 1307 [2d Dept 2011]; *Diaz v. State*, 256 AD2d 1010 [3d Dept 1998]; *Wesolek v. Tops Mkts.*, 255 AD2d 972 [4th Dept 1998]). However, where a patron observed a spill near a supermarket checkout counter for several minutes and the patron who fell stated she was 20 feet from the accident site, had been in the area for ten minutes, and had not heard anything fall, break, or drop, an issue of fact existed and summary judgment in favor of the defendant supermarket was reversed (*see Field v. Waldbaum, Inc.*, 35 AD3d 652 [2d Dept 2006]).

Therefore, in order to make a prima facie case of entitlement to summary judgment on the issue of constructive notice,[3] Binghamton Giant would have to establish that the spill did not exist for a sufficient period of time prior to Miss Faber's fall to permit it to discover and remedy it. Even assuming that the spill occurred as described in the Knapp statements,[4] there is absolutely no evidence establishing how long it took for Mr. Knapp to secure the area, obtain the cleaning equipment, and return to the area. Mr. Knapp's statements do not address the lapse of time in that regard and the testimony of the manager on duty at the time of the fall was that the spill was already cleaned up when he got to the area and talked with Ms. Faber and her daughter (*see* Deposition of Michael Wheaton at p 50, ln 10-14).[5]

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[3] Thereby shifting the burden of proof to the plaintiff to raise an issue of fact in that regard.

[4] That Mr. Knapp dropped a bottle while stocking shelves and the fall occurred after he left to obtain items to clean the spill.

[5] Ms. Faber suggests that Mr. Knapp may have continued to stock the shelves after the spill and waited until that task was complete before leaving to obtain the equipment needed to clean

On this record, it is possible that Mr. Knapp promptly and efficiently dealt with the situation, and it is equally possible that he unreasonably delayed in securing the area or obtaining the cleaning equipment such that Binghamton Giant had constructive notice of the spill. As there is no evidence regarding the period of time that elapsed between the spill and Miss Faber's fall, Binghamton Giant could not have made a prima facie case of entitlement to summary judgment based on a lack of constructive notice.

Another aspect of the motion arises based on the opposition submitted by Ms. Faber. In the affirmation submitted by her attorney, she asserts that there is an issue of fact concerning whether Binghamton Giant was negligent in placing the displays which obstructed the view of anyone in the aisle where the fall occurred. Binghamton Giant contends Ms. Faber never raised this as an issue prior to the motion and it is not disclosed or included in her bill of particulars.

It is true that the plaintiff did not specifically raise the issue of an obstructed view in her bill of particulars. However, she did generally allege that Binghamton Giant breached its duty of care by "otherwise failing to exercise reasonable care, diligence and prudence" (*see* Exhibit D at ¶ 3[d]). In any event, the law is clear that leave to amend a bill of particulars is "given freely unless the party opposing [it] can demonstrate prejudice or surprise[6] from [the] delay" (*Benjamin v. Desai*, 228 AD2d 764 [3d Dept 1996], *citing Volpe v. Good Samaritan Hosp.*, 213

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it, thereby raising the question of whether that lapse of time was sufficient for Binghamton Giant to discover the spill and remedy it.

[6] This is arguably not the first time this issue was raised. When asked if there was a reason she did not notice the puddle before she fell, Miss Faber answered, "Yeah, I was coming around the display" (*see* Deposition of Danielle Faber at p 12).

AD2d 398 [2d Dept 1995][noting that this rule applies with equal force even when the proposed amendment is sought on the eve of trial]).

In one sense, any aisle or display could obscure a spill on the side away from an approaching patron about to turn the corner around it. Whether this can constitute negligence may be problematic. At this point, though, on a record that lacks sufficient detail regarding and does not fully address that issue with witness statements or depositions – and cognizant that leave to amend is freely given and summary judgment is a drastic remedy – any summary determination of that issue will await a more fully developed record. While the reference in the bill of particulars is vague and could fairly be considered a catch-all, it is sufficient to keep open plaintiff's claim of other negligence unless otherwise narrowed in the course of pre-trial disclosure.

At this point, it may be that defendants feel that additional discovery is warranted in light of plaintiff's recently defined claim that placement of the merchandise displays in the aisle constitutes negligence by Binghamton Giant. Defendants may well be entitled to additional disclosure on this theory of negligence, which has now been specified by the plaintiff in response to this motion. Should defendants desire additional disclosure on this issue from the plaintiff, counsel should attempt to reach an agreement in that regard. If such an agreement cannot be reached, the Court will hold a conference with counsel to discuss an appropriate resolution of that issue.

For all of the foregoing reasons, the motion for summary judgment is denied.

b. Common law indemnification

Binghamton Giant also seeks common law indemnification from A. L. George. It asserts

that since A. L. George's employee caused the spill, A. L. George is primarily responsible and should indemnify Binghamton Giant.

As the statements attributed to Mr. Knapp are not admissible, there is no proof in the record regarding how the liquid spilled on the floor. Consequently, there is currently nothing to establish that A. L. George caused or is primarily responsible for the spill and no basis on which to order indemnification in that regard.

Conclusion

Based on the foregoing, the motion for summary judgment is denied, as is Binghamton Giant's request for common law indemnification from A. L. George.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: December 18, 2013
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
DEC 19 2013
BROOME COUNTY CLERK